AT THE CROSSROADS BETWEEN PEACEKEEPING AND DEVELOPMENT: THE CURIOUS CASE OF THE ESTABLISHMENT AND FUNCTIONING OF A NATIONAL HUMAN RIGHTS INSTITUTION IN HAITI

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ABSTRACT

The challenges of the Haitian democratic construction present a unique perspective on an institutional model that has garnered extensive attention in the contemporary human rights discourse and developed into a strategic priority for the United Nations, that of national human rights institution (NHRI). A preliminary examination of how the NHRI movement came to be and the normative framework it spurred reveals the attachment of international stakeholders to a singular standard for structuring and assessing NHRIs, one in which context and domestic effectivity are at best secondary considerations. How well this standard translates in Haiti is informed by the peculiar account of the establishment and functioning of the Haitian *Office de la Protection du Citoyen* as a status "A" accredited NHRI. Partly building on fieldwork in Haiti, this thesis examines the discrepancy that seems to exist between the OPC's international recognition as a NHRI and its ability to effectively function in that capacity in the trying Haitian human rights environment.

RÉSUMÉ

Les défis posés par la construction démocratique haïtienne offrent une perspective unique sur un modèle institutionnel suscitant une attention considérable dans le discours contemporain des droits de la personne et devenu priorité stratégique pour les Nations Unies : l'institution nationale des droits de l'Homme (INDH). Un examen préliminaire de l'émergence du concept d'INDH démontre une prise en compte par les acteurs internationaux d'un cadre normatif singulier pour la structuration et l'évaluation des INDHs, dans lequel les facteurs contextuels et l'efficacité interne ne sont au mieux que des considérations secondaires. La manière avec laquelle ce cadre trouve à s'appliquer en Haïti est révélée par le récit atypique de l'établissement et du fonctionnement de l'Office de la Protection du Citoyen d'Haïti (OPC) en tant qu'INDH accréditée au statut « A ». Fondée en partie sur une expérience de terrain, cette étude examine le décalage qui semble exister entre la reconnaissance internationale de l'OPC à titre d'INDH et sa capacité à fonctionner efficacement en cette qualité dans le difficile contexte Haïtien des droits de la personne.

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Ayiti, ou rete nan kè mwen…

LIST OF ABBREVIATIONS AND ACRONYMS

Art	Article
Arts	Articles
ASFC	Avocats Sans Frontières Canada / Lawyers Without Borders Canada
BINUH	United Nations Integrated Office in Haiti
CAT	Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN)
CED	Committee on Enforced Disappearances (UN)
CEDAW	Committee on the Elimination of Discrimination against Women (UN)
CERD	Committee on the Elimination of Racial Discrimination (UN)
CESCR	Committee on Economic, Social and Cultural Rights (UN)
Chap	Chapter
CHRTB	Chairs of Human Rights Treaty Bodies (UN)
CHR	Commission on Human Rights (UN)
CHRC	Canadian Human Rights Commission
CIC	Comité International de Coordination des Institutions Nationales pour la Promotion et la Protection des Droits de l'Homme
CMW	Committee on the Protection of Migrant Workers and Members of their Families (UN)
CNCDH	Commission nationale consultative des droits de l'Homme (France)
Com RPD	Committee on the Rights of Persons with Disabilities
CRC	Committee on the Rights of the Child (UN)
CRPD	Convention on the Rights of Persons with Disabilities
CSPJ	Conseil Supérieur du Pouvoir Judiciaire (Haïti)
ESC	Economic and Social Council (UN)
GA / UNGA	General Assembly (UN)
GANHRI	Global Alliance for National Human Rights Institutions
G.O.	General Observation (GANHRI/SCA)
HRC	Human Rights Council (UN)
HR Com	Human Rights Committee (UN)
ICC	International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights
ICCPR	International Covenant on Civil and Political Rights

IEH	Independent expert on the situation of human rights in Haiti
ILC	International Labour Conference
ILO	International Labor Organization
Inter-Am Comm HR	Inter-American Commission on Human Rights
MICAH	International Civilian Support Mission in Haiti
MICIVIH	International Civilian Mission in Haiti (OAS/UN)
MINUJUSTH	United Nations Mission for Justice Support in Haiti
MINUSTAH	United Nations Stabilization Mission in Haiti
MIPONUH	United Nations Civilian Police Mission in Haiti
NHRI	National Human Rights Organization
NMM	National Monitoring Mechanism envisaged by the CRPD
NPM	National preventive mechanism under OPCAT
No	Number
OAS	Organization of American States
OHCHR	United Nations High Commissioner for Human Rights, Office of the (UN)
OPC	Office de la Protection du Citoyen d'Haïti
OPCAT	Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
OR	Official Records
para	paragraph
paras	paragraphs
prepara	preambular paragraph (or clause)
Rec	Recommendation
Res	Resolution
SC / UNSC	Security Council (UN)
SCA	Sub-Committee on Accreditation (ICC/GANHRI)
SDG	UN General Assembly Sustainable Development Goals
Sess	Session
SG / UNSG	Secretary-General (UN)
SPT	Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (UN)
Supp	Supplement
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme

UNESCO	United Nations Educational and Scientific Organization
UNMIH	United Nations Mission in Haiti
UNSMIH	United Nations Support Mission in Haiti
UNTMIH	United Nations Transition Mission in Haiti
UPR	Universal Periodic Review
Vol	Volume

INTRODUCTION

On June 25, 2019, the United Nations Security Council (UNSC) adopted a resolution to establish the United Nations Integrated Office in Haiti (BINUH), designed to support the country's government in "promoting and strengthening political stability and good governance, including the rule of law, preserving and advancing a peaceful and stable environment, (…), and protecting and promoting human rights"[1]. Formally[2] putting an end to 15 years of peacekeeping in the country, one can be forgiven for construing this adoption as a historic milestone, marking a resolute turnaround in Haiti's stabilization and democratization. The reality is more nuanced, to say the least.

Since the demise of the Duvalier regime in 1986, Haiti has experienced a succession of political and constitutional crises, too often characterized by violence and contested power seizures, when not compounded by deadly natural disasters. As a result, the turbulent Haitian democratic transition has witnessed the deployment of multiple peacekeeping[3] and civilian peacebuilding missions[4], the BINUH representing the ninth multilateral operation in Haiti and the second transition from peacekeeping in the last 20 years. While this string of missions can be credited with many achievements, most notably the improvement of the general security situation in the country, the root causes of instability in Haiti are still present and, in some cases, exacerbated. An ever-contested social contract, erosion of public confidence in the State, rampant corruption, pronounced inequalities and underdevelopment, a weak rule of law and a culture of zero-sum politics remain major obstacles for the realization of human rights and are contributing to a

[1] *The question concerning Haiti,* SC Res 2476, UNSCOR 74th Sess, UN Doc S/INF/74 (to be issued) (2019), para 1a).
[2] The UN multinational military presence in Haiti ended in 15 October 2017 at the expiration of the mandate of the United Nations Stabilization Mission in Haiti (MINUSTAH), which was originally established in 2004: *The question concerning Haiti*, SC Res 1542, UNSCOR 59th Sess, UN Doc S/INF/59 (2004), 206. Despite not containing a military component, the resolution mandating its follow-up mission - the United Nations Mission for Justice Support in Haiti (MINUJUSTH) – was adopted under Chapter VII of the UN Charter, dedicated to peacekeeping operations: *The question concerning Haiti*, SC Res 2350, UNSCOR 72nd Sess, UN Doc S/INF/72 (to be issued) (2017).
[3] United Nations Mission in Haiti (UNMIH), from 09/1993 to 06/1996; United Nations Support Mission in Haiti (UNSMIH), from 06/1996 to 07/1997; United Nations Transition Mission in Haiti (UNTMIH), from 07/1997 to 11/1997; United Nations Civilian Police Mission in Haiti (MIPONUH), from 11/1997 to 03/2000; MINUSTAH, from 04/2004 to 10/2017; MINUJUSTH, 10/2017 to 10/2018.
[4] The International Civilian Mission in Haiti, OAS/UN (MICIVIH), from 02/1993 to 07/1994 and from 10/1994 to 03/2000; International Civilian Support Mission in Haiti (MICAH), from 03/2000 to 02/2001; since 10/2018, BINUH.

growing disillusionment in the democratic process[5]. In that regard, the United Nations (UN) recent - but long-planned[6] - transitioning to the end of peacekeeping is less a testament to improving conditions in the country than an acknowledgment on the limits of peacekeeping operations in dealing with the structural drivers for violence and human rights violations in Haiti.

The challenges of the Haitian democratic construction present a revealing perspective on an institutional model that has garnered extensive attention in the contemporary human rights discourse, that of national human rights institution (NHRI). The "possible missing link between ambitious international standards and highly uneven human rights practices on the ground"[7], "between the ideal and its implementation"[8], a NHRI is "an independent national institution established by a Member or Observer State of the United Nations with a constitutional or legislative mandate to promote and protect human rights"[9]. It occupies a unique position within a State's institutional architecture. Independent from Government yet dependent on its political and financial support, it is an official State body that operates as a non-judicial oversight mechanism upholding and promoting norms highlighted in international treaties. The emergence of NHRIs on the human rights landscape has been transformative and exponential[10]. They are present in every region of the globe, in full-fledged democracies and in authoritarian States. Their presence in transitioning regimes or emerging democracies is the focus of sustained international support, notably from the Office of the United Nations High Commissioner for Human Rights (OHCHR) that devotes considerable resources – including a specialized section – to their establishment and

[5] See: *Report of the Secretary-General on the Stabilization Mission in Haiti*, UN Doc S/2017/223 (2017), at para 49; Raju Jan Singh & Mary Barton-Dock, *Haiti: Toward a New Narrative* (Washington: World Bank Group, 2015) at 9-10, 50-52.

[6] Transition planning started as early as 2008 but was held up by a series of crises, notably the January 2010 earthquake. See: Namie Di Razza, "Mission in Transition: Planning for the End of UN Peacekeeping in Haiti" International Peace Institute, December 2018, at 4-5.

[7] Katerina Linos & Tom Pegram, "What Works in Human Rights Institutions?" (2017) 112: 3 AJIL 1 at 53 [Linos & Pegram, "What works"].

[8] Expression used by the representative of Canada during a panel organized by the then Commission on Human Rights (CHR) on NHRIs. "National Human Rights Institutions' participation in Commission's debates welcome initiative, Australia tells Human Rights Commission", *UN Press release HR/CN/735* (12 April 1996), online: <https://www.un.org/press/en/1996/19960412.hrcn735.html> [perma.cc/U7JG-2DF2], at para 13.

[9] Definition contained in the *Statute of the Global Alliance of National Human Rights Institutions*, first adopted on 21 October 2008 and last revised 5 March 2019, at art 1, online: <https://nhri.ohchr.org> [perma.cc/T5DH-BM99] [GANHRI statute]. The most recent iteration completes the definition with the following wording: "…and which is, or intends to be, accredited by GANHRI in line with the Paris Principles". What this means and implies is examined below at sec 2.3.

[10] As of March 2020, 123 NHRIs have been accredited by GANHRI, including 80 with "A" status.

strengthening. UN treaty bodies have made it standard practice to press States to establish NHRIs[11] and their effective presence in a State is even incorporated as an indicator in the UN General Assembly (UNGA) Sustainable Development Goals (SDGs)[12]. More broadly, the UN system has to a large extent cast the concept of NHRI as a "democratic institution, a sign of commitment to international norms"[13].

With NHRIs developing into a "strategic priority" for the UN and an essential part of its human rights "toolkit"[14], their effective establishment has increasingly been integrated in UN peace missions' strategies and objectives. They are presented as a central component of a strong national human rights system and an important indicator international democratic consolidation efforts. But what constitutes an effective NHRI in an emergent democracy, where by definition the institutional landscape is weak and resources scarce? And what impact can the presence of an NHRI have on the overall human rights situation in such conditions? Is effectiveness a corollary to compliance to international standards? If so, what importance should be given to context in this equation? What prompts an emergent democracy to establish a NHRI: legitimate State building considerations or international pressure? And to what extent can the answer to this question impact the effectiveness of a NHRI? Throughout these interrogations lies the double paradox of NHRI establishment in emergent democracies. A Government is encouraged, when not compelled, to fund, support and, to a certain extent, collaborate with an institution that can, if effective, reveal itself to be a thorn in its side and, potentially, affect its international standing at a critical juncture of its development. On the other hand, the international credibility of a newly established NHRI lies in its adherence to a set of standards pertaining chiefly to its independence, but that disproportionately require for their effective implementation government collaboration, and that do not necessarily equate to

[11] Katerina Linos & Tom Pegram, "Architects of their own making: national human rights institutions and the United Nations" (2016) 38:4 Hum Rts Q 1109 at 1129 [Linos &Pegram, "Architects"].
[12] *Transforming our world: the 2030 Agenda for Sustainable Development*, GA Res 70/1, UNGAOR 70th Sess, Supp No 49, UN DOC A/70/49 (Vol. I) (2015), 3 at 21 (target 16a); *Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development indicator*, GA Res 71/313, UNGAOR 71th Sess, Supp No 49, UN DOC A/71/49 (Vol. 3) (2017), 39 at 58 (indicator 16.a.1): "Existence of independent National Human Rights Institutions in compliance with the Paris Principles".
[13] Sonia Cardenas, "Emerging Global Actors: The United Nations and National Human Rights Institutions" (2003) 9:1 Global Governance 22 at 35.
[14] Wording derived from the title and foreword of: *UNDP-OHCHR Toolkit for collaboration with National Human Rights Institutions* (New York, Geneva, December 2010), online (pdf): <https://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf> [perma.cc/84AQ-PZ95] [*UNDP-OHCHR Toolkit*].

national credibility. A NHRI must thus balance the international and domestic imperatives that presided over its establishment and govern its functioning in a manner that safeguards its independence, but also ensures a certain degree of effectiveness required to forge and maintain its national credibility. Add to these considerations the volatile political context that too often characterizes emerging democracies and the vested interests of international stakeholders in the success of stabilization and/or State-building endeavors, and the dynamics become more complex, less linear, the motivations muddier, and the overall narrative purely – for lack of a better word – curious.

That is the case of Haiti. In its November 2013 session, the international body in charge of evaluating NHRIs declared the Haitian *Office de la Protection du Citoyen* (Office for the Protection of Citizens - OPC) in full compliance with the *Principles relating to the status of national institutions* (Paris principles)[15]. The path taken to reach this milestone – **(Chap I) the establishment of the OPC -** and the one that followed – **(Chap II) the functioning of the OPC** - offer a unique case-study on the implementation of the NHRI doctrine in an emerging yet fragile democracy, where needs are immense, ambitions high and interests multi-faceted. The where, why, when and who are as central to this account as the how, as the answers are multi-layered and regularly intertwined. Partly building on fieldwork in Haiti[16], the following pages seek to provide an insight on the discrepancy that seems to exist between the OPC's international recognition as a NHRI and its ability to effectively function in that capacity in the challenging Haitian human rights environment. A preliminary examination of how the NHRI movement came to be – (1) **historical overview** - and the international normative framework it spurred – (2) **the adoption of the Paris principles** – reveals the attachment of international stakeholders to a singular standard for structuring and assessing NHRIs in which context and domestic effectivity are at best secondary considerations. On the one hand, how well this standard translates in the Haitian democratic construction is informed by the peculiar tale of the OPC's (re)birth as a NHRI, by certain choices made to ensure the international recognition of the institution and some of the motivations that

[15] ICC, "Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 18-22 November 2013", online (pdf): <https://nhri.ohchr.org/> [perma.cc/5EXT-XX3E], at 8-10 [SCA November 2013].
[16] Between 2011 and 2018, the author has served in various capacities in the country in the field of human rights and democratic governance. He was a first-hand witness of the OPC's 2012-13 efforts to seek ICC (now GANHRI) accreditation.

guided them. On the other hand, some of the OPC's shortcomings can be traced back to the difficulty of applying the core requirements of this standard in Haiti, where the transition from a tradition of authoritarianism has been all but linear.

1. HISTORICAL OVERVIEW OF THE DEVELOPMENT OF THE CONCEPT OF NHRI

If the concept of NHRI is almost universally recognized, the institutional model used by States to implement it is far from being homogeneous, as no less than six NHRIs models are currently in use across the globe[17]. This diversity can be explained by the fact that the modern concept of NHRIs was in part informed by past state practices, prior institutional arrangements.

1.1 Institutional precedents

One of the most apparent precursor to modern NHRIs is the ombudsman. Historical references of officials carrying-out similar functions to the ombudsman can be found since antiquity in a variety of cultures; its modern incarnation derives from the Swedish *justitieombudsman* (ombudsman for justice) of 1809, who was appointed by Parliament to supervise the public administration and the judiciary in the fulfillment of their official duties[18]. The *ombudsman* or "representative of the people" thus originated as a parliamentary creation designed to check executive power. Subsequently adopted by several countries in the second half of the 20th century at national and/or regional, state or provincial levels, this institutional model generally refers to an independent high-level official, imparted with complaint-handling, investigative and recommendation powers to examine administrative grievances with a focus on mediation. Whether called *Médiateur de la République* in certain francophone countries, *Parliamentary Commissioner for Administration* in the United Kingdom or *Protecteur du Citoyen* in the province of Québec, the ombudsman's mandate, in its traditional form, can be assimilated to that of an administrative watchdog.

[17] Human rights commissions, human rights ombudsman, hybrid institutions, consultative and advisory bodies, Institutes and centers, and multiple institutions. As explicitly listed on the GANHRI website: <https://nhri.ohchr.org/EN/AboutUs/Pages/RolesTypesNHRIs.aspx> [perma.cc/E3KM-TB5P]; and further examined in OHCHR, *National Human Rights Institutions - History, Principles, Roles and Responsibilities, Professional Training Series No.4 Rev.1* (New York & Geneva: United Nations, 2010) at 15-19 [OHCHR, *History, principles*].

[18] Linda C. Reif, *The Ombudsman, Good Governance, and the International Human Rights System* (Leiden/Boston: Martinus Nijhoff Publishers, 2004) at 4-5 [Reif, *The Ombudsman*]

The collapse of communist and fascist regimes spurred the creation of ombudsman institutions with an explicit human rights mandate such as Spain's *Defensor del pueblo*, Poland's *Human Rights Defender*, and Guatemala's *Procuraduría de los Derechos Humanos*. In some cases, a human rights mandate was combined to traditional ombudsman functions to form what is referred to as "hybrid ombudsman" institutions. Whether traditional, human rights focused or hybrid, ombudsman institutions are typically structured around a single person and are heavily dependent on the credibility and leadership of their head[19].

Conversely, the government commission model which thrived in the nineteenth century is by definition collegial and composed of a plurality of experts. Where the focus of the traditional ombudsman is on assessing individual complaints, that of government commissions is to investigate – commission of inquiry of British tradition – and/or to advise – consultative commissions of French tradition – on matters of public policy from a broader perspective. Despite being often ad hoc creations, government commissions share several commonalities with NHRIs, as they are appointed to assess a matter regularly involving a wrongdoing, provide supporting information, and offer a range of options and recommendations[20]. Hence, it is only logical that the first national human rights body, France's *Commission nationale consultative des droits de l'Homme* (CNCDH)[21], springs from this institutional model.

In the same vein, it can be claimed that the Canadian Human Rights Commission (CHRC), one of the first "human rights commission" model in the world, is to some extent linked to US interracial bodies that appeared early in the 20th century at state and local levels[22]. The experience of racial tensions in the US influenced developments in Canada, notably the adoption of the first provincial

[19] OHCHR, *History,* principles, *supra* note 16, at 17.
[20] Sonia Cardenas, *Chains of Justice: The Global Rise of State Institutions for Human Rights* (Philadelphia: University of Pennsylvania Press, 2014) at 22 [Cardenas, "Chains of justice"].
[21] First established by a Ministerial order : *Arrêté du 17 mars 1947 constituant une commission consultative pour la codification du droit international et de la définition des droits et devoirs des Etats et des droits de l'homme,* 74 JORF (27 mars 1947) p 2849. The Commission was reborn in 1984: *Décret 84-72 du 30 janvier 1984 relatif à la commission consultative des droits de l'homme*, JORF (1 février 1984) p 489 and strengthened ever since: *Loi 2007-292 du 5 mars 2007 relative à la Commission nationale consultative des droits de l'homme*, 55 JORF (6 mars 2007) p 4215, texte No 6.
[22] Cardenas, *Chains of justice*, *supra* 19, at 23, 85.

antidiscrimination legislation and the creation of the first provincial human rights commission[23]. By the time the CHRC came to be, all Canadian provinces had established a human rights commission. It was part of a wave of anti-discrimination commissions in Commonwealth countries, habilitated to address a range – but not the full one - of human rights issues[24].

Overlapping the notions of institutional precursors and first articulations of the concept of NHRIs are the national cooperation bodies introduced in the framework of the International Labour Organisation (ILO) and the United Nations Educational and Scientific Organisation (UNESCO) to further their objectives. The 1919 ILO Constitution and its 1923 Recommendation put forward as a "guiding principle" and "one of the most effective means of ensuring the enforcement of Conventions" the requirement for States to establish permanent and independent labour inspectorates to investigate, advise, promote and regularly report on matters relating to the protection of workers[25]. In accordance with article VII of the UNESCO constitution, States were to form "a National Commission broadly representative of the Government" and main bodies "interested in educational, scientific and cultural matters" (…) "to act in an advisory capacity" and "as agenc[y] of liaison in all matters of interest to" the organization[26]. It is important to note that the modalities of establishment of both these models of national cooperation bodies is left to each States' appreciation[27], as the question of national sovereignty was to become an important variable in the evolution of the NHRI concept.

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[23] Reference is here made to Ontario's adoption in 1944 of the *Racial Discrimination Act*, RSO 1950, c 328, that ultimately paved the way to the 1961 *Ontario Human Rights* code and establishment of the *Ontario human rights commission:* RSO. 1990, c H.19

[24] Richard Carver, "A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law" (2010) 10:1 Human Rights L Rev 1 at 5. [Carver, "A new answer"]

[25] *International Labour Organization Constitution*, 28 June 1919, UNTS 874 (entered into force 10 January 1920), at art 41 point 9; *Recommendation concerning the General Principles for the Organisation of Systems of Inspection to Secure the Enforcement of the Laws and Regulations for the Protection of the Workers*, ILC Rec 020, 5th Sess (1923) (outdated), prepara 4, arts 7, 14, 21.

[26] *Constitution of the United Nations Educational, Scientific and Cultural Organization*, 16 November 1945, 52 UNTS 276 (entered into force 4 November 1946), at art 7. In 1978, the Charter of National Commissions for UNESCO was adopted setting key principles and modalities relating to their establishment, mandate and relationship with the organization. Since its adoption, over 20 resolutions of the General conference were adopted on the subject. See: UNESCO, *Legal texts on National Commissions for UNESCO* (Paris, 2002), UN DOC ERC.2002/WS/1. As of this writing, there are 199 National Commissions for UNESCO.

[27] See *Rec 020*, *supra* note 24, at prepara 4: "its sovereignty or its authority and must accordingly itself determine in accordance with local conditions what measures (…) to assume (…) responsibility"; *UNESCO Constitution*, *ibid*, at art VII 1. "as suit its particular conditions".

1.2 The first articulations of the concept of NHRI

The sway of past State practices on the structuration of modern NHRIs is attributable to how the concept of NHRI evolved from its first articulations to its formalization. The process was long, anchored to the gradual consolidation of the international human rights system, although delayed by reservations of certain governments towards this process.

The first articulations of the concept of NHRI can be traced to the first foundational steps of the United Nations, more precisely to 1946 when the "nuclear" Commission on Human Rights was in the process of recommending to the UN Economic and Social Council (ESC) a structure and mission for the soon to be established Commission on Human Rights (CHR). During exchanges centering on the Commission's needs in terms of human rights documentation, it is none other than René Cassin[28] that recommended the establishment of: "information groups or local human rights committees (…), who would transmit periodically information to the Commission (…) on the observance of human rights in their country, both in their legal system and their jurisdictional and administrative practice"[29]. A few weeks later, in its resolution 9 (II) creating the CHR, the ESC invited member States to "consider the desirability of establishing information groups or local human rights committees within their respective countries to collaborate with them in furthering the work of the Commission (…)"[30]. The contrast between the two phrasings is stark. Where the recommendation explicitly enunciates a broad human rights monitoring function ("observance") with periodic information transmission, the resolution is unapologetically vague with its sole mention of collaboration. Both texts do however share the same conception of these bodies, one of domestic mechanisms in support of the emergent international organization[31], with no recognized function of protecting or promoting human rights. Despite its shortcomings, the

[28] French jurist and 1968 Nobel peace prize winner for his work in drafting the UDHR. Amongst many other distinctions, including presiding the European Court for Human Rights, he is vastly credited for the efforts leading to the 1947 creation of the first national human rights body, the French CNCDH (*supra*, note 20) and for being its first president.

[29] ESC, "Commission on human rights of the Economic and Social Council summary record of meetings", UN Doc E/HR/15 (1946), at 3-4; *Report of the Commission on human rights to the second session of the Economic and Social Council*, UN Doc E/38/Rev.1 (1946), at 6 (point A2).

[30] *Commission on Human Rights*, ESC Res 9(II), UNSCOR 2nd Sess, UN Doc E/RES/9(II)-E/56/Rev.2 (1946), 520, at para 5.

[31] Anna-Elina Pohjolainen, *The Evolution of National Human Rights Institutions. The role of the United Nations* (Copenhaguen: Danish Institute for Human Rights, 2006) at 30.

precedent was set; national bodies could be envisaged as instruments in the furtherance of international human rights law.

The following years witnessed attempts by the UN Secretary-General (UNSG) to push forward the issue of implementing resolution 9(II). His 1951 memorandum on the subject is a good illustration of the difficulties he was facing. In it, it is noted that the CHR had yet to provide any guidance on the functions to be performed by national bodies, as it had considered that the question could only be examined after implementation measures of the Covenant on Human Rights had been decided on and drafted[32]. Also highlighted are responses provided by governments to the UNSG's requests for details on national implementing measures of resolution 9(II). Indifference and confusion were evident, as only 27 governments out of 58 provided a reply, of which 11 had only expressed "interest" in the resolution or noted it for "future guidance", while the majority of others required "clarification"[33]. As "certain guiding principles regarding the functions of local human rights committees" were clearly required, the Secretary-General proposed to the CHR a series of points for consideration. If the proposed role of "information center" appears in line with the spirit of resolution 9 (II), the function of "observing the promotion of human rights (…) in the light of the standards laid down in the Declaration with a view to making recommendations to Governments regarding existing legislation and practices" is far more ambitious than even Cassin's suggestion prior to Resolution (9) II's adoption. It marked a clear break from the restrictive vision of national bodies as mere support instruments to the CHR, opening the door for a domestic international human right law watchdog function. The UNSG's expanded vision of national bodies was to be confirmed in his last suggestion to the CHR that it examines "what part may be played by these groups in the implementation of instruments safeguarding human rights"[34].

The first indication of this vision finding some echo came in a 1959 report by the Chairman of the CHR proposing a draft resolution to the ESC inviting governments to "consider the advisability of

[32] *Local human rights committees or information groups. Memorandum submitted by the Secretary-General*, CHR 7th Sess, UN Doc E/CN.4/519 (1951), at 4 para 5.
[33] Most of the remaining 11 governments that professed already possessing national bodies listed vague embryonic initiatives when not referring to civil society organizations. *Ibid*, at 2-4. Also see for the full text of some Government replies: *Report on the establishment of information groups or local human rights committees: report / by the Secretary-General*, CHR 2nd Sess, UN Doc E/CN.4/28 (1947), 3-14. Of note Haiti's response (at 11) regarding the existence of "the League for the Defence of the Rights of Men and of the Citizen".
[34] *Ibid*, at 8-11.

establishing a national advisory committee on human rights, consisting of persons of outstanding ability and reputation (…)"[35]. The proposed functions for this committee included to "study current problems of human rights on the national and local level and to make recommendations to the government thereon", "make annual or periodic surveys on how human rights are observed", and "to advise the government on any matters, legislative or administrative, relating to the observance of human rights"[36]. The phrasing of the draft resolution was remarkable in at least three regards. First, the designation of "national advisory committee on human rights" eliminated confusions created by the "information groups"/"local human rights committees" tandem, and clearly established the expanded role of the envisioned committee. Second, the reference to "persons of outstanding ability and reputation" was a significant foray in the question of the composition of the committee, as it implied a somewhat unassailable nature for its members, without explicitly calling for their autonomy let alone their independence. Lastly, the proposed advisory, recommendation making and reporting functions are an unmistakable indication of things to come, shaping what was to become the modern concept of NHRI.

Resolution 777 (XXX) B adopted by the ESC the following year was very different from the proposed draft, its language less assertive and markedly more deferential to governments[37]. It contained no wording on the composition of the committees and no express reference to recommendation making, advisory or reporting functions; the word "function" itself did not appear in the text. The second preambular clause did nonetheless recognize "the importance of the contribution which can be made towards the promotion of respect for and observance of human rights by bodies representing, in each country, informed opinions on questions relating to human rights". This notion of "important contribution" was expanded upon in the first operative clause by which the Council "considers that the studies and opinion of such body on questions of human right can be of great value to Governments (…)". As such, the resolution resembled a soft sales pitch on the desirability for governments to "favour, in such manner as may be appropriate, the formation of such bodies"[38], rather than a clarification on their functions.

[35] CHR, "Memorandum on national advisory committees on human rights", CHR 16th Sess, UN Doc E/CN.4/791 (1959), at 3-4.
[36] *Ibid*, at 4.
[37] *National advisory committee on human rights*, ESC Res 777(XXX) B, UNESCOR 30th Sess, Supp No 1, UN Doc E/3422 (1960) 14.
[38] *Ibid*, para 2.

This pitch was to be repeated two years later in a somewhat more effective package. Eschewing preambular clauses, Resolution 888 (XXXIV) F straightforwardly invited "again (…) Governments to favour, in light of conditions in their countries, the formation of the bodies (…)" that "could, for example, study questions relating to human rights, consider the situation as it exists nationally, offer advice to Government and assist in the formation of a public opinion in favour of respect for human rights"[39].

While some headway was evident between resolutions 9 (II) and 888 (XXXIV) F in trying to articulate the idea of national human rights bodies, it was made through cautious small steps rather than assured strides. The unease of several governments towards such bodies, especially in the heat of the Cold War, was palpable. At a time where paranoia was pervasive, many countries retreated behind the walls of the principle of sovereignty when faced with the prospect of an unknown and yet to be understood national entity studying its internal workings and sharing information on the international stage. In addition, most if not all stakeholders were focused on standards-setting, on delineating the weight of their eventual international human rights obligations, with implementation mechanisms, especially of the national variety, not high on the list of priorities. It is thus, that for several governments in the early 1960's, there was "no necessity" or "imperative" for the establishment of national human rights bodies, as they were "superfluous" and less "effective[e] and comprehensive[e]" than State organs[40].

1.3 The Geneva guidelines dress rehearsal

"Desiring to give appropriate significance to the thirtieth anniversary" of the Universal Declaration of Human Rights (UDHR), the UN General Assembly (UNGA) proposed a series of measures for this celebration, including the "Organization in 1978 at Geneva of a special seminar (…), at the world-wide level, on the subject of national and local institution for the promotion and protection

[39] *National advisory committee on human rights*, ESC Res 888 (XXXIV) F, UNESCOR 34th Sess, Supp No 1, UN Doc E/3671 (1962) 23.

[40] Positions taken respectively by Poland and Byelorussia (necessity), Cambodia (no imperative), India (superfluous), and the USSR (Effective…). See: *National advisory committee on human rights. Report of the Secretary-General*, CHR 18th Sess, UN Doc E/CN.4/828/Add.1, Add.2, Add.3, Add.4 (1962).

of human rights (…)"[41]. The contours of this event were to be drawn by the CHR through Resolution 23 (XXXIV) recognizing that "the international community has insufficient information regarding existing types of national institutions for the promotion and protection of human rights" and hence deciding that the seminar should "suggest certain possible guidelines for the[ir] structure and functioning"[42]. The Commission's resolve in moving forward the issue was apparent with the addition of an annex to the resolution listing "some possible functions which could be performed by the institutions (…) if so decided by the government concerned", amongst which advisory, recommendation making and periodic reporting functions, with the caveat that they be performed upon government referral of a matter[43].

The observance of the 30th anniversary of the UDHR was a laudable incentive for the organization of the seminar, but not in itself responsible for instilling new momentum into the definition process of NHRIs. Rather, it was the entry into force two years prior of the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) that brought about a significant paradigm shift. With the Covenants translating the standards of the UDHR into binding obligations, the focus was to move beyond standard-setting to the implementation of human rights at a national level. And for this, "new machinery was needed"[44].

The *Seminar on national and local institution for the promotion and protection of human rights* was held in Geneva in September 1978, with 26 countries participating out of the 36 invited. Its end result, the first set of international guidelines for the structure and functioning of national institutions (Geneva guidelines), represents an important milestone in the conceptualization of NHRIs. Addressed to new national institutions that Governments may decide to set up, as well as (…) existing national institutions, comprising all governmental and public bodies concerned with

[41] *Observance of the thirtieth anniversary of the Universal Declaration of Human Rights,* GA Res. 32/123, UNGAOR 32nd Sess, Supp No 45, UN DOC A/32/45 (1977), 145 at prepara 6 and Annex 2b). Possible actions at national level included "establishment of national or local institutions for the promotion and protection of human rights" (Annex 1e).
[42] *National institutions in the field of human rights*, CHR Res 23 (XXXIV), CHR 34th Sess, UNESCOR 1978 Supp No 4, UN Doc E/1978/34 E/CN.4/1292, 130, at prepara 5, para 3.
[43] *Ibid*, annex.
[44] As noted by participants of the 1978 Geneva seminar. See: UN, "Seminar on national and local institution for the promotion and protection of human rights (organized by the United Nations Division of Human Rights) Geneva, 18-29 September 1978", UN Doc ST/HR/SER.A/2 (1978), at 40, para 169 [Geneva Seminar].

the promotion and protection of human rights", the guidelines set forth six functions, worded in the exact same terms as the ones suggested by the CHR in the annex to Resolution 23 (XXXIV), here summarized as: (1) provision of information, (2) education of public opinion, (3) recommendation-making, (4) advisory, (5) periodic reporting based on study of legislative, judicial and administrative human rights arrangements, and (6) any other function assigned to them by Government in connexion with its international human rights duties[45]. If an abundance of cautious seems to have guided the seminar in limiting its enunciation to the CHR suggested functions[46], its efforts to flesh out these functions in a detailed list of "areas of actions" are noteworthy despite being perhaps overambitious and at times muddled. It is through these areas of actions that the ability for national institutions to "investigate" citizen complaints and "to apply concrete remedies to individual cases of human rights violations" are for the first time expressed on the international stage along with the power to "summon witnesses and have access to relevant evidence"[47].

The guidelines are also credited for delineating and promoting an embryonic set of structural recommendations. With no template put forth by the CHR for the issue of "structure", the seminar's exchanges on the matter were sparse. Some participants did nonetheless raise the issue of "statutory independence", as well as the need to protect national institutions from "governmental persecution or repression"[48]. The guidelines did take into account these considerations although not entirely, suggesting that national institutions be established "as autonomous, impartial, statutory bodies" and that their appointed members "not be removed arbitrarily or without cause". In addition, they laid the foundations for the principles of plurality, accessibility and permanency of national institutions by recommending that national institutions be designed as to bring "all parts of the population into the decision-making process", that their membership composition reflect "wide cross-sections of the public", and that they function "regularly" and provide "immediate access" to "any member of the public or public authority"[49].

[45] *Ibid*, at 43-47.
[46] Through a restrictive interpretation of the phrasing "based on the provisions of the resolution and annex thereto" contained in Res 23 (XXXIV), *supra* note 42, prepara 5 and Geneva seminar, *Ibid*, at 43, prepara 3.
[47] Geneva seminar, *ibid*, at 46, paras 25-25.
[48] *Ibid*, at 40 para 170, 42 para 180.
[49] *Ibid*, at 48 respectively paras 44, 46, 42, 45, 48.

As the first international normative reference point for NHRIs, the Geneva guidelines were rapidly endorsed by the UNGA and the CHR, with the former "emphasizing the importance of the integrity and independence" of national bodies and the latter pushing for the matter to remain on its agenda and on that of the UNSG [50]. With increased international attention came wider acceptance. The conditions were now set for the institutionalisation and spread of the concept of NHRIs[51].

2. THE ADOPTION OF THE PARIS PRINCIPLES OR THE EMERGENCE OF AN INTERNATIONAL REGIME ON NHRI

The end of the Cold War marked an important turning point for the diffusion of international human rights standards, an operational shift towards their effective implementation at the domestic level. It is in this context that the first *International workshop on national institutions for the promotion and protection of human rights* was held in Paris in October 1991 (Paris workshop), at the prompting of the CHR "with a view to increasing their effectiveness nationally and internationally"[52]. How a three-day workshop was able to define a set of international principles that to this day remain as influential as they are immutable is a remarkable occurrence that warrants a closer attention. The atypical genesis of the *Principles relating to the status of national institutions [53],* universally known as the Paris principles, informs not only their unexpected success but also their persistent shortcomings.

[50] Respectively: *National institutions for the promotion and protection of human rights*, CHR Res 24 (XXXV), CHR 35th Sess, UNESCOR 1979, Supp 6, UN Doc E/1979/36 E/CN.4/1347, 129, at para 1, 5, 7; *National institutions for the promotion and protection of human rights*, GA Res 33/46, UNGAOR 33rd Sess, Supp No 45, UN Doc A/33/45 (1978), 21 para 1; *National institutions for the promotion and protection of human rights*, GA Res 34/49, UNGAOR 34th Sess, Supp No 46, UN Doc A/34/46 (1979), 172, at para 2.

[51] See on this point the detailed account of the popularization of the concept of NHRI in Pohjolainen, *supra* note 31, at 47-58.

[52] *National institutions for the promotion and protection of human rights,* CHR Res 1990/73, UNESCOR 46th Sess, Supp No 2, UN Doc E/1990/22-E/CN.4/1990/94 (1990), 151 at 152 para 3; Also see: *National institutions for the promotion and protection of human rights*, CHR Res. 1991/27, UNESCOR 47th Sess, Supp No 2, UN Doc E/1991/22-E/CN.4/1991/91 (1991), 73 at 75 para 9. The workshop's report can be found at: CHR, *Report of the International Workshop on National Institutions for the Promotion and Protection of Human Rights, Paris 7-9 October 1991*, CHR 48th Sess (item 11b), UN Doc E/CN.4/1992/43 (1991), 1 [*Paris workshop*].

[53] As drafted during the *Paris workshop*, *ibid*, at 46-49; and then adopted by the UNGA: *National institutions for the promotion and protection of human* rights, GA Res. 48/134, UNGAOR 48th Sess, Supp No 49, UN Doc A/48/49 (Vol I) (1993), 252 at 253-254 [Paris principles].

2.1 From mere workshop to international consecration

Representatives of national institutions from 35 countries participated in the Paris workshop, a clear majority of which were from commission type models. Of the ombudsman institutions represented, most were of the European traditional model, with almost no visibility offered to human rights ombudsman bodies. With the event being held in the French capital and organized in cooperation with the French CNCDH at the invitation of the French Government, the French delegation was not only the largest but also played a leading role in the debates. While foreign diplomats were present, they did not participate in discussions and the ensuing definition of NHRI characteristics. The elaboration of what was to become the normative standard to which NHRIs are held, was purely the result of a three-day peer-to-peer gathering with the modest objective of having each NHRI "exchange experience" and be encouraged "to step up their action"[54]. The Paris workshop was the antithesis of formalist, politically driven and compromise-laden multilateral drafting processes, to the extent that the elaboration of principles was not even an agenda item, but a behind-the-scenes initiative of a small working group led by representatives of the French and Australian institutions[55].

The end result reflects the atypical nature of the proceedings. In a preamble to the enunciations of the principles, the workshop participants recognize "having devoted their deliberation mainly to the experience of the national commissions"[56]. Accordingly, the Paris principles are initially dubbed *Principles relating to the status of commissions and their advisory role*, and their contents is strongly influenced by the French consultative commission model. In addition, their final section is dedicated to "the status of commissions with quasi-jurisdictional competence", a clear - despite the translation error[57] - reference to the Australian model. Though mention is made of the "specific importance and effectiveness of ombudsmen and mediators", the features of such institutions are but a secondary consideration of the principles when not omitted. Be that as it may, the principles as adopted during the Paris workshop were to be consecrated internationally.

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[54] *Paris workshop*, *ibid*, at 1 para 4.

[55] On the atypical process of the Paris negotiations, see: Katerina Linos & Tom Pegram, "The Language of Compromise in International Agreements" (2016) 70:3 Int'l Org. 587 at 597-600.

[56] *Paris Workshop*, *supra* note 52, at 45.

[57] The term "quasi-jurisdictional competence" has been recognized as a translation error. It is instead meant to be understood as "quasi-judicial competence". See: GANHRI, *General Observations of the Sub-Committee on Accreditation*, adopted 21 February 2018, online: <https://nhri.ohchr.org> [perma.cc/69WS-FWT3], at 49 G.O. 2.9 [GANHRI, *Gen Obs 2018*].

In its Resolution 46/124, the UNGA welcomed the convening of the workshop and requested that its results be forwarded to the CHR[58]. The latter would, through Resolution 1992/54, take decisive steps towards the international adoption of the Paris principles[59]. First, its decision "to rename those principles the "Principles relating to the status of national institutions" was consequential, as it closed the door on the possibility of amending them despite their admitted bias to the Commission model, the streamlining of their title indicative of the necessity of eschewing additional debates in order to seize favorable momentum. The CHR's desire to favor a prompt consensus was also apparent when the draft to Resolution 1992/54 was amended with the words "welcomes the guidance provided by" replacing the more loaded proposition of "endorses" in referring to the Paris principles[60]. In parallel, the CHR sought to promote the principles by requesting that they be publicized by the UNSG, be given proper attention during the 1993 World Conference on Human Rights, and considered in the preparation of a manual on national institutions. More importantly, it called for the newly renamed principles to be adopted by UNAG.

The international consecration of the Paris principles was to be confirmed in 1993 on the two biggest stages, the World Conference on Human rights attended by 171 of the UN's 184 member-States. The *Vienna declaration and program of action* adopted by consensus during the former reaffirmed "the important and constructive role played by national institutions for the promotion and protection of human rights" and encouraged "the[ir] establishment and strengthening having regard to the Principles relating to the status of national institutions"[61]. This same wording was to be used by the UNAG in Resolution 48/134, to which the principles were annexed without modification[62]. Both texts took care to recall "the right of each State to choose the framework that is best suited to its particular needs at the national level".

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[58] *National institutions for the protection and promotion of human rights*, GA Res 46/124, UNGAOR 46th Sess, Supp No 49, UN Doc A/46/49 (Vol I) (1991), 98, at paras 13-14.
[59] *National institutions for the protection and promotion of human rights*, CHR Res 1992/54, UNESCOR 48th Sess, Supp No 2, UN Doc E/1992/22-E/CN.4/1992/84 (1992), 125, in particular paras 9-16.
[60] See discussions on draft resolution (E/CN.4/1992/L.56) found in UNESCOR 48th Sess, Supp No 2, UN Doc E/1992/22-E/CN.4/1992/84 (1992), 264, at para 364.
[61] Adopted June 25 1993, at para 36.
[62] UNGA Res. 48/134, *supra* 53, at paras 11-12.

2.2 An international normative template for NHRIs: the contents of the Paris Principles[63]

As noted above, the Paris principles were the result of a swift, informal and collective drafting process, eschewing the pitfalls of State involvement and multilateral negotiations. Their atypical genesis certainly aided their quick ascension on the world stage, but also resulted in a text that, while ambitious, is poorly drafted, partly deficient and imprecise, and definitely not adapted to the ombudsman model. Still, it marks a clear departure from the deference to State prerogative found in the Geneva guidelines. With the Paris principles, a NHRI is no longer an instrument serving at the sole discretion of Government, but an "independent" institution "vested with the competence to promote and protect human rights" [A1], with wide-ranging "responsibilities" [A3], and delineated "methods of operation" [C]. It is given "as broad a mandate as possible (…) clearly set forth in a constitutional or legislative text" [A2], and can "freely consider any questions falling within its competence" [C1a)]. It acts "at the request of authorities or through the exercise of its power to hear a matter without higher referral" [A3a)].

The Paris principles are in essence articulated around three main components, relating to the competence [A], the composition [B], and the functioning of NHRIs [C], with an additional optional section concerning institutions with quasi-judicial attributions [D]. Concerning the competence, the principles enunciate seven responsibilities that an NHRI is *inter alia* to have [A3]. The core responsibility relates to the NHRI's faculty to "submit to Government, Parliament, and other State bodies, on an advisory basis, (…) opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights". In this regard, the inclusion of a faculty for NHRIs to self-refer any questions within their mandate represents a pivotal institutional safeguard for their operational independence. NHRIs are also to play a key role in promoting international human rights instruments, whether by monitoring their implementation at the national level, encouraging their ratification, or by contributing to reports which States are required to submit pursuant to their treaty obligations[64]. Accordingly, they are

[63] Paris principles, *supra* note 53. As seen in Annex 1, the principles are divided in four sections containing numbered paragraphs. For ease of reference, these sections will be respectively lettered (A,B,C and D) and thus referred to in the text when necessary, followed with the pertinent paragraph.

[64] On this last point, the lack of clarity of the principles were cause of uncertainty, as both NHRI and treaty bodies did not know what to make of the apparent tautologous wording: "and, where necessary, to express an opinion on the subject, with due respect for their independence" that directly followed the enunciation of the NHRI role of contributing to treaty reporting. See: Carver, "A new answer", *supra* note 24, at 20, 22.

also to cooperate with the UN system and regional institutions, as well as with other national institutions with similar human rights mandates. Finally, NHRIs are to be given educational and informational responsibilities, with a reference on "efforts to combat all forms of discrimination" reflective of the influence of the Australian and, to a lesser extent, the Canadian models during the Paris workshop.

In addressing the composition of NHRIs, the Paris principles cast independence as a corollary of pluralism. If the procedure by which members are to be appointed is left unspecified, leaving open the possibility of a designation by the Executive branch, it has to afford "all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights" [B1], with Government representation permitted solely in advisory capacity. Save for a listing of what sectors are representative of the said "social forces", no further criteria for membership is listed. While it can be argued that in allowing considerable flexibility in the appointment process of NHRI members, the Paris principles seek to accommodate the diversity of national experiences, the emphasis on pluralist representation betrays the strong influence of the French CNCDH during their drafting[65]. Moreover, it poses the question as to how it can be reconciled with single-member institutions, such as ombudsman offices[66].

The principles also affirm that "there can be no real independence" without the guarantee of a "stable mandate" for the members of the NHRI [B3]. This stability is to be obtained through an appointment "effected by an official act which shall establish the specific duration of the mandate". The possibility of reappointment is vaguely envisaged, as long as plurality within the institution is ensured. The text is however silent on the conditions or circumstances by which a member may be removed or on the issue of immunity from prosecution. The notion that appointees "may not be removed arbitrarily or without cause" found in the Geneva guidelines[67] is totally absent from the Paris principles. Though these safeguards could be deduced from the general emphasis of the principles on independence and on an NHRI's capacity to "freely consider" any matter under its

[65] Emmanuel Decaux, "Le dixième anniversaire des principes directeurs des institutions nationales des droits de l'homme dits « Principes de Paris » " (2003) 3 Droits fondamentaux 11 at 24.
[66] Some observers interpreted the emphasis on pluralism as excluding ombudsman institutions from the Paris principles. See: Linos & Pegram, "Architects", *supra* note 11, at 1119.
[67] Geneva Seminar, *supra* note 44, at 48 para 46.

purview, such omission is regrettable from the text purported to represent the international normative template of NHRIs. This omission is made more glaring as the principles do consider independence from an operational standpoint. As such, an NHRI should have a suitable infrastructure and "adequate funding", enabling it "to have its own staff and premises", and "not be subject to financial control" [B2]. Although crucial to preserve an NHRI's independence from Government, as well as to favor its effectiveness, the allocation of sufficient credits has proven difficult to implement, particularly in the context of fragile or emergent democracies.

The template for the functioning of an NHRI - the "methods of operation" [C] - outlined by the Paris principles is also not exempt of shortcomings. If an NHRI is to possess "as broad a mandate as possible", reason would dictate that it be given powers commensurate to its responsibilities. The principles do assert that an NHRI shall "freely consider any questions" [C(a)], as well as "hear any person and obtain any information and any documents" necessary to its assessment [C(b)], but these "methods of operation" can be rendered futile if not translated into concrete investigatory attributions to compel testimony or to feely access at any time locations such as places of detention. Though such powers could be indirectly inferred from the section on quasi-judicial bodies [D], such inference is limited by its optional nature and by the absence of express wording to that effect. More broadly, the structuring of the Paris principles as a whole can be confounding as it sometimes blurs the line between detailing the mandate of a NHRI and the attributions needed to carry it out. The only express reference to "powers" is found in the quasi-judicial section, with the sole purpose of highlighting the complementary nature of the said section to the "other powers" previously stated in the principles. The absence of indication as to what these "other powers" refer to compounds the confusion, and further underlines design omissions in the Paris principles.

Other functions highlighted by the principles include a NHRI's prerogative to "address public opinion directly or through press organs" [C(c)], "establish working groups" and/or local/regional sections [C(e)], and "develop relations" with human rights non-governments organizations (NGOs) in view of their "fundamental role" "in expanding the work of the national institutions" [C(g)]. According to the principles, NHRIs are also to "maintain consultation with the other bodies (…) responsible for the promotion and protection of human rights (in particular ombudsmen, mediators and similar institutions" [C(f)]. This last point raises a perplexing question. If a NHRI

is to consult with an ombudsman institution with human rights responsibility, is it to be inferred that the latter institution is not a NHRI as envisaged by the Paris principles? While the regular co-existence in one jurisdiction of both models, commission and ombudsman, could be said to justify such wording, this passage is nonetheless additional evidence that the Paris principles were not designed to encompass the ombudsman model.

The treatment afforded to complaint-handling competency by the Paris principles has been a contentious subject to say the least[68]. The principles do not require that a NHRI be habilitated to receive and consider individual complaints regarding alleged human rights violations. They do however propose a set of functions where a NHRI's mandate provides for such quasi-judicial competence. In essence, a NHRI is to "hear any complaints or transmit them to other competent authorities", search for "an amicable settlement through conciliation", inform a petitioner of his rights and promote his access to available remedies, and make recommendations to authorities in relation to the complaint, "especially by proposing amendments or reforms" [D (a)-(d)]. Once more, the principles omit key considerations, as they contain no reference to basic tenets pertaining to accessibility and effectivity of complaint-handling in the NHRI context, such as cost-free and easy access, prompt examination, and procedural fairness, let alone the possibility for a NHRI to seek compliance with its decisions through courts.

Commentators increasingly view complaints-handling as an "essential characteristic"[69] of an NHRI. As the direct link between individuals and the institution, it can provide an accessible and effective remedy, especially for vulnerable groups, and play a vital role in revealing systematic rights violations. In its 2002 General Comment on NHRIs, the UN Committee on the Rights of the Child (CRC) stated that "NHRIs must have the power to consider individual complaints and petitions and carry out investigations, including those submitted on behalf of or directly by children"[70]. While this assertion was made in the context of the establishment of broad-based

[68] Linos & Pegram, "What works", *supra* note 7, at 9.
[69] Richard Carver, *Performance and Legitimacy: National human rights institutions (second edition)*, (Geneva: International Council on Human Rights Policy, 2004) at 2 [Carver, *Performance & Legitimacy*]; Also, the inclusion of the complaints-handling function in a "quasi-optional group of principles" is an obvious weakness for Canada: Maxwell Yalden, "The Paris Principles Twenty Years After" in Lucie Lamarche & Ken Norman, eds, *14 Arguments in favour of National Human Rights Institutions* (Toronto: Irwin Law, 2014) 191 at 200.
[70] CRC, *General Comment No. 2 (2002) - The role of independent national human rights institutions in the promotion and protection of the rights of the child*, CRC 32nd Sess, UN Doc CRC/GC/2002/2, at 3-4 para 13 [CRC, *Gen Com 2*].

NHRIs with a specific focus on children rights, the implications of the wording "must have" are clear. On the other hand, it can be argued - and the Haitian experience partly verifies this assumption[71] – that the processing and examination of complaints can represent a heavy burden for NHRIs, potentially outstretching their limited resources and diverting their capacity to strategically address the most urgent human rights issues[72]. This can be especially true in fragile or emergent democracies where dysfunctions can be pervasive and the judicial system highly inefficient. In addition, the fact for a NHRI to accept individual complaints carries with it the weight of public expectations. Where the effective carrying-out of the complaint-handling function can provide a reputational boon to an NHRI, shortcomings whether real or perceived can severely damage its credibility. In this respect, the two sides of the complaint-handling debate appear not so much antithetical, but rather two reflections from opposite perspectives on the importance for NHRIs to dispose of adequate resources and broad powers when habilitated to examine complaints.

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As a whole, the Paris principles can be said to be "curiously inadequate in a somewhat paradoxical way, laying down a maximum program that is hardly met by any [NHRI]"[73], all while making optional, weakly defining or omitting essential features. While part of these deficiencies can be attributed to the severe time-constraints of the Paris workshop, coupled with its informal and participative approach, others can be said to be by design. At the time, the objective of the participants – not to mention their expectations – was certainly not to draft the authoritative and definitive document on NHRIs, but rather to attempt to flesh out their elusive concept by identifying a minimum set of requirements out of a diversity of existing national practices. The drafters of the principals were not tasked to formulate in a vacuum their ideal proposition of what constitutes a NHRI. They were themselves, each in their own manner and institutional model, already testing out the concept, making the concern for universality a defining characteristic of the workshop. Too comprehensive of an approach could implicate censoring national experiences represented in Paris, not to mention risk infringing on the sacrosanct prerogative of each country to choose the form of institution which best suits its needs at the national level. Workarounds

[71] See below, Chapt II sec 2.1.
[72] Linos & Pegram, "What works", *supra* note 7, at 10.
[73] Carver, *Performance & Legitimacy*, *supra* note 69, at 2.

needed to be found, such as the often glossed over yet explicit mention that the workshop's deliberations focused essentially on the national commission model and its collegial structure[74]. With balance having to be struck between thoroughness and flexibility, standard-setting and commonality, some degree of imprecision and vagueness was to form part of the drafting exercise. The need to posit essential principles superseded the requirement of detailing their nuances. Hence, "guarantees of independence and pluralism" are proclaimed in a sub-heading with little guidance as to how to achieve this independence[75]; no definition of NHRI is contained in the principles, just a reference to the "basic functional principle" of an institution "vested with competence to promote and protect human rights"[76]. Be that as it may, independence and an explicit human rights mandate were asserted as *sine qua non* constitutive characteristics of NHRIs, and that, in and of itself, represented a fundamental stepping-stone towards the construction of an international NHRI regime. Significantly, these assertions were made by those having the most at stake in the matter, members of NHRIs, which had for effect of buttressing the credibility and standing of the Paris principles[77].

In spite of their flaws or partly because of them, the Paris principles developed into the "touchstone of all NHRIs"[78], contributing to the dissemination of their concept and influencing their establishment world-wide. They have also become close to immutable, as any proposition to revisit them would risk conditioning the process to political negotiations among States and diluting the standards[79]. Nevertheless, their deficiencies are partly being addressed by a peer monitoring mechanism reminiscent of the Paris principles, in that it is novel yet perfectible.

[74] *Paris workshop*, *supra* note 52, at 45.
[75] On this point, see the critical take of: C. Raj Kumar, "National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights" (2003) 19:2 Am U Intl L Rev 259 at 271-272.
[76] As noted by: Linda C. Reif, "The Shifting Boundaries of NHRI Definition in the International System" in Ryan Goodman, Thomas Pegram, eds, *Human rights, state compliance, and social change: assessing national human rights institutions* (New York: Cambridge University Press, 2012) 52 at 54 [Reif, "Shifting boundaries"].
[77] Chris Sidoti, "National Human Rights Institutions and the International Human Rights System" in Goodman & Pegram eds, *ibid*, 93 at 96.
[78] Cardenas, *Chains of justice*, *supra* note 20, at 39.
[79] Sidoti, *supra* note 77, at 96.

2.3 The establishment of an international peer accreditation process and the development of a Paris principles jurisprudence

Where the first international workshop on NHRIs is credited for the elaboration of the Paris principles, the second one, held in Tunis on the heels of the Vienna World conference on human rights, led to the creation of the International Coordinating Committee of national institutions for the promotion and protection of human rights (ICC)[80]. The ICC, which was rebranded in 2016 as the Global Alliance of National Human Rights Institutions (GANHRI), is a "global association of NHRIs" having for purpose to promote and strengthen NHRIs "to operate in line with the Paris Principles"[81]. Its functions are to coordinate at the international level the activities of Paris-principles compliant NHRIs, and to promote their establishment and strengthening[82]. It is formally recognized within the UN system as the main representative of NHRIs[83], and contributes to the work of UN human rights bodies. Though not itself a UN body, it works in close cooperation with OHCHR that serves as its secretariat and under whose auspices GANHRI meetings are held[84].

One of the main concerns of the participants of the Tunis workshop, that prompted the creation of the ICC, was ensuring that the standards set by the Paris principles were met by NHRIs[85]. With the principles being propelled on the world stage and cast as the standard for NHRI establishment, compliance within their ranks became an issue of credibility for their drafters[86]. In parallel, the establishment of NHRIs in line with the Paris principles was increasingly being touted as falling within the set of international human rights commitments to be made by States. The risk of seeing the standards instrumentalized or diluted by self-serving State practices became a pressing matter. It was to be directly addressed by the ICC, that started in 1999 reviewing compliance with the Paris principles, through an accreditation process administered by the Sub-Committee on

[80] CHR, *Report of the second International Workshop on National Institutions for the Promotion and Protection of Human Rights (Tunis, 13-17 December 1993)*, CHR 50th Sess (item 11b), UN Doc E/CN.4/1994/45 (1993), at 18 para 6 [*Tunis workshop*].
[81] GANHRI statute, *supra* note 9, art 5.
[82] *Ibid*, arts 7(1) a) and b).
[83] *Ibid*, arts 7(1) a) (i). See for example: *National institutions for the promotion and protection of human rights*, CHR Res 2005/74, CHR 61st Sess, UNESCOR 2005, Supp 3, UN Doc E/2005/23 E/CN.4/2005/135, 285 prepara 7, paras 11a), 18.
[84] *Ibid*, art 6.
[85] *Tunis workshop*, *supra* note 80, at 17 para 5.
[86] On this point, see the quote of the former Australian Human Rights Commissioner (1995-2000) contained in: Linos & Pegram, "Architects", *supra* note 11, at 1123.

Accreditation (SCA). In the face of the proliferation of NHRIs and the heightened legitimacy stemming from their accreditation, the process was to be gradually strengthened and made more rigorous. As it stands[87], the SCA meets twice a year under the auspices of the OHCR to consider applications for accreditation or reaccreditation submitted by NHRIs. It assesses "compliance with the Paris principles in both law and practice", considering the applicant's legal basis and whether its actions demonstrate effective fulfillment of human rights protection and promotion mandate[88]. NHRIs whose application are accepted are attributed one of two levels of accreditation: "A" status for the ones deemed fully compliant with the Paris principles and "B" status for those partially compliant[89]. "A" status NHRIs are to be reexamined every five years or earlier if circumstances may have changed in a way that affects their compliance[90]. Importantly, applicants for re-accreditation have to demonstrate how they have addressed recommendations made by the SCA in their previous review, making the SCA examination somewhat of an evolving discussion[91].

The SCA accreditation process has led to development of an important body of jurisprudence on the application of the Paris principles. Its published recommendations on accreditations went from being a one sentence summary in 2001, a few short paragraphs in 2008, to adopting since 2011 a more elaborate and comprehensive format[92]. They are articulated and motivated around an analysis grid based on key provisions of the Paris principles and characteristics of the NHRI under examination (eg: mandate, selection and appointment, adequate funding…). While limited in scope to the applicant institution and generally succinct, the SCA's views often have broader interpretative value[93]. Deriving from and supplementing the body of jurisprudence are the *General*

[87] GANHRI, *Rules of procedure for the GANHRI Sub-committee on accreditation (amended version adopted on 4 March 2019)*, online (pdf): <https://nhri.ohchr.org> [perma.cc/N3ME-AJRL] [GANHRI, *SCA rules*].
[88] *Ibid*, art 8.
[89] *Ibid*, arts 24.1-24.2. Two other categories existed, but their use was discontinued by GANHRI: "C" status for non-compliant institutions and "A(R)" status for cases where insufficient documentation was provided for a determination to be made.
[90] GANHRI statute, *supra* note 9, arts 15-16.
[91] GANHRI, *SCA rules*, *supra* note 87, at 6.1, 8.3.
[92] Comparison made through an examination of "Reports and Recommendations of the Sessions of the Sub-Committee on Accreditation (SCA)" found on the GANHRI website: <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Pages/SCA-Reports.aspx> [perma.cc/ES6P-7XHR]
[93] For example, in its March 2019 re-accreditation of Haiti's OPC, the SCA highlighted "its expectation that NHRIs who have been accredited with A status will take the necessary steps to pursue continuous efforts to improve and to enhance their effectiveness and independence (…)". GANHRI, "Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) - Geneva, 11-15 March 2019", online (pdf): <https://nhri.ohchr.org/> [perma.cc/4GVV-G2DT], at 25 sec 3.6 [SCA March 2019].

Observations developed by the SCA since 2006[94]. They are based on the premise, not to say recognition, that "the Paris principles are "broad and lack [in] precision and specificity"[95], and are designed as an interpretative tool to promote Paris principles compliance by NHRIs, persuade Governments to address issues relating thereto, and guide the SCA's determinations. The observations are categorized into two sections, "essential requirements of the Paris Principles" and "practices that directly promote Paris Principles compliance", and are regularly cited by the SCA when issuing views on accreditation applications. Above all, the General Observations represent a crucial authoritative addition to the GANHRI's arsenal as they address several deficiencies and gaps of the Paris principles and allow for them to be expanded upon and fleshed-out in a wide range of circumstances.

The GANHRI accreditation process is unique and significant, though not exempt of criticism. While the OHCHR provides it with substantive support and secretariat services, it is not a UN process and is mostly shielded from UN political considerations. In a manner akin to the Paris principles, the norm it seeks to uphold, accreditation is conferred through a peer-review mechanism developed, implemented and revised by NHRI practitioners. With accreditation conditioning access to GANHRI, it is not unlike a closed-circuit system. The difficulty for GANHRI lies in threading the fine line between promoting the interests of its members and critically assessing them. Too soft of an accreditation process would certainly devaluate the Paris principles and affect the credibility of the system as a whole. But too stringent or demanding could hurt the standing of the GANHRI constituency and, by extension, its plurality. Similar challenge is posed by the nature of the Paris principles, the closely guarded norm that constitutes the life-force of GANHRI. At their core, they represent a framework, concise instructions on how to build and operate an NHRI. Thus, assessing compliance to the principals essentially involves a structural evaluation. However, it has become abundantly clear that satisfying the Paris principles does not necessarily result in an NHRI being effective or bringing about change[96]. It is possible to respect the letter of the principles without respecting their spirit. Consequently, with accreditation

[94] GANHRI, *Gen Obs 2018*, *supra* note 57.
[95] GANHRI, *A practical guide to the work of the sub-committee on accreditation (SCA)*, (December 2017-updated November 2018), online (pdf): <https://nhri.ohchr.org/> [perma.cc/E69Z-RMK2], at 15.
[96] Julie Mertus, "Evaluating NHRIs: Considering Structure, Mandate, and Impact", in Goodman & Pegram, eds, *supra* note 76, 74 at 76.

becoming an increasingly valued commodity on the world stage and the introduction of an external review mechanisms not being in the interest of GANHRI, the SCA's focus was gradually expanded to include an examination of an NHRI's performance, its compliance to the principles "in practice". *Practice notes* (PN) were adopted to complement the General Observations from a procedural standpoint, notably PN 3 on "assessing the performance of NHRIs", which references indicators such as the ability for an NHRI "to carry out its mandate effectively" and its "willingness to address the pressing human rights issues"[97]. The emphasis was also placed on making the process less hermetic by opening it to information provided by "credible third parties", such as international and regional human rights bodies and mechanisms, the OHCHR, as well as civil society and other organizations including the media. Detailed and in-depth information provided from convergent sources and referring to verifiable facts will be given importance by the SCA during its review of an NHRI[98].

The jury is still out on how profound of an impact these revisions will have on the overall comprehensiveness of the accreditation process and on its ability to measure an NHRI's effectiveness through its actions and taking into account the context in which it operates. As it stands, the results are mixed. While the analysis grid has been expanded to include concerns on effectiveness, deference to NHRIs is still present, as SCA decisions sometime appear as less than the sum of their parts[99]. The SCA's requirements for assessing effectiveness remain – sometimes deliberately[100] - vague with no clear set of variables being set. In reaction, a growing body of literature has been examining the effectiveness conundrum and delineating frameworks for

[97] GANHRI, "Practice note 3 - Assessing the performance of NHRIs", adopted 6 March 2017 [GANHRI, "PN 3"].
[98] *Ibid*; GANHRI, "Practice Note 5 – Sources of information to assess the performance of NHRIs", adopted 18 may 2018 [GANHRI, "PN 5"].
[99] Eg: Despite being concerned by the effectiveness of the Nepalese NHRI in addressing serious human rights issues, the SCA reaccredited it with an A status. SCA March 2019, *supra* note 93, at 29 sec 3.7; This point will be further examined in the developments dedicated to the SCA's 2013 accreditation (Chap I, sec 3.3) and 2019 reaccreditation (Chap II, sec 3) of the OPC.
[100] In 2013, G.O. 1.6 "Recommendations by National Human Rights Institutions" which stated that "NHRI recommendations (…) should normally be discussed within a reasonable amount of time, not to exceed six months, by the relevant government ministries (…)" was revised by removing the reference to a set time frame: ICC, *ICC SCA General Observations as adopted in Geneva in May 2013*, online (pdf): <https://nhri.ohchr.org> [perma.cc/6T28-BRHR] at 86 [ICC, *Gen Obs 2013*]. The wording of "timely manner" used in the most recent version of the observation is more malleable. GANHRI, *Gen Obs 2018*, *supra* note 57, at 17.

evaluating an NHRIs performance[101]. With performance based approaches increasingly informing self-assessment tools and international capacity building efforts, the question of how permeable the SCA is or has to be to this literature is debatable and largely depends on what it perceives to be the finality of its accreditation process.

In any event, accreditation confers an NHRI substantial legitimacy within the NHRI community and within the global human rights framework, in particular the UN. It is a prerequisite for entry in the exclusive GANHRI club, where an "A" status NHRI is a "voting member" that can hold office in the Bureau or any sub-committee, and a "B" status holder is a "non-voting member" that is entitled to speak at GANHRI general assemblies[102]. This Paris principles-centric vision extends to the revised definition of NHRI included in the GANHRI statute which is limited to an NHRI "which is, or intends to be, accredited by GANHRI in line with the Paris Principles". In other words, compliance to the Paris principles is not only the entry price for admission to GANHRI, it is to a large extent a requisite for international recognition as a NHRI. This presents certain complexities in countries where more than one body would meet conditions for accreditation, including thematic NHRIs such as the ones promoted by the UN Committee on the rights of the child. While provisions are made for this possibility, GANHRI favors "one consolidated and comprehensive" NHRI, with the alternative being a "very exceptional circumstance"[103]. In several instances where human rights commissions and ombudsman institutions coexist, this rule has had for effect of excluding the latter institution from GANHRI recognition and the NHRI definition[104].

Ever since its first articulation on the international stage, the NHRI concept was developed around the premise of furthering the work of the international human rights law system at the national level. In the Paris principles, this premise materialized in the form of "responsibilities" for promoting the ratification and effective implementation and domestication of international human rights instruments, contributing to treaty bodies reporting mechanisms, and cooperating with the

[101] See: Richard Carver, *Measuring the impact and development effectiveness of national human rights institutions. A proposed framework for evaluation,* (Bratislava: UNDP, 2014) [Carver, *Measuring the impact*]; Mertus, *supra* note 96; Linos & Pegram, "What works", *supra* note 7.
[102] GANHRI statute, *supra* note 9, arts 1, 24.1, 24.2, 38, 43.
[103] GANHRI, *SCA rules*, *supra* note 87, sec 6.3; ICC, *Gen Obs 2013*, *supra* note 100, sec 6.6. This observation no longer appears in the 2018 revision (*supra* note 87), but has not been replaced nor amended.
[104] Reif, "Shifting boundaries", *supra* note 76, at 57-58.

UN system *latu sensu*[105]. With GANHRI's accreditation process gaining authoritative influence on the world stage and OHCHR making the establishment and strengthening of NHRIs a priority of its international cooperation efforts, the concept of NHRIs was to come full circle. NHRIs have increasingly been entrenched in the international human rights framework, in a manner that transcends the enhancement of their participatory rights. They are developing into domestic "agents" of international human rights law[106].

2.4 Beyond the Paris principles: NHRIs as domestic agents of international human rights law

The enhancement of NHRIs' participatory rights within the UN system can be traced to the consolidation and strengthening of the GANHRI accreditation process[107] and in its progressive integration in the UN scheme on NHRIs. Initially, NHRIs were authorized to speak in place of their Government before the CHR and, after 1998, in their own capacity but only under a sole agenda item on national institutions[108]. These practices were problematic. The first posed serious perception issues, while the second was overtly limiting. Both did not account for the fact that in most cases any institution that presented itself as a NHRI would be allowed by the CHR to speak, with no regard to its legitimacy or credibility. This was to change with Resolution 2005/74 in which the CHR raised the issue of permitting NHRIs accredited by the ICC to speak "within their mandates under all items of the Commission's agenda", to be allocated "dedicated seating" for this purpose and be supported in "their engagement with all the subsidiary bodies of the Commission"[109]. This resolution was to be implemented in 2007 through the rules of procedures of the newly created Human Rights Council (HRC)[110]. As a result, "A" status NHRIs are afforded significant participatory rights before the Council and its mechanisms and procedures[111]. In particular, they are habilitated to participate in all stages of the Universal Periodic Review (UPR)

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[105] Paris principles, *supra* note 53, at sec A 3b)-3e).
[106] Expression borrowed from Carver, "A new answer", *supra* note 24, at 2-3.
[107] In his 2005 report on NHRIs, the UNSG insisted that "the strengthening of the accreditation procedures of the ICC should be a priority". *Enhancing the participation of national human rights institutions in the work of the Commission on Human Rights and its subsidiary bodies - Report of the Secretary-General*, CHR 61st Sess, UN Doc E/CN.4/2005/107 (2005), at 4 para 16.
[108] On the evolution of NHRIs' international engagement, see: Sidoti, *supra* note 77, at 104-122.
[109] CHR Res 2005/74, *supra* note 83, at 288 para 11 a).
[110] *Institution-building of the United Nations Human Rights Council*, HRC Res 5/1, UNGAOR 62nd Sess, Supp No 53, UN Doc A/62/53 (2007), 48 at 66 Chap VII, rule 7b).
[111] See for instance: *Review of the work and functioning of the Human Rights Council*, HRC Res 16/21, UNGAOR 66th Sess, Supp No 53, UN Doc A/66/53 (2011), 70 at 72 paras 9, 13 for UPR, 73-74 paras 22a), 28 for Special procedures [HRC, *Res 16/21*].

and are expressly encouraged by the HRC "to monitor, promote and support the implementation of accepted recommendations in their respective national contexts"[112]. In the context of special procedures, "A" status NHRIs can nominate candidates as special procedures mandate-holders and intervene immediately after the State concerned during the interactive dialogue phase[113]. They are also counted on as credible information sources, indispensable support to country visits and for report follow-up.

This increased engagement of NHRIs has been recognized by the UNGA and the HRC in recent resolutions, with the former "welcom[ing] the strengthening of opportunities" for Paris principles-compliant NHRIs to contribute to the work of the HRC, and the latter encouraging them "to continue to participate in and contribute to [it], including where relevant by providing parallel reports and other information"[114]. While both also command GANHRI for its important role in the development of NHRIs guided by the Paris principles, there seems to be divergence between the two bodies on the issue of ombudsman institutions. For the UNGA, there are "functional and structural differences between [NHRIs], on the one hand, and the Ombudsman and mediator institutions, on the other", that warrant that they be considered distinctly[115]. The HRC, for its part, "encourages relevant national institutions, including ombudsman institutions, to seek accreditation status"[116]. This partial disconnect can be traced once more to the original bias of the Paris-principles to the commission model and the regular exclusion under GANHRI's one NHRI policy of ombudsman institutions, especially of the traditional type, despite their contributions to human rights protection. It has translated into efforts to consolidate their status while recognizing their particularities, none more significant than the *Principles on the protection and promotion of the Ombudsman institution (Venice principles)* adopted by the Council of Europe in May 2019[117].

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[112] *National institutions for the promotion and protection of human rights*, HRC Res 33/15, UNGAOR 71st Sess, Supp No 53, UN Doc A/71/53/Add.1 (2016), 46 at 49 para 19.
[113] HRC, *Res 16/21*, *supra* note 111, at 73-74 arts 22a), 28.
[114] *National institutions for the promotion and protection of human rights*, GA Res 72/181, UNGAOR 72nd Sess, Supp No 49, UN Doc A/72/49 (Vol.I) (2017), 828 at 831 paras 12-13 [GA, *Res 72/181*]; *National human rights institutions*, HRC Res 39/17, UNGAOR 73rd Sess, Supp No 53A, UN Doc A/73/53/Add.1 (2018), 75 at 77 para 5 [HRC, *Res 39/17*]
[115] *The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights*, GA Res 71/200, UNGAOR 71st Sess, Supp No 49, UN Doc A/71/49 (Vol. I) (2016), 840 at para 4.
[116] HRC, *Res 39/17*, *supra* note 114, at 78 para 6.
[117] Council of Europe, European Commission for democracy through law, Opinion No. 897 / 2017, CDL-AD (2019) 005.

The treatment afforded by UN treaty bodies system to NHRIs is another illustration of their expanding "agent" role. All UN treaty bodies systematically highlight the importance of Paris principles-compliant NHRIs, recommending where applicable their establishment[118] with "adequate financial and human resources"[119], their strengthening[120] taking into account the comments made by the ICC[121], when not expressing concern at the downgrading of their accreditation status[122] or at the lack of safeguards guaranteeing the independence of their members[123]. Each treaty body, whether through the adoption of a specific general comment[124], cooperation papers or statements [125], guidelines[126], or the amendment of its rules of

[118] Eg: CAT's 2016 recommendation to Israel. CAT, *Concluding observations on the fifth periodic report of Israel*, CAT 57th Sess, UN Doc CAT/C/ISR/CO/5 (2016), at 3 para 11. Also see: CERD, *Concluding observations on the combined twenty-first to twenty-fourth periodic reports of Kuwait*, CERD 93rd Sess, UN Doc CERD/C/KWT/CO/21-24 (2017), at 2 paras 11-12.

[119] Eg: CESCR's 2014 recommendation to China. CESCR, *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, CESCR 52nd Sess, UN Doc E/C.12/CHN/CO/2 (2014), at 2 sec C.

[120] Eg: HR Com's recommendations that Ireland should ensure that its NHRI be in "full conformity" with the principles. HR Com, *Concluding observations on the fourth periodic report of Ireland*, HR Com 111th Sess, Un Doc CCPR/C/IRL/CO/4 (2014), at 2 sec C.

[121] Eg: CAT, *Concluding observations on the third periodic report of Senegal, adopted by the Committee at its forty-ninth session (29 October–23 November 2012)*, CAT 49th Sess, UN Doc CAT/C/SEN/CO/3 (2013), at 8 para 23.

[122] Eg: CESCR, *Concluding observations on the fifth periodic report of Norway*, CESCR 51st Sess, UN Doc E/C.12/NOR/CO/5 (2013), at 2 sec C. Also see on the noted absence of an NHRI with "A" status: CAT, *Concluding observations on the third periodic report of Belgium*, CAT 51st Sess, UN Doc CAT/C/BEL/CO/3 (2014), at 2 para 9.

[123] Eg: CAT, *Concluding observations on the initial report of Gabon as adopted by the Committee at its forty-ninth session (29*
October–23 November 2012), CAT 49th Sess, UN Doc CAT/C/GAB/CO/1(2013), at 4 para 12; CRC, *Concluding observations on the second periodic report of Malta, adopted by the Committee at its sixty-second session*, CRC 62nd Sess, UN Doc CRC/C/MLT/CO/2 (2013), at 4 paras 18-19.

[124] CRC, *Gen Com 2*, *supra* note 70; CESCR, *General comment 10: The role of national human rights institutions in the protection of economic, social and cultural rights*, CESCR 19th Sess, UN Doc E/C.12/1998/25 (1998); CERD, *General recommendation No. 17 on the establishment of national institutions to facilitate the implementation of the Convention*, CERD 42nd session (1993).

[125] HR Com, *Paper on the relationship of the Human Rights Committee with national human rights institutions*, HR Com 106th Sess, UN Doc CCPR/C/106/3 (2012); CED, *The relationship of the Committee on Enforced Disappearances with national human rights institutions*, 28 October 2014, CED 7th Sess, UN Doc CED/C/6 (2014); CEDAW, *Statement by the Committee on the Elimination of Discrimination against Women on its relationship with national human rights institutions*, CEDAW 40th Sess, UN Doc E/CN.6/2008/CRP.1 (2008), at annex 2; CMW, *Statement by the Committee on cooperation with national human rights institutions*, online (pdf): <https://tbinternet.ohchr.org> [perma.cc/25P8-WQ5K]; Com RPD, *Joint Declaration by the Committee on the Rights of Persons with Disabilities and the Global Alliance of National Human Rights Institutions*, Com RPD 19th Sess (2018), online: <https://www.ohchr.org/> [perma.cc/M3AW-JW3U].

[126] Com RPD, *Guidelines on independent monitoring frameworks and their participation in the work of the Committee on the Rights of Persons with Disabilities*, in Com RPD, "Rules of procedures", Com RPD 16th Sess, UN Doc CRPD/C/1/Rev.1 (2016), at 34 (Annex) para 5 [Com RPD, *Guidelines*].

procedures[127] or working methods[128] has not only acknowledged the important contribution of NHRIs to its processes but has sought to various extents to formalize their inclusion therein. This recognition was to be consolidated by the decision of the Chairs of the treaty bodies, prompted by the UNGA, "to consider a common treaty body approach to engagement" with NHRIs[129]. Discussions between the treaty bodies are ongoing with some key mutually beneficial points being already agreed upon. Chief amongst them are a specific recognition for "A" status NHRIs as a source of credible information, and the possibility for treaty bodies to provide feedback to GANHRI on the capacity and independence of NHRIs[130].

Going beyond engagement with treaty bodies is the inclusion within a human rights instrument of a role for NHRIs in in monitoring and promoting the objectives of that instrument. Both the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT) and the *Convention on the Rights of Persons with Disabilities* (CRPD) require State parties to designate or establish an independent national mechanism to support their implementation or monitoring[131]. Under OPCAT, the National preventive mechanism (NPM) is to be habilitated to access all places of detention and information regarding persons deprived of their liberty, including through private interviews, and to contact and meet the *Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture* (SPT)[132]. It makes recommendations on the treatment of detainees and on existing or draft legislation to relevant authorities who are obliged to examine them and to publish and disseminate its annual reports[133]. The national monitoring mechanism (NMM) envisaged by CRPD has a much broader aim as it is "to promote, protect and

[127] CAT, UN Doc CAT/C/3/Rev.6 (2014), rules 63, 73; Com RPD, *ibid*, rules 30(3), 51, 83; CMW, UN Doc CMW/C/2 (2019), rule 29; CED, UN Doc CED/C/1 (2012), rules 47, 52, 55-56. Also see: CESCR (provisional rules under the optional protocol), UN Doc E/C.12/49/3 (2013), rule 27e).
[128] Eg: the working methods of the CERD now include a section B titled: "The Committee's relations with national human rights institutions and non-governmental organizations", online: <https://www.ohchr.org/> [perma.cc/BKE5-YT6T];
[129] *Report of the Chairs of the human rights treaty bodies on their twenty-eighth meeting,* CHRTB 28th Sess, UN Doc A/71/270 (2016), at 2 para 92; *National institutions for the promotion and protection of human rights*, GA Res 70/163, UNGAOR 70th Sess, Supp 49, UN Doc A/70/49 (Vol I) (2015-16), 753 at 756 para 17.
[130] CHRTB, *Common approach to engagement with national human rights institutions*, CHRTB 29th Sess, UN Doc HRI/MC/2017/3 (2017), at 4 para 12, 10-11 para 51.
[131] OPCAT, 18 December 2002, 2375 UNTS 237 art 17 (entered into force 22 June 2006); CRPD, 13 December 2006, 2515 UNTS 3 art 33(2) (entered into force 3 May 2008; accession by Haiti 23 July 2009).
[132] OPCAT, art 20.
[133] *Ibid*, arts 18(1), 19, 22, 23.

monitor the implementation" of the Convention, and is to be afforded a wide range of attributions, such as complaints-handling, investigatory powers and possibility to participate in judicial proceedings[134]. While OPCAT (art 33(2)) and CRPD (art 18(4)) call for due consideration to be given to the Paris principles when establishing or designating NPMs and NMMs, they don't expressly require NHRIs to fill this role. For the SPT, there is a clear distinction to be made between NHRIs, "which generally act in response to specific situations, and [NPMs], which have preventive functions"[135]. Its guidelines do not link NPMs to NHRIs and contain no reference to the Paris principles, despite clearly drawing from them. They do however implicitly recognize this possibility by stating that "where the body designated as the NPM performs other functions in addition to those under [OPCAT], its NPM functions should be located within a separate unit or department, with its own staff and budget"[136]. With a majority of State parties having designated their NHRI as NPM or as part of a group of bodies forming their NPM[137], the SPT has sought to further clarify the distinction between NHRI and NPM functions insisting on the notion of "separate structures serving two different mandates and preserving a level of autonomy"[138]. In contrast, the Committee on the Rights of Persons with Disabilities (Com RPD) fully embraces the Paris principles and NHRIs throughout its guidelines and encourages States "to appoint their Paris principles-compliant [NHRI]" as NMM or as part of it, and to equip it with additional and adequate resources to appropriately discharge this mandate[139]. This recognition of a central role for NHRIs can at least in part be explained by the active participation of NHRIs as experts in the Ad Hoc Committee of the UNGA that negotiated the CRPD[140]. In other words, NHRIs participated in setting the international standard that provided for their specific role in its implementation.

Operating as if the mere reference to the Paris principles suffices to justify its involvement, the SCA has determined that the designation of an NHRI as NPM or NMM falls within the purview

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[134] Com RPD, *Guidelines*, *supra* note 126, paras 13, 15.
[135] *Third annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT 44th Sess, UN Doc CAT/C/44/2 (2010), at 14 para 51 [SPT, *3rd annual report*]
[136] SPT, *Guidelines on national preventive mechanisms*, SPT 12th Sess, UN Doc CAT/OP/12/5 (2010), at 5 para 32.
[137] See database compiled by the Association for the Prevention of Torture (last visited 10 March 2020), online: <https://apt.ch/en/by-type/> [perma.cc/G2VK-6V67].
[138] *Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT 57th Sess, UN Doc CAT/C/57/4 (2016), at 21 para 18 (Annex: "Compilation of advice provided by the Subcommittee in response to requests from national preventive mechanisms").
[139] Com RPD, *Guidelines*, *supra* note 126, at para 17.
[140] On the participation of NHRIs, see: Sidoti, *supra* note 77, at 120.

of its accreditation process. According to General observation 2.8, the SCA will assess if an NHRI is carrying out its NPM or NMM functions in compliance with the Paris principles[141]. In its examination, the SCA may consider if an NHRI is "effectively undertaking all relevant roles and functions as may be provided in the relevant international instrument" and whether its mandate is "appropriately defined" in light of the rights contained in that instrument. With that approach, the SCA could potentially encroach on the competences of treaty bodies and create incoherencies with their approaches[142]. This is especially true in the case of the SPT that is of the opinion that accreditation "should not be used as a procedure for accreditation of national mechanisms in general, since it is for the Subcommittee to make such assessments in specific cases"[143]. In practice, this risk has failed to materialize as the SCA's assessment on NPM functions seems confined to generalities and insistence on adequate resources and funding[144].

When considering the latest HRC and UNGA resolutions on NHRIs[145], one can't help but notice how omnipresent their engagement in UN fora, mechanisms and processes has become. The NHRI concept as consolidated by GANHRI has transcended the boundaries of cooperation and been incorporated in the UN human rights scheme, where it is the object of sustained capacity building efforts led by OHCHR and the United Development Fund (UNDP). The establishment and strengthening of Paris principles-compliant NHRIs has become "a critical benchmark" for the success of OHCHR field work and even "part and parcel of peace building strategies in post

[141] GANHRI, *Gen Obs 2018*, *supra* note 57, at 46 "G.O. 2.8 -Assessing NHRIs as National Preventive and National Monitoring Mechanisms".
[142] On that point, see: Katrien Meuwissen, "The Paris Principles and National Human Rights Institutions: Lost in Translation?", KU Leuven Working Paper No 163/2015, online: <https://ghum.kuleuven.be/> [perma.cc/8L9X-JYBX], at 16-17.
[143] SPT, *3rd annual report*, *supra* note 135, at 17 para 61.
[144] Eg: Assessment of Rwanda's NHRI in GANHRI, "Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) Geneva, 15-19 October 2018", online (pdf): <https://nhri.ohchr.org/> [perma.cc/6S3Y-JS73], at 15 subs 2; Also for Panama's NHRI: GANHRI, "Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) Geneva, 13-17 November 2017", online (pdf): <https://nhri.ohchr.org/> [perma.cc/YQ4E-WNY9], at 25-26 subs 3.
[145] "Welcoming also the valuable participation and contribution of [NHRIs) and their networks, including their contribution to national mechanisms for reporting and follow-up, and with regard to follow-up to recommendations and relevant [UN] mechanisms and processes, in accordance with their respective mandates, including the Human Rights Council and its universal periodic review mechanism and the special procedures, the treaty bodies, the Expert Mechanism on the Rights of Indigenous Peoples, the United Nations Permanent Forum on Indigenous Issues, the Commission on the Status of Women, the Conference of States Parties to the Convention on the Rights of Persons with Disabilities and the Open-ended Working Group on Ageing, and their continuing efforts in support of the 2030 Agenda, and encouraging further efforts in this regard". HRC, *Res 39/17*, *supra* note 114, at prepara 15, para 6; GA, *Res 72/181*, *supra* note 114, at paras 12-16.

conflict situations"[146]. At present, the relationship between GANHRI and UN organs appears symbiotic. By endorsing the SCA's imperfect and somewhat selective accreditation process and making Paris-principles compliant NHRIs integral part of their human rights discourse, UN organs have bolstered GANHRI's standing on the world stage as the exclusive guardian of the Paris principles. In turn, they can rely on a legion of GANHRI sanctioned domestic "agents" of international human rights law to further their objective, as the UN human rights agenda and rationale appear to have been assimilated by GANHRI processes[147].

Although sanctioned by a global alliance and called upon to play an enhanced role in the international human rights framework, an NHRI is above all a State institution with a domestic mandate. If its international recognition lies in its adherence to the Paris principles, its national credibility depends on its ability to be a reliable bridge between citizens and State, between rights holders and their duty bearer. While these two imperatives can regularly overlap, they remain on parallel tracks, especially in a fragile democratic context such as Haiti, where the international agenda is not always echoed by national stakeholders.

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By embracing the Paris principles, the UN human rights scheme has elevated a singular standard for structuring and assessing NHRIs, one whose ubiquity cannot disguise a drawn-out and incomplete development. An examination of the path followed to establish the OPC (**Chap I**) as a GANHRI accredited NHRI and of its functioning (**Chap II**) provides an insight on how this standard translates in the Haitian democratic construction. It reveals a discrepancy between the OPC's international recognition as a NHRI and its ability to effectively function in that capacity in Haiti's trying human rights environment.

[146] OHCHR, "Guidance note. National Human Rights Institutions and the work of OHCHR at Headquarters and field level", September 2007, online copy made available at: [perma.cc/B6T5-Z935], at 2.
[147] Eg: *The Mérida Declaration. The Role of National Human Rights Institutions in implementing the 2030 Agenda for Sustainable Development*, adopted during the Twelfth International conference of the ICC, 10 October 2015.

CHAPTER I
THE CURIOUS PATH TO THE ESTABLISHMENT OF A NHRI IN HAITI: THE (RE)BIRTH OF THE OPC

The fall of the Duvalier dictatorship ushered in a sense of hope and belief in the democratic ideal within Haitian society, that was to be embodied by the 1987 Haitian Constitution[148]. If 33 years in, the Haitian democratic construction remains on frail ground, with political and social crises being a near constant, and stability a luxury, it is not so much due to the inherent flaws of this Constitution, but rather to its overambitious nature. Intended to be the ultimate bulwark against a despotic executive[149], the 1987 Constitution laid out an intricate set of checks and balances, merging French and American influences to outline a complex institutional architecture whereby: the executive is split in two by the creation of the post of Prime-Minister; legislative power is vested in two chambers; and elections are to take place at minimum every two years[150]. The text also enshrined at Title VI a novel notion that would prove precarious to implement in the Haitian context, that of "independent institutions". It is within this Title and under the heading "Protection of Citizens" that the OPC was born. The path followed to realize a vague constitutional concept into an internationally recognized NHRI was tortuous if not curious. It is one of an institution initially established as an Ombudsman office *stricto sensu* **(1)**, that would initially fail to transition to a human rights focus **(2)**, only to be reborn as a Paris principles-compliant NHRI **(3)** with the return of a familiar face and unremitting international support. This path was to be strongly influenced by and to some extent mirror Haiti's challenges in consolidating a sustainable democratic culture.

[148] *Constitution de la République d'Haïti du 29 mars 1987*, Le Moniteur 142 No. 36, 28 avril 1987, art 207 [*1987 Constitution*] The present study will when required refer to the English translation of the text published online by the Organization of American States (OAS) at: <http://www.oas.org/es/sla/ddi/docs/ha1%20constitution.pdf> [perma.cc/D6NW-5HDR].

[149] Patrick Bellegarde-Smith, "Uprisings, insurrections, and political movements: contemporary Haiti and the teachings of history, 1957-2010", in Martin Munro, ed, *Haiti Rising: Haitian History, Culture and the Earthquake of 2010* (Liverpool: Liverpool University Press, 2011) 134 at 139.

[150] *1987 Constitution*, *supra* note 148, arts 88, 92, 95.3, 133, 134.1.

1. THE POST-DICTATORSHIP CREATION OF AN OMBUDSMAN OFFICE *STRICTO SENSU*

Wanting to rid the country of its authoritarian legacy, the framers of the 1987 Constitution sought to put the citizen at the heart of the system of government, proclaiming a detailed – though today outdated and incomplete – list of civil, economic, social and cultural rights with reference to the UDHR[151]. In this respect, the inclusion of an Office destined to protect citizens - the OPC – in the constitutional project certainly adhered to this vision **(1.1)**, but somewhat partially, as it did so through the perspective of maladministration. That is to say that one of the defining trait of the OPC is that, following a false start under a military government **(1.2)**, it was originally conceived and established as an Ombudsman office *stricto sensu* **(1.3)**.

1.1 The constitutional consecration of an Ombudsman office

According to article 207 of the 1987 Constitution, "An office known as the OFFICE OF CITIZEN PROTECTION is established to protect all individuals against any form of abuse by [public administration]"[152]. The OPC's consecration in the Constitution is regularly attributed to Louis Roy, a civil society icon who played a prominent role in the Constituent Assembly that drafted the 1987 charter[153]. His exile in Quebec during the Duvalier dictatorship informed his constitutional vision, as the OPC appellation and mandate bears resemblance with *Le Protecteur du Citoyen*, institution created by the Québec National Assembly in 1968[154]. Like its Québécois counterpart, the OPC was conceived as an independent Ombudsman institution headed by a "citizen bearing the title of [*Protecteur du Citoyen - Protector of Citizens]"* (Protector) and whose "intervention on behalf of any complainant is without charge"[155]. While the protection of human rights was a central consideration of the 1987 Constitution, it did not provide the OPC with an explicit human

[151] *Ibid*, arts 19-51.
[152] It is important to note that the English translation proposed on the OAS website (*supra,* note 148) uses the wording "government" in lieu of "public administration". We felt compelled to make this change to more accurately reflect the original French wording "*Administration publique*". Similarly, the translation "Office of Citizens Protection" differs from the one used by the ICC/GANHRI of "Office for the Protection of Citizens" in its accreditation reports (*supra*, note 15). While the latter seems closer to the French wording, we will privilege the acronym "OPC" or the expression "Office" in order to avoid possible confusion.
[153] See: OPC, *Rapport Annuel Combiné 2009-2012* (Port-au-Prince: Bibliothèque nationale d'Haïti, 2013) at 7, 106, online pdf copy made available at <https://perma.cc/AEW5-8EV7> [OPC 2009-12].
[154] L.Q 1968, c 11. As presently amended: RLRQ, c P-32. Also see for an analysis of the initial adoption of the law: Patrice Garant, "Loi du Protecteur du citoyen" (1969) 10:1 C de D 189.
[155] *1987 Constitution*, *supra* note 148, arts 207.1-207.2.

rights mandate, nor did it complement it with a human rights commission type body similar to the one created by the Quebec *Charter of Human Rights and Freedoms* in 1975[156]. Unlike its Spanish and Guatemalan contemporaries[157], the OPC was created as a traditional ombudsman, a watchdog scrutinizing the doings of "public administration" for "any form abuse".

The 1987 Constitution's focus on shielding the State's architecture from autocratic tendencies extended to the appointment process of the Protector [art 207.1] who is to be "chosen by consensus of the President of the Republic, the President of the Senate and the President of the Chamber of Deputies" to serve a non-renewable seven-year term. On the one hand, the reference to "consensus" between the executive and the bi-cameral legislative branches will prove somewhat utopic given the persistent limitations of the Haitian democratic culture, especially stakeholders' attachment to zero-sum game type of politics and the weaknesses of political parties. On the other hand, the seven-year term is noteworthy as it is longer than the one afforded to any elected official, especially the President of the Republic[158], thus ensuring that a Protector's mandate is not constrained to the actions of a sole Administration and/or Legislature. This safeguard is further accentuated by the non-renewable nature of the Protector's mandate and the fact that the President of the Republic can seek an additional term only after an interval of five years[159].

All in all, the constitutional text only contained three substantial provisions on the OPC and provided no further detail regarding the eventual functioning of the institution or precisions on what is covered by the notion of "abuse". A fourth [art 207.3] rather stated that "a law sets the conditions and regulations for [its] operation". Linking most of the institution building to the legislative exercise will reveal itself hazardous as Haiti's democratic construction process was to go through trying times[160].

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[156] We are of course here referring to the *Commission des droits de la personne* as it was then called created by article 57 of the Charter, CQLR.12-c C

[157] The Spanish *Defensor del Pueblo* created by the Spanish Constitution of 1978, arts 53-54; the Guatemalan *Procurador de los Derechos Humanos* created by the Guatemalan Constitution of 1985, art 274.

[158] According to the 1987 Constitution, *supra* note 148, at art 134.1, the term of the President of the Republic is five years.

[159] *Ibid*, art 134.3. Also, the President can only be re-elected once.

[160] Between 1987 to October 1994 when President Aristide returned to the country, Haiti was marred by a succession of coups, failed coups, military rule, and transition governments. For a detailed timeline, see online: <https://www.universalis.fr/chronologie/haiti/> [perma.cc/ZQ79-UC69].

1.2 A false start under a military government

From September 1988 to March 1990, Haiti was ruled by a military government headed by General Prosper Avril. This period has been described as one of "institutionalized violence" during which "the rights to life and humane treatment have been repeatedly violated"[161]. Curiously, it is also the period that witnessed the first attempt to establish the OPC, by a 1989 Military Decree taking note in its preamble of the dissolution of Parliament and highlighting the attachment of the military government to the promotion and protection of human rights[162].

Titled "Decree creating an independent institution having legal personality named [OPC]", the text expanded on the notions of "abuse" and "public administration", mandating the Office to "intervene and take all necessary steps before civilian or military authorities and concerned institutions every time the rights and liberties of a citizen have been compromised or infringed upon"[163]. Promulgated a decade after the Geneva guidelines, but a few years prior to the drafting of the Paris principles, it recognized a human rights mandate to the OPC, a noteworthy fact, were it not the product of a highly pressured regime on its last breaths. In addition, the 1989 Decree would offer a first glimpse at the difficulties in implementing the notion of "independent institution" in the Haitian context. All while referring to its independent nature, it established the OPC as a "special body" (*Organisme special*) put under the tutelage of the Minister of Justice, as the administrative authority in charge of its relations with the executive branch [164]. Ultimately, the decree was inherently flawed by the exceptional circumstances during which it was adopted. In light of the impossibility of attaining the constitutionally required consensus between the executive and legislative leadership, it provided for the Protector to be named by presidential order and to remain in office until conditions allowed for an appointment consistent with the Constitution[165]. Such presidential order would be made in December 1989 to little avail[166]. As serious concerns regarding the independence and hands-off approach of the new Protector were surfacing[167], the

[161] OAS, Inter-Am Comm HR, *Report on the situation of human rights in Haiti. Chapter II Right to life and humane treatment*, OR OEA/Ser.L/V/II.77 rev.1, Doc. 18 (1990), paras 174-175.
[162] *Décret créant une institution indépendante jouissant de la personnalité juridique dénomée « Office de la Protection du Citoyen »*, Le Moniteur 144 No 73, 21 septembre 1989, preparas 2, 9 [1989 decree].
[163] *Ibid*, art 2. As no official translation of the text is available, the above represents our closest approximation.
[164] *Ibid*, prepara 10, art 1(2).
[165] *Ibid*, art 4.
[166] *Arrêté nommant le citoyen Gérard Romélus Protecteur du Citoyen*, Le Moniteur 145 No 3, 11 janvier 1990.
[167] Americas Watch, the National Coalition for Haitian Refugees & al., "Reverting to despotism: Human Rights in Haiti", (1990), online: <https://www.icj.org> [perma.cc/5F79-2CSZ], at 114-117.

military government's reign would come to an end, and with it the initial attempt at establishing the OPC.

1.3 The 1995 decree or the establishment of an "autonomous" Ombudsman office

The return of President Jean-Bertrand Aristide to Haiti in October 1994, after being deposed and forced to exile three years prior by a military coup, signaled the start of a major program of institutional reforms, especially in regards to security forces and the judiciary [168]. It is in this context that the September 1995 "Decree establishing an Office called: *Office de la Protection du Citoyen et de la Citoyenne* having for purpose to protect all individuals against any form of abuse by public administration" (1995 Decree) was issued[169]. Prior to delving into the substance of the text, two preliminary considerations pertaining to its form should be made. First, the addition of the phrasing "*et de la Citoyenne*" in the designation of the OPC was significant in as much as it implied a recognition of the hardships faced by women in Haitian society and of their status as bearers of rights within it. Second, although legislative elections were being finalized and Parliament was to be fully seated, President Aristide issued a decree to establish the OPC where the 1987 Constitution [art 207.3] required "a law". The difference is not trivial, despite the possibility of arguing that the contents of an eventual law would have been essentially the same in light of the Aristide led coalition securing a Parliamentary majority. From a symbolic standpoint, the issuance of a purely Executive act as the foundation of a landmark democratic institution represented a clear departure from the spirit of the 1987 Constitution. More significantly, it also resulted in the OPC founding text being unconstitutional, in a manner similar to the 1989 Decree, with the difference that it was issued by an elected President. Regardless, it was to remain for the next 17 years the text governing the Office's establishment and functioning.

Containing 35 articles, the 1995 Decree was a detailed and structured attempt at fleshing out the competence, structure and powers of the OPC. From the outset, it fundamentally differed from the 1989 text by containing no reference to human rights and, by extension, no human rights mandate

[168] As noted in: *Situation of Human Rights in Haiti. Report by Mr. Adama Dieng, independent expert, prepared in accordance with Commission resolution 1995/70*, CHR 52nd Sess, UN Doc E/CN.4/1996/94 (1996), at 3 para 6, 10 para 40.

[169] *Décret créant un Office dénommé OFFICE DE LA PROTECTION DU CITOYEN ET DE LA CITOYENNE dont le dessein est de protéger tout individu contre toutes les formes d'abus de l'Administration Publique*, Le Moniteur 150 No 82-A, 16 Octobre 1995 [*1995 Decree*].

for the OPC. Its preamble made clear that the competence of the institution was akin to that of a traditional ombudsman; it was to offer "a remedy allowing to correct all abuses and errors, whether willful or not, of the Administration and autonomous State bodies in their dealings with taxpayers and more generally with collectivity"[170]. The preamble also offered, absent a comprehensive definition, an indication on the type of acts that may constitute an "abuse", namely those "not constitutive of criminal or penal offenses" but that remain unjust or abusive[171]. The return to the restrictive vision and interpretation of the 1987 Constitution was further confirmed in the many verbatim similarities between the Decree and the Québec *Loi sur le Protecteur du Citoyen* (*Public Protector Act*), including in defining the jurisdiction of the Office[172]. Hence, the Protector was to intervene "whenever he ha[d] reasonable cause to believe that a person or group of persons has suffered or may very likely suffer prejudice as the result of an act of a public body, its chief executive officer, its members or a person holding an office, employment or position accountable to the chief executive officer"[173]. A "public body" – and interestingly not the constitutional notion of "Public Administration", other sign of the Québec influence – comprised Ministries, institutions placed under their authority, autonomous State bodies, the Police and Churches, but significantly excluded the Presidency, the leadership of both chambers of Parliament, the Supreme Court, and independent institutions such as the Court of Auditors [art 14 (4) (5)].

The functions and powers conferred to the OPC by the 1995 Decree suggested an investigative administrative body with some attributions analogous to quasi-judicial functions, in other words an ombudsman institution. It could receive complaints (also called "intervention requests") from any person or group of persons acting on his or its own behalf or on behalf of another person, or could intervene of its own initiative[174]. Particular focus was put on complaints of persons deprived of liberties, with an obligation made to penitentiary personnel to relay them without delay in full confidentiality [art 20(6)]. The OPC conducted confidential investigations when necessary, in

[170] *Ibid*, prepara 4.
[171] *Ibid*, prepara 6.
[172] On the jurisdiction, compare art 14 of the *1995 Decree*, *ibid*, and art 13 of the Québec law as it then stood, 1987, c 46 s 5. For other similarities, compare arts 22-25, 27-29 of the Decree to 26-26.2, 27, 27.3(1), 30-31 of the Law.
[173] *Ibid.* The only variation between the two texts is the lack of mention in the Haitian one of "omission" in defining the modalities of intervention of the Protector ("the result of an act *or omission*" in the Québec law). The presence of the wording "*soit par un acte posé*" in the Haitian text without any corresponding alternative tends to indicate that the absence of "omission" is more the result of a material error when publishing the Decree than the intent of its drafters.
[174] *Ibid*, art 14 para 2; The wording "complaint" (*plainte*) and "intervention request" (*demande d'intervention*) are both used with similar meaning in the Decree (see art 20 vs. art 21).

respect of the *audi alteram partem* principle, and could in doing so compel witnesses and document production [arts 21, 30-31]. If of the opinion that a prejudice existed, it notified the responsible party, made appropriate recommendations and requested to be informed of measures taken to remedy the situation [arts 23-24]. Although its decisions were not binding, it could notify, through a comprehensive report, the Executive and Legislative branches of cases where no satisfactory measure had been taken within a reasonable time; and was habilitated to call their attention on the necessity of legislative reforms to prevent the recurrence of prejudicial situations[175].

In defining the structure of the OPC, the Decree introduced two defining additions. On the one hand, borrowing once again from the Québec vision[176], it provided for the President of the Republic to name a Deputy Protector (*Protecteur du Citoyen et de la Citoyenne adjoint*) on the recommendation of the Protector, for a once renewable 4-year mandate [art 7]. The creation of a deputy position was common practice in ombudsman structures, favoring efficiency and visibility of the institution, and to some extent plurality in its composition. The appointment of the Deputy Protector through an official act of the President was certainly intended to heighten the profile of the position. But in the Haitian context, it opened the door to potential Executive obstructionism, not to say interference, the likelihood of which was enhanced by the wording "*peut être effectué*" (may be carried-out) in referencing the possibility for the President to dismiss the deputy for cause on recommendation of the Protector. On the other hand, the creation of the position of "*délégués départementaux*" (departmental delegates) was significant [art 12(3)]. It laid the groundworks for the institution's decentralization and presence on a national scale. Essential to increasing the accessibility of the institution, especially to vulnerable sections of society located outside the capital, this decentralization was only partially fleshed-out by the Decree. Departmental delegates were but a step, although a non-negligible one, to the creation of functioning regional or local sections.

Tainting the entirety of the 1995 Decree was the conspicuous absence of any reference to "independent institution" or even to "independence". This omission was not accidental. While the

[175] *Ibid*, prepara 7 (*dépourvues de force exécutoire*), arts 25, 27.
[176] Art 4 at it then stood, 1968, c11. The French wording "adjoint" has since been replaced by "Vice-Protecteur", 2005, c 32, s 269

Decree recognized the immovability of the Protector, save for the possibility of indictment before the High Court of Justice, the constitutional mechanism in case of offenses committed by the President, Prime Ministers and other high-ranking officials[177], it did not establish the function nor the Office as being independent. The text contained no safeguards, whether in the form of admissibility criteria, incompatibility clauses or exclusionary provisions, recognizing a special status to the Protector function or indicating an intent to preserve it from political or other inclinations. Likewise, it made no mention of an independent budgetary line for the OPC or of its right to be provided with adequate resources so as to ensure its independence (and efficiency). More glaringly, the Decree instituted a ten-member "Administrative Council" (*Conseil d'Administration*) composed notably of members designated by the Executive, both Legislative branches and human rights organizations to "deliberate" on all issues brought forward by the OPC leadership [art 12 para 1]. Such structure implied that the OPC was assimilated to an "autonomous agency" rather than an "independent institution" as per the 1987 Constitution[178]. It also made clear that the OPC, as constructed by the 1995 Decree, was not an NHRI as envisioned by the Paris principles.

2. THE FAILED TRANSITION TO A HUMAN RIGHTS MANDATED OPC

In February 1996, Haiti witnessed for the first time in its history a smooth transfer of power between an outgoing elected President and his elected successor. This "major step in the consolidation of the democratic process in Haiti" also represented "a certain measure of continuity" in State affairs due to the political proximity between the outgoing and incoming administrations[179]. Under the presidency of René Préval, Haiti was to pursue efforts to strengthen democratic institutions and guarantee increased respect for human rights. It would do so in close collaboration with the International Civilian Mission to Haiti (MICIVIH), whose mandate was extended at the request of the President, and the International Civilian Support Mission in Haiti

[177] *1995 Decree*, *supra* note 169, art 6; 1987 Constitution, *supra* note 148, arts 185-190. It should however be noted that the Decree (art 31) had subjected the Protector to the jurisdiction of the Criminal Court (*Tribunal Correctionnel*) in case of a confidentiality breach from his behalf, punishable by a fine. It marked a clear distinction with a similar provision (art 33) from the Québec Public Protector Act, that did not extend this possibility to the Public Protector.
[178] *Mutatis mutandis* 1987 Constitution, *supra* note 148, art 142. This fact is also highlighted on the current website of the OPC, in its « historique » section (6th para): <www.opchaiti.com/Historique.html> [perma.cc/3396-246S].
[179] *The situation of democracy and human rights in Haiti. Report of the Secretary-General. Addendum,* UNGA 50th Sess (item 38), UN Doc A/50/861/Add.2 (1996), at 1 paras 2-3 [*UNSG 1996 report*].

(MICAH), from March 2000 to February 2001[180]. The coupling of the human rights focused approach of the international civilian missions to the institution building priorities of the Préval administration would translate into a conceptual shift in the OPC's identity. Where the 1995 Decree created a traditional ombudsman, international and national stakeholders were early to recognize OPC's potential contribution to the promotion and protection of human rights, and set about efforts to transition it into a NHRI. This recognition was to be explicit **(2.1)**, through the discourse of key stakeholders, but also implicit **(2.2)**, as it was to stem from the OPC's functioning in the Haitian human rights environment. The transition efforts would however prove challenging due to persistent institutional shortcomings and the resurgence of political instability **(2.3)**.

2.1 The explicit recognition of a human rights mandate for the OPC

In May 1996, Louis Roy – the initiator of the OPC concept – was appointed Protector in accordance with the constitutionally prescribed consensus[181]. Due to delays in resource allocation[182], it would take another 18 months for the OPC to officially open its doors (November 1997). In the interval, the OPC was to undergo an identity change.

As previously examined, the mid-nineties marked the international ascension of the Paris principles and their conception of NHRIs. Coincidently, they also saw the establishment of OHCHR[183], that would go on to play an instrumental role in the diffusion of the NHRI concept. It was thus predictable that the CHR, in its April 1997 resolution on the situation of human rights in Haiti, would encourage Haitian authorities "to study the possibility of establishing, with the assistance of the High Commissioner/Centre for Human Rights, a [NHRI] with the greatest possible participation of civil society"[184]. The wording left no place for interpretation; its implications were unequivocal. Despite the recent appointment of a Protector, the OPC was not considered by the CHR to be a NHRI, nor was it, absent an express reference, contemplated as a

[180] *Ibid*, para 6. The mandate of MICIVIH expired 15 may 2000.
[181] He was first appointed in 1995 ad interim Protector by President Aristide. His appointment was confirmed in May 1996 by Préval in consensus with the Presidents of both chambers of parliament. See: OPC 2009-12, *supra* note 153, at 20.
[182] *UNSG 1996 report*, *supra* note 179, at 8 para 34.
[183] *High Commissioner for the promotion and protection of all human rights*, GA Res 48/141, UNGAOR 48 Sess, Supp No 49, UN Doc A/48/49 (Vol.I) (1993) 261. OHCHR was merged with the Center for human rights in September 1997.
[184] *Situation of human rights in Haiti*, CHR Res 1997/52, UNESCOR 1997, Supp No 3, UN Doc E/1997/23-E/CN.4/1997/150, 171 at 173 para 17.

candidate for transition into a NHRI. The resolution crystallized at the UN level what the 1995 Decree had outlined in the Haitian institutional landscape: the OPC was an Ombudsman institution *stricto sensu*. This script was however to be flipped only a few months later.

In his November 1997 report recommending the extension of the UN component of MICIVIH, the UNSG sought to highlight the contributions of the civilian mission to institution building and democratic consolidation in Haiti. Amongst the many listed achievements, was an innocuous mention of "a contribution to the creation of the Office of the Ombudsman, which *will have an important human rights promotion role*"[185]. The UNSG was to double down on this assertion in the conclusion to his report by referring to the OPC as one of the "important human rights protection mechanisms and institutions [that] are (…) still in their infancy"[186]. In suddenly recognizing a human rights mandate to the OPC, the UNSG was nevertheless but echoing the views of the Haitian President, as expressed in a letter attached to the report. In it, the OPC is listed as one of the "key institutions for the promotion and protection of human rights" justifying the continued support of MICIVIH[187]. Remarkably, 2 years after a restrictive vision of the OPC was laid out by 1995 Decree, Haiti's highest authority while not discarding it, was at the very least substantially expanding upon it. The CHR would draw the logical inference in its follow-up resolution, inviting OHCHR "to contribute to [OPC's] strengthening, through a program of technical cooperation, so that it may develop into a national institution for the promotion of human rights, widely open to participation by civil society"[188]. The lack of mention of the Paris principles was more a sign of the times - the resolution predating the creation of the ICC/GANHRI accreditation process - than of any of nuance in the CHR's request. As further evidenced by the implied reference to plurality ("widely open"), the objective was for the OPC to transition into a NHRI.

With the benefit of hindsight, a combination of factors can be advanced to explain this somewhat curious turnaround. On the one hand, without seeking to speculate on his rationale, President

[185] *The situation of democracy and human rights in Haiti. Report of the Secretary-General*", UNGA 52nd Sess (item 44), UN Doc A/52/687 (1997), at 3 para 7 [*UNSG 1997 report*]. Our emphasis.
[186] *Ibid*, at 12 para 46.
[187] *Ibid*, at 14.
[188] *Situation of human rights in Haiti*, CHR Res 1998/58, CHR 54th Sess, UNESCOR 1998, Supp No 3, UN Doc E/1998/23-E/CN.4/1998/177, 185 at 187 para 10.

Préval's desire for the international civilian mission to remain in Haiti to support the Government's institution building vision was abundantly clear, despite its political cost[189]. With the focus of the mission resolutely on human rights and given the scant Haitian institutional landscape, the newly created by the 1995 Decree OPC represented an appropriate – if not ideal – entry point for support, and was from the very outset of its existence to be accompanied by MICIVIH[190]. Additionally, the timing of this support happened to coincide with the irresistible emergence on the world stage of the Paris principles, which was to permeate the many facets of the UN human rights scheme, particularly technical cooperation activities. On the other hand, Haiti's socio-political context influenced national and international actors into going down the OPC path in lieu of forging a more natural one. The country was once again experiencing a political crisis, with Government activity paralyzed, the ruling coalition fragmented, and mounting public security concerns[191]. In this context, the potential necessity of creating a body with a specific a human rights mandate was outweighed by the political, legislative and financial implications of seeking to do so. Even if for argument's sake such an option was available, it would lead to the untenable construction of an NHRI being established by law where the traditional ombudsman is consecrated by the Constitution. Differently put, the creation of a non-OPC NHRI would invariably have had to be enacted through a constitutional amendment, an inconceivable path under the prevailing circumstances of the time. The OPC was hence somewhat by default brought to carry the burden of NHRI expectations, though human rights were also to be inherently linked to its ombudsman role.

2.2 A human rights mandate implicit to the OPC's functioning

> *"Through their independence, flexibility and non-conflictual approach to the relations between individuals and the public administration, Ombudsmen have a key role to play in the protection of individual rights. (...) Whilst explicit reference to human rights protection may be absent from the mandate of certain ombudsmen, it is clear that human rights violations by state authorities constitute, at the same time, serious cases of maladministration, and as such fall within the concerns of even the most narrowly defined institutions "*[192]

[189] As noted at the time by the UNSG, the international presence in Haiti was subject of mounting criticism. *UNSG 1997 report*, *supra* note 185, at 2 para 5.
[190] As evidenced by the UNSG report, i*bid*, at 10 para 34.
[191] *Ibid*, at 1-2 paras 2-5.
[192] Quote attributed to former Commissioner for Human Rights of the Council of Europe, Alvaro Gil Robles in: European Ombudsman, "The Ombudsmen as human rights protection mechanisms" (Vienna, 2010), copy of speech online: <https://europa.eu/!wh87Qd> [perma.cc/TP3X-75YB], at 1.

These words, attributed to former Commissioner for Human Rights of the Council of Europe Gil Robles, highlight the frequently porous distinction between the inter-connected yet separated notions of "maladministration" and "human rights violations". They are especially felicitous in the Haitian setting, where the two notions are often undistinguishable. Indeed, if an ombudsman institution is a "mechanis[m] of democratic accountability"[193], that "complement[s]"[194] the work of the judicial system, its role can only be magnified in a transitioning democracy struggling to overcome its authoritarian legacy and where State deficiencies are systemic, prominently in the judiciary[195]. Classical ombudsmen such as the one outlined by the 1995 Decree are designed to view maladministration through the prism of individual complaints against State institutions and/or *proprio motu* investigations into their doings. But in a State where "[human rights] violations are as common as they are extensive"[196] and traditional protection channels ineffective to the point of being responsible for violations, the image reflected by this prism is bound to encompass infringements of what the 1987 Constitution labels "fundamental rights" of the citizen[197]. In other words, the prevailing institutional and human rights environment in post-dictatorship Haiti imposed a human rights focus to the OPC where its constitutive text did not. In this regard, Haiti stood out as an anomaly amongst States transitioning from authoritarian or communist to democratic regimes that established an ombudsman institution. With the 1995 Decree, it espoused a restrictive vision where the great majority of transitioning States provided their ombudsman with a human rights mandate[198]. Whether deliberately intended or rather resulting from unfamiliarity with other State practices, this distinction would prove mostly vaporous.

[193] Reif, *The Ombudsman*, *supra* note 18, at 55.
[194] P. Nikiforos Diamandouros, "The ombudsman institution and the quality of democracy", (Centre for the Study of Political Change, University of Siena, 2006), copy of lecture online: <https://europa.eu/!yy38bv> [perma.cc/FX2T-KNVV], at 7.
[195] As constantly noted in reports on Haiti, including for the period under examination: *The situation of democracy and human rights in Haiti. Report of the Secretary-General*, UNGA 54th Sess (item 48), UN Doc A/54/625 (1999), at 5 para 29 [*UNSG 1999 report*].
[196] Quote of Florence Élie, Protectrice du Citoyen (2009-2017) regarding the human rights situation in Haiti "*Les violations sont aussi courantes que variées*" in OPC 2009-12, *supra* note 153, at 4.
[197] 1987 Constitution, *supra* note 151, Title II, Chapter 2 "*Droits fondamentaux*".
[198] Diamandouros, *supra* note 194, at 6.

The OPC's interventions on detention files are a prime illustration of this point. With special care given by the 1995 Decree to complaints from detainees, the OPC was brought early on[199] to direct its attention on the pervasive and persistent issue of prolonged pretrial detention and its perverse effects on material conditions of detention (eg: overcrowding). While these problematics constitute a form a maladministration, resulting from the dysfunction on many levels of the justice system, the police and penitentiary authorities, they are constitutive above all of serious violations of the right of a person to not be subjected to arbitrary detention or ill-treatment, as well as the right of all detainees to be treated with respect for their human dignity. These rights are safeguarded as "fundamental rights" by the 1987 Constitution, but also as civil and political human rights in treaties ratified by Haiti[200]. Making matters even blurrier and further extending the realm of what could constitute an "abuse" is Haiti's monist structure under which ratified treaties "become part of the legislation of the country and abrogate any laws in conflict with them"[201]. Consequently, in examining the norm applicable to public administration in its dealings with the public, the OPC was in part informed by the State's human rights obligations as enshrined in domestic legislation, the Constitution, as well as in applicable treaties. Human rights were thus to become inherent to the OPC's functioning, even absent a specific mandate.

2.3 The OPC's initial failure as a NHRI

During its first decade of existence (1998-2008), the OPC was confronted by a host of challenges that ultimately doomed its initial attempt at positioning itself in the Haitian institutional landscape as a NHRI. Chief amongst them were its ambiguous status and lack of resources.

As previously examined, the 1995 Decree, in addition to being unconstitutional, did not properly reflect the OPC's explicitly recognized mission of promoting and protecting human rights. With international support, the institution sought very early to redefine itself through the preparation of a draft bill on its organization and functioning. Traces of such draft bill are multiple throughout

[199] The OPC was said to be monitoring prisons since 1999, even publishing a specific report on the subject in 2004. See OPC 2009-12, *supra* note 156, at 36-37.
[200] See: *1987 Constitution*, *supra* note 148, arts 24, 24.1, 44.1. With regards to treaties, see ICCPR, 19 December 1966, 999 UNTS 171, arts 7-10 (entered into force 23 March 1976, accession by Haiti 6 February 1991).
[201] *Ibid*, art 276.2.

the years[202]. In the year 2000[203], it was said to be in the process of being finalized, in 2005[204], in need of revision to bring it line with the Paris principles, and in 2007[205], with Government for consideration. For unspecified reasons, this iteration of the draft bill was never to be brought to a vote, leaving the OPC on uncertain legal footing for the duration. This uncertainty was exacerbated when the Protector post was left vacant between June 2001 and July 2002, and then filled in questionable circumstances[206]. The ambiguity surrounding its legal status and functioning undermined efforts to establish the OPC in the national institutional landscape. To a certain extent, it contributed to the Office's inability to secure adequate resources from State coffers for its functioning[207]. The budget afforded to the OPC was notoriously low, to the point that it was publicly denounced by the Protector and was said to render the institution practically inoperative[208].

With an ambiguous status and markedly insufficient resources, the OPC was set-up to fail. It was in no position to deploy an effective response to growing human rights challenges in the country. The end of President's Préval first term and the re-election of President Aristide in dubious circumstances would spell troubled times for Haiti, characterized by insecurity, impunity, the

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[202] OPC 2009-12, *supra* note 153, at 36-37. The report refers to the preliminary version of the draft bill in 2000-2001 and then to work on the legal framework from the years 2001 to 2004.

[203] *Situation of human rights in Haiti. Report on the situation of human rights in Haiti prepared by Mr. Adama Dieng, independent expert, in accordance with Commission resolution 2000/78, para. 21*, CHR 57th Sess (item 19), UN Doc E/CN.4/2001/106 (2001), at 19-20 para 48.

[204] *Implementation of General Assembly 60/251 of 15 March 2006 entitled "Human Rights Council". Situation of human rights in Haiti. Report prepared by the independent expert, Louis Joinet*, HRC 4th Sess (item 2), UN Doc A/HRC/4/3 (2007), at 21 para 76a) [*IEH Joinet 2007 report*].

[205] *Report of the Secretary-General on the United Nations Stabilization Mission in Haiti*, UN Doc S/2009/129 (2009), at 11 para 50.

[206] The vacancy was noted by IEH Joinet as affecting the credibility of the OPC in: *Situation of human rights in Haiti. Report prepared by the independent expert, Mr. Louis Joinet, pursuant to the Chairperson's statement at the fifty-eighth session of the Commission on Human Rights under agenda item 19, entitled "Technical cooperation and the situation of human rights in Haiti"*, CHR 59th Sess (item 19), UN Doc E/CN.4/2003/116 (2002), at 7 para 13 [*IEH Joinet 2002 report*]; The expert later noted that the 2002 appointment of the Protector was made without the constitutionally required consensus: *Situation of human rights in Haiti. Report prepared by the independent expert, Louis Joinet*, CHR 61st Sess (item 19), UN Doc E/CN.4/2005/123 (2005), at 20 para 82 [*IEH Joinet 2005 report*].

[207] For the evolution of the OPC budget: OPC 2009-12, *supra* note 153, at 27. The budget went from approximately US$ 170,000 in fiscal year 1998-1999 (est. rate 1999: 1$ = 17.96 HTG) to US$ 290,000 in 2007-2008 (est. rate 2008: 1$ = 39.22 HTG). It substantially increased (doubling) in 2012-2013, period that corresponded with the vote and promulgation of the OPC organic law examined in sec 3.1 below. This tends to lend credence to the link between OPC's ambiguous status and inability to receive a proper budget. Nonetheless, as will be examined in chap II sec 1.3, this increased budget would prove insufficient to fulfill an ambitious NHRI mandate.

[208] Jean Gardy Gauthier, "Quelle institution protège les citoyens?", *Le Nouvelliste* (5 May 2008), online: <https://lenouvelliste.com> [https://perma.cc/4ENY-SFXU].

departure and eventual return of the UN presence, and another disruption of the constitutional order[209]. During that period, the OPC was repeatedly singled out, including by the Independent expert on the situation of human rights in Haiti (IEH), for doing "virtually nothing about serious human rights violations of human rights" and not playing its "vital role" in "combatting humanity"[210]. Its credibility within the population, as well as within public administration, was irremediably tarnished. As noted in a May 2008 newspaper clipping, the OPC only existed by name[211].

3. THE (RE) BIRTH OF THE OPC AS A PARIS PRINCIPLES-COMPLIANT NHRI

In September 2009, Haiti was making significant advances on the path to stability[212]. Accordingly, the multidimensional and integrated peacekeeping operation that was MINUSTAH, already in the country for over five years, was in the process of fine-tuning its exit strategy. The OPC was to figure prominently in the mission's revised consolidation plan, consisting of benchmarks and associated indicators. More precisely, "the adoption of legislation for the [Office] and progress towards strengthening its effectiveness" was listed as a 2009-2010 progress indicator under the Rule of law and human rights benchmark, with the end goal for 2010-2011 being a "fully operational and effective [OPC], drawing on limited additional support, as required"[213]. These indicators reflected the vision previously set out by the IEH, whereby high priority should be given to the reform of the Office with the view of it "tak[ing] over the tasks of promoting and protecting human rights (…) entrusted to the MINUSTAH human rights section"[214]. It would find an echo in the person of Florence Elie, appointed *Protectrice du Citoyen* by President Préval just a few days

[209] MICAH mandate expired in February 2001 without being renewed. Under growing pressure, President Aristide stepped down in February 2004 and a provisional government led by Boniface Alexandre was sworn in. At the same period, the UNSC authorized by resolution 1529 (2004), the deployment of a Multinational Interim Force to secure the country. This force was to transition into MINUSTAH. On the prevailing human rights situation at that period, see: *IEH Joinet 2002 report* & *IEH Joinet 2005 report*, both at *supra* note 206.
[210] *Ibid*, respectively, at 7 para 13; at 20 para 82.
[211] Gauthier, *supra* note 208: "« *L'OPC n'existe que de nom », dit un cadre de l'administration publique qui se demande à quoi il sert*"
[212] Progress in many areas was noted in: *Report of the Secretary-General on the United Nations Stabilization Mission in Haiti*, UN Doc S/2009/439 (2009).
[213] *Ibid*, at 22-23, Benchmark IV.
[214] *IEH Joinet 2007 report*, *supra* note 204, at 20-21 paras 75-76. It should be noted that the MINUSTAH human rights section is a representation of OHCHR integrated within the civilian component of the mission.

after the publication of the indicators[215], and whose first order was to produce an ambitious action plan for the OPC[216]. Having previously served as deputy Protector (2000) and Protector a.i. (2001-2002), Elie was not new to the institution and presumably familiar with its shortcomings. Her action plan put the emphasis on the extension of the OPC's human rights protection and promotion mandate, with the express objective of "obtaining accreditation from the international human rights system", an imprecise yet unmistakable reference to the ICC/GANHRI NHRI accreditation process[217]. Two major events would come delay this objective and cast it in a different light.

First, on January 12, 2010, a powerful earthquake would devastate the Haitian capital and bordering towns, causing massive loss of lives (including within MINUSTAH and UN agencies), severe destruction, and impairing Government functioning. The OPC would not be spared by the devastation, forced to initially carry out its operations under tents due to extensive damage to its offices. The deep humanitarian crisis that would ensue would redefine the MINUSTAH mandate and also make Haiti, and incidentally the OPC, the recipient of significant international attention and support. As noted by the then new IEH, who happened to have intimate knowledge of the NHRI scheme, "in this period of crisis and endangerment of human rights it is especially important for the national human rights institution to be supported in its role as oversight mechanism"[218]. As a result, the institution would benefit from variety of international support, amongst which in-kind technical assistance from OHCHR/OIF/UNDP for the implementation of the aforementioned OPC action plan[219].

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[215] *Arrêté nommant la Citoyenne Florence Elie Protectrice du Citoyen et de la Citoyenne*, Le Moniteur 164 No 95, 9 Septembre 2009, 1. As noted in the preamble (clause 7), the appointment was made through the constitutionally required consensus.

[216] The swiftness to produce the plan was noted by the IEH Forts: *Report of the independent expert on the situation of human rights in Haiti, Michel Forst*, HRC 14th Sess (item 10), UN Doc A/HRC/14/44, (2010), at 16 para 76 [*IEH Forst 2010 report*]; The plan is found under the heading "*Stratégie de relance institutionnelle*" in: OPC 2009-12, *supra* note 153, at 58-59.

[217] OPC 2009-12, *ibid*, at 58-59 secs 2.1-2.2, 3.2 "*Obtenir l'accréditation auprès du système international des droits humains"*.

[218] Reference is here made to Michel Forst, who was IEH from 2008 till 2013 when he resigned before the end of his mandate, and who served from 2005 to 2016 as the Secretary General of the French NHRI, the CNCDH. For the quote, see: *IEH Forst 2010 report*, *supra* note 216, at 16 para 77.

[219] OPC 2009-12, *supra* note 153, at 30 "tableau 5" for the list of international financing, 75 "tableau 30" for the technical assistance. Also see on the joint OHHR/OIF/UNDP support: *National institutions for the promotion and protection of human rights, Report of the Secretary-General*, HRC 20th Sess (items 2,8), UN Doc A/HRC/20/9 (2012), at 6 para 15.

Second, the bitterly contested and now infamous 2010-2011 presidential election would substantially alter Haiti's political landscape[220]. Where many expected continuity in the form of Jude Célestin, the candidate running under the banner of Président Préval's party, it was rather Michel Martelly, an entertainer turned politician, that would emerge victor and take the reins of the country for the following five years. His accession implied the new Protector would serve the better part of her mandate under an administration with whom she shared no natural affinity[221]. Likewise, it meant that efforts to cement the OPC as a NHRI would be led under an administration having no ownership of the initiative and very little historic links with the institution.

It is in this context that the OPC would, while facing existential quandaries **(3.1)**, play a pivotal role in the adoption of its own organic law **(3.2)** and, closely after, be recognized by the ICC as being a Paris-principles compliant NHRI **(3.3)**.

3.1 The OPC's existential quandaries

The Paris principles require a NHRI "be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence"[222]. In the case of the OPC, these requirements were partly met by section 207, et seq of the 1987 Constitution creating the Office and the position of Protector. But, as previously noted, the constitutional text did not expressly define the sphere of competence of the OPC to encompass human rights. While the NHRI identity of the Office could - and ultimately would (see below 3.2) - be addressed in a legislative text, this text risked having its constitutionality called into question if confronted to a restrictive interpretation such as the one that influenced the adoption of the 1995

[220]The results of the first round of the Presidential election initially placed Mirlande Manigat and Jude Célestin, respectively in first and second place, excluding Michel Martelly, the third-place finisher, from the run-off. Martelly would be moved up to second place in lieu of Célestin following a joint OAS/CARICOM report recommending the exclusion of number of tally sheets deemed irregular. Martelly would go on to participate in and win the run-off. See: *Report of the Secretary-General on the United Nations Stabilization Mission in Haiti*", UN Doc S/2011/183 (2011), at 1-3 paras 2-8.

[221] The inference is based on the fact that the main positions occupied by Elie throughout her career were either during the Aristide (first term) or Preval presidencies (See her biographical notice contained in: OPC 2009-12, *supra* note 153, at 104 Annex 1); and the fact that Martelly (and his administration) was said to entertain some links with elements of the Duvalier regime and represent a brand of nationalism somewhat hostile to the Lavalas movement. See: *Mémoire portant sur la lutte contre l'impunité en Haïtidu Collectif contre l'impunité et d'Avocats sans frontières Canada (ASFC) présenté à la Commission interaméricaine des droits de l'Homme (CIDH) à l'occasion de l'audience thématique du 2 mars 2018 – 167ème session*, Port-au-Prince (2018), online: <https://www.asfcanada.ca> [perma.cc/TK6F-APGB], at 24.

[222] *Supra* note 53, sec A2.

Decree. As such, a constitutional amendment enshrining the NHRI status of the OPC was the ideal course of action to dissipate any confusion, and it so happened that Haiti was, in 2009, in the process of revising its constitution[223]. This process, though marred by controversy and procedural flaws[224], would culminate in the June 2012 adoption of the 1987 amended Constitution (amended Constitution)[225].

The core of the amendment and much of the ensuing polemic pertained to sensitive political issues such as the composition of the electoral council, the procedure in the event of Presidential vacancy, and dual nationality. The amendments also attempted to comprehensively address the State's architecture with the creation of - a new independent institution, the Constitutional Council, and the introduction in the Constitution of a key institution previously created by law, the Superior Council of the Judicial Power[226]. This comprehensiveness was not to extend to the OPC. The section pertaining to its creation was solely modified by the introduction of article 207.2bis which mandates the institution "in the exercise of its functions, [to] pay a special attention to the complaints presented by women, particularly in that relating to the discriminations and the aggressions of which they may be victims notably in their work". Over 20 years after the adoption of the Paris principles, if the intent was to proclaim the OPC a NHRI, it certainly could have been done in a more unambiguous manner. Although the specific focus on women does provide a human rights-oriented insight on what constitutes an "abuse", it does not dissipate doubts on the OPC's status or imply that it can be compared to anti-discrimination bodies accredited as NHRIs (Eg: the CHRC). Article 207.2bis should rather be viewed as part of a wider effort of the amendments to combat the scourge of gender discrimination in Haiti, evidenced by the addition of a specific

[223] For this purpose, President Préval created by a February 2009 presidential order the "*Groupe de Travail sur la Constitution de 1987"* (Working Group on the 1987 Constitution), see: Le Moniteur 164 No 16, 20 février 2009, 12.
[224] On the troubled constitutional amendment process, see: Mulry Mondélice, *Le droit international et l'État de droit. Enjeux et défis de l'action internationale à travers l'exemple d'Haïti* (LLD Thesis, Université Laval/Université Panthéon-Assas Paris II, 2015) [unpublished], at 172 -176 [Mondélice, *Le droit international*].
[225] *Loi constitutionnelle portant amendement de la Constitution de 1987*, Le Moniteur 167 No 96, 19 juin 2012, at 4-21 [*Amended Constitution*]. Reference will be made where necessary to the English translation of the text found online at: <http://extwprlegs1.fao.org/docs/pdf/hai127411.pdf> [perma.cc/2H9U-XS5S].
[226] Respectively the *Conseil Constitutionnel,* created by art 190bis of the amended Constitution and that has yet to be established, and the *Conseil supérieur du pouvoir judiciaire (CSPJ)*, art 184.2 of the amended Constitution, previously created by the *Loi créant le Conseil supérieur du pouvoir judiciaire (CSPJ)*, Le Moniteur 162 No 112, 20 décembre 2007, 19.

preambular clause and the introduction of a gender quota[227]. Insofar as it pertained to the national human rights infrastructure, the constitutional revision process represented a missed opportunity to cement in the Haitian institutional landscape a NHRI, whether the OPC or a differently structured body. This was to be made apparent during Haiti's participation in the first cycle of the UPR.

In its initial presentation to the UPR Working Group, the Haitian delegation solely referred to the OPC as one of the institutions, along with various Ministries and public bodies, to be "connected to the protection of human rights"[228]. However, when faced with suggestions from Member States that a NHRI need be established, it asserted that "such an institution already existed, under the name of Office de la Protection du Citoyen"[229]. This somewhat surprising response would not prevent several delegations from formally recommending to Haiti the establishment of a NHRI in compliance with the Paris principles[230]. In yet another twist, these recommendations would be rejected by Haiti, with its Justice Minister explaining to the HRC that "the necessity of creating a NHRI does not for the moment constitute a priority for the Government, but that it is considering either expanding the mandate of the Office of the Ombudsman or creating a national human rights institution"[231]. This explanation was not only remarkable for its wording but also for its timing, as it intervened just 10 days after the Haitian senate had unanimously adopted a draft bill proclaiming the OPC to be "the national institution for the protection and promotion of human rights, as understood by the Paris principles"[232]. More troubling is the fact that the initial draft of the Haitian response to the UPR recommendation only referred to the possibility of creating in a national human rights commission. The eventual inclusion of a reference to the Office in the official

[227] The following clause was added to the preamble: "To assure to women a representation in the instances of power and of decision which must conform to the equality of the sexes and to equity of gender". Article 17.1 recognizes a quota of at least 30% of women at all levels of national life. Also see art 31.1.1 on the same quota in political parties.
[228] *Report of the Working Group on the Universal Periodic Review*Haiti*, UN Doc A/HRC/19/19 (2011), at 4 para 8.
[229] *Ibid*, at 12 para 79.
[230] *Ibid*, at 15 recommendations 88.23-88.27. Only Hungary (recommendation 88.28) seemed to acknowledge the Haitian position on the OPC by recommending to "begin the accreditation process".
[231] *Report of the Working Group on the Universal Periodic Review* Haiti Addendum. Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, UN Doc A/HRC/19/19/Add.1 (2012), at 5 para 35. For the Minister's quote: "Le Conseil des droits de l'homme adopte les résultats de l'Examen périodique de la République de Moldova, d'Haïti et d'Antigua-et-Barbuda", *OHCHR news archive* (16 mars 2012), online: <https://newsarchive.ohchr.org> [perma.cc/EVB4-45U8].
[232] *Loi portant organisation et fonctionnement de l'Office de la protection du citoyen*, Le Moniteur 167 No 119, 20 juillet 2012, prepara 21 [*Organic law*] (Our translation); Senate first voted on the text 6 March 2012.

response necessitated sustained sensitization and lobbying efforts[233]. Evidently, the OPC did not figure in the Government's plans for a NHRI, if such plans existed.

3.2 The adoption of the OPC organic law: the ultimate affirmation of independence

According to OHCHR and UNDP, "a national consultation process should precede the establishment of an NHRI, in order to build consensus and to maximize the likelihood of public acceptance"[234]. The 1987 Constitution, drafted by prominent civil society figures following the fall of a dictatorship and adopted by referendum, was without doubt the product of a societal consensus. It was however adopted prior to the Paris principles and the diffusion of the concept of NHRI, and its subsequent amendments did not consider these developments. Thereby, the consultative process that produced the 1987 Constitution can be said to have sprung the creation of the OPC, but not the establishment of a NHRI. With successive Governments either failing to act or not making a priority of it, it fell on the OPC, with sustained international support and some encouragement from civil society[235], to forge its own path to formally transition into a NHRI. In what can be seen as the ultimate attempt at affirming its independence, the institution drafted its own organic law, and took the initiative of presenting it to Parliament and advocating for its adoption, without involving Government.

The *Loi portant organisation et fonctionnement de l'Office de la Protection du Citoyen* (Organic law), promulgated July 20, 2012, is a unique occurrence in the Haitian legislative process, where laws are initiated by the Executive branch or to a lesser extent by one of the two Chambers of Parliament[236]. It was adopted "on the report of the Protectrice du Citoyen, in concertation with the Presidents of the Justice and Human Rights Commissions of Parliament" [237]. Completely shut out from the elaboration and adoption process, the Executive was left with the possibility of intervening through the President's "right to make objections" within "eight full days"[238]. While

[233] The author was privy to such efforts.
[234] *UNDP-OHCHR Toolkit*, *supra* note 14, at 137.
[235] Eg: joint submission 1 from human rights organizations to the UPR that called for the expansion of the scope of the OPC in line with the Paris principles. *Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 Haiti**, UN Doc A/HRC/WG.6/12/HTI/3 (2011), at 2 para 6.
[236] *Organic law*, *supra* note 232; The amended Constitution (*supra* note 236, art 111.1) recognizes the power to initiate laws to both Chambers of Parliament and to the Executive.
[237] *Ibid*, last prepara. (our translation)
[238] *Amended Constitution*, *supra* note 225, arts 121-122.

this prerogative was not utilized, the delay of more than two months in promulgating the law was indicative of a certain form of reticence, especially in view of the Government's declarations during the UPR[239]. This unease was to manifest itself in the following months through several informal attempts by officials to depict the law and the Office as being unconstitutional, a possibility left open by the singular construction of the text.

The Organic law represents an ambitious attempt at outlining a NHRI consistent with the dual but not easily reconciled frameworks of the Paris principles, on the one hand, and the 1987 amended Constitution, on the other. This delicate exercise of harmonization is accomplished through an evolutive interpretation of the constitutional text in light of the Paris principles, prominently illustrated by the definitions given to phrasing from article 207 of the Constitution in order to delineate the *ratione materiae* and *ratione personae* jurisdiction of the OPC ("*definitions*", art 4). Hence, "individual" refers without exclusion or preferences to any "natural person" ("*personne physique"*) – and thus not to legal persons -; "abuse" covers "any actions, omissions or negligence of Public administration or condoned thereby, whether deliberate or not, susceptible of causing a prejudice to an individual, including human rights violation directly, indirectly or incidentally connected to the State"; and "public administration" is understood to include all State bodies, even independent institutions, and the administration of all three powers, with no apparent exclusions such as the ones previously laid out by the 1995 Decree[240]. Accordingly, the Organic law establishes a hybrid ombudsman institution, designated as a Paris principles NHRI, with the two-pronged mission of monitoring State compliance to international and regional human rights commitments, and to protect individuals from any form of abuse by public administration ("*Mission de l'OPC*", art 3).

The appointment process of the Protector represents another illustration of the Organic law building on the premise of the constitutional provisions or, more precisely, around them. With the Paris principles requiring plurality and the 1987 Constitution solely imposing a consensus between

[239] The law was first voted by the Senate on March 6, 2012; then by the Lower Chamber on March 27, 2012; and due to modifications made to the text, voted one final time by the Senate on May 3, 2012. The President had eight days following this date to make objections or promulgate the law. The promulgation only intervened on July 12, 2012. See *Organic law*, *supra* note 232, at 15-16.

[240] *Ibid*, art 4 respectively a), b) and c). (our translation of "abuse"). For the exclusions of the *1995 Decree*, *supra* note 169, art 14 4th indent.

the President of the Republic and the Presidents of the Senate and of the Lower Chamber, the law recasts this consensus as the final step in a multi-layered process, starting with a public "call for applications" ("*appel public à candidatures"*) initiated by both chambers of Parliament at least 90 days prior to the end of the mandate of the Protector, and culminating with the consensus having to be found from a list containing a maximum of three candidacies[241]. In between, parliamentarians are to consider and vote on each application, and draw up the list from the candidacies garnering the support of the majority in each Chamber [arts 10 (3), (4)]. Clearly having for objective of democratizing and making more transparent the appointment of the Protector, this process surprisingly gives no formal consideration to civil society or social forces featured in the Paris principles. While such groups can participate in the call for application phase and, in an advocacy and monitoring function, during the vote, the onus of the process rests mostly on the Haitian Parliament. Furthermore, the addition of a list of candidacies appears like an unfortunate attempt by the Organic law at making room for the constitutionally prescribed consensus, insomuch as it implies a choice. Although limited to three names, the list leaves ample margin for discretion in a process intended to be transparent, and could under certain circumstances jeopardize it as a whole.

Moreover, the Organic law asserts in no uncertain terms the constitutionally recognized and Paris principles-required independence of the OPC. In announcing in its preamble that the *Decree organizing the central administration of the State* does not apply to the Office, the law seeks to mark a clean break from State practice that linked, due to a legislative void, the functioning of independent institutions to that of autonomous bodies[242]. Consequently, where the 1995 Decree provided for a "Board of Directors" ("*Conseil d'Administration"*), the Organic law asserts that the OPC "is subjected neither to the hierarchical control of any administrative authority nor to the stewardship of any administrative or political institution, [and]is to receive no instructions in the performance of its duties (…)"[243]. In similar vein, the Office is to "benefit from financial resources (…) that guarantee its independence, impartiality and effectiveness. (…) it prepares annually its budget and (…) a specific budgetary line is afforded to it in the annual State budget"[244]. The

[241] *Ibid*, art 10 (2) and (1) (*Processus de nomination du Protecteur du Citoyen*).
[242] *Ibid*, prepara 22 that refers to the non-application to the OPC of the *Décret portant organisation de l'administration centrale de l'État*, Le Moniteur 160 No 8, 27 Septembre 2005 [2005 Decree]. Despite this decree (article 4c) specifying that it does not apply to independent institutions, State practice was at times ambiguous.
[243] *Ibid*, art 2 (*Indépendance de l'OPC*) (our translation)
[244] *Ibid*, art 26 (*Ressources financières*) (our translation)

independence of the Office and its separation from the central administration of the State is further confirmed by the prerogative of the Protector to designate the OPC's director general [art 21(1)]. Although this designation has to be formalized by presidential order, the overall wording suggests it to be a formality, rather than an Executive led process[245]. The independency requirement also extends to the person of the Protector who is to remain neutral towards political groupings, avoid political activities, respect the principle of equal treatment, and be independent from both authorities and individuals to be protected by the OPC ("*Obligations*", art 17).

Like the 1995 Decree that it abrogated, the 2012 law provides for a Deputy Protector ("*Protecteur du Citoyen adjoint"*) to assist the Protector in the performance of his duties [art 18]. No other mention is made of his role or eventual attributions, the law paying no heed to repeated calls from the independent expert to establish a new arrangement between the posts of Protector and Deputy Protector to strengthen the operational capacity of the institution[246]. The Deputy is afforded a once renewable mandate of four years, but doubts surrounding the length of this mandate are raised by the provision calling for his nomination within 90 days after the Protector takes office[247]. Contrary to the Director General, the Deputy is not designated but rather proposed by the Protector to the President, a slight but non-negligible nuance as it pertains to Executive discretion, potentially reinforced by the 1995 Decree inspired use of the wording "*peut-être effectué*" ("may be carried-out") in referencing the dismissal of the Deputy by the President on the recommendation of the Protector [arts 18(2), 20(2)]. Notably, the Deputy Protector is but one piece of the (overly) ambitious structure outlined by the Organic law for the OPC, composed of a General Direction, Directions, Specialized Units, and Territorial Presences in each of Haiti's 146 communes[248].

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[245] It should be read in contrast with art 59 of the *2005 Decree*, *supra* note 242, which sets the regular designation process of a Director General ("…*nommé par le Président de la République par arrêté pris en Conseil des Ministres sur proposition du Ministre assurant la tutelle hiérarchique"*).

[246] According to IEH Forst: "in the new arrangement, the Ombudsman would be more particularly responsible for supervision of the mandate of the Office, relations with the national authorities and international relations, while the Deputy Ombudsman would have a dual protection and promotion role, on the one hand undertaking the supervision and coordination of investigations (…) and, on the other, providing human rights training (…)". *Technical assistance and capacity building. Report of the independent expert on the situation of human rights in Haiti, Michel Forst"*, HRC 11th Sess (item 10), UN Doc A/HRC/11/5 (2009), at 9 para 30; Also see: *IEH Joinet 2007 report*, *supra* note 204, at 21 para 76b).

[247] *Organic law*, *supra* note 232, art 18(2) - (3) "*il est nommé (...) dans les [90] jours qui suivent l'entrée en fonction du Protecteur du Citoyen*". What effect does this requirement have on a Deputy serving a 4-year mandate when a new Protector is named?

[248] *Ibid*, arts 21-24. With regards to Territorial Presences, it is to be noted that a previous draft of the bill put the emphasis on their presence in all departments and jurisdictions, of which the country has respectively 10 and 17, but

Furthermore, as a full-fledged hybrid NHRI, the OPC is afforded by the 2012 law wide-ranging duties and considerable powers. In an at times superfluous and confusing manner, the text operates a distinction between the duties (*Attributions*) of the Protector and those of the Office [arts 6, 13]. If such distinction can partly be explained by the necessity of highlighting management and representation functions specific to the person of the Protector [arts 13 a), b), f) to j) and m)], as well as those provided for in other statutes [art 13 r), s)], the delineation between the two sets of duties is not always intelligible and cause for redundancies. Hence, both the OPC and the Protector are to protect individuals from abuse from Public Administration, but the former is to do so through investigations while the latter is to accompany individuals through his mediation[249]. Both are to promote the ratification and implementation of international human rights instruments, but only the former is to contribute independently to the State's reporting obligations[250]. The OPC is to sensitize administrative authorities on the abuses faced by the individuals, while the Protector is to draw the attention of the Executive and Legislative authorities on human rights violations in the country[251]. In spite of this mishmash approach, a combined reading of the provisions relating to the duties of both the OPC and the Protector details far-ranging human rights promotion and protection functions. They are to be read in conjunction with "the means of intervention of the Office" ("*modalités d'interventions"*, arts 28-44), articulated into four core faculties.

First, as an ombudsman type institution, the OPC retains the ability to receive complaints ("*Saisine par une plainte*") or to act on its own initiative (*"Auto-saisine"*), with a special focus to be given to "the most vulnerable or disadvantaged individuals, especially children, women, detainees, persons with disabilities, and older persons"[252]. Second, it has far-reaching investigative powers ("*Pouvoir d'enquêter"*) that include the right to access in all time places of detention as well as the possibility of being supported when necessary by other State bodies [arts 34-39]. While it cannot – as was the case in its 1995 iteration – compel testimony, it can interrogate any public administration employee, who are in turn obligated to collaborate[253]. Third, the OPC has the

that the Lower Chamber amended the text to mandate the presences in all communes of the country. See: République d'Haïti Chambre des Députés, "Liste des modifications apportées au projet de loi portant organisation et fonctionnement de l'Office de la Protection du Citoyen", undated, on file with author.

[249] *Ibid*, compare arts 6a) and c) to 13c) and d).

[250] *Ibid*, compare arts 6j) and m) to 13e).

[251] *Ibid*, compare art 6f) to 13p).

[252] *Ibid*, arts 28, 31, and for the special focus, art 5 2nd indent (our translation).

[253] *Ibid*, arts 34(2), 37b) compared to *1995 Decree*, *supra* note 169, art 30.

power, on the basis of its investigations, to make recommendations ("*Pouvoir de formuler des recommandations*") to which State bodies have 30 days to respond [arts 40-42]. In case of non-execution, the Protector can refer the matter to Parliament and, if it pertains to human rights violations, to courts, as well as inform the public [art 42]. Lastly, the Organic law recognizes to the Protector – in lieu of the OPC – the faculty to formulate proposals to authorities ("*Propositions de réforme*"), including legislative reform and actions to be taken in face of likely human rights violations [art 44]. This faculty is completed by the Protector's duty to refer to the constitutional body a law infringing fundamental rights [art 13u)].

Despite its singular construction and some shortcomings, not least the inexplicable and inexcusable removal of the use of the feminine in the title of the Office and of the Protector[254], the 2012 Organic law reintroduced the OPC on the Haitian stage, elevating its status – and that of its Head[255] – to that of an independent institution having a broad mandate, and corresponding powers and duties, to promote and protect the rights, including human rights, of individuals. Spearheaded by the same institution that it sought to reestablish, it was an affirmation of both the special status of the OPC in the national institutional landscape and of its aspiration of being recognized as a NHRI internationally. Not surprisingly, it was to form shortly after its promulgation the core of the OPC's application to the ICC for accreditation.

3.3 The status "A" accreditation of the OPC

The OPC's application for accreditation was considered by the SCA during its May 2013 session[256]. This timing implied, considering the deadline set by the SCA's rules of procedure[257], that the application had been filed only a few months after the July 2012 promulgation of the Organic law and its recognition of a NHRI mandate to the OPC. Despite that relatively short span, there were some indications of the institution benefiting from the entry into force of its enabling

[254] The original draft of the bill contained, similarly to the *1995 Decree*, the phrasing "de la Citoyenne" in referring to the Office and to the Protector. It was to be removed during the Senate's consideration of the text. Le Sénat, "Rapport relatif à la proposition de loi portant organisation et fonctionnement de l'Office de la Protection du Citoyen et de la Citoyenne", undated, on file with author.
[255] The Organic law, *supra* note 232, art 8(4), elevates the rank and remuneration of the Protector to that of a Minister.
[256] ICC, "Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) Geneva, 13-16 May 2013", online (pdf): <https://nhri.ohchr.org/> [perma.cc/N4ZM-7ELZ], at 6-7 [SCA May 2013].
[257] The rules in effect at the time recommended that documents in support of an application be submitted four months prior to the meeting of the SCA: former rule 3.4, online (pdf): [perma.cc/4K9F-DMB9].

law, namely a doubling of its budgetary line, a 30% growth of its workforce, a substantial increase of the amounts of complaints received, and the publication for the first time in three years of an annual report highlighting human rights promotion and protection activities[258].

However, a closer examination revealed a more nuanced picture of the OPC's transition into a NHRI. On the one hand, as evidenced by the activity report, covering fiscal years 2009-12 and thus a period of only 3 months under the new mandate[259], the Office's formal shift to a human rights focus predated to a large extent the entry into force of the Organic law. In this respect, the law can be said to have formalized a mandate already being implemented by the Office on the basis of the Protector's 2009 action plan. On the other hand, the OPC had yet to fully put in place the structure laid out by its enabling law, with both the Deputy Protector and Director General positions still vacant[260]. That is to say, the Office was seeking accreditation with only at its head a Protector, who was not appointed on the basis of the process outlined by Organic law.

These considerations would partly come into play during the accreditation process, but in no decisive manner. The SCA "commend[ed] the OPC for successfully advocating for a significantly expanded mandate through substantial amendments made to its enabling legislation (…)", and noted that it "has been operating effectively as the national human rights institution under its expanded mandate" since the coming into force of the law in July 2012[261]. On the issue of vacancies, the Sub-committee observed that the Office was "proceeding on a timely basis to seek to have a Deputy appointed and to hire a Director General". This generally positive appreciation did not prevent the SCA from acknowledging the premature nature of the OPC's application, by declaring that "a formal report on at least one year's activities" was required "to assess the operational effectiveness of an NHRI (…) that has recently been provided with a significantly broadened mandate". Consequently, it recommended that the consideration of the application be deferred to its November 2013 session and requested the OPC to provide "a formal report on its activities for the period beginning July 2012"[262].

[258] This information is found in OPC 2009-12, *supra* note 153, at 27 (budget), 33 (workforce), 70 (complaints), 62, 65 (for the emphasis on protection and promotion activities).
[259] In Haiti, the fiscal year runs from October 1 to September 30 of the following year: *ibid* at 29.
[260] *Ibid* at 25, footnotes 6-7, and later confirmed by SCA May 2013, *supra* note 256, at 7.
[261] SCA May 2013, *ibid*.
[262] *Ibid*.

On that last point, it is important to note that an equivalent to the phrasing "formal" does not appear in the French version of the SCA recommendation, according to which the OPC is requested to provide "un rapport annuel d'activités (…)"[263]. Lost in translation, this nuance would prove important in the November 2013 session, as the SCA would acknowledge "with appreciation the OPC's annual report for 2012-2013"[264], despite no such report being ever formally published or made public by the institution[265]. Although a report was provided to the SCA, it inherently could not be the annual report referred to by article 6(k) of the Organic law that is to be published and widely disseminated at the end of each fiscal year (October 1 to September 30). It was rather a report specifically prepared at the SCA's aforementioned request and, in light of it never being published, for its exclusive use. In that sense, whether it could be considered "formal" as per the SCA's May 2013 English phrasing, or "documentation in its official or published form" as required by section 6.1 of the SCA rules of procedures was debatable. Nonetheless, it would for the SCA serve as evidence of the OPC "operating effectively as the national human rights institution under its expanded mandate"[266].

With the issue of the mandate being addressed by the unpublished 2012-2013 report, the core of the Sub-committee examination of the OPC's accreditation request was to cover four main considerations, all pertaining to different extents to its structural independence. First, the appointment process of the Protector described by the enabling law was called into question for its lack of conformity to the Paris principles, the SCA recommending "the OPC to advocate for the formalization of a broad based participatory and merit based selection process in the relevant laws, regulations or binding administrative guidelines" (subs 1). Interestingly, the Sub-committee's observation was only based on its reading of the law, as it paid no heed to the fact that the Protector was not appointed in accordance to the prescribed process. Second, the SCA expressed concern on

[263] CIC, "Rapport et recommandations de la session du Sous-comité d'accréditation (SCA) Genève, 13-16 mai 2013", online (pdf): <https://nhri.ohchr.org/> [perma.cc/7TFE-QJ6P], at 7.
[264] SCA November 2013, *supra* note 15, at 8.
[265] As of this writing, since the coming into force of the Organic law, the OPC has published and made public only 2 annual reports: 2009-12, *supra* note 153, published in January 2013; and a 2017-18 report published in April 2019: OPC, *Rapport Annuel 2017-2018* (Port-au-Prince, 2019), online (pdf): <https://www.asfcanada.ca/site/assets/files/7636/ascf_rapport-annuel-opc_2019.pdf> [perma.cc/AB4M-V4U9] [OPC 2017-18]. This was confirmed in: *United Nations Mission for Justice Support in Haiti. Report of the Secretary-General*, UN Doc S/2019/563 (2019), at 11 para 53 [*UNSG MINUJUSTH July 2019 report*].
[266] SCA November 2013, *supra* note 15, at 8. The SCA's assessment is divided in five sub-sections (subs), which will be, where relevant, referred to directly in the text.

the issue of the persisting vacancies. With regards to the Deputy position being "vacant for a significant period", it noted that a candidate had been selected but that "the appointment [had] yet to be finalised by the President", encouraging the Protector to pursue the formalization of the appointment "as a matter of urgency" (subs 2). While no mention was made of a candidate selected for the post of Director General, the SCA cautioned that the "formal 'appointment' process [i.e. the President] should not be used as a mechanism to interfere with or delay the appointment of the Director General as this may undermine the capacity of the OPC to function freely and effectively" (subs 4). The two remaining considerations pertained respectively to the security of tenure of the OPC leadership and to its funding (subs 3, 5). In the case of the former, the SCA regretted the lack of details provided by the law regarding the grounds for dismissal of the Deputy, as well as the meaning of "grave offence" as it relates to the dismissal of the Protector. In regards to the latter, it quoted lengthily general observation 1.10 on "adequate funding", though not applying it *in concreto*, in spite of several elements deserving of consideration (Eg: absence of stable offices and reliance on foreign funding[267]).

In a decision that did not necessarily amount to the sum of its parts, the SCA recommended that the OPC be accredited with "A" status. The fact that the Office was found to be Paris compliant despite non-negligible reservations regarding its structural independence casts a light on the generally permissive nature of the accreditation process where deference to NHRIs is rule unless manifestly revealed to be unwarranted. And in the case of the OPC, this deference was more than warranted considering its quarter of a century journey from an unfulfilled promise of the 1987 Constitution, to its international consecration; from its first unconvincing steps as an Ombudsman *stricto sensu*, to its (re)birth as a NHRI that merits the SCA's appreciation "for the significant role [it] play[s] in Haitian society in particularly difficult circumstances"[268]. Undeniably, the OPC's accreditation was a landmark accomplishment for Haiti. It was symbol of the country's commitment to democracy and human rights, just not necessarily of its Government's, whose position on the Office was ambiguous at best. The OPC's success was also an achievement for Haiti's international partners, the UN system, and in particular OHCHR, who from the outset and at every critical juncture supported the institution's transition into a NHRI, making it an integral

[267] These elements and more generally the issue of adequate funding are examined below, Chap II, 1.3.
[268] SCA November 2013, *supra* note 15, at 8.

part of democratic consolidation efforts.

In addition to being an end in itself, accreditation was to mark the start a new chapter for the OPC, who was now faced with the challenge of functioning effectively and credibly as a NHRI. As the next time it would face the SCA, the OPC wouldn't be a newly minted NHRI in the process of finalizing its transition, but one expected to have functioned in compliance with the Paris principles for five years in order to retain its "A" status.

CHAPTER II
THE CURIOUS FUNCTIONING OF A NHRI IN HAITI: FROM STATUS A ACCREDITATION TO REACCREDITATION OF THE OPC

In March 2019, the GANHRI SCA recommended that the OPC be re-accredited with "A" status[269]. The five-and-half-years that separate OPC's accreditation from its reaccreditation provide an instructive look into the external an internal functioning of a NHRI deemed to be Paris principles-compliant, and, incidentally, into the threshold for maintaining this status. This period was a defining one for the Office, faced with the dual challenge of implementing an ambitious NHRI mandate and meeting the structural requirements of the Paris principles, with its credibility resting in the balance. If at first view, reaccreditation by the SCA would suggest a certain degree of success in carrying the NHRI mantle, closer consideration reveals a more nuanced portrait of the OPC's functioning. Noticeable in it are limitations and hesitations in the institution's appropriation of its NHRI mandate, as well as concerning structural shortcomings, prominently on display in the trying leadership change experienced by the institution.

Influencing when not compounding the issues was the difficult and somewhat peculiar socio-political context that characterized Haiti during this period. With elections not held within the constitutional timeframe, Parliament was rendered mandateless in January 2015. The following year, an electoral crisis would lead to the installation of a provisional President and government, that would remain in place until the accession to power in February 2017 of Jovenel Moise, President Martelly's hand-picked successor[270]. In turn, the Moise presidency would usher in an era of heightened skepticism towards the international community's modus operandi, and a reflexive resistance to international criticism, best exemplified by the Haitian government's delay in signing the MINUJUSTH status of mission agreement[271], the non-renewal of the mandate of the

[269] SCA March 2019, *supra* note 93, at 25.
[270] See: *Report of the Secretary-General on the United Nations Stabilization Mission in Haiti*: 8 March 2016, UN Doc S/2016/225, para 2-14; 31 August 2016, UN Doc S/2016/753, paras 2-8; 16 March 2017, UN Doc S/2017/223, paras 2-8.
[271] The Haitian Government expressed disapproval over a new Chapter VII mandated mission, considering that the country's context rather warranted a technical cooperation mission under the umbrella of Chapter VI of the UN Charter. See: UNSC, "Haïti: le Conseil de sécurité dresse, « à une ombre majeure » près, un bilan positif de la MINUSTAH, remplacée par une mission réduite d'appui à la justice", *UNSC Meeting coverage CS/13026* (12 October 2017), online : <https://www.un.org/press/fr/2017/cs13026.doc.htm> [perma.cc/Y6FK-AWZB].

Independent Expert on the situation of human rights in Haiti[272], and the diplomatic row that followed the issuance of a UN statement on corruption[273]. This nationalist-tinged approach would serve as backdrop to the October 2017 transition from MINUSTAH to the far more limited in scope MINUJUSTH, and would partly inform the latter mission's relatively poor performance[274]. The OPC would figure prominently in this transition with one of the eleven MINUJUSTH benchmark relating to its capacity to "function independently and [to] protect citizens whose rights have been violated"[275].

The ensuing examination of the internal **(1)** and external **(2)** functioning of the OPC aims at providing an insight into the cardinal notions of independence and effectiveness in the case of a NHRI operating in a fragile democracy, and raises the question of their interconnectedness and of their permeability to context. Traditionally linked and considered to a certain degree mutually reinforcing, the case of the OPC seems to hint at a more complex relation, first, between the two notions, and, second, between the notions and the contextual lens through which they are assessed. Moreover, the reaccreditation of the OPC **(3)**, including the fact that it intervened six months late according to the GANHRI accreditation cycle, is an illustration of the manner by which these notions and, by extension, the Paris principles are considered by the SCA.

1. THE INTERNAL FUNCTIONING OF THE OPC: A DIFFICULT OPERATIONALIZATION OF THE NHRI STRUCTURE

Compliance to the Paris principles, as clarified and expanded upon by the SCA General Observations, translates into number of structural and operational requirements being placed on a NHRI. Pertaining notably to senior staffing and leadership appointment (1.1), the preparation and publication of an annual report (1.2.), or the availability of adequate resources (1.3), these requirements reflect on the ability of a NHRI to function independently and efficiently. However,

[272] See: "Council discusses human rights situation in Haiti and in Libya under its technical assistance and capacity building agenda item", *OHCHR News* (21 March 2017), online: <https://www.ohchr.org/> [perma.cc/6TE8-9HRG].
[273] Strong reactions of President Moise to the UN statement ultimately led to the replacement of the Head of the UN mission. Robenson Geffrard, "Mamadou Diallo remplace Susan D. Page à la tête de la MINUJUSTH", *Le Nouvelliste* (8 mai 2018), online: <https://lenouvelliste.com> [perma.cc/6BZB-DRT8].
[274] Only 28% of the 46 indicators from the benchmarked exit strategy were to be achieved by the October 2019 end of mandate of the mission. *UNSG MINUJUSTH July 2019 report*, *supra* note 265, at 16-17 para 78.
[275] *Report of the Secretary-General on the United Nations Mission for Justice Support in Haiti*", UN Doc S/2018/241 (2018), at 16 (benchmark 7) [*UNSG MINUJUSTH March 2018 report*].

the capacity of a NHRI to meet the SCA's expectations and the manner by which it does are largely dependent on external factors, primarily Government commitment to its effective functioning. In the case of Haiti, the Government posed a dual challenge to the OPC. On the one hand, its controlling tendencies impacted the institution's independence in operationalizing the NHRI structure. On the other hand, the deep failings of Government and generalized State weakness constrained the OPC's capacities to execute its mandate, all while representing a major obstacle for the realization of human rights in the country.

1.1 The renewal of the OPC leadership: the trials of institutional independence in the Haitian political context

In the period between its accreditation and reaccreditation by the SCA, the OPC's composition underwent significant changes. The Director General and Deputy Protector vacancy were filled, and a new Protector was designated, following the procedure set out by the Organic law, to replace Florence Elie. However, the timing and manner through which these changes occurred call into question the institution's ability to function independently.

During the 2013 examination of the OPC, the SCA had expressed concerns regarding potential interference or delay in the naming of a Director General, and called for the urgent formalization of the appointment of a Deputy Protector. Despite this urging, these posts would take another three years to be filled[276]. Where the prolonged delay in making these appointments hinted at a possibility of interference by an Executive politically at odds with the Protector[277], the political context during which these appointments were eventually to take place further suggested it. Indeed, the two posts were to be finally filled in the spring of 2016, during the interim presidency of Jocelerme Privert, a figure clearly allied politically to Protector Elie[278]. The apparent influence of

[276] 10 May 10 2016 for the Director General : *Arrêté nommant le citoyen Frantz-Charles DE HONNET, Directeur Général de l'Office de la Protection du Citoyen*, Le Moniteur 171 No 85, 10 mai 2016, at 8 ; 2 June 2016 for the Deputy Protector : *Arrêté nommant le citoyen Fritz JEAN, Protecteur du Citoyen adjoint*, Le Moniteur 171 No 100, 2 juin 2016 at 1.

[277] As examined previously (*supra* note 221), Protector Elie was to serve the better part of her mandate during Michel Martelly's presidency, with whom she was unaligned politically.

[278] Minister under Aristide (2002-2004), Privert was an advisor to President Préval (2008-2010). In addition to sharing the same political affiliations than her, Privert sought unsuccessfully to name Florence Elie Minister of Justice at the start of his interim presidency. See: Frantz Duval, "Qui est Jocelerme Privert, nouveau président provisoire d'Haïti?", *Le Nouvelliste* (15 février 2016), online: <https://lenouvelliste.com> [perma.cc/686L-AAV9]; *Arrêté nommant les membres du cabinet ministériel*, Le Moniteur 171 No 45, 8 mars 2016, at 2 art 1.

the political context on the OPC's (in)capacity to appoint senior staff is an illustration of the many obstacles faced by the notion of institutional independence in the Haitian democratic construct, in which political considerations regularly hamper the establishment and action of oversight mechanisms[279]. While the Organic law expressly sought to insulate the institution from outside pressure in the appointment of its personnel, it did not fully succeed. The close to four years it took the OPC to fill the Director General and Deputy Protector posts tends to demonstrate that the recruitment process was not at the "sole discretion of the NHRI", as required by the SCA's General Observation 2.4[280]. Paradoxically, the manner with which these posts were to be eventually filled would also prove concerning and raise the specter of politicization of the OPC. As noted by a prominent civil society organization, the selected candidates had disputable qualifications, and their appointment was made without consultation with the human rights sector, only two months prior to the expiry of the mandate of the Protector[281].

The questions surrounding the OPC's ability to effectively and independently exercise its staffing prerogatives foreshadowed the challenges awaiting the institution when it was to go through a leadership change. In contrast to senior personnel selection, the process culminating in the appointment of a new Protector was totally beyond the control of the OPC. As such, it represented a significant indicator - if not the ultimate test - of the readiness of the Haitian democratic construction to accommodate an independent NHRI. On this issue, the SCA interprets the Paris principle as requiring "a clear, transparent, merit-based and participatory selection and appointment process" of the decision-making body of NHRIs[282]. Such requirements take particular significance in ombudsman type bodies, where a large part of the credibility of the institution rests on the reputation and capacities of a sole person. In the case of the OPC, the selection process of the Protector provided by the Organic law attempted to overcome the constraints of the opaque consensus requirement of the 1987 Constitution. If the proposed formula was somewhat successful at broadening the process, little mention was made to a transparent or merit-based approach. This

[279] Other prominent examples during the same period include the difficult establishments of the CSPJ and of the Provisional Electoral Council (CEP). Mondélice, *Le droit international*, *supra* note 224, at 239-248, 276-283.
[280] GANHRI, *Gen Obs 2018*, *supra* note 57, at 39 "G.O. 2.4 - Recruitment and retention of NHRI staff".
[281] Marie Yolène Gilles, "Installation du Protecteur du citoyen adjoint : le RNDDH fait le point", *Le Nouvelliste* (15 juillet 2016), online: <https://lenouvelliste.com> [perma.cc/75PX-3JE6].
[282] GANHRI, *Gen Obs 2018*, *supra* note 57, at 22 "G.O. 1.8 - Selection and appointment of the decision-making body of NHRIs".

was to become evident when the selection process was to be finally tested-out by Haitian political stakeholders.

With the seven-year mandate of Protector Elie expiring in October 2016, the Organic law required a public call for application to be made at least 90 days prior by both Chambers of Parliament. Nevertheless, the vacancy was only publicized by the Senate in February 2017, and the ensuing selection process would take another eight months to be finalized[283]. In the interval, Protector Elie continued to head the OPC, a possibility presciently contemplated by the Organic law (art 11(3)), in spite of its adverse effects on the institution's standing. The prevailing political context, more particularly the need to await the finalization of the Presidential elections and thus the return to constitutional normality, certainly contributed to the delay in initiating the selection process. But if the overall objective was to grant legitimacy to the appointment of the new Protector by ensuring that it was enacted by an elected President, the flawed manner with which the selection process was to be conducted by Parliament ran counter to this objective.

Where the Organic law called for both Chambers of Parliament to consider and vote on all candidatures to compose a list of no more than three names garnering bi-cameral support, parliamentarians privileged a more restrictive and politically oriented approach. The selection process was exclusively led on the basis of a report drawn-up by the Senate Justice Commission, with no indication as to the methodology or criteria used to shortlist candidates[284]. In other words, the examination of applications, including interviews, was at the discretion of a handful of senators and no Lower Chamber representative. With the field of candidates reduced by the Senate report, instead of a vote to determine which and how many candidates collected bi-cameral support, each Chamber attributed itself the right to designate through its Justice Commission a single name, and to jointly select a third[285]. The presence of three names on the list transmitted to the presidency for final selection had hence more to do with a political arrangement than a merit-based voting process.

[283] "Le Sénat lance un appel à candidatures", *Haïti Libre* (28 février 2017), online : <https://www.haitilibre.com> [perma.cc/LZB8-SEMC] ; *Arrêté nommant le citoyen Renan Hédouville, Protecteur du Citoyen et de la Citoyenne*, Le Moniteur 172 No 168, 27 octobre 2017, at 1.
[284] Danio Darius, "Renan Hédouville, le nouveau Protecteur du citoyen et de la citoyenne", *Le Nouvelliste* (27 octobre 2017), online: <https://lenouvelliste.com> [perma.cc/JT8P-23YE].
[285] "Les Députés en session ce samedi sur l'OPC et le Budget", *Haititweets* (9 Septembre 2017), online: <https://haititweets.com/> [perma.cc/G4X6-DKL6].

As declared by the Senator heading the selection efforts, the choice of the Protector was "eminently political"[286]. Further confirming this assertion was the fact that human rights organizations were not consulted during the process, not even after publicly airing serious grievances against the candidate that was to be ultimately selected by the President to head the OPC[287].

As a whole, the process was denounced by Haitian human rights organizations as rigged from the get-go in favor of a candidate whose proximity to the President was well established[288]. The new Protector, despite possessing some human rights credentials, took office in October 2017 with a credibility gap stemming from concerns over his integrity and independence. As for MINUJUSTH, it would see in the "controversy" surrounding the first attempt to appoint a new Protector under the scheme provided by the Organic Law "the need for continued international support" in the critical area of human rights[289]. If the Government was largely left out from – when not resistant to – the efforts to reestablish the OPC as a NHRI, the appointment of a new Protector provided the ideal opportunity to put a stamp on the institution.

1.2 The publication of annual report: public display of (in)effectiveness, indicator of internal (in)efficiency?

The publication by a NHRI of an annual report serves at minimum two main functions. On the one hand, it is a vehicle by which a NHRI can monitor and assess the national situation with regards to human rights, and make recommendations to Government thereon. At the intersection of the promotion and protection role, widely publicized and distributed, it invites public scrutiny of Government's performance on human rights and can serve as leverage for remedial actions to be taken. On the other hand, an annual report, insomuch as it details the activities undertaken by the NHRI to further its mandate, represents a public account of the functioning of the institution. Its recurrence makes it an indispensable instrument of institutional continuity, serving to highlight

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[286] "*Le choix du protecteur du Citoyen est éminemment politique a déclaré le sénateur Jean Renel Senatus, président de la Commission Justice et Sécurité*" in: "Qui pour protéger les citoyens haitiens ?", *Haitiz News* (17 August 2017), online : <https://www.haitiz.com> [perma.cc/X83Q-BJJA].

[287] Haitian human rights organizations expressed concerns over past accusations of gender-based violence. See: "Haïti-Droits humains : Renan Hédouville « entame son mandat avec un déficit de crédibilité » à la tête de l'Opc, selon la Pohdh", *Alterpresse* (30 octobre 2017), online: <https://www.alterpresse.org/> [perma.cc/B979-URMH]; *UNSG MINUJUSTH March 2018 report*, *supra* note 275, at 8 para 36 .

[288] Darius, *supra* note 284.

[289] *UNSG MINUJUSTH March 2018 report*, *supra* note 275, at 13 para 59.

trends, evolutions, and eventual issues in the NHRI's performance. In both cases, the annual report contributes to shaping perceptions regarding the effectiveness of the NHRI and to building its credibility nationally and internationally. Accordingly, the SCA views the preparation and wide distribution of an annual report as an "essential requirement" of the Paris principles, and, as previously examined, a *sine qua non* condition for accreditation[290].

Moreover, the preparation of an annual report presents a window into the inner workings of the NHRI, an indicator of its efficiency. It subtends a certain level of internal capacity and resources from the institution: first, to audit the Government's performance on human rights and make the relevant recommendations and follow-up; second, to compile, break down, analyze, and present the data relating to the NHRI's undertakings in the implementation of its mandate. The recurrent nature of the exercise adds a further layer of complexity posing the challenge of systematization and regularity. But if the preparation of an annual report appears in and of itself as a vital yet challenging responsibility for a NHRI, what is to be inferred from the repeated failure of one to produce such document?

In the five and half year period between its accreditation and reaccreditation, the OPC only published a single annual report, covering the 2017-18 exercise[291]. That is to say that since its accreditation the Office has repeatedly failed to meet the obligation set by its Organic law and required by the Paris principles to publish and largely distribute an annual report. As for the 2017-18 report, its publication overlapped with the examination of OPC's reaccreditation application by the SCA, in similar fashion to how the 2009-12 report closely preceded the initial accreditation request of the institution, conveying the impression of an exercise primarily dictated by international considerations[292]. Although the reasons behind this prolonged failing are unclear, some indication can be found in the fact that both the 2009-12 and 2017-18 reports were prepared

[290] GANHRI, *Gen Obs 2018*, *supra* note 57, at 30-31 "G.O. 1.11 - Annual reports of NHRIs".
[291] On this issue, see *supra* note 265. Also see the developments at Chap I sec 3.3 on the preparation of a 2013 report at the request of the SCA.
[292] The 2017-18 report was officially presented in April 2019, while the reaccreditation of the OPC was confirmed by the SCA in March 2019. Most likely, the report was submitted to the SCA prior to its official publication. The 2009-12 report was published in January 2013 and submitted to the SCA around the same time, as the OPC was to be accredited just a few months later in May 2013.

and published with external support, primarily from international partners[293]. The apparent connection between external support and the production of the last two annual reports, seems to suggest issues with the internal capacities of the institution, or at the very least an inability to prioritize the task in the absence of external support.

Beyond the implications of this prolonged failing are also its consequences, as there exists no consolidated and official public account of the OPC's functioning for a span of five years. This documentary void entails that, save for direct contact with the Office or contemporaneous access to relevant information, observers are left with the somewhat impractical recourse of tracing and piecing together snippets of media coverage, and perusing the institution's internet presence to try to identify its undertakings during this period. The void remains however quasi-complete with regards to quantifiable and analyzable data pertaining for instance to the OPC's faculty to examine individual complaints, make recommendations and proposals, or to Government reaction to the Office's promptings. In this particular instance, the five-year gap between reports is evocative of a break in institutional continuity, with the 2017-18 report - its data totally dissociated from preceding reporting cycles - akin to reintroducing the institution. Equally glaring is the related failure by the OPC, excluding punctual actions on specific cases or contributions to international reporting mechanisms[294], to produce an assessment of the national human rights situation, let alone publicize its findings to relevant authorities and the general public.

Whether owing to internal capacity issues or other factors, the repeated failure by a newly established NHRI such as the OPC to meet its obligation with regards to the preparation of an annual report reflected poorly on its functioning. At a pivotal time of its existence in which it sought to cement its presence and credibility in the Haitian institutional landscape, the OPC could ill-afford such shortcoming that goes to the heart of the *modus operandi* of a NHRI.

[293] See: OPC 2009-12, *supra* note 153, at 3. The report was published with the support of the *Organisation Internationale de la Francophonie* and two consultants, including an international one; OPC 2017-18, *supra* note 265, at 5-6. The preparation of the report is said to have received the "*l'appui determinant*" of *Avocats Sans Frontières Canada* (ASFC) and is even, as of this writing, only available through this NGO's website.
[294] Some of these actions and contributions are examined below in sections 2.2 and 2.3.

1.3 Financial and material constraints to independence and effectiveness

Haiti remains the poorest country in the Western Hemisphere and one of the poorest countries in the developing world[295]. Recurrent political crises, rampant corruption, and high vulnerability to natural hazards continues to hinder the country's social and economic development. As a result, with very limited resources at its disposal and social unrest brewing, the Haitian Government is left in the unenviable position of trying to arbitrate amongst the plethora of the country's urgent needs. In this context, the provision of adequate funding to the NHRI required by the Paris principles, expanded upon by the SCA's General Observation and reaffirmed domestically by the Organic law appears like a trying proposition, made more unlikely by questionable Government commitment to, and incentives in, the OPC's effective functioning[296]. International influence and cooperation efforts play however a partly offsetting role in this dynamic, but at a potentially detrimental cost.

The necessity for the OPC to be provided with sufficient resources to carry out its expansive mandate has been repeatedly underscored, by national human rights organizations[297], UN treaty bodies[298], the UNSG[299], and the institution itself[300]. While the Haitian delegation sought to highlight an increase in the OPC's budget during the second cycle of the UPR[301], this increase and

[295] As constantly noted by the World Bank, namely in its most recent overview of the country (last updated 15 october 2019), online: <https://www.worldbank.org/en/country/haiti/overview> [perma.cc/EC5Z-DZ27].
[296] Paris principles, *supra* note 53, sec B2; GANHRI, *Gen Obs 2018*, *supra* note 57, at 27-29 "G.O. 1.10 - Adequate funding of NHRIs"; *Organic law*, *supra* note 232, arts 25-27.
[297] Coalition des Organisations et Plateformes Haïtiennes sur le Rapport Alternatif du PIDCP, *Haiti. Rapport Alternatif de la société civile sur la mise en œuvre du Pacte International relatif aux Droits Civils et Politiques* (12 Septembre 2014), online : <https://tbinternet.ohchr.org/> [perma.cc/Z684-Z2EK], at 11 paras 10-13; *Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21 Haiti**, UN Doc A/HRC/WG.6/26/HTI/3 (2016), at 3 para 22 [*OHCHR 2016 UPR summary]*.
[298] HR Com, *Concluding observations on the initial report of Haiti**, HR Com 112th Sess, UN Doc CCPR/C/HTI/CO/1 (2014), at 2 para 6 [HR Com, *2014 observations*]; CRC, *Concluding observations on the combined second and third periodic reports of Haiti**, CRC 71st Sess, UN Doc CRC/C/HTI/CO/2-3 (2016), at 4 para 16 [CRC, *2016 observations*]
[299] "Financial allocations through the State budget continued to fall short of the [OPC]'s operational needs". *Report of the Secretary-General on the United Nations Stabilization Mission in Haiti*, *supra* note 270, at 18 para 14.
[300] OPC, *Rapport alternatif sur l'application du Pacte international relatif aux droits civils et politiques. Présenté au Comité des Droits de l'Homme des Nations unies en vue de l'examen du rapport initial du Gouvernement Haïtien* (July 2014), online (pdf): <https://tbinternet.ohchr.org/> [perma.cc/9CRX-2VD9], at 5 para 6 [OPC, *rapport alternatif 2014*); OPC 2009-12, *supra* note 153, at 102 (Recommendation to Parliament); OPC 2017-18, *supra* note 265, at 69.
[301] *Report of the Working Group on the Universal Periodic Review* Haiti*, UN Doc A/HRC/34/14 (2016), at 4 para 12.

the ones that followed remained "insufficient"[302], constraining the institution's capacity to function effectively and independently.

Some of the limitations faced by the Office undermined its accessibility and in a wider sense its credibility. As noted in its latest annual report, the institution does not have its own premises, and has been called to move seven times since its establishment[303]. Moreover, though progress has been accomplished in implementing and structuring "regional presences", the decentralization of the OPC remains partial, hampered by material considerations, and well short of the overly ambitious presence in each of Haiti 146 communes envisaged by the Organic law[304]. Several of the regional presences are housed in temporary accommodations provided by MINUSTAH[305]. The Office's digital presence, while commendable[306], seems to also be facing issues. The website of the institution, overhauled in 2018, is still, as of writing, mostly unusable; most pages, including the ones linking to the complaint form, past reports, and recommendations, remain inactive[307]; the site's URL was changed with no forwarding from the former domain being set[308]. Like the previously examined shortcoming pertaining to the preparation of an annual report, the OPC's digital issues are a reminder that internal capacities and institutional continuity, both fundamental components of effectiveness, also depend on the NHRI's ability to secure adequate resources, notably to hire, train, and retain sufficient competent staff. On that front, the OPC, whose limited credits are largely allocated to the payment of salaries[309], suffers from the same woes that plague all Haitian State institutions, including the inability to attract or retain qualified personnel due to

[302] The budget was of HTG 48.5 million, approx. US$ 749,000 for fiscal year 2016-2017 (est. rate: 1$ = 64.73 HTG); HTG 55 million, approx. US$ 897,000 for fiscal year 2017-2018 (est. rate: 1$ = 61.31 HTG); HTG 70.4 Million, approx. US$ 1,025,000 at the beginning of the 2018-19 exercise. All the information can be found in the budgetary laws published on the official website of the Haitian Minister of Economy and Finance (last visited 10 March 2020): <www.mef.gouv.ht/index.php?page=Accueil> budget section; OPC 2017-18, *supra* note 265, at 69 (*"le financement de l'État accordé à l'OPC s'avère insuffisant"*).
[303] OPC 2017-18, *ibid*, at 75.
[304] *Ibid*, at 38, 61, 69.
[305] Laura Louis, "Connaissez-vous l'Office de la Protection du Citoyen?" *Ayibopost* (16 mai 2018), online: <https://ayibopost.com/connaissez-vous-loffice-de-la-protection-du-citoyen> [perma.cc/F8J6-XEZU].
[306] Since 2011, in addition to having a website currently at <www.opchaiti.com/Premier_index.php> [perma.cc/Z8FM-JU3L], the OPC is present on Facebook (OPCHaiti) and Twitter (@opchaiti).
[307] *Ibid.* At minimum, this has been the case for the period going from September 2019 to March 2020.
[308] i.e. a search for the OPC website at its previously publicized URL <www.protectioncitoyenhaiti.org> will result in an error message instead of a forward to the new site. The same goes for all of the institution's email addresses using the previous web domain, including significantly the one used for the electronic filing of complaints.
[309] In the 2017-18 annual report, *supra* note 265, at 75, it is stated that 70% of the budget is affected to payment of salaries.

the combination of a restrictive salary scale, the poaching of skilled candidates by international agencies and organizations, and the persistent brain drain affecting the country[310].

Furthermore, the continual quest to obtain appropriate funding in an unfavorable national context poses a risk to the OPC's independence. On the one hand, the institution is put in the difficult position of having to jockey for budgetary credits from imminently political stakeholders represented in Parliament and Government, and whose actions are to be monitored for conformity to human rights standards. In such circumstances, budget allocation risks becoming a mean of exerting control on the NHRI, with freezes and cuts as potential sanctions for an effective, yet politically inconvenient, execution of the institution's human rights mandate[311].

On the other hand, the OPC is brought to rely in several circumstances on international funding and support[312], which also entails a complex set of issues. The development and maintaining of relationships with multiple international donors, and the conditions and procedural requirements attached to their support, can be resource-draining and place additional stress on the institution's ability to carry-out its mandate[313]. As demonstrated by past experience in Haiti[314], international aid is also volatile in nature and hence offers little in terms of predictability and long-term support, while posing the risk of desensitizing Government on the responsibility to properly fund the NHRI. Additionally, when aid takes the form of technical assistance, the line between knowledge transfer and transfer of responsibility can become blurry, as revealed by the preparation of the OPC's annual reports and complaints handling manual[315]. Dependence on donor support can further lock

[310] Some of these points are addressed in: Caroll Faubert, *Case study Haiti – evaluation of UNDP assistance to conflict-affected countries* (New York: UNDP, 2006), online: <https://www.oecd.org/countries/haiti/44826404.pdf> [perma.cc/2TDE-TCJG], at sec 2.7.

[311] This has proven to be the case in the Latin America region as examined in: Thomas Pegram, "National Human Rights Institutions in Latin America. Politics and Institutionalization", in Goodman/Pegram, eds, *supra* note 76, 210 at 214-215.

[312] OPC 2009-12, *supra* note 153, at 30-31, 75; OPC 2017-18, *supra* note 265, at 69.

[313] Over 30 years ago, independent expert Adama Dieng distinctly commented on the potential disruptive effect of international cooperation in Haiti. His remarks appear still valid. *Report on the situation of human rights in Haiti prepared by Mr. Adama Dieng, independent expert, in accordance with Economic and Social Council decision 1997/262,* UNGA 52nd Sess (item 112c), UN Doc A/52/499 (1997), at 16 paras 56-59.

[314] On the abrupt termination of MICAH, see: *IEH Joinet 2007 report*, *supra* note 204, at 20 para 75.

[315] See above, sec 1.2, on the role of international assistance in the preparation of the annual reports. The manual was prepared through a partnership with ASF Canada. It was officially presented to the OPC by the NGO in a July 2019 public ceremony, which from symbolic standpoint is not without consequence. See: "L'Office de protection du citoyen en Haïti se dote d'un manuel de procédures de traitement des plaintes 32 ans après sa création", *ASF Canada* (10 Juillet 2019), online: <https://www.asfcanada.ca/> [perma.cc/H22Y-RFBJ].

the Office in an unsustainable project based approach that may not fully reflect its priorities or those dictated by the prevailing human rights context. A NHRI has hence to preserve its ability to freely operate from international supporters, however commendable their intents, in similar manner that it has to be independent from Government. Failure to do so, whether actual or perceived, could damage the OPC's domestic legitimacy in a country where the international presence is fueling a sentiment of increased suspicion and rejection among the population[316].

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A common thread in the impediments affecting the OPC's internal functioning is the difficult recognition and realization of the many facets of institutional independence in the Haitian democratic construction. In what can arguably be one of its most significant yet under-appreciated achievement, the Office initiated and led coordination efforts with the other three independent institutions created by the 1987 Constitution that resulted in the elaboration of a draft framework act (*loi cadre*) on independent institutions[317]. The adoption of such text, defining and asserting the legal, administrative and operational implications of institution independence has long been seen as critical for fulfilling the promise of the 1987 Constitution[318]. In 2014, the draft text was submitted to Parliament for consideration; over five years later, legislators had yet to take-it up for debate, with the issue not figuring as a priority of the OPC's new leadership. The apparent failure of this initiative, beyond representing additional evidence of resistance of Haitian political actors to the notion of institutional independence, highlights a different set of challenges faced by the OPC, pertaining to its external functioning and the ability to effectively carry out its ambitious human rights mandate.

[316] On similar challenges faced by NHRIs in the Asia Pacific region see: Catherine Renshaw and Kieren Fitzpatrick, "National Human Rights Institutions in the Asia Pacific Region. Change Agents under Conditions of Uncertainty" in Goodman/Pegram, eds, *supra* note 76, 150 at 170-171.

[317] Reference to these efforts are made in the OPC's 2014 alternative report to the HR Com, *supra* note 300, at para 6.

[318] For a detailed examination of the question, see: Joubert Neptune, *Les institutions indépendantes d'Haïti: quelle indépendance?*, (Port-au-Prince: Imprimerie Henri Deschamps, 2013) at 18.

2. THE EXTERNAL FUNCTIONING OF THE OPC: A PARTIAL FULFILLMENT OF AN AMBITIOUS NHRI MANDATE

The Organic law vested the OPC with wide-ranging duties and significant powers to both promote and protect human rights. The fulfillment of this ambitious NHRI mandate lies in the capacity of the Office to respond to the needs and expectations of those within Haitian society whose rights are infringed upon or at risk thereof[319]. In that regard, the SCA, in assessing performance, is said to consider *inter alia* a NHRI's ability to "carry out its mandate effectively and without interference", and to demonstrate "independence in practice and a willingness to address the pressing human rights issues"[320]. An examination of the OPC's external functioning hence involves going beyond the legal and structural requirements of the Paris principles to consider if, in which circumstances, and how the institution fulfilled the responsibilities set-out by the Organic law.

To that end, the focus will first be placed on (2.1) complaint-handling, a pivotal although problematic OPC function, and then turn to (2.2) the Office's necessary appropriation of its NHRI mandate, of its powers and responsibilities. Lastly, consideration will be paid to (2.3) the institution's interaction with the international human rights system, on how it assumes the role of "domestic agent". Underlying the examination is the issue of receptiveness of Government to the OPC's actions, and ultimately the question of their effectiveness in the challenging Haitian context. For if SCA accreditation provided the Office with a degree of formal legitimacy, its public legitimacy can only be attained by being perceived as credibly addressing the "complex but not irremediable"[321] situation of human rights in Haiti.

2.1 The complaint-handling power of the OPC: testament of effectiveness or liability?

The power to receive, investigate and resolve individual complaints alleging human rights violations, though not a compulsory requirement of the Paris principles, is a defining characteristic of the Ombudsman institutional model, and a consequential part of the OPC's work. Recent

[319] See *mutatis mutandis*: Carver, *Performance & Legitimacy*, *supra* note 69, at foreword.
[320] GANHRI, "PN 3", *supra* note 97.
[321] Qualification given by IEH Gallon in his last report prior to the non-renewal of the expert mandate by the Haitian Government. *Report of the Independent Expert on the situation of human rights in Haiti**, HRC 34th Sess (item 10), UN Doc A/HRC/34/73 (2017), at 1.

academic literature tends to view complaint-handling as essential in enabling NHRI effectiveness, even in developing country settings[322]. However, an analysis of the OPC experience, based on the two available annual reports published since the promulgation of the Organic law, provides some cautionary indications, in spite of apparent methodological shortcomings.

From the outset, it is to be noted that the five-year interruption in public reporting and the corresponding unavailability of consecutive yearly reporting considerably limit the scope of available data and possible extrapolations. The issue is exacerbated by the lack of any reference in the 2017-18 to preceding reporting cycles, making it impossible to determine the fate of the many cases unresolved at the end of the 2012 cycle, or the number of complaints originating from previous cycles that were finalized or pending during the 2017-18 exercise. Similarly, both reports contain no indication on the average processing time, the proportion of complaints closed without being resolved, or the amount and nature of cases in which recommendations were formulated by the Office but not acted upon. In addition to representing critical indicators of both NHRI performance and authorities' attitude towards the NHRI mandate, such information should be seen as critical in the perspective of institutional credibility-building.

Moreover, the presented typology of complaints, seems to indicate a disregard of the *ratione materiae* jurisdiction as set by the Organic law, and important limitations in the type of grievances received by the Office. Both reports classify nearly all of the caseload as either "administrative abuses" or "emanating from detainees" (or "judicial"), with a small exception made in the 2017-18 report for cases pertaining to ill-treatment of women and children[323]. While the presence of administrative complaints can be traced to the hybrid mandate of the Office, the conflating of the wording "abuse" (*abus*) to administrative disputes[324] is contrary to the extensive definition provided by article 4b) of the Organic law, which explicitly refers to human rights violations. Additionally, the caseload data reveals a disproportionate number of complaints relating to detention (prolonged pre-trial and/or arbitrary detention, prison conditions…), calling into question the institution's ability to attract and address through individual complaints a

[322] Linos & Pegram, "what works", *supra* note 7, at 54; Carver, *Measuring the impact*, *supra* note 101, at 19-20.
[323] OPC 2009-12, supra note 153, at 70; OPC 2017-18, supra note 265, at 27-32, 37, 49-50.
[324] *Ibid*; OPC 2017-18, *ibid*, at 28 subs 3.2.2.

comprehensive range of human rights violations.

As shown in the table below, the OPC has experienced since 2011 a substantial increase in the amount of recorded complaints, a trend that appeared to continue in 2017-18. Advances in the institution's promotion efforts and the establishment of regional presences certainly contributed to this upsurge, but cannot be dissociated from the strategic focus on detention put forward by the Office. In addition to the creation of a unit specifically assigned to the protection of detainees, the regular visit and monitoring of detention facilities represented a substantial part of the work of regional agents, of the women and child protection unit, and of the Protector. This sustained focus on and proactive engagement with detainees blurred the line between individual complaint and self-referral, translating into the significant preponderance of detention related complaints in the OPC caseload and casting doubt on the overall viability of the strategy.

Evolution of number of received complaints and percentage of detention/judicial related complaints[325]		
Reporting period	**# total complaints**	**% of overall complaints relating to detention/judicial**
2010	235	64.3%
2011	1063	89.3%
2012 (till September 30th)	3240	95.4%
Fiscal 2017-18	7747	93.7%

The many failings of the Haitian judicial system and their dramatic consequences on detention in the country are well-documented, persistent, and endemic, with international efforts to tackle them dating back to MICIVIH, and being one of the main motivation behind the more recent establishments of MINUJUSTH and BINUH[326]. Therefore, the significant volume of detention/judicial complaints received by the OPC did not have for cumulative effect of uncovering a systemic rights violation, but rather of repeatedly confirming a systemic issue identified several years prior. It poses the question of whether the Office was to a degree crossing the line between executing the protective function of a NHRI and substituting itself to judicial and

[325] Data drawn from OPC 2009-12, *ibid*, at 70-74; OPC 2017-18, *ibid*, at 26-36, 49-51. It is to be noted that the accuracy of some figures provided in the latter report is uncertain, particularly those pertaining to "judicial complaints" from the *Cayes* judicial district (at 50: 4174 complaints) that appear unrealistic when compared to the total number of detainees for the same district (at 55-60: between 671 to 786). The possibility of the 2017-18 report accounting for complaints from previous cycles (pending or no longer active) cannot be discarded.

[326] For the persistence of the issue see respectively for 1996, 2006, and 2016: *UNSG 1996 report*, *supra* note 179, at 7-10 paras 29-42; *Report of the Secretary-General on the United Nations Stabilization Mission in Haiti*, UN Doc S/2006/592 (2006), at 22-26; *UNSG August 2016 report*, *supra* note 270, at 22-25, 62.

prison authorities, at the expense of its limited resources and effectiveness.

In that respect, limitations to the available data and the unavailability of complementary information make it impossible to measure precisely to what degree the OPC was efficient in handling the plethora of detention/judicial complaints; it is nonetheless clear that, in a majority of cases, complaints remained unresolved[327]. In the context of despair that characterizes detention in Haiti, even a limited degree of success may have, in the short term, translated into positive reputational feedback for the Office. However, in the longer term, this success, coupled to the systemic nature of detention issues, resulted in a significant increase in demand, impossible for the Office to effectively meet. With public legitimacy of the OPC hinging not on its ability to create expectations but rather on its capacity to rise to their level, the effectiveness of tackling pre-identified systemic human rights problems through individual complaints is – to say the least - debatable[328]. In a wider sense, the systemic nature of human rights violations in Haiti pose a formidable challenge to the Office's capacity to prioritize. Due to the broad nature of their mandates, all NHRIs are expected to set priorities in fulfilling their promotion and protection functions. It is one of the core responsibilities that stems from their independence and that may inform their effectiveness. But prioritizing becomes a somewhat impossible proposition in the face of pronounced and repeated human rights violations and generalized State failings; even more so in the case of a NHRI with a hybrid (maladministration and human rights) mandate, that is habilitated to receive individual complaints and expected to resolve them effectively.

2.2 The appropriation of the NHRI mandate by the OPC: from hesitations to limitations

Beyond statutory safeguards, the effective implementation of the "as broad a mandate as possible" called for by the Paris principles is contingent upon its dual appropriation. First, by the NHRI itself, who has to progressively grow in and own its many responsibilities and powers, and determine when and how to effectively intervene in light of the particularities of the context in which it operates. Second, by public authorities, and more widely the three branches of Government, on whose cooperation and receptiveness a NHRI depends to secure adequate

[327] OPC 2009-12, *supra* note 153, at 74 (tableau 29); OPC 2017-18, *supra* note 265, at 27, 50.
[328] For a similar conclusion regarding Ombudsman institutions in Central and Eastern Europe, see: Richard Carver, "National Human Rights Institutions in Central and Eastern Europe. The Ombudsman as Agent of International Law", in Goodman & Pegram, eds, *supra* note 76, 181 at 200.

funding, operate independently and without interference, and give effect to its actions[329].

Influencing this appropriation are the international and domestic pressures to which both State and NHRI are subjected to[330]. In the case of Haiti, the (re)establishment of the OPC as a NHRI, while driven by domestic human rights needs, was not primarily spurred by domestic pressure. From its creation, international stakeholders saw in the development of the Office a benchmark of the country's democratization efforts, and by extension, of their success in supporting its democratic transition. Such was the case of MINUJUSTH, for who the number of OPC recommendations implemented by national institutions was an indicator of the mission's benchmarked exit strategy[331]. Likewise, the Office's quest for accreditation and reaccreditation by the SCA can only with difficulty be connected to domestic pressure. Given the endemic nature of State deficiencies and the general distrust amongst Haitians in State institutions, the existence of domestic pressure about the OPC's functioning was conditioned to a prior demonstration of the institution's ability to function independently and effectively. But could such demonstration be provided in the context of minimal domestic pressure and a degree of State resistance to international pressure? An overview of the OPC's realizations suggests a general propensity of the institution to appropriate the core elements of its mandate, but certain limitations and hesitations in the use of its powers, exacerbated by the lack of receptiveness of public authorities.

While promotion and protection functions of a NHRI can at times overlap, especially in terms of their effect, the distinction between these two sets of functions, enshrined by the Paris principles, is relevant when examining the implementation by a NHRI of its mandate. More particularly, distinguishing between a NHRI's activities in raising public awareness on human rights (promotion) and its actions to remedy human rights violation (protection) provides an effective lens through which to assess appropriation of the NHRI mandate. In that respect, protective functions can be assumed to require a higher degree of appropriation by Government, as they imply

[329] Mulry Mondélice, "L'internationalisation du rôle des institutions nationales dans la promotion de l'État de droit sur la base des Principes de Paris : dynamiques nouvelles et défis de consolidation", in Collectif, ed, *Mélanges en l'honneur du Professeur Emmanuel Decaux. Réciprocité et universalité - Sources et régimes du droit international des droits de l'homme* (Paris: Pedone, 2017) 1283 at 1299.
[330] On the theory of NHRI influences, see: Sonia Cardenas, "National human rights institutions and State compliance", in Goodman & Pegram, eds, *supra* note 76, 29 at 42-45 [Cardenas, "State compliance"].
[331] *UNSG MINUJUSTH July 2019, supra* note 265, at 26 (indicator 7.2).

more complex and potentially binding interactions with the NHRI.

On that premise, the OPC can be said to have extensively, though not thoroughly, embraced its promotion duties. Through a sustained sensitization campaign in schools and detention facilities, thematic workshops, training sessions, public events, and frequent media appearance, the Office actively sought to raise public awareness on human rights issues. This sustained public presence also had for aim of (re)introducing the institution and its mandate to the general public, as well as public authorities, judicial actors, and civil society segments, groups whose cooperation is essential to the fulfilment of the NHRI mandate. Somewhat masking the prolonged interruption in annual reports and the scarcity of thematic reports was the recurrent and sometimes compelling use of press releases to draw attention on systemic human rights issues, remark on recent developments, highlight certain of the Office's activities and achievements, and even make recommendations to authorities[332].

Blurring the line between promotion and protective function was the use of the media in the context of certain individual cases of alleged violations of rights. This approach can certainly serve as a showcase of the institution's disposition to openly challenge high authorities on their handling of sensitive matters and stir up public pressure for remedial actions. However, it entails a more adversarial process and an entrenchment of positions, in which the eventual refusal of authorities to act could reflect publicly and negatively on the OPC's capacity to enforce its recommendations. It can also raise questions regarding the neutrality of the institution and on its rationale for taking a specific file public over other ones.

This delicate calculus was in evidence when the OPC was thrust in the spotlight with its recommendation to the electoral council that it restore the rights of a 2015 presidential candidate barred from the race on - what a majority of observers saw as - questionable grounds. The recommendation was publicly dismissed by the Head of the electoral body as "just another

[332] Promotional activities are detailed in OPC 2009-12, *supra* note 153, at 62-65; OPC 2017-18, *supra* note 265, at 16-25, 40-47, 62-63. For an illustration of the effective use of a press release to combat social stigma attached to detainees: "Justice: Près de 7,000 personnes incarcérées arbitrairement en Haïti...", *Haïti Libre* (4 octobre 2013), online: <https://www.haitilibre.com/> [perma.cc/8T9T-RSPX].

opinion" (*une opinion comme les autres*)[333], and was to mark the only known intervention of the Office in a prolonged electoral process decried by national human rights organizations for its many shortcomings. On another occasion, a press release was used to incite a high-ranking official against whom a criminal complaint for sexual assault was filed to cooperate with legal proceedings[334]. In what would prove prescient in light of dubious dealings that would surround the case, the Office also seized the opportunity of the release to call attention to the judicial system's persistent failure in the handling of sexual violence complaints. The eventual closure of the case without further action would display limits to the OPC's protective reach; yet its public stance contributed to keeping the file in the public eye and formed part of a larger debate on gender-based violence.

A degree of success on the promotion front has led to the regular participation of the institution, in an advisory role, to a variety of sector specific working groups, inter-ministerial coordination mechanisms and inter-agency task forces, with representatives of UN agencies and international NGO's often partaking in such endeavors when not initiating them. The multiplication and sometimes ephemeral existence of such initiatives may cast doubt on their viability, but should not overshadow the general acknowledgement of the role to be played by the Office therein. More remarkable are the instances of the OPC playing a central and convening role in similar concertation efforts, such as those culminating in the elaboration of a draft law reforming the penitentiary administration, or its more recent involvement in promoting civil society's voice in the framework of the national human rights action plan[335].

On the protection front, the recognition to the OPC of the faculty to self-refer any matter falling within its mandate is in and of itself a significant development in the efforts to flesh-out the operational requirements of institutional independence in the Haitian political and legal landscape. In practice, it has allowed the Office to intervene on both systemic and high-profile cases of rights violations, though not always optimally. In certain instances, the institution seemed to struggle

[333] Danio Darius, "Affaire Jacky Lumarque. La recommandation de l'OPC, une opinion comme les autres, selon Pierre-Louis Opont", *Le Nouvelliste* (6 août 2015), online: <https://lenouvelliste.com/> [perma.cc/8FQK-LXDU].
[334] "Haiti-Viol : L'Office de la Protection du Citoyen recommande que Josué Pierre-Louis se mette à la disposition de la justice", *Alterpresse* (6 décembre 2012), online: <https://www.alterpresse.org/> [perma.cc/65CF-2Z2E].
[335] See respectively: "Justice : Une proposition de loi pour améliorer la vie des prisonniers", *Haiti Libre* (6 février 2017), online: <https://www.haitilibre.com/> [perma.cc/28DP-5NA6] ; OPC 2017-18, *supra* note 265, at 70.

threading the line between fulfilling its protection mandate and overcompensating for acute State dysfunctions. Its overarching presence in jails was not only testament to the catastrophic human rights situation of detainees, but also to its inability to break from a cycle of micro-level interventions in order to favor a macro-based strategy to addressing the systemic problems of detention. Targeted actions such as providing detention facilities with food or legal support undeniably provided some level of relief, even led to releases, but could not prevent the perpetuation on the larger scale of multi-faceted violations of detainees' rights. Similarly, the *proprio motu* monitoring of number of residential facilities for children may not have been the most efficient way of addressing the endemic allegations of mistreatment associated with their functioning; it translated in the Office almost substituting itself to, when not duplicating the work of, the specialized government agency overseeing these facilities, with little results in terms of remedial actions.

The dichotomy between the OPC's persistent attempts to address human rights violations of vulnerable groups, in particular children and detainees, and its inability to effect lasting improvement in their situation derives in large part from the limited consideration given to its recommendations by Government. If the institution is able to achieve some degree of compliance from officials in individual cases or specific circumstances, the same cannot be said with respect to its formal recommendations to authorities, including the ones from its two last annual reports, the vast majority of which has yet to be implemented. Even in cases where OPC recommendations are followed, it is difficult to determine to what extent the institution can be credited for inciting Government compliance. Most of the recommendations relate to issues concurrently and often more extensively tackled by the UN mission and agencies, bilateral cooperation actors and international NGOs. In this regard, the Office cannot fully be expected to succeed where years of international pressure have partly failed to achieve sustainable results, nor can it be given sole credit for the too rare step forward. As symbolically demonstrated by the final self-performance assessment of MINUJUSTH, the OPC's shortcomings with the implementation of its recommendations were also those of the UN mission[336].

Haitian authorities' failure to carry out much-called-for reforms is a long-standing and complex

[336] *UNSG MINUJUSTH July 2019, supra* note 265, at 26 (indicator 7.2).

phenomenon, that extends far beyond the issue of appropriation by authorities of the OPC's NHRI mandate, yet can inform it. Nonetheless, shortcomings of the Office in the appropriation of its power to issue recommendations should not be overlooked. Contrary to the SCA's expectations for NHRIs[337], the institution has failed to undertake systematic and rigorous follow-up actions to advocate for the implementation of its recommendations, nor has it regularly publicized detailed information on the Government's response, or lack thereof, to its recommendations. These shortcomings are further compounded by the nature and phrasing of certain recommendations made by the Office, especially in its 2017-18 report. In several instances, they appear too broad, composed of multiple generalities and lacking in specifics, as if referring to a series of long-term goals to be met by Government rather than to specific means to attain them. In addition, contrary to the practice favored by the OPC in the 2009-12 report, recommendations are simply directed to the Haitian State, with no clear indication on which branch of Government, or specific Ministry or Office, is responsible for their implementation[338]. Also to be considered is the arrival of a new Protector, in controversial circumstances. While the noticeable change in tone - generally more conciliatory - can be explained by the contrasting personalities of the two last holders of the post, or differences in strategic approach, the unconvincing manner with which the Office broached the issue of responsibility of State officials and police in its report on the November 2018 La Saline massacre is not without concerns[339].

The OPC's incomplete appropriation of its protection role is, moreover, evidenced by hesitancies in using the full-range of powers recognized by the Organic law. Available data indicate that the Office has yet to formally refer to Parliament a case of non-compliance to its recommendations, or to initiate judicial proceedings when such case relates to human rights violations [art 42 *Organic law*). The effectiveness of both avenues in the Haitian context may well be doubtful, especially at first, given stakeholders' unfamiliarity and lack of details on how such recourses are to be put into

[337] GANHRI, *Gen Obs 2018*, *supra* note 57, at 17-19 "G.O. 1.6 - Recommendations by NHRIs".
[338] The difference in formulation and presentation between the recommendations contained in the 2009-12 and 2017-18 reports is stark: OPC 2009-12, *supra* note 153, at 100-103; OPC 2017-18, *supra* note 265, at 108-109.
[339] A comparison of the reports of the OPC and OHCHR on the same events, and of the recommendations contained therein, reveals important differences in how the potential responsibility of police elements and State authorities is addressed. OPC, *Rapport sur les évènements de la Saline Du 13 novembre 2018*, 14 janvier 2019, online (pdf): [https://www.cliohaiti.org/IMG/pdf/rapport_situation_de_la_saline_pc_corrige_final.pdf> [perma.cc/E59Y-X5TR], at 4-5; OHCHR/MINUJUSTH, *La Saline : justice pour les victimes. L'État a l'obligation de protéger tous les citoyens,* Juin 2019, online (pdf): [https://minujusth.unmissions.org/] [perma.cc/M8QC-ABEH], at 19-20.

practice. Referral to Parliament also carries the risk of exposure to overtly political calculus and dysfunctions, while the weakness of the judiciary could pose an insurmountable obstacle to justice being rendered. Nevertheless, both powers are integral parts of the OPC's arsenal and their importance should not be discounted. At the very least, their timely utilization can contribute to increased accountability on the prominent role that both the Legislator and Judiciary are expected to play in the protection of human rights. In this respect, recent efforts by the Office to reach a cooperation agreement with Parliament seem to signal a willingness to address this protection gap[340].

The foregoing considerations should not overshadow the fact that, even when fully appropriating its protection mandate, the OPC's impact on the Haitian human rights environment remains limited. Paradoxically, the institution's most important contribution to the fight against impunity fully encapsulates the Sisyphean nature of human rights protection in Haiti. Reference is here made to the role of the Office following the tragic events that took place in the civilian prison at Les Cayes in January 2010, where the violent repression by police officers of an uprising led to the death of at least 12 prisoners with several others injured. In the face of increasing international pressure denouncing a cover-up by authorities[341], an international commission of inquiry co-presided by the Protector was established to look into the events. This commission found police officers to be responsible of extrajudicial killings and tasked the OPC with the responsibility *inter alia* of monitoring the handling of the file by penal authorities and ensuring the holding within a reasonable delay of a fair trial[342]. A trial - dubbed *le procès des Cayes* - was finally to be held from October 2011 to January 2012, arguably also in response to international lobbying, particularly from IEH Forst[343]. Despite numerous legal and logistical shortcomings, a verdict condemning nine officers - including one *in abstentia* - to sentences ranging from three to 13 years of imprisonment was delivered and lauded as an important breakthrough in combatting impunity in Haiti. The OPC's role was pivotal to the conduct of the proceedings, especially the efforts deployed to

[340] OPC 2017-18, *supra* note 265, at 75.
[341] Deborah Sontag & Walt Bogdanich, "Escape Attempt Led to Killings of Unarmed Inmates", *New York Times* (22 May 2010), online: <https://www.nytimes.com/> [perma.cc/RC5P-64GX]; Gerda Leroi, "Le procès de 34 policiers aux Cayes", *Le Nouvelliste* (16 novembre 2011), online: <https://lenouvelliste.com> [perma.cc/94T5-K9C9].
[342] For the full quote in French from the Commission's report and a detailed analysis of the ensuing trial, see: Mondélice, *Le droit international*, *supra* note 224, at 459, 455-465.
[343] *Report of the Independent Expert on the situation of human rights in Haiti, Michel Forst*, HRC 17th Sess (item 10), UN Doc A/HRC/17/42 (2011), at 14 paras 64, 19 para 82j) [*IEH Forst 2011 report*].

accompany and protect a key witness. It was all to be for naught, as the Supreme Court would set aside the entire verdict on the basis of a mere clerical error; subsequent proceedings would lead to the acquittal of all police officers, save for the one suspected to have fled the country[344].

2.3 The OPC as "domestic agent" of international human rights law

The establishment and functioning of the OPC has been at the heart of the international human rights system's priorities for Haiti, as evidenced notably by the unremitting support of OHCHR to the institution. The plan was very clear and expressly laid out by IEH Joinet since 2005: developing a close relationship with the OPC in order for it to gradually - and eventually permanently - take over the functions of OHCHR in the country[345]. The idea of a national counterpart to OHCR is a contemporary illustration of the original premise behind the NHRI concept, of a national mechanism in support of the international human rights system. In Haiti, it translated into an extensive engagement of the OPC, despite limited resources, with the international system that had encouraged its re-emergence as a NHRI. This engagement would prove, for the most part, mutually beneficial. The Office, notwithstanding some limitations, actively assumed the function of "domestic agent" of a system that would, in turn, advocate for its consolidation.

In that regard, the OPC's interactions with UN human rights mechanisms can be viewed as serving three distinct purposes. First, by submitting alternative reports to treaty bodies, such as the HRCom, CRC and ComRPD, and prominently participating to two cycles of the UPR and sessions of the HRC, the Office has displayed a readiness to monitor, assess, and call into question State compliance with international human rights obligations[346]. Its Status "A" accreditation by the SCA has elevated its status within the UN scheme, including within the framework of the UPR where its contributions are given prominent placement[347], and brought more credence to its findings. Second, the OPC has used some of its interactions with the human rights system to highlight

[344] OHCHR/MINUSTAH, *Rapport semestriel sur les droits de l'homme en Haïti. Janvier – Juin 2014*, Décembre 2014, online (pdf): <https://www.ohchr.org> [perma.cc/C888-YKRU], at 12 para 46.
[345] *IEH Joinet 2005 report*, *supra* note 206, at 22 para 89; see also: *IEH Joinet 2007 report*, *supra* note 204, at 21 para 76.
[346] OPC, *rapport alternatif 2014*, *supra* note 300 ; OPC, *Rapport alternatif sur la Convention internationale relative aux droits de l'enfant*, décembre 2015, online : <https://tbinternet.ohchr.org/> [perma.cc/V4EP-LZPR]; OPC, *Rapport alternatif sur l'application de la Convention relative aux droits des personnes handicapées*, janvier 2018, online: <https://tbinternet.ohchr.org> [perma.cc/GLB6-5CW4].
[347] As a Paris principles compliant NHRI, the OPC's contribution is included in a separate section, at the beginning of the stakeholder summary prepared by OHCHR. See: *OHCHR 2016 UPR summary*, *supra* note 297, at 2-3.

concerns relating to its own functioning, and hence seek support for its consolidation as a NHRI. For instance, during the first UPR cycle, it advocated for the passing of the Organic law, while its alternative report to the HRCom underscored its need for additional resources and for a specific regime protecting independent institutions to be adopted. Third, the OPC has effectively positioned itself as an advocate of the international human rights scheme. In addition to regularly encouraging the ratification of international instruments and the implementation of recommendations of UN bodies, the institution played an important role in mobilizing civil society's participation in international reporting and follow-up mechanisms, as well as in sensitizing Government on its various treaty obligations. Following repeated calls from the Office, Haiti signed in August 2013, though it has not yet ratified, the Convention against Torture. A coalition of 20 human rights organizations was formed under its leadership to prepare a joint alternative report to the CRC[348]. On one remarkable occasion, the OPC went beyond advocacy to a more assertive defence of the human rights system, by strongly condemning the failure of Haitian authorities to appear before the HRC for the UPR interactive dialogue[349].

From the human rights system's perspective, the establishment of the OPC has generally been welcomed favourably, and accompanied by a special focus on ensuring its effective functioning. This was especially true of the IEH, who played a pivotal role in transitioning the Office into a NHRI, buttressing its international credibility and securing significant international support for its strengthening[350]. As for UN treaty bodies, their receptiveness mostly reflected the degree of engagement of the OPC with their mechanisms. In their concluding observations, both the HRCom and CRC echoed the concerns raised by the Office with regards to insufficient funding and understaffing, and their effect on its capacity to act freely and independently, with the former also recommending that the framework act promoted by the institution be adopted. Conversely, the CEDAW's observations made no mention of the OPC, not even the section dedicated to "national machinery for the advancement of women", despite reference being made to the Office in Haiti's report to the Committee. This omission can be explained by the failure of the OPC to provide

[348] OPC et la Coalition, *Rapport alternatif sur la Convention relative aux droits de l'enfant*, 20 juin 2014, online (pdf): <https://uprdoc.ohchr.org/> [perma.cc/DR4A-SM9Y].
[349] As highlighted and quoted in OPC 2009-12, *supra* note 153, at 52.
[350] *IEH Forst 2011 report*, *supra* note 343, at 14 paras 65-66; *Report of the Independent Expert on the situation of human rights in Haiti, Michel Forst*, HRC 22nd Sess (item 10), UN Doc A/HRC/22/65 (2013), at 14 paras 74-76 [*IEH Forst 2013 report*].

CEDAW with a shadow report, individually or in collaboration with human rights organizations. The institution rather resorted to the State's report to include a concise recommendation regarding its intention to create a directorate for the protection and promotion of women. This was a failed opportunity for a NHRI explicitly mandated to give special attention to women, and whose capacity to protect them was called in question by human rights organizations in their submission to CEDAW[351].

On at least two instances, UN treaty bodies did however call into question the functioning of the OPC. The HRCom was specifically concerned by the measures taken by Haiti to implement the recommendations made by the Office, an issue that goes to the core of the institution's ability to effectively implement its protection mandate. The Government's response would come more than four years later, through Haiti's second periodic report, and cast a contemporary light on its restrictive view of the OPC's function. Indeed, by simply stating that "[w]henever the Office […] carries out visits to detention centres, it makes recommendations to the Ministry of Justice, which are always taken into consideration", the Government seems to reduce the Office to a prison monitoring role, completely disregarding its expansive mandate[352]. This response is even more troubling as it was drafted by the Haitian Interministerial Human Rights Committee, a State organ with whom the OPC is assumed to collaborate closely. It provides additional evidence of the OPC's shortcomings in expanding its protective scope beyond judicial issues and in effectively sensitizing authorities on its protection mandate. Partly confirming this assertion was the ComRPD, who despite receiving an alternative report from the Office, was concerned by "the insufficient clarity and scope of [its] mandate" and regretted that no independent monitoring mechanism compliant with the Paris principles had yet to be designated[353]. More broadly, the Committee's remarks raised

[351] For the treaty bodies references, see: HR Com, *2014 observations*, *supra* note 298, at 2 para 6; CRC, *2016 observations*, *supra* note 298, at 4 para 15-16; CEDAW, *Concluding observations on the combined eighth and ninth periodic reports of Haiti**, UN Doc CEDAW/C/HTI/CO/8-9 (2016), at 5; CEDAW, *Consideration of reports submitted by States Parties under article 18 of the Convention. Eighth and ninth periodic reports of States parties due in 2014. Haiti**, UN Doc CEDAW/C/HTI/8-9 (2014), at 18 paras 48-49; Consortium coordonné par CATW-LAC, *Rapport Alternatif sur la mise en application de la Convention pour l'Elimination de toutes les formes de Discrimination à l'égard des Femmes en Haïti*, Juillet 2015, online: <https://tbinternet.ohchr.org> [perma.cc/J5BA-UTQD], at paras 20-21 .

[352] For the HR Com's concerns see: *2014 observations*, *ibid.* For Haiti's response: HR Com, "Second periodic report submitted by Haiti under article 40 of the Covenant, due in 2018 *", UN Doc CCPR/C/HTI/2 (2019), at 16 para 130.

[353] Com RPD, *Concluding observations on the initial report of Haiti**, UN Doc CRPD/C/HTI/CO/1 (2018), at 14 para 60.

question on the OPC's ability to fully embrace, or be perceived by authority as capable of fully assuming, the role of "domestic agent" of the international human rights system.

Engaging with the human rights system is an increasingly integral component of a NHRI's work, especially for one like the OPC whose existence is closely linked to the system. It offers an important platform for the NHRI to demonstrate its independence and capacity to hold a State accountable to its international obligations, while providing a channel to expose concerns relating to its functioning. It can even be argued that acknowledgment of the NHRI's voice on the international stage has an amplifying effect, lending it more authority in its attempt to promote State compliance. But, it is also a resource draining function that may impede with the institution's capacity to wholly appropriate and execute its protection mandate domestically. In the case of the OPC, international expectations and ambitions for the institution were high, with IEH Forst already raising in 2013 the possibility of it being entrusted with NPM and NMM responsibilities[354]. Such lofty ambitions somewhat failed to grasp the immensity of the challenges facing the Office, in both its internal and external functioning. International stakeholders sought to make - and partially succeeded in making - the OPC a full-fledged "domestic agent" of the international human rights system, at a time when the institution trudged to assert itself domestically as more than the product of international efforts. This gap between the OPC's international and domestic identity can in large part be ascribed to inherent flaws in the barometer of success favoured by the human rights system when vetting a NHRI: SCA accreditation.

3. THE REACCREDITATION OF THE OPC: A STATIC SNAPSHOT OF PARIS PRINCIPLES COMPLIANCE?

Of the many revisions undertaken since 2006 by ICC/GANHRI to buttress the accreditation process, the requirement that all "A" status NHRIs apply for reaccreditation every five years has to be the most consequential. A periodic review implies a dynamic and evolving assessment of a NHRI's work, the establishment of an episodic dialogue between the institution and the SCA on what is to be understood and expected by Paris-principles compliance. Accordingly, an NHRI seeking reaccreditation is to demonstrate the steps taken to address concerns raised by the SCA

[354] *IEH Forst 2013 report*, *supra* note 350, at 14 para 76.

during its previous examination[355]. Likewise, accreditation review is assumed to provide an opportunity to consider the developments relating to the NHRI's functioning in the preceding five years, to focus on what may have enhanced or impeded the institution's adherence to the Paris principles. The suggestion of an *in concreto* assessment by the SCA is further supported by the possibility for it to refer to relevant information, whether publicly available or provided by third-party sources[356].

However, the March 2019 decision by the SCA to reaccredit with "A" status the OPC's reveals a far more static and hermetic vetting process[357]. In it, no explicit reference is made by the SCA to its previous examination of the OPC, and concerns highlighted therein. The reaccreditation decision rather appears completely dissociated from the findings it is intended to review. Hence, if in 2013 (subss 2,4), the Sub-committee was preoccupied by the fact that the Deputy protector and Director general posts had yet to be filled, the 2019 evaluation makes no mention of the four years it took to finalize the appointments, the potential reasons behind this prolonged delay, or of the curious conditions in which the appointments were eventually made. Both decisions (2013 subs 1, 2019 subs 2), despite being more than five years apart, note in almost similar terms that the "selection and appointment process" of the Protector as enshrined in the Organic law is "not sufficiently broad and transparent" to promote a merit-based selection and ensure pluralism. The only hint of any consideration being given to the passing of time can possibly be found in the more assertive wording employed by the SCA in 2019 - "critically important to ensure" vs "encourages"- to recommend that the OPC advocates for the formalization of a revised process.

More concerning is the fact that the SCA's examination of the selection process seems to be made, once more, *in abstracto*. If in 2013, when the process had yet to be tested, such an approach could to some extent be comprehensible, the SCA's omission to even acknowledge in the 2019 decision the polemic around the delayed appointment of the new Protector borders on absurd. Although it could be argued that the SCA's views on the selection process were substantiated by the contentious appointment, or even that they represented an implicit recognition of the issues

[355] GANHRI, *SCA rules*, *supra* note 87, at 6.1, 8.3.
[356] GANHRI, "PN 5", *supra* note 98.
[357] SCA March 2019, *supra* note 93, at 25-27 sec 3.6. The SCA's assessment is divided in five sub-sections (subs), which will be, where relevant, referred to directly in the text.

surrounding this appointment, the Sub-committee would, nonetheless, be expected to address the possibility that the single-member NHRI under review is headed by an appointee whose character and independence were called into question. Not only did the SCA postpone the OPC's accreditation review as a result of the protracted selection process[358], but it could also not ignore that its primary institutional partner, OHCHR, publicly stated, only a few months prior, that the new Protector was appointed following a process "marked by controversies about [its] independence and transparency"[359].

No matter what the SCA deems the full scope of its accreditation process to be, its shortcomings are evident in this particular case. If intended as a mere structural assessment of the NHRI's conformity to the Paris principles, the accreditation scheme fails to hold the OPC to account for the prolonged lack of a transparent and merit-based selection process, despite independence being a core requirement of the principles. Alternatively, the SCA's omission to expressly address the circumstances of the new protector's appointment precludes accreditation review from being viewed as truly assessing compliance to the principles "in practice". Lastly, the SCA's examination cannot be assimilated to a mandate-based approach, in which the focus is put on a NHRI's capacity to carry-out the responsibilities set-out in its enabling statute.

Despite rhetoric to the contrary, the Sub-committee does not appear intent or readily equipped to determine if an NHRI is "effectively fulfilling its mandate to promote and protect human rights". If it were, the OPC's repeated failure to publish an annual report during the period under review and its implications on the effectiveness of the institution would be factored in the reaccreditation decision. Instead, the SCA (subs 5) prefers to generally acknowledge that the Office "has produced such reports [annual, special and thematic] and press releases, which include recommendations to authorities". Similarly, on the issue of recommendations (subs 5), the OPC is "encourage[d] to conduct follow-up activities" to monitor and promote their implementation, with no reference being made to the institution's failings in this area. As such, an informed observer is left to surmise

[358] As noted in *UNSG MINUJUSTH March 2018 report*, *supra* note 275, at 8 para 36.
[359] Remarks made by the UN Deputy High Commissioner for Human Rights Gilmore in "Introduction to country reports/briefings/updates of the Secretary-General and the High Commissioner", Geneva, 21 and 22 March 2018, online: <https://www.ohchr.org> [perma.cc/CW5X-RD2E], at 2 (Haiti).

from the mere inclusion of a subsection on recommendations in the SCA's observations that this may be a matter of concern for the NHRI under review.

In light of the foregoing, accreditation review appears less like a substantive examination of the evolution of a NHRI's compliance to the Paris principles and more like a snapshot of the institution's intent to continue to comply to the principles. This snapshot is not only static - representing the NHRI at the moment of the reaccreditation examination - but it also is somewhat self-serving, as it is provided by the NHRI itself through its statement of compliance. Issues that potentially plagued the institution since it was last examined, or steps taken to address previously raised concerns, thus appear as peripheral considerations to the SCA. Reaccreditation seems rather focused on the NHRI's own depiction of its readiness to continue carrying out a human rights mandate regardless of eventual limitations. In that respect, the OPC's contention to the SCA (subs 4) that it has "sufficient funding", despite numerous statements to the contrary, notably in its then just published 2017-18 annual report, is a glaring illustration of this dynamic. As is the SCA's reply encouraging it nonetheless "to continue to advocate for an appropriate level of funding".

In a broader sense, while GANRI has demonstrated dynamism and rigor in its efforts to flesh-out the contents of the Paris principles - notably by the development and regular revision of General observations by the SCA -, these efforts did not necessarily translate in a more dynamic and rigorous accreditation or reaccreditation process. As the guardian of the Paris principles brand, GANHRI continues to prioritize a strength through numbers approach and a widespread and global recognition of brand ambassadors, i.e. accredited NHRIs.

From this perspective, the accreditation process as a whole can be said to serve a mostly promotion function, in contrast to the assumed protection one. It is a periodic vehicle by which GANHRI sensitizes and assists NHRIs in understanding the SCA's regularly evolving interpretation of the Paris principles and their practical application. It is as much a showcase for the brand than an advocacy tool for the brand's ambassadors in their dealings with Government. As for the protective function, it is reserved for the most glaring cases, when a NHRI "falls substantially short"[360] or, in other words, is a liability to the Paris principles brand. Hence, while an "A" status designation is

[360] GANHRI, *SCA rules*, *supra* note 87, at 2.2.

not necessarily a testament of NHRI effectiveness, the denial by the SCA of this status is indicative of a manifestly problematic NHRI. This approach is also evidenced by the SCA's greater recourse to accreditation or reaccreditation deferrals[361], in lieu of suspension or demotion. Safeguarding the Paris principles involves above all insuring NHRI understanding of and commitment to the principles, rather than censuring deficient compliance.

Viewed through this lens, the rationale behind GANHRI's permissive approach to accreditation is fathomable. After all, why would the organization hurt the international standing of its members and, by extension, its prominence on the world stage for compliance issues that often are beyond the sway of NHRIs? Despite all the emphasis put on their independence and on the special place they occupy within a State's architecture, NHRIs are by definition not fully in control of the parameters of their existence and functioning. If the Paris principles do not impose a specific institutional model for NHRIs, they also leave no place for contextual considerations in their implementation. They "make no distinction between different political systems and varying histories of respect for human rights"[362], and thus do not factor in the degree of dependence or vulnerability of a NHRI to the State, the capacities of the State to enable the efficient functioning of a NHRI, or the challenges possibly posed by the human rights environment in which the NHRI operates.

This is where the GANHRI accreditation scheme comes into play. The SCA rules allow for some flexibility in the assessment of NHRIs operating in "volatile contexts", where they "cannot be reasonably expected to be in full conformity with all the provisions of the Paris Principles". Correspondingly, factors such as "political instability", "lack of State infrastructure", "excessive dependency on donor funding", and the overall capacity of a NHRI to execute "its mandate in practice" are listed as warranting due consideration by the Sub-committee[363]. In other words, GANHRI therewith recognizes the impossibility of full compliance to the Paris principles in some context, all while continuing to promote their adoption and implementation irrespective of context.

[361] As noted in Linos & Pegram, "What works", *supra* note 7, at 16.
[362] Carver, *Measuring the impact, supra* note 101, at 6.
[363] GANHRI, *SCA rules*, *supra* note 87, at 8.4.

Premised by an acknowledgment that the OPC "operates in a challenging context", the SCA's decision to reaccredit the Office thus takes on its full meaning. In the human rights conundrum that is Haiti, the benefits of recognizing a Paris principles standard-bearer, especially one closely associated to OHCHR, far outweigh the necessity of highlighting its failings. As long as no red line - as in a conspicuous loss of independence – is crossed, the OPC will continue to enjoy positive reinforcement from GANHRI in the form of accreditation.

CONCLUSION - *at the crossroads between peacekeeping and development*

In a recent briefing to the UNSC on Haiti, the UN High Commissioner for Human Rights, Michèle Bachelet, remarked that the country "stands at the crossroads between peacekeeping and development. We must recognize the progress accomplished. We must also continue building on it, or risk losing it"[364]. This cautiously optimistic outlook might just as well apply to the OPC, so much the establishment and functioning of the institution has been linked and has closely mirrored the many challenges faced by the Haitian democratic construction.

The OPC's inclusion in the 1987 Constitution was one of the manifestations of the Haitian people's desire to break with authoritarianism and safeguard against its return. But as the democratic transition was to initially falter, so did the first attempt to establish the institution. In no position to provide a credible response to an increasingly challenging human rights environment, the OPC sank into irrelevance. It would however reemerge under a new more ambitious form. One guided by an international standard whose ubiquity cannot disguise a drawn-out and incomplete development. Embraced by the UN human rights scheme, the Paris principles would propel the concept of NHRI on the world stage and make it an integral part of international democracy consolidation support efforts. This was evident in Haiti, where the resurgence of the OPC was as much the enactment of a vision spearheaded by Protector Elie than that of OHCHR and a host of other international partners, who saw in the institution's successful establishment a sign of the country's attachment to international human rights norms. The Haitian Government, though, was in large part absent from this equation, not to say resistant to the efforts to reestablish the Office as a NHRI.

That is to say that the tale of the rebirth of the OPC is not one of a NHRI established at the moment of political transition from dictatorship, with public sentiment coalescing around it and buttressing its legitimacy. Neither is it one of an institution put into place by a Government with ambiguous democratic credentials to quell international criticism. It is rather the curious tale of a disregarded ombudsman institution that, with committed international support, forged its own path to transition into a Paris principles-compliant NHRI, almost unbeknownst to Government and the public. Its

[364] Michèle Bachelet, "Human rights situation in Haiti. Briefing to the Security Council on Haiti", New York, 3 April 2019, online: <https://www.ohchr.org> [perma.cc/UPL5-GC54].

reestablishment did not coincide with the start of Haiti's democratization but was instead a component of multidimensional peacekeeping efforts aimed at safeguarding the country's fragile democratic gains. The peculiar circumstances of the OPC's reemergence informs some of its shortcomings and begets questions about the international human rights system's attachment to the Paris principles almost regardless of context.

As the central tenet of the Paris principles template, institutional independence poses a challenging conundrum in Haiti, admittedly one that goes far beyond NHRIs. Any proximity to authorities is viewed with suspicion by large swath of the Haitian public, while any attempts to preserve some distance will likely be assimilated by Government to opposition. In these circumstances, striking the necessary balance between cooperating with Government and scrutinizing its actions becomes a trying proposition for a NHRI. Be that as it may, an alternative blueprint to NHRI establishment, one less centered around institutional independence and more focused on effective cooperation with authorities risks running counter to the very essence of the NHRI concept. Independence may not always be required to effectively address some human rights concerns, but without independence there is no guarantee that all and any human rights concerns can be raised. The ability for a NHRI - within the parameters set by its enabling law - to decide which issue or file it seeks to address, when to do it and in which manner is an essential institutional design safeguard, especially in the very contexts where it may be the most difficult to achieve. While independence may potentially translate in limited NHRI influence on authorities, such limits are less a gauge of the institution's effectiveness and maybe more a reflection of the state of democracy in the country. Institutional independence is in and of itself a core democratic precept; it would be nonsensical for it not to be intertwined with the establishment of institutions having for mandate the promotion and protection of human rights, notably in transitioning democracies.

With "cover" provided by its international partners, the OPC was to some extent able to assert itself as independent in the Haitian institutional landscape. But the fulfillment of its expansive responsibilities remained, by definition, dependent on Government's appropriation of its NHRI mandate. If the OPC can be said to have operated freely under the Martelly administration, it remained largely unfunded, incapable of naming a Deputy Protector or a Director General, and compliance to its recommendations was very limited. Independence came at a cost, one that could

only be partially compensated by sustained international funding and technical support. And even this assistance, no matter how well-intended, carried its own set of risks. The OPC came close to overstepping the line between benefitting from and over-relying on external support, and projecting the image of being itself an international project.

The establishment and functioning of the OPC as a Paris principles-compliant NHRI may not have been an international project *per se* but was certainly part of the international agenda for Haiti, even serving as a performance benchmark of MINUJUSTH. It resulted in an expansive - and maybe too ambitious - human rights protection and promotion mandate being thrust upon the Office. In spite of manifest limitations, the institution was expected to carry-out a wide-spectrum of domestic responsibilities, in addition to serving as a domestic "agent" of the international human rights law system. Shortcomings were to be expected and were evident in both its internal and external functioning, from its prolonged failure to produce an annual report to its treatment of individual complaints, amongst others. Still, the institution did more than enough - at least in intent - to carry the NHRI mantle. Under the largely deferential and forgiving GANHRI accreditation scheme, where effectiveness remains a largely elusive and malleable consideration, the OPC was recognized twice over as fully compliant to the Paris principles, despite clearly not fully meeting this standard.

For all of its weaknesses, GANHRI accreditation represents an attainable and, more importantly, tangible achievement, a scarce commodity in the challenging Haitian human rights environment. The haste demonstrated in seeking accreditation following the vote of the Organic law and the glossing over of certain shortcomings during the reaccreditation examination were symptomatic not only of an institution determined to obtain and maintain international recognition, but also of international stakeholders in desperate need of a "win". If, as mentioned above, OHCHR publicly took exception with the protracted appointment process of the new Protector, it nevertheless considered this appointment a "welcome development"[365]. Such pragmatism in the application of the Paris principles in Haiti is to some extent a by-product of the pragmatism that guided their global ascension. The principles were endorsed by UN bodies as universal despite their clear bias for Commission-type structures; promoted as authoritative regardless of their imprecisions. Close

[365] Gilmore, *supra* note 359.

to 50 years in the making, the necessity of seizing favorable political momentum on the world stage superseded any considerations relating to their substance. The result was the adoption of an idealistic institutional template often called to be applied in less than ideal contexts.

NHRIs such as the OPC operating in challenging conditions "have an inordinately difficult task before them. Where they are the most needed, they are virtually doomed to disappoint"[366]. The broad mandate required by the Paris principles takes almost impossible proportions in a country such as Haiti, where human rights violations are often systemic and the State's capacity to address them severely lacking. NHRIs, as envisioned by the Paris principles, have an important and complementary role in the democratic functioning of a country, but evidently cannot be expected to stand-in where core democratic and rule of law institutions are failing.

Similarly, it may be unreasonable to expect an NHRI to succeed where years of sustained international presence have yet to necessarily translate in sustainable progress. The overall impact of even the most effective NHRI is at best minimal in the context of widespread human rights violations. Somewhat ironically, the maximalist vision laid out by the Paris principles creates the most expectations where they are the most difficult to meet. In the case of the OPC, this vision was further heightened by the warranted belief of international stakeholders in the determination and vision of Protector Elie for the institution.

It appears thus clear that the yardstick for measuring the OPC's success cannot lie in its capacity to reduce the level of human rights abuses in Haiti. It should instead be found in the institution's ability to enduringly serve as a credible domestic voice on human rights, one whose capacity to persuade Government may not be optimal but whose authority on the subject matter is unquestionable. The importance of human rights promotion actions, even if only accompanied by partially effective protection functions, should never be disregarded. If credibly sustained, their effect can be mobilizing and help recalibrate social forces' influence on and expectations towards Government, all while countering growing disillusionment in the democratic experience. In this regard, the requirements set forth by the Paris principles are both a blessing and a liability. Independence represents a multi-faceted challenge that, if not repeatedly met, can irremediably

[366] Cardenas, "State compliance", *supra* note 330, at 51.

damage the institution's credibility and, by the same token, its sustainability. Additionally, the "as broad a mandate as possible" imposes upon the NHRI the delicate task of prioritizing, of seeking to ensure an efficient enough response while managing public expectations. The combination of both, however, allows the OPC to have a unique voice amongst the many seeking to improve human rights in Haiti, "at the intersection of Government and civil society, of international law and the domestic order"[367].

As Haiti attempts to transition from peacekeeping to development, the treatment afforded by its authorities to the OPC warrants careful consideration. As evidenced by the appointment of a Protector deemed close to President Moise, the institution is no longer running on parallel tracks from Government. This new dynamic seems to have paid dividends: a budget increase, the addition of office space in the capital, and the prompt formalization of the selection of a new Director General[368]. The comfort level of Government towards the OPC has clearly increased but has not demonstrably translated into better receptiveness to its recommendations. While Government appropriation seems to be clearly in display, its form and intent are yet to be fully defined. Is it the long overdue appropriation of the NHRI mandate, the vital understanding of the OPC's role and a readiness to facilitate its work? Or is another form of appropriation at work, one targeting the institution as a whole, seeking - as too often witnessed in Haiti - to neutralize the consolidation of an oversight body? With international stakeholders progressively reducing their engagement in the country, the *Office de la Protection du Citoyen* also seems to stand at a defining crossroad.

[367] Description freely translated from Decaux, *supra* note 65, at 29.
[368] These developments are respectively noted in: Bachelet, *supra* note 364; OPC 2017-18, *supra* note 265, at 22; *Arrêté nommant le citoyen Amoce Auguste, directeur général de l'office de la protection du citoyen (OPC)*, Le Moniteur 173 No 41, 7 Mars 2018, at 15-16.

BIBLIOGRAPHY

1. LEGISLATION

1.1 Legislation: Canada

Charter of Human Rights and Freedoms, CQLR c C-12, s 10

Human Rights code*,* RSO 1990, c H.19

Loi sur le protecteur du citoyen, RLRQ c P-32

Racial Discrimination Act, RSO 1950, c 328

1.2 Legislation: France

Arrêté du 17 mars 1947 constituant une commission consultative pour la codification du droit **international et de la définition des droits et devoirs des Etats et des droits de** *l'homme*, 74 JORF (27 mars 1947) p 2849

Décret 84-72 du 30 janvier 1984 relatif à la commission consultative des droits de l'homme, JORF (1 février 1984) p 489

Loi 2007-292 du 5 mars 2007 relative à la Commission nationale consultative des droits de l'homme, 55 JORF (6 mars 2007) p 4215, texte No 6

1.3 Legislation: Haiti

Arrêté créant une Commission Présidentielle dénommée: Groupe de Travail sur la Constitution de 1987, Le Moniteur 164 No 16, 20 février 2009, 12

Arrêté nommant la Citoyenne Florence Elie Protectrice du Citoyen et de la Citoyenne, Le Moniteur 164 No 95, 9 Septembre 2009

Arrêté nommant le citoyen Amoce Auguste, directeur général de l'office de la protection du citoyen (OPC), Le Moniteur 173 No 41, 7 Mars 2018, 15

Arrêté nommant le citoyen Frantz-Charles DE HONNET, Directeur Général de l'Office de la Protection du Citoyen, Le Moniteur 171 No 85, 10 mai 2016, 8

Arrêté nommant le citoyen Fritz JEAN, Protecteur du Citoyen adjoint, Le Moniteur 171 No 100, 2 juin 2016

Arrêté nommant le citoyen Gérard Romélus Protecteur du Citoyen, Le Moniteur 145 No 3, 11 janvier 1990

Arrêté nommant les membres du cabinet ministériel, Le Moniteur 171 No 45, 8 mars 2016

Constitution de la République d'Haïti du 29 mars 1987, Le Moniteur 142 No. 36, 28 avril 1987

Décret créant une institution indépendante jouissant de la personnalité juridique dénomée « Office de la Protection du Citoyen », Le Moniteur 144 No 73, 21 septembre 1989

Décret créant un Office dénommé OFFICE DE LA PROTECTION DU CITOYEN ET DE LA CITOYENNE dont le dessein est de protéger tout individu contre toutes les formes d'abus de l'Administration Publique, Le Moniteur 150 No 82-A, 16 Octobre 1995

Décret portant organisation de l'administration centrale de l'État, Le Moniteur 160 No 8, 27 Septembre 2005

Loi constitutionnelle portant amendement de la Constitution de 1987, Le Moniteur 167 No 96, 19 juin 2012, 4

Loi créant le Conseil supérieur du pouvoir judiciaire (CSPJ), Le Moniteur 162 No 112, 20 décembre 2007, 19

Loi portant organisation et fonctionnement de l'Office de la protection du citoyen, Le Moniteur 167 No 119, 20 juillet 2012

Arrêté nommant le citoyen Renan Hédouville, Protecteur du Citoyen et de la Citoyenne, Le Moniteur 172 No 168, 27 octobre 2017

1.4 Legislation: International instruments

Constitution of the United Nations Educational, Scientific and Cultural Organization, 16 November 1945, 52 UNTS 276 (entered into force 4 November 1946)

Convention on the Rights of Persons with Disabilities, 13 December 2006, 2515 UNTS 3, (entered into force 3 May 2008)

International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, (entered into force 23 March 1976)

International Labour Organization Constitution, 28 June 1919, UNTS 874 (entered into force 10 January 1920)

Principles on the protection and promotion of the Ombudsman institution (Venice principles), Council of Europe, European Commission for democracy through law, Opinion No. 897 / 2017, CDL-AD (2019) 005

Principles relating to the status of national institutions (Paris principles), GA Res. 48/134, UNGAOR 48th Sess, Supp No 49, UN Doc A/48/49 (Vol I) (1993), 252 at 253-254

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 18 December 2002, 2375 UNTS 237, (in force 22 June 2006)

Recommendation concerning the General Principles for the Organisation of Systems of Inspection to Secure the Enforcement of the Laws and Regulations for the Protection of the Workers, ILC Rec 020, 5th Sess (1923) (outdated)

Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna (25 June 1993)

2. UNITED NATIONS DOCUMENTS

2.1 UN Documents: Resolutions

Commission on Human Rights Resolutions

National advisory committee on human rights. Report of the Secretary-General, CHR 18th Sess, UN Doc E/CN.4/828/Add.1, Add.2, Add.3, Add.4 (1962)

National institutions in the field of human rights, CHR Res 23 (XXXIV), CHR 34th Sess, UNESCOR 1978 Supp No 4, UN Doc E/1978/34 E/CN.4/1292, 130

National institutions for the promotion and protection of human rights, CHR Res 24 (XXXV), CHR 35th Sess, UNESCOR 1979, Supp 6, UN Doc E/1979/36 E/CN.4/1347, 129

National institutions for the promotion and protection of human rights, CHR Res 1990/73, UNESCOR 46th Sess, Supp No 2, UN Doc E/1990/22-E/CN.4/1990/94 (1990), 151

National institutions for the promotion and protection of human rights, CHR Res. 1991/27, UNESCOR 47th Sess, Supp No 2, UN Doc E/1991/22-E/CN.4/1991/91 (1991), 73

National institutions for the protection and promotion of human rights, CHR Res 1992/54, UNESCOR 48th Sess, Supp No 2, UN Doc E/1992/22-E/CN.4/1992/84 (1992), 125

Situation of human rights in Haiti, CHR Res 1997/52, UNESCOR 1997, Supp No 3, UN Doc E/1997/23-E/CN.4/1997/150, 171

Situation of human rights in Haiti, CHR Res 1998/58, CHR 54th Sess, UNESCOR 1998, Supp No 3, UN Doc E/1998/23-E/CN.4/1998/177, 185

National institutions for the promotion and protection of human rights, CHR Res 2005/74, CHR 61st Sess, UNESCOR 2005, Supp No 3, UN Doc E/2005/23 E/CN.4/2005/135, 285

Economic and Social Council Resolutions

Commission on Human Rights, ESC Res 9(II), UNSCOR 2nd Sess, UN Doc E/RES/9(II)-E/56/Rev.2 (1946), 520

National advisory committee on human rights, ESC Res 777(XXX) B, UNESCOR 30th Sess, Supp No 1, UN Doc E/3422 (1960) 14

National advisory committee on human rights, ESC Res 888 (XXXIV) F, UNESCOR 34th Sess, Supp No 1, UN Doc E/3671 (1962) 23

General Assembly Resolutions

Observance of the thirtieth anniversary of the Universal Declaration of Human Rights, GA Res. 32/123, UNGAOR 32nd Sess, Supp No 45, UN DOC A/32/45 (1977), 145

National institutions for the promotion and protection of human rights, GA Res 33/46, UNGAOR 33rd Sess, Supp No 45, UN Doc A/33/45 (1978), 21

National institutions for the promotion and protection of human rights, GA Res 34/49, UNGAOR 34th Sess, Supp No 46, UN Doc A/34/46 (1979), 172

National institutions for the protection and promotion of human rights, GA Res 46/124, UNGAOR 46th Sess, Supp No 49, UN Doc A/46/49 (Vol I) (1991), 98

National institutions for the promotion and protection of human rights, GA Res. 48/134, UNGAOR 48th Sess, Supp No 49, UN Doc A/48/49 (Vol I) (1993), 252

High Commissioner for the promotion and protection of all human rights, GA Res 48/141, UNGAOR 48 Sess, Supp No 49, UN Doc A/48/49 (Vol.I) (1993) 261

Transforming our world: the 2030 Agenda for Sustainable Development, GA Res 70/1, UNGAOR 70th Sess, Supp No 49, UN DOC A/70/49 (Vol. I) (2015), 3

National institutions for the promotion and protection of human rights, GA Res 70/163, UNGAOR 70th Sess, Supp 49, UN Doc A/70/49 (Vol I) (2015-16), 753

The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights, GA Res 71/200, UNGAOR 71st Sess, Supp No 49, UN Doc A/71/49 (Vol. I) (2016), 840

Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development indicator, GA Res 71/313, UNGAOR 71th Sess, Supp No 49, UN DOC A/71/49 (Vol. 3) (2017), 39

National institutions for the promotion and protection of human rights, GA Res 72/181, UNGAOR 72nd Sess, Supp No 49, UN Doc A/72/49 (Vol.I) (2017), 828

Human Rights Council Resolutions

Institution-building of the United Nations Human Rights Council, HRC Res 5/1, UNGAOR 62nd Sess, Supp No 53, UN Doc A/62/53 (2007), 48

Review of the work and functioning of the Human Rights Council, HRC Res 16/21, UNGAOR 66th Sess, Supp No 53, UN Doc A/66/53 (2011), 70

National institutions for the promotion and protection of human rights, HRC Res 33/15, UNGAOR 71st Sess, Supp No 53, UN Doc A/71/53/Add.1 (2016), 46

National human rights institutions, HRC Res 39/17, UNGAOR 73rd Sess, Supp No 53A, UN Doc A/73/53/Add.1 (2018), 75

Security Council Resolutions

The question concerning Haiti, SC Res 1542, UNSCOR 59th Sess, UN Doc S/INF/59 (2004), 206

The question concerning Haiti, SC Res 2350, UNSCOR 72nd Sess, UN Doc S/INF/72 (to be issued) (2017)

The question concerning Haiti, SC Res 2476, UNSCOR 74th Sess, UN Doc S/INF/74 (to be issued) (2019)

2.2 UN Documents: Reports and memorandums

Report of the Commission on human rights to the second session of the Economic and Social Council, UN Doc E/38/Rev.1 (1946)

Report on the establishment of information groups or local human rights committees: report / by the Secretary-General, CHR 2nd Sess, UN Doc E/CN.4/28 (1947)

Local human rights committees or information groups. Memorandum submitted by the Secretary-General, CHR 7th Sess , UN Doc E/CN.4/519 (1951)

CHR, "Memorandum on national advisory committees on human rights", CHR 16th Sess, UN Doc E/CN.4/791 (1959)

UN, "Seminar on national and local institution for the promotion and protection of human rights (organized by the United Nations Division of Human Rights) Geneva, 18-29 September 1978", UN Doc ST/HR/SER.A/2 (1978)

CHR, *Report of the International Workshop on National Institutions for the Promotion and Protection of Human Rights, Paris 7-9 October 1991*, CHR 48th Sess (item 11b), UN Doc E/CN.4/1992/43 (1991)

CHR, *Report of the second International Workshop on National Institutions for the Promotion and Protection of Human Rights (Tunis, 13-17 December 1993)*, CHR 50th Sess (item 11b), UN Doc E/CN.4/1994/45 (1993)

The situation of democracy and human rights in Haiti. Report of the Secretary-General. Addendum, UNGA 50th Sess (item 38), UN Doc A/50/861/Add.2 (1996)

Situation of Human Rights in Haiti. Report by Mr. Adama Dieng, independent expert, prepared in accordance with Commission resolution 1995/70, CHR 52nd Sess, UN Doc E/CN.4/1996/94 (1996)

Report on the situation of human rights in Haiti prepared by Mr. Adama Dieng, independent expert, in accordance with Economic and Social Council decision 1997/262, UNGA 52nd Sess (item 112c), UN Doc A/52/499 (1997)

The situation of democracy and human rights in Haiti. Report of the Secretary-General", UNGA 52nd Sess (item 44), UN Doc A/52/687 (1997)

The situation of democracy and human rights in Haiti. Report of the Secretary-General, UNGA 54th Sess (item 48), UN Doc A/54/625 (1999)

Situation of human rights in Haiti. Report on the situation of human rights in Haiti prepared by Mr. Adama Dieng, independent expert, in accordance with Commission resolution 2000/78, para. 21, CHR 57th Sess (item 19), UN Doc E/CN.4/2001/106 (2001)

Situation of human rights in Haiti. Report prepared by the independent expert, Mr. Louis Joinet, pursuant to the Chairperson's statement at the fifty-eighth session of the Commission on Human Rights under agenda item 19, entitled "Technical cooperation and the situation of human rights in Haiti", CHR 59th Sess (item 19), UN Doc E/CN.4/2003/116 (2002)

Enhancing the participation of national human rights institutions in the work of the Commission on Human Rights and its subsidiary bodies - Report of the Secretary-General, CHR 61st Sess, UN Doc E/CN.4/2005/107 (2005)

Situation of human rights in Haiti. Report prepared by the independent expert, Louis Joinet, CHR 61st Sess (item 19), UN Doc E/CN.4/2005/123 (2005)

Report of the Secretary-General on the United Nations Stabilization Mission in Haiti, UN Doc S/2006/592 (2006)

Implementation of General Assembly 60/251 of 15 March 2006 entitled "Human Rights Council". Situation of human rights in Haiti. Report prepared by the independent expert, Louis Joinet, HRC 4th Sess (item 2), UN Doc A/HRC/4/3 (2007)

Technical assistance and capacity building. Report of the independent expert on the situation of human rights in Haiti, Michel Forst", HRC 11th Sess (item 10), UN Doc A/HRC/11/5 (2009)

Report of the Secretary-General on the United Nations Stabilization Mission in Haiti, UN Doc S/2009/129 (2009)

Report of the Secretary-General on the United Nations Stabilization Mission in Haiti, UN Doc S/2009/439 (2009)

Report of the independent expert on the situation of human rights in Haiti, Michel Forst, HRC 14th Sess (item 10), UN Doc A/HRC/14/44, (2010)

Report of the Secretary-General on the United Nations Stabilization Mission in Haiti", UN Doc S/2011/183 (2011)

Report of the Independent Expert on the situation of human rights in Haiti, Michel Forst, HRC 17th Sess (item 10), UN Doc A/HRC/17/42 (2011)

*Report of the Working Group on the Universal Periodic Review*Haiti*, UN Doc A/HRC/19/19 (2011)

National institutions for the promotion and protection of human rights, Report of the Secretary-General, HRC 20th Sess (items 2,8), UN Doc A/HRC/20/9 (2012)

Report of the Working Group on the Universal Periodic Review Haiti Addendum. Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, UN Doc A/HRC/19/19/Add.1 (2012)

Report of the Independent Expert on the situation of human rights in Haiti, Michel Forst, HRC 22nd Sess (item 10), UN Doc A/HRC/22/65 (2013)

OHCHR/MINUSTAH, *Rapport semestriel sur les droits de l'homme en Haïti. Janvier – Juin 2014*, Décembre 2014, online (pdf): <https://www.ohchr.org> [perma.cc/C888-YKRU]

Report of the Secretary-General on the United Nations Stabilization Mission in Haiti, UN Doc S/2016/225 (2016)

Report of the Secretary-General on the United Nations Stabilization Mission in Haiti, UN Doc S/2016/753 (2016)

Report of the Chairs of the human rights treaty bodies on their twenty-eighth meeting, CHRTB 28th Sess, UN Doc A/71/270 (2016)

Report of the Working Group on the Universal Periodic Review Haiti*, UN Doc A/HRC/34/14 (2016)

Report of the Secretary-General on the Stabilization Mission in Haiti, UN Doc S/2017/223 (2017)

*Report of the Independent Expert on the situation of human rights in Haiti**, HRC 34th Sess (item 10), UN Doc A/HRC/34/73 (2017)

Report of the Secretary-General on the United Nations Mission for Justice Support in Haiti", UN Doc S/2018/241 (2018)

United Nations Mission for Justice Support in Haiti. Report of the Secretary-General, UN Doc S/2019/563 (2019)

OHCHR/MINUJUSTH, *La Saline : justice pour les victimes. L'État a l'obligation de protéger tous les citoyens,* Juin 2019, online (pdf): [https://minujusth.unmissions.org/] [perma.cc/M8QC-ABEH]

2.3 UN Documents: Treaty Bodies

Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CAT, *Concluding observations on the third periodic report of Senegal, adopted by the Committee at its forty-ninth session (29 October–23 November 2012)*, CAT 49th Sess, UN Doc CAT/C/SEN/CO/3 (2013)

CAT, *Concluding observations on the initial report of Gabon as adopted by the Committee at its forty-ninth session (29 October–23 November 2012)*, CAT 49th Sess, UN Doc CAT/C/GAB/CO/1(2013)

CAT, *Concluding observations on the third periodic report of Belgium*, CAT 51st Sess, UN Doc CAT/C/BEL/CO/3 (2014)

CAT, *Rules of procedure*, UN Doc CAT/C/3/Rev.6 (2014)

CAT, *Concluding observations on the fifth periodic report of Israel*, CAT 57th Sess, UN Doc CAT/C/ISR/CO/5 (2016)

Committee on Economic, Social and Cultural Rights

CESCR, *General comment 10: The role of national human rights institutions in the protection of economic, social and cultural rights*, CESCR 19th Sess, UN Doc E/C.12/1998/25 (1998)

CESCR, *Concluding observations on the fifth periodic report of Norway*, CESCR 51st Sess, UN Doc E/C.12/NOR/CO/5 (2013)

CESCR, *Provisional rules under the optional protocol*, UN Doc E/C.12/49/3 (2013)

CESCR, *Concluding observations on the second periodic report of China, including Hong Kong, China, and Macao, China*, CESCR 52nd Sess, UN Doc E/C.12/CHN/CO/2 (2014)

Committee on the Elimination of Discrimination against Women

CEDAW, *Statement by the Committee on the Elimination of Discrimination against Women on its relationship with national human rights institutions*, CEDAW 40th Sess, UN Doc E/CN.6/2008/CRP.1 (2008)

CEDAW, *Consideration of reports submitted by States Parties under article 18 of the Convention. Eighth and ninth periodic reports of States parties due in 2014. Haiti**, UN Doc CEDAW/C/HTI/8-9 (2014)

CEDAW, *Concluding observations on the combined eighth and ninth periodic reports of Haiti**, UN Doc CEDAW/C/HTI/CO/8-9 (2016)

Committee on the Elimination of Racial Discrimination

CERD, *General recommendation No. 17 on the establishment of national institutions to facilitate the implementation of the Convention*, CERD 42nd session (1993)

CERD, *Concluding observations on the combined twenty-first to twenty-fourth periodic reports of Kuwait*, CERD 93rd Sess, UN Doc CERD/C/KWT/CO/21-24 (2017)

CERD, "The Committee's relations with national human rights institutions and non-governmental organizations", Working methods, sec B, online: <https://www.ohchr.org/> [perma.cc/BKE5-YT6T]

Committee on Enforced Disappearances

CED, *Rules of procedure*, UN Doc CED/C/1 (2012)

CED, *The relationship of the Committee on Enforced Disappearances with national human rights institutions*, 28 October 2014, CED 7th Sess, UN Doc CED/C/6 (2014)

Committee on the Protection of Migrant Workers and Members of their Families

CMW, *Statement by the Committee on cooperation with national human rights institutions*, online (pdf): <https://tbinternet.ohchr.org> [perma.cc/25P8-WQ5K]

CMW, *Rules of* procedure, UN Doc CMW/C/2 (2019)

Committee on the Rights of the Child

CRC, *General Comment No. 2 (2002) - The role of independent national human rights institutions in the promotion and protection of the rights of the child*, CRC 32nd Sess, UN Doc CRC/GC/2002/2

CRC, *Concluding observations on the second periodic report of Malta, adopted by the Committee at its sixty-second session*, CRC 62nd Sess, UN Doc CRC/C/MLT/CO/2 (2013)

CRC, *Concluding observations on the combined second and third periodic reports of Haiti**, CRC 71st Sess, UN Doc CRC/C/HTI/CO/2-3 (2016)

Committee on the Rights of Persons with Disabilities

Com RPD, *Guidelines on independent monitoring frameworks and their participation in the work of the Committee on the Rights of Persons with Disabilities*, in Com RPD, "Rules of procedures", Com RPD 16th Sess, UN Doc CRPD/C/1/Rev.1 (2016)

Com RPD, *Concluding observations on the initial report of Haiti**, UN Doc CRPD/C/HTI/CO/1 (2018)

Com RPD, *Joint Declaration by the Committee on the Rights of Persons with Disabilities and the Global Alliance of National Human Rights Institutions*, Com RPD 19th Sess (2018), online: <https://www.ohchr.org/> [perma.cc/M3AW-JW3U]

Human Rights Committee

HR Com, *Paper on the relationship of the Human Rights Committee with national human rights institutions*, HR Com 106th Sess, UN Doc CCPR/C/106/3 (2012)

HR Com, *Concluding observations on the fourth periodic report of Ireland*, HR Com 111th Sess, Un Doc CCPR/C/IRL/CO/4 (2014)

HR Com, *Concluding observations on the initial report of Haiti**, HR Com 112th Sess, UN Doc CCPR/C/HTI/CO/1 (2014)

HR Com, "Second periodic report submitted by Haiti under article 40 of the Covenant, due in 2018 *", UN Doc CCPR/C/HTI/2 (2019)

Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

SPT, *Guidelines on national preventive mechanisms*, SPT 12th Sess, UN Doc CAT/OP/12/5 (2010)

Third annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT 44th Sess, UN Doc CAT/C/44/2 (2010)

Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, CAT 57th Sess, UN Doc CAT/C/57/4 (2016)

2.4 UN Documents: varia

ESC, "Commission on human rights of the Economic and Social Council summary record of meetings", UN Doc E/HR/15 (1946)

Discussions on draft resolution (E/CN.4/1992/L.56) in UNESCOR 48th Sess, Supp No 2, UN Doc E/1992/22-E/CN.4/1992/84 (1992), 264

UNESCO, *Legal texts on National Commissions for UNESCO* (Paris, 2002), UN DOC ERC.2002/WS/1

OHCHR, "Guidance note. National Human Rights Institutions and the work of OHCHR at Headquarters and field level", September 2007, online copy made available at: [perma.cc/B6T5-Z935]

OHCHR, *National Human Rights Institutions - History, Principles, Roles and Responsibilities, Professional Training Series No.4 Rev.1* (New York & Geneva: United Nations, 2010) at 15-19

UNDP-OHCHR Toolkit for collaboration with National Human Rights Institutions (New York, Geneva, December 2010), online (PDF): <https://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf> [perma.cc/84AQ-PZ95]

*Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 Haiti**, UN Doc A/HRC/WG.6/12/HTI/3 (2011)

*Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21 Haiti**, UN Doc A/HRC/WG.6/26/HTI/3 (2016)

CHRTB, *Common approach to engagement with national human rights institutions*, CHRTB 29th Sess, UN Doc HRI/MC/2017/3 (2017)

3. ICC/GANHRI DOCUMENTS

ICC, *ICC SCA General Observations as adopted in Geneva in May 2013*, online (pdf): <https://nhri.ohchr.org> [perma.cc/6T28-BRHR]

CIC, "Rapport et recommandations de la session du Sous-comité d'accréditation (SCA) Genève, 13-16 mai 2013", online (pdf): <https://nhri.ohchr.org/> [perma.cc/7TFE-QJ6P].

ICC, "Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) Geneva, 13-16 May 2013", online (pdf): <https://nhri.ohchr.org/> [perma.cc/N4ZM-7ELZ]

ICC, "Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 18-22 November 2013", online (pdf): <https://nhri.ohchr.org/> [perma.cc/5EXT-XX3E]

ICC, *Rules of procedure for the ICC Sub-committee on accreditation (former version)*, online (pdf): [perma.cc/4K9F-DMB9]

The Mérida Declaration. The Role of National Human Rights Institutions in implementing the 2030 Agenda for Sustainable Development, adopted during the Twelfth International conference of the ICC, 10 October 2015

GANHRI, "Practice note 3 - Assessing the performance of NHRIs", adopted 6 March 2017

GANHRI, "Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) Geneva, 13-17 November 2017", online (pdf): <https://nhri.ohchr.org/> [perma.cc/YQ4E-WNY9]

GANHRI, *General Observations of the Sub-Committee on Accreditation*, adopted 21 February 2018, at 49 G.O. 2.9 online: <https://nhri.ohchr.org> [perma.cc/69WS-FWT3]

GANHRI, "Practice Note 5 – Sources of information to assess the performance of NHRIs", adopted 18 may 2018

GANHRI, "Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) Geneva, 15-19 October 2018", online (pdf): <https://nhri.ohchr.org/> [perma.cc/6S3Y-JS73]

GANHRI, *A practical guide to the work of the sub-committee on accreditation (SCA)*, (December 2017-updated November 2018), online (pdf): <https://nhri.ohchr.org/> [perma.cc/E69Z-RMK2]

GANHRI, *Rules of procedure for the GANHRI Sub-committee on accreditation (amended version adopted on 4 March 2019)*, online (pdf): <https://nhri.ohchr.org> [perma.cc/N3ME-AJRL]

Statute of the Global Alliance of National Human Rights Institutions, first adopted on 21 October 2008 and last revised 5 March 2019, online: <https://nhri.ohchr.org> [perma.cc/T5DH-BM99]

GANHRI, "Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) - Geneva, 11-15 March 2019", online (pdf): <https://nhri.ohchr.org/> [perma.cc/4GVV-G2DT]

4. OFFICE DE LA PROTECTION DU CITOYEN D'HAÏTI (OPC) DOCUMENTS

OPC, *Rapport Annuel Combiné 2009-2012* (Port-au-Prince: Bibliothèque nationale d'Haïti, 2013) at 7, 106, online (pdf): <https://perma.cc/AEW5-8EV7>

OPC et la Coalition, *Rapport alternatif sur la Convention relative aux droits de l'enfant*, 20 juin 2014, online (pdf): <https://uprdoc.ohchr.org/> [perma.cc/DR4A-SM9Y]

OPC, *Rapport alternatif sur l'application du Pacte international relatif aux droits civils et politiques. Présenté au Comité des Droits de l'Homme des Nations unies en vue de l'examen du rapport initial du Gouvernement Haïtien* (July 2014), online (pdf): <https://tbinternet.ohchr.org/> [perma.cc/9CRX-2VD9]

OPC, *Rapport alternatif sur la Convention internationale relative aux droits de l'enfant*, décembre 2015, online : <https://tbinternet.ohchr.org/> [perma.cc/V4EP-LZPR]

OPC, *Rapport alternatif sur l'application de la Convention relative aux droits des personnes handicapées*, janvier 2018, online: <https://tbinternet.ohchr.org> [perma.cc/GLB6-5CW4]

OPC, *Rapport Annuel 2017-2018* (Port-au-Prince, 2019), online (pdf): <https://www.asfcanada.ca/site/assets/files/7636/ascf_rapport-annuel-opc_2019.pdf> [perma.cc/AB4M-V4U9]

OPC, *Rapport sur les évènements de la Saline Du 13 novembre 2018*, 14 janvier 2019, online (pdf): [https://www.cliohaiti.org/IMG/pdf/rapport_situation_de_la_saline_pc_corrige_final.pdf> [perma.cc/E59Y-X5TR]

5. SECONDARY MATERIAL

5.1 Secondary Material: Articles

Bellegarde-Smith, Patrick, "Uprisings, insurrections, and political movements: contemporary Haiti and the teachings of history, 1957-2010", in Martin Munro, ed, *Haiti Rising: Haitian History, Culture and the Earthquake of 2010* (Liverpool: Liverpool University Press, 2011) 134

Cardenas, Sonia, "Emerging Global Actors: The United Nations and National Human Rights Institutions" (2003) 9:1 Global Governance 22

Cardenas, Sonia, "National human rights institutions and State compliance", in Ryan Goodman, Thomas Pegram, eds, *Human rights, state compliance, and social change: assessing national human rights institutions* (New York: Cambridge University Press, 2012) 29

Carver, Richard, "A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law" (2010) 10:1 Human Rights L Rev 1

Carver, Richard, "National Human Rights Institutions in Central and Eastern Europe. The Ombudsman as Agent of International Law", in Ryan Goodman, Thomas Pegram, eds, *Human rights, state compliance, and social change: assessing national human rights institutions* (New York: Cambridge University Press, 2012) 181

Decaux, Emmanuel, "Le dixième anniversaire des principes directeurs des institutions nationales des droits de l'homme dits « Principes de Paris » " (2003) 3 Droits fondamentaux 11

Di Razza, Namie, "Mission in Transition: Planning for the End of UN Peacekeeping in Haiti" International Peace Institute, December 2018

Garant, Patrice, "Loi du Protecteur du citoyen" (1969) 10:1 C de D 189.

Kumar, C. Raj, "National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights" (2003) 19:2 Am U Intl L Rev 259

Linos, Katerina & Tom Pegram, "Architects of their own making: national human rights institutions and the United Nations" (2016) 38:4 Hum Rts Q 1109

Linos, Katerina & Tom Pegram, "The Language of Compromise in International Agreements" (2016) 70:3 Int'l Org. 587

Linos, Katerina & Tom Pegram, "What Works in Human Rights Institutions?" (2017) 112: 3 AJIL 1

Mertus, Julie, "Evaluating NHRIs: Considering Structure, Mandate, and Impact", in Ryan Goodman, Thomas Pegram, eds, *Human rights, state compliance, and social change: assessing national human rights institutions* (New York: Cambridge University Press, 2012) 74

Meuwissen, Katrien, "The Paris Principles and National Human Rights Institutions: Lost in Translation?", KU Leuven Working Paper No 163/2015, online: <https://ghum.kuleuven.be/> [perma.cc/8L9X-JYBX]

Mondélice, Mulry, "L'internationalisation du rôle des institutions nationales dans la promotion de l'État de droit sur la base des Principes de Paris : dynamiques nouvelles et défis de consolidation", in Collectif, ed, *Mélanges en l'honneur du Professeur Emmanuel Decaux. Réciprocité et universalité - Sources et régimes du droit international des droits de l'homme* (Paris: Pedone, 2017) 1283

Pegram, Thomas, "National Human Rights Institutions in Latin America. Politics and Institutionalization", in Ryan Goodman, Thomas Pegram, eds, *Human rights, state compliance, and social change: assessing national human rights institutions* (New York: Cambridge University Press, 2012) 210

Pegram, Tom, "Global Human Rights Governance and Orchestration: National Human Rights Institutions as Intermediaries", (2014) 21:3 Eur J Intl Relations 595

Reif, Linda C., "The Shifting Boundaries of NHRI Definition in the International System" in Ryan Goodman, Thomas Pegram, eds, *Human rights, state compliance, and social change: assessing national human rights institutions* (New York: Cambridge University Press, 2012) 52

Renshaw, Catherine & Kieren Fitzpatrick, "National Human Rights Institutions in the Asia Pacific Region. Change Agents under Conditions of Uncertainty" in Ryan Goodman, Thomas Pegram, eds, *Human rights, state compliance, and social change: assessing national human rights institutions* (New York: Cambridge University Press, 2012). 150

Sidoti, Chris, "National Human Rights Institutions and the International Human Rights System" in Ryan Goodman, Thomas Pegram, eds, *Human rights, state compliance, and social change: assessing national human rights institutions* (New York: Cambridge University Press, 2012) 93

Yalden, Maxwell, "The Paris Principles Twenty Years After" in Lucie Lamarche & Ken Norman, eds, *14 Arguments in favour of National Human Rights Institutions* (Toronto: Irwin Law, 2014) 191

5.2 Secondary Material: Monographs

Cardenas, Sonia, *Chains of Justice: The Global Rise of State Institutions for Human Rights* (Philadelphia: University of Pennsylvania Press, 2014)

Carver, Richard, *Performance and Legitimacy: National human rights institutions (second edition)*, (Geneva: International Council on Human Rights Policy, 2004

Carver, Richard, *Measuring the impact and development effectiveness of national human rights institutions. A proposed framework for evaluation,* (Bratislava: UNDP, 2014)

Lindsnaes, Birgit, Lone Lindholt & Kristine Yigen, eds, *National Human Rights Institutions Articles and working papers. Input to the discussions on the establishment and development of the functions of national human rights institutions* (Denmark: The Danish Centre for Human Rights, 2001)

Mondélice, Mulry, *Le droit international et l'État de droit. Enjeux et défis de l'action internationale à travers l'exemple d'Haïti* (LLD Thesis, Université Laval/Université Panthéon-Assas Paris II, 2015) [unpublished]

Murray, Rachel, *The Role of National Human Rights Institutions at the International and Regional Levels. The Experience of Africa*, (Oxford & Portland, Oregon: Hart publishing, 2007)

Neptune, Joubert, *Les institutions indépendantes d'Haïti: quelle indépendance?*, (Port-au-Prince: Imprimerie Henri Deschamps, 2013)

Paisant, Gilles, ed, *De la place de la coutume dans l'ordre juridique haïtien. Bilan et perspectives à la lumière du droit comparé*, (Grenobles: Presses universitaires de Grenobles, 2003)

Pohjolainen, Anna-Elina, *The Evolution of National Human Rights Institutions. The role of the United Nations* (Copenhaguen: Danish Institute for Human Rights, 2006)

Reif, Linda C., *The Ombudsman, Good Governance, and the International Human Rights System* (Leiden/Boston: Martinus Nijhoff Publishers, 2004)

Singh, Raju Jan & Mary Barton-Dock, *Haiti: Toward a New Narrative* (Washington: World Bank Group, 2015)

5.3 Secondary Material: Speeches, lectures and remarks

Bachelet, Michèle, "Human rights situation in Haiti. Briefing to the Security Council on Haiti", New York, 3 April 2019, online: <https://www.ohchr.org> [perma.cc/UPL5-GC54]

Diamandouros, P. Nikiforos, "The ombudsman institution and the quality of democracy", (Centre for the Study of Political Change, University of Siena, 2006), copy of lecture online: <https://europa.eu/!yy38bv> [perma.cc/FX2T-KNVV]

Gilmore, Kate in "Introduction to country reports/briefings/updates of the Secretary-General and the High Commissioner", Geneva, 21 and 22 March 2018, online: <https://www.ohchr.org> [perma.cc/CW5X-RD2E]

Gil Robles, Alvaro in: European Ombudsman, "The Ombudsmen as human rights protection mechanisms" (Vienna, 2010), copy of speech online: <https://europa.eu/!wh87Qd> [perma.cc/TP3X-75YB]

5.4 Secondary Material: News Sources

Haiti

Jean Gardy Gauthier, "Quelle institution protège les citoyens?", *Le Nouvelliste* (5 May 2008), online: <https://lenouvelliste.com> [https://perma.cc/4ENY-SFXU]

Gerda Leroi, "Le procès de 34 policiers aux Cayes", *Le Nouvelliste* (16 novembre 2011), online: <https://lenouvelliste.com> [perma.cc/94T5-K9C9]

"Haiti-Viol : L'Office de la Protection du Citoyen recommande que Josué Pierre-Louis se mette à la disposition de la justice", *Alterpresse* (6 décembre 2012), online: <https://www.alterpresse.org/> [perma.cc/65CF-2Z2E]

"Justice: Près de 7,000 personnes incarcérées arbitrairement en Haïti...", *Haïti Libre* (4 octobre 2013), online: <https://www.haitilibre.com/> [perma.cc/8T9T-RSPX]

Danio Darius, "Affaire Jacky Lumarque. La recommandation de l'OPC, une opinion comme les autres, selon Pierre-Louis Opont", *Le Nouvelliste* (6 août 2015), online: <https://lenouvelliste.com/> [perma.cc/8FQK-LXDU]

Frantz Duval, "Qui est Jocelerme Privert, nouveau président provisoire d'Haïti?", *Le Nouvelliste* (15 février 2016), online: <https://lenouvelliste.com> [perma.cc/686L-AAV9]

Marie Yolène Gilles, "Installation du Protecteur du citoyen adjoint : le RNDDH fait le point", *Le Nouvelliste* (15 juillet 2016), online: <https://lenouvelliste.com> [perma.cc/75PX-3JE6]

"Justice : Une proposition de loi pour améliorer la vie des prisonniers", *Haiti Libre* (6 février 2017), online: <https://www.haitilibre.com/> [perma.cc/28DP-5NA6]

"Le Sénat lance un appel à candidatures", *Haïti Libre* (28 février 2017), online: <https://www.haitilibre.com> [perma.cc/LZB8-SEMC]

"Les Députés en session ce samedi sur l'OPC et le Budget", *Haititweets* (9 Septembre 2017), online: <https://haititweets.com/> [perma.cc/G4X6-DKL6]

"Qui pour protéger les citoyens haitiens ?", *Haitiz News* (17 August 2017), online : <https://www.haitiz.com> [perma.cc/X83Q-BJJA]

Danio Darius, "Renan Hédouville, le nouveau Protecteur du citoyen et de la citoyenne", *Le Nouvelliste* (27 octobre 2017), online: <https://lenouvelliste.com> [perma.cc/JT8P-23YE]

"Haïti-Droits humains : Renan Hédouville « entame son mandat avec un déficit de crédibilité » à la tête de l'Opc, selon la Pohdh", *Alterpresse* (30 octobre 2017), online: <https://www.alterpresse.org/> [perma.cc/B979-URMH]

Robenson Geffrard, "Mamadou Diallo remplace Susan D. Page à la tête de la MINUJUSTH", *Le Nouvelliste* (8 mai 2018), online: <https://lenouvelliste.com> [perma.cc/6BZB-DRT8]

Laura Louis, "Connaissez-vous l'Office de la Protection du Citoyen?" *Ayibopost* (16 mai 2018), online: <https://ayibopost.com/connaissez-vous-loffice-de-la-protection-du-citoyen> [perma.cc/F8J6-XEZU]

United Nations

"National Human Rights Institutions' participation in Commission's debates welcome initiative, Australia tells Human Rights Commission", *UN Press release HR/CN/735* (12 April 1996), online: <https://www.un.org/press/en/1996/19960412.hrcn735.html> [perma.cc/U7JG-2DF2]

"Le Conseil des droits de l'homme adopte les résultats de l'Examen périodique de la République de Moldova, d'Haïti et d'Antigua-et-Barbuda", *OHCHR news archive* (16 mars 2012), online: <https://newsarchive.ohchr.org> [perma.cc/EVB4-45U8]

"Council discusses human rights situation in Haiti and in Libya under its technical assistance and capacity building agenda item", *OHCHR News* (21 March 2017), online: <https://www.ohchr.org/> [perma.cc/6TE8-9HRG]

UNSC, "Haïti: le Conseil de sécurité dresse, « à une ombre majeure » près, un bilan positif de la MINUSTAH, remplacée par une mission réduite d'appui à la justice", *UNSC Meeting coverage CS/13026* (12 Octobre 2017), online : <https://www.un.org/press/fr/2017/cs13026.doc.htm> [perma.cc/Y6FK-AWZB]

Other

Deborah Sontag & Walt Bogdanich, "Escape Attempt Led to Killings of Unarmed Inmates", *New York Times* (22 May 2010), online: <https://www.nytimes.com/> [perma.cc/RC5P-64GX]

"L'Office de protection du citoyen en Haïti se dote d'un manuel de procédures de traitement des plaintes 32 ans après sa création", *ASF Canada* (10 Juillet 2019), online: <https://www.asfcanada.ca/> [perma.cc/H22Y-RFBJ]

5.5 Secondary Material: Varia

Americas Watch, the National Coalition for Haitian Refugees & al., "Reverting to despotism: Human Rights in Haiti", (1990), online: <https://www.icj.org> [perma.cc/5F79-2CSZ]

OAS, Inter-Am Comm HR, *Report on the situation of human rights in Haiti. Chapter II Right to life and humane treatment*, OR OEA/Ser.L/V/II.77 rev.1, Doc. 18 (1990)

Caroll Faubert, *Case study Haiti – evaluation of UNDP assistance to conflict-affected countries* (New York: UNDP, 2006), online: <https://www.oecd.org/countries/haiti/44826404.pdf> [perma.cc/2TDE-TCJG]

Coalition des Organisations et Plateformes Haïtiennes sur le Rapport Alternatif du PIDCP, *Haiti. Rapport Alternatif de la société civile sur la mise en œuvre du Pacte International relatif aux Droits Civils et Politiques* (12 Septembre 2014), online : <https://tbinternet.ohchr.org/> [perma.cc/Z684-Z2EK]

Consortium coordonné par CATW-LAC, *Rapport Alternatif sur la mise en application de la Convention pour l'Elimination de toutes les formes de Discrimination à l'égard des Femmes en Haïti*, Juillet 2015, online: <https://tbinternet.ohchr.org> [perma.cc/J5BA-UTQD]

Mémoire portant sur la lutte contre l'impunité en Haïti du Collectif contre l'impunité et d'Avocats sans frontières Canada (ASFC) présenté à la Commission interaméricaine des droits de l'Homme (CIDH) à l'occasion de l'audience thématique du 2 mars 2018 – 167ème session, Port-au-Prince (2018), online: <https://www.asfcanada.ca> [perma.cc/TK6F-APGB]

République d'Haïti Chambre des Députés, "Liste des modifications apportées au projet de loi portant organisation et fonctionnement de l'Office de la Protection du Citoyen", undated, (on file with author)

Le Sénat, "Rapport relatif à la proposition de loi portant organisation et fonctionnement de l'Office de la Protection du Citoyen et de la Citoyenne", undated, (on file with author)

5.6 Secondary Material: Websites

For a detailed timeline of Haiti related events: <https://www.universalis.fr/chronologie/haiti/> [perma.cc/ZQ79-UC69]

For Haitian budgetary laws (last visited 10 March 2020): <www.mef.gouv.ht/index.php?page=Accueil> budget section

For the database compiled by the Association for the Prevention of Torture (last visited 10 March 2020): <https://apt.ch/en/by-type/> [perma.cc/G2VK-6V67]

For the World Bank Haiti overview (last updated 15 october 2019): <https://www.worldbank.org/en/country/haiti/overview> [perma.cc/EC5Z-DZ27]

ANNEX 1
Principles relating to the Status of National Institutions (Paris Principles)

(A) Competence and responsibilities

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

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

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

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

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

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

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

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

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

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

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

(e) To cooperate with the United Nations and any other orgnization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the protection and promotion of human rights;

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

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

(B) Composition and guarantees of independence and pluralism

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

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

(b) Trends in philosophical or religious thought;

(c) Universities and qualified experts;

(d) Parliament;

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

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

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

(C) Methods of operation

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

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

(b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;

(c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;

(d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly concerned;

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

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

(g) In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the 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.

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

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

(a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;

(b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;

(c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;

(d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

ANNEX 2
Excerpts of the Haitian Constitution

CHAPTER IV
PROTECTION OF CITIZENS

Article 207
An office known as the OFFICE OF CITIZEN PROTECTION is established to protect all individuals against any form of abuse by the government.

Article 207-1
The office is directed by a citizen bearing the title of PROTECTOR OF CITIZENS. He is chosen by consensus of the President of the Republic, the President of the Senate and the President of the House of Deputies. His term is seven (7) years and may not be renewed.

Article 207-2
His intervention on behalf of any complainant is without charge, whatever the court having jurisdiction might be.

Article 207-2bis
(inserted by the Constitutional 2012 amendment)
In the exercise of its functions, it will pay a special attention to the complaints presented by women, particularly in that relating to the discriminations and the aggressions of which they may be victims notably in their work.

Article 207-3
A law sets the conditions and regulations for the operation of the Office of Citizen Protection.

CHAPITRE IV
DE LA PROTECTION DU CITOYEN

Article 207
Il est créé un office dénommé OFFICE DE LA PROTECTION DU CITOYEN dont le but est de protéger tout individu contre toutes les formes d'abus de l'Administration Publique.

Article 207.1
L'Office est dirigé par un citoyen qui porte le titre de PROTECTEUR DU CITOYEN. Il est choisi par consensus entre le Président de la République, le Président du Sénat et le Président de la Chambre des députés. Il est investi d'un mandat de sept (7) ans, non renouvelable.

Article 207.2
Son intervention en faveur de tout plaignant se fait sans frais aucun, quelle que soit la juridiction.

Article 207-2bis
(inséré par l'amendement constitutionnel 2012)
Dans l'exercice de ses fonctions, il accordera une attention spéciale aux plaintes déposées par les femmes, particulièrement en ce qui a trait aux discriminations et aux agressions dont elles peuvent être victimes notamment dans leur travail.

Article 207.3
Une loi fixe les conditions et les règlements de fonctionnement de l'Office du Protecteur du Citoyen