KREDDHA EXPERT MEETING ON INTERNATIONAL ADJUDICATION MECHANISMS FOR INTRASTATE PEACE AGREEMENTS

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The Hague, The Netherlands

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This report provides an extensive summary of the discussions that took place at the meeting. The recommendations made as to follow-up action, including but not limited to institutions and individuals to be approached, are noted at the conclusion of each of the sub-sections on potential mechanisms and under the section on follow-up activities.

EXECUTIVE SUMMARY

In late 2005, Kreddha hosted a four day expert meeting in The Hague on international adjudication mechanisms for intrastate peace agreements. The purpose of the meeting was to identify and discuss mechanisms of this type that could be employed by parties to intrastate peace agreements to resolve disputes that arise in the implementation of those agreements.

The meeting was attended by a select group of international human rights lawyers and academics, international arbitration practitioners, the Secretary-General of the Permanent Court of Arbitration, a former UN Assistant Secretary General for Political Affairs and a specialist in dispute resolution systems design.

The Problem Addressed

The meeting acknowledged that there is a gap in the international dispute resolution framework in that there are few, if any, international bodies, judicial or otherwise, to which a population group as one party and a state as the other can bring a dispute for binding resolution. It is almost inevitable, however, that disputes will arise between such parties after the conclusion of a peace agreement, whether as to the implementation or interpretation of that agreement. Without effective, trusted and reliable methods of resolving those disputes, a fragile peace can be put in jeopardy. This can occur even when the dispute in question relates to a relatively minor, technical issue.

Many intrastate peace agreements do contain some form of dispute settlement clause, but almost invariably these provide for domestic, rather than international mechanisms, and for resolution of disputes by facilitated negotiation or mediation rather than through the use of judicial or arbitral mechanisms that produce binding decisions. A contemporary example is the 2005 Comprehensive Peace Agreement between the Sudan People's Liberation army and the Khartoum government, which has no mechanism for resolving disputes that have arisen over the agreed equal division of oil revenues. This has meant delays in the disbursement of revenues to the government of Southern Sudan and diminishing optimism amongst the people in the south that this aspect of the peace agreement will be implemented.[3]

The meeting sought to identify international adjudication mechanisms to which parties to intrastate peace agreements could have recourse *in addition to* other, possibly domestic, dispute resolution mechanisms. In most cases, these mechanisms would be made available as a last resort after the usual alternative dispute resolution methods had failed to produce a settlement.

[3] United Nations Press Release of Briefing by Secretary-General's Representative to the Security Council, 13 January 2006, available at www.un.org/News/Press/docs/2006/sc8607.doc.htm.

The key requirements in examining a potential mechanism were that it was capable of providing parties with a binding result, and that this result was produced by an international body or a body with sufficient international character (such as an arbitral tribunal chaired by an international arbitrator). The international nature of the mechanism was felt to be crucial because in many countries emerging from intrastate conflict the national judicial system, or any other domestic mechanism, is not perceived to be impartial or sufficiently independent. Access to a neutral, independent adjudicatory body held in high esteem by both parties could help to depoliticize a dispute, and ensure that other unrelated issues are not brought up for renegotiation. It could also help to overcome the fear of non-implementation that hinders progress during the negotiations phase.

The Solutions Explored

Numerous potential mechanisms were examined by participants. It was acknowledged at the outset that in many cases innovation would be required to make these available to parties to intrastate peace agreements. Participants thus engaged in creative but realistic discussions as to how certain existing mechanisms could be modified and used in a novel manner or completely new mechanisms created.

In examining each potential mechanism, the meeting focused on a number of key questions, such as: is it within the mandate of the organization or institution to deal with such disputes and if not, are there politically realistic changes that could be made to that mandate to enable it to do so; does the organization or institution have the capacity and necessary expertise to deal with such disputes; would the result produced be enforceable in the domestic setting; would the length of time taken to adjudicate disputes be reasonable and would the cost be acceptable to parties; and, would use of the mechanism be palatable to the parties?

The mechanisms examined included regional human rights mechanisms (courts and commissions), regional courts (such as the East African Court of Justice), regional intergovernmental organizations (such as the OAS and the AU), UN mechanisms (such as a modified version of the Secretary General's good offices function), and international *ad hoc* or institutional arbitration.

A number of mechanisms appeared to have particular promise and thus to warrant more focused examination by way of in-depth research and the initiation of dialogue with the relevant institution, organization or other body. The mechanisms identified as such were as follows:

Americas
- Inter-American Commission on Human Rights
- OAS (Office of Secretary General; Inter-American Juridical Committee)

Africa
- African Commission and Court on Human and Peoples' Rights
- East African Court of Justice
- ECOWAS Community Court of Justice
- South African Development Community Tribunal
- African Peer Review Mechanism
- AU Peace and Security Council

Europe
- European Court of Human Rights
- Council of Europe
- OSCE

Asia Pacific
- ASEAN
- South Pacific Forum

United Nations
- Office of Secretary General
- Peacebuilding Commission and Support Office
- UNHCHR

International arbitral mechanisms
- Permanent Court of Arbitration
- *ad hoc* arbitration (eg. Brcko arbitration)

Participants also engaged in creative discussions of a suggestion that separate mechanisms be adopted for economic components of peace agreements, that is, terms that touch upon economic interests in some way and could perhaps be quantified in monetary terms. An example given was the obligation of a central government to subsidize a new autonomous government for a certain period of time. Terms such as these could be separated out and put in an annex to the agreement, or even a separate agreement, with its own dispute resolution mechanisms. A liquidated damages provision could be included, under which a failure by one party to comply with certain obligations by a fixed date would incur a financial penalty. The parties could be required to put funds in an escrow account so that they would be available if and when a dispute arose. Participants agreed that this was a novel approach that called for further rigorous discussion to ascertain whether it was viable.

It was also suggested that efforts be made to involve international and regional financial organizations such as the World Bank and the African Development Bank, as well as national donor agencies, in the promotion of the use of dispute resolution mechanisms in intrastate peace agreements and/or the financing of the required capacity building of existing dispute resolution bodies.

The Initiative Launched

Having successfully identified a number of potential mechanisms that warrant further examination, the meeting constituted the launch of a new initiative that Kreddha wishes to run over the coming years, subject to the necessary funding being obtained. It envisages doing so with the assistance of various eminent individuals, including willing participants in this meeting, and in cooperation with relevant institutions and organizations.

This initiative would see in-depth research and focused exploration being undertaken of the mechanisms listed above, as well as the initiation of dialogue with relevant institutions, organizations and other bodies. Those bodies would be approached with the objective of obtaining a sense of their receptiveness to the initiative and to further the research undertaken.

It is contemplated that the initiative would culminate in the publication of a valuable end-product, most likely in the form of a manual that could be available to parties negotiating intrastate peace agreements, facilitators of peace processes and others involved in the drafting of such agreements. Such a manual would ideally contain a 'tool box' of dispute resolution mechanisms that parties could choose from when drafting agreements, with model clauses and commentary on those clauses. The commentary would explain how the clauses are intended to operate, which mechanisms are most appropriate in particular situations, and the nature and procedures of the institution or organization under the auspices of which certain mechanisms would be provided.

Numerous other activities would be undertaken with the aim of contributing to the contemplated manual or other end-product. These include: the compilation of an extensive collection of existing intrastate and interstate peace agreements containing dispute resolution clauses; the drafting of model clauses, with the assistance of international arbitration practitioners at Wilmer Cutler Pickering in respect of arbitration clauses; the writing of articles for publication by appropriate journals in order to raise awareness of the topic of this meeting and the initiative launched; and the holding of further meetings on this topic, including those that bring together specific actors such as drafters of intrastate peace agreements or government negotiators.

PROBLEM STATEMENT AND KEY QUESTIONS ADDRESSED

The opening session of the meeting was presented by Miek Boltjes, Kreddha's Director of Dialogue Facilitation. Ms. Boltjes set the scene for the discussions that would follow by describing Kreddha's observation, through its peace process facilitation work, of the extent to which the fear of non-implementation of commitments impacts detrimentally on the behavior of the negotiating parties. She then provided an overview of the conclusions of the earlier meeting co-hosted by Kreddha and the Centre UNESCO de Catalunya in order to place the discussions at this meeting in their proper context.

Ms. Boltjes noted Kreddha's observation that the fear of non-implementation is particularly strong among those negotiating on behalf of the population group. These actors have often experienced broken promises on the part of the central government in the past, are conscious of the asymmetry of the power relations between themselves and government negotiators, and are frustrated by their perception that, unlike the government, there is little they can do to secure full implementation of any agreement reached apart from retaining their weapons. Yet a commitment to disarm is usually sought by the government at an early stage in negotiations.

Driven by the fear of non-implementation, population group leaders often present and maintain demands far more radical than may be necessary to satisfy their constituents' interests. Such behavior on the part of the population group can put the negotiations themselves at risk, as governments often find themselves unable or unwilling to meet demands of this nature. The leaders of the population group are also often anxious to involve an international organization or institution in the peace process as a means of protection from non-implementation, whereas the government usually finds this unpalatable. The resulting tensions, together with heightened frustration on the part of the population group that there are in fact few if any such organizations or institutions that can play the role they are seeking in the peace process, makes it extremely difficult for governments and population groups to reach an agreement.

It was then emphasized that the impetus for this meeting came from the recommendations made at a 2003 meeting on the implementation of intrastate peace agreements and the role of third parties, co-hosted by Kreddha and the Centre UNESCO de Catalunya in Sitges, Spain ("the Sitges meeting"). At the Sitges meeting participants held in-depth discussions on the reasons for non-implementation, the measures that are employed by the parties and other actors to secure and promote implementation, and other possible means of promoting effective and satisfactory implementation in the future. The identified reasons for non-implementation included: a lack of political will on the part of the parties; dissatisfaction with the contents of the agreement; shortcomings in the terms of the agreement (such as ambiguities or omissions); a failure to entrench the agreement, particularly when it involves an autonomy arrangement; a lack of endorsement of the agreement by important domestic and international stakeholders; and, finally, the failure to include specific provisions establishing the institutions and mechanisms necessary to implement power-sharing arrangements. A summary of the conclusions reached at that meeting was provided by Ms. Boltjes but will not be reproduced in this report.[4] For the purposes of this report it suffices to note that a key general conclusion was that the implementation of intrastate peace agreements appears to be a far greater challenge for the parties than the negotiation and conclusion of those agreements. This conclusion gave rise in turn to a heightened appreciation of the need to employ all possible measures that can assist the parties in fulfilling their commitments, including assistance from third parties and other actors.

[4] Interested readers are referred to Miek Boltjes, Ed., Implementing Negotiated Agreements; The Real Challenge to Intrastate Peace, Kreddha, 2005 (to be published shortly).

Participants at the Sitges meeting examined a variety of measures that can be employed by the parties and other actors to assist in securing full implementation, including entrenchment of the agreement, the use of incentives and sanctions, and engaging international organizations to facilitate and monitor implementation. A measure of particular interest, and one which was recognized as requiring further in-depth examination, was the inclusion in intrastate peace agreements of a provision for the resolution of disputes that may arise in the implementation phase. Participants noted that access to international judicial or arbitral authorities was lacking, and considered that such access could contribute significantly to the level of confidence parties have in the peace process generally and the implementation of the agreement in particular. While acknowledging the value of all the measures discussed at the Sitges meeting, as well as the benefit of having available to the parties a variety of measures to choose from, only some of which may be appropriate in a given situation, Kreddha decided to hold this expert meeting on the specific topic of international adjudication mechanisms for intrastate peace agreements.

The second session of the meeting was presented by Michael van Walt, Kreddha's Executive Director. Mr. van Walt reiterated that the purpose of this meeting was to focus specifically on international adjudication as a dispute resolution mechanism and elaborated on the reasons for choosing this focus. He emphasized that it is normal for disputes to arise in the implementation phase, but that without prior agreement on mechanisms to resolve them such disputes can lead to renewed hostilities due to the volatility of the post-conflict situation. These disputes can become politicized very quickly, even though they often involve a genuine misunderstanding or differing interpretations on a relatively minor technical issue. While acknowledging that dispute resolution methods such as negotiation and mediation may in many instances be most appropriate and sufficient, Kreddha believes that access to a neutral, independent adjudicatory body held in high esteem by both parties could depoliticize a dispute, and ensure that other unrelated issues are not brought up for renegotiation. It could also help to overcome the fear of non-implementation that hinders progress during the negotiations phase.

Mr. van Walt noted that intrastate peace agreements often contain no dispute resolution clause at all, or, if they do, such a clause often provides for the use of typical alternative dispute resolution methods or for adjudication by national courts. While the latter mechanism may be useful in countries where respect for the rule of law is high and the national courts are seen to be impartial, this is often not the case. For the more vulnerable of the parties, and the one that most often has a complaint about non-implementation – the population group – a court or tribunal of undisputed independence, preferably with an international dimension, is of great appeal and, in Kreddha's observation, much hoped for. While governments may be hesitant to agree to put implementation disputes to a fully international body, they may see the advantages of submitting such disputes to courts or tribunals that have international credibility. The ability to refer potentially controversial and divisive matters to an adjudicatory body not involved in domestic politics may also be politically appealing to governments.

Paraphrasing Sir Arthur Watts QC, Mr. van Walt explained that the type of mechanism sought can perhaps be best described as one that is available to adjudicate disputes between states and sub-state entities (most often autonomous entities) and that is not fully international in the inter-state sense (such as the International Court of Justice) but also not entirely domestic. A key concern is that the mechanism can produce a binding decision. It should be borne in mind that the search is not for such mechanisms in order to replace other less adversarial and well recognized dispute resolution mechanisms, but rather in order that they can be available to parties for inclusion in a peace agreement in addition to those mechanisms.

Participants were then referred to the potential mechanisms identified by Kreddha in its background paper for the meeting. This paper appears at Appendix 4 to this report, and readers are encouraged to refer to it in conjunction with the summary of the discussions on various mechanisms that is provided in the next section. The potential mechanisms identified by Kreddha and elaborated on by Mr. van Walt included:

- UN mechanisms: use or adaptation of the good offices function of the UN Secretary General in a manner that produces a formal ruling; extending the mandates of UN missions such that they have the authority to resolve disputes formally in addition to simply assisting in resolving disputes; use of joint commissions chaired by a Special Representative of the UN Secretary General, with authority to issue rulings on disputes between the parties; use of the newly created Peacebuilding Commission.

- Regional organizations: mechanisms similar to those suggested above but provided by, for example, the OAS or the AU.

- Regional human rights mechanisms: broader use of existing regional human rights courts and commissions so as to provide parties with binding rulings on the implementation or interpretation of their intrastate peace agreements; extension of the mandate of the OSCE High Commissioner on National Minorities or creation of an institution similar to the OSCE Court of Conciliation and Arbitration.

- International arbitral mechanisms: use of the dispute resolution services provided by the Permanent Court of Arbitration (PCA) based in The Hague; use of *ad hoc* arbitration.

- International monitoring missions: extending the mandates of such missions such that they have authority to interpret and rule on disputes arising out of the peace agreement.

It was emphasized that the potential mechanisms identified by Kreddha were not intended to limit discussions, but rather provided a starting point from which any

mechanisms suggested by participants could be considered. Participants were also encouraged to take note of the dispute settlement provisions of the Draft Convention on Self-Determination Through Self-Administration drafted by Sir Arthur Watts QC as part of an initiative launched by Prince Hans Adams II of Liechtenstein in the 1990s. Those provisions included a specially created court to which both states and 'communities' could submit cases. While the initiative in the UN General Assembly was ultimately unsuccessful, the proposal of such a court is of interest in the context of this meeting. Finally, Mr. van Walt referred participants to the suggestion proffered by Professor Gudmundur Alfredsson, who had due to unexpected personal reasons been unable to attend the meeting, of the creation of a panel of experts that could on the request of the parties deliver expert opinions or even quasi-judgments.

Attention was then drawn to the key questions that would need to be explored and answered in relation to each potential mechanism in order to produce creative but realistic recommendations. As summarized in the background paper, these questions were:

a) Is it within the mandate or policy of the organisation or institution to deal with such disputes?
b) If not, what changes would need to be made to that mandate or policy, and what is the likelihood of those changes being made in the near future?
c) Is it currently possible, or might it be possible, to obtain a binding decision from the organisation or institution on such disputes?
d) Does the organisation or institution have the necessary expertise and skills base to consider the types of disputes likely to arise?
e) What procedure would be followed in adjudicating disputes? Consider rules of evidence, confidentiality, length of time, location etc.
f) What would be the cost implications for the parties? Would it be prohibitively expensive for population groups?
g) If the mechanism is to be used, how should the dispute resolution clause in the intrastate peace agreement be worded?
h) How could parties to intrastate conflicts be encouraged, and reluctant parties convinced, of the benefit of including a dispute resolution clause of this nature in their peace agreement? How could governments be helped to overcome the concern that the international nature of the mechanism intrudes in their domestic affairs?

To conclude the opening sessions, Mr. van Walt explained to participants that this meeting was not a one-time event, but rather the beginning of an initiative in which Kreddha hoped to work with participants and others who had expressed an interest in the topic to build on and take forward the recommendations that emanated from the meeting. It was acknowledged that adapting or improving existing international

adjudication mechanisms and creating new ones so as to serve the specific needs of parties to intrastate peace agreements was a difficult challenge, but it is one that Kreddha is committed to taking up with the assistance of those in attendance and other interested individuals.

The remainder of this report is presented by topic rather than in a linear fashion. It summarizes the key points made during all discussions on each potential mechanism, records the comments of participants throughout the meeting on various challenges faced and concerns held, and presents the various follow-up activities that were decided upon at the conclusion of the meeting.

EXAMINATION OF POTENTIAL MECHANISMS

Americas

The discussions on this region benefited from the expertise of Professor Jim Anaya of the University of Arizona, who provided and presented a paper on the adjudication of complaints within the Inter-American human rights system, with a particular focus on experiences involving indigenous peoples' claims.

Professor Anaya explained that the complaints procedures of the Inter-American human rights system, which functions as part of the Organization of the American States (OAS), have increasingly been used to address concerns of indigenous peoples. The Inter-American Human Rights Commission and Court have shown themselves to be increasingly hospitable to claims of such groups that challenge states to alter systemic practices and institutions, particularly with regard to land and resources. So far, however, they have shown limited capacity to implement solutions to the conflicts they address involving these types of claims.

Inter-American Commission on Human Rights

The Commission is a permanent organ of the OAS charged with monitoring human rights conditions throughout the Americas. Its terms of reference are specified in the OAS Charter, the American Convention on Human Rights and in the Commission's statute. As with other such commissions and tribunals, it may investigate and make recommendations in response to specific complaints against member states. Its competency to receive and act on complaints is formally limited to addressing alleged violations of rights specified in the American Convention and the American Declaration of the Rights and Duties of Man. While these instruments do not include specific reference to indigenous peoples or to collective rights of the type they assert, the Commission has since the 1980s increasingly taken an expansive view and interpretation of the relevant normative framework.

Professor Anaya expressed the view that the Commission's general competence mandate might be able to be used by parties to intrastate peace agreements in the manner we are seeking. This mandate is broader than that under the complaints procedure, allowing the Commission to "make recommendations to the governments of the states on the adoption of progressive measures in favor of human rights in the framework of their legislation, constitutional provisions and international commitments, as well as appropriate measures to further observance of those rights".[5] It also has the power to "respond to inquiries made by any member state through the General Secretariat of the Organization on matters related to human rights in the state and, within its possibilities, to provide those states with the advisory services they request".[6]

[5] Statute of the Inter-American Commission on Human Rights, Article 18(b).

[6] *Ibid*, Article 18(e).

It was suggested that the parties to an intrastate peace agreement could agree that the government side will seek the advice or recommendations of the Commission under one of these provisions when either party considers that a dispute has arisen as to implementation of the agreement. In other words, the government would ask the Commission to provide the parties with "advisory services" on the application or interpretation of the peace agreement. Both parties would have to agree to treat the "advice" as binding.

Professor Anaya noted that this would be a novel use of the Commission, but that it might be possible. He considered that the parties would need to consult with the Commission during the negotiations leading to the agreement, and specifically inform it that they wished it to play this role in the implementation phase. While he was of the view that the Commission probably did have the formal competence to take on such a role, he anticipated that the Commission may be reluctant due to resource limitations. These limitations would mean that the Commission would not be in a position to adjudicate on factual issues by way of its own investigations, but would need to rely on submissions from the parties.

Some concern was expressed at the fact that the population group would have to rely on the government to initiate this procedure. The question was raised as to whether the parties could agree that, immediately after the signing of the agreement, the government would request the Commission to put itself at the parties' disposal to provide advisory services whenever requested by either party. Professor Anaya felt that, practically speaking, it was difficult to envisage the Commission being able to accept such a request. To do so it would need a significant increase in its finances.

On a cautionary note, the meeting was informed of the poor implementation record of the Commission's decisions, which in reality have had little practical impact. Professor Anaya also warned that he senses that the Commission is reluctant to get too involved in intrastate conflicts, and that governments also prefer that it keep its distance. To have the Commission involved in the manner we are exploring would require much commitment, effort and energy on its part, and far greater resources both in terms of financing and personnel.

It was suggested that the Commission's general competence mandate be examined further, following which an approach could be made to the Commission in the appropriate manner through individuals to be suggested at a later date. Concrete proposals would need to be put to the Commission together with suggestions as to capacity building.

Inter-American Court on Human Rights

While, unlike the Commission, the Court has the power to issue binding decisions, it was felt that it was unlikely to provide a workable mechanism for our purposes. It is not possible for parties to agree to take a dispute to the Court, as cases can only be brought before the Court by the Commission. Moreover, cases must concern the application and interpretation of the American Convention on Human Rights.

The Court is empowered to give advisory opinions at the request of member states. Its mandate is more limited than that of the Commission however: such advice must relate to the interpretation of the American Convention or of other treaties concerning the protection of human rights in the Americas. If it was desired to make use of the Court in the same way as suggested above with respect to the general competence of the Commission, the Convention would need to be amended, or a new instrument adopted by the OAS General Assembly.

Organization of American States (OAS)

Mention was made of the good offices function of the OAS Secretary General, which has been used for a number of intrastate conflicts. It was noted however that the OAS Secretariat is small and under-resourced, and highly political.

Professor Anaya suggested that use of the Inter-American Democratic Charter may be worth exploring. This could perhaps provide a platform on which to create the type of mechanisms we are seeking. The Charter was adopted in 2001 and while it has been increasingly invoked by NGOs, there are no authoritative pronouncements on it yet. The question was raised, and considered worth exploring further, whether it would be possible to seek to develop jurisprudence on the Charter's principles through the office of the Secretary General or perhaps through the Inter-American Juridical Committee.

Africa

The discussions on this region benefited from the expertise of Mr. Ledum Mitee, Nigerian human rights and constitutional lawyer, and Professor Michelo Hansungule of the University of Pretoria. Professor Hansungule provided and presented a paper on the African human rights system, and Mr. Mitee made a presentation on his experiences with the African Commission on Human and Peoples' Rights.

Regional Human Rights Mechanisms

The African Charter on Human and Peoples' Rights can be distinguished from other human rights treaties in its protection of numerous economic, social and cultural rights and, significantly, of certain peoples' rights. The latter include the right of all peoples

to national and international peace and security[7], to equality[8], to self-determination[9], to freely dispose of their wealth and natural resources[10], and to their economic, social and cultural development with due regard to their freedom and identity[11]. While the term "peoples' is not defined in the Charter, the African Commission on Human and Peoples' Rights has recently adopted a report of its Working Group on Indigenous Populations/Communities in which it is concluded that the rights of peoples under the Charter should be available to "sections of populations within nation states, including indigenous peoples and communities."[12]

African Commission on Human and Peoples' Rights

The Commission is charged with the promotion and protection of human and peoples' rights and the interpretation of the Charter. It may consider communications submitted by individuals and non-governmental organisations acting on behalf of alleged victims of human rights violations. Communications must satisfy the exhaustion of local remedies requirement before the Commission will have jurisdiction (unless it can be shown that there are no local remedies or that pursuing such remedies will be unduly prolonged).

Professor Hansungule informed the meeting that to date there have been just three cases on peoples' rights, one of which (*Endoris People* v. *Kenya*) is still ongoing. In the celebrated case of *SERAC and CESR* v. *Nigeria*, the Commission found that Nigeria had violated certain economic and social rights of the people of Ogoniland and appealed to the Nigerian government to take specified remedial action for those violations. While the Commission has no binding powers and can make recommendations only, the Commission's 2001 decision appeared less advisory in tone and contained fairly robust directions. In spite of this, however, it has not yet been implemented by the Nigerian government.

Professor Hansungule urged the meeting not to dismiss the possibility of mediation through the Commission, expressing the view that in some cases of the nature we are considering a mediated settlement could be more effective than obtaining a decision through the communications process. While it is not certain that the Commission can take on a mediating role, there is room for argument that it can do so under Article 46 of the Charter. Seeking the appointment of mediators by the Commission could also be something worth exploring.

[7] Article 23.

[8] Article 19.

[9] Article 20.

[10] Article 21.

[11] Article 22.

[12] ACHPR /Res.65(XXXIV)03: Resolution On The Adoption Of The "Report Of The African Commission's Working Group On Indigenous Populations/Communities"; Report of the ACHPR Working Group on Indigenous Populations/Communities in Africa, p.112, available at www.iwgia.org/sw2186.asp.

Note was also made of the ability of the Commission, at the request of the Assembly of Heads of State and Government, to undertake an in-depth study of "special cases" in which one or more communications "reveal the existence of a series or massive violations of human and peoples' rights".[13] In such cases the Commission makes a factual report accompanied by its findings and recommendations. This mechanism enables the Commission to get involved at an earlier stage than under the lengthy communications process.

Some concern was expressed as to the Commission's lack of independence from the African Union. Commissioners, while elected by national politicians, are required to serve in their personal capacity. Nevertheless, the Commission, which was established *outside* the AU framework, does not appear to be truly independent of regional political authorities. This reality was highlighted by the events that followed the Commission's report on its fact finding mission to Zimbabwe in 2002, undertaken using its broad investigatory powers under the Charter, described in Professor Hansungule's paper.

There was some discussion of the scantiness of the enforcement and compliance control mechanisms contained in the African Charter. The lack of implementation of the Ogoni decision was cited as an example of the limitations of the African human rights system. Professor Hansungule expressed the view that African governments tended to treat judgments of their own national courts with greater respect than decisions of the Commission. Mr. Mitee agreed, adding that he sensed a growing frustration on the part of the Commission that its rulings were being flouted. He mentioned, however, an encouraging recent decision of the Nigerian Supreme Court which might allow for an argument to be made that decisions of the Comission have a higher status than domestic law. In 2000 the Court ruled that the 1990 Act incorporating the Charter into Nigerian domestic law has an international character so that in any conflict between it and another statute, its provisions will prevail.[14] The Court described the Charter as possessing 'a greater vigour and strength" than any other domestic statute, with the exception of the Nigerian Constitution. Its decision overturned a Federal High Court ruling that international legal obligations were overruled by military decrees which prohibited recourse to the courts.

Mr. Mitee noted that in recent discussions between the Ogoni people and the Commission regarding the difficulties faced in having the Commission's 2001 decision implemented, the Commission suggested that a new communication be submitted claiming non-implementation of that decision, or that an approach be made by the Ogoni people to the national human rights commission in Nigeria. The Ogoni people are considering, however, bringing an action in the Nigerian national courts relying on the abovementioned case and making the argument that, by extension, Commission decisions should have a higher status than domestic law. It is hoped that this may assist in convincing the government to implement the 2001 decision.

[13] Article 58.

[14] *Abacha & Ors* v *Fawehinmi* [2000] ICHRL 23 (28 April 2000).

Professor Hansungule commented that it should not be for the victims of unimplemented Commission decisions to approach national human rights commissions, but rather for those commissions to get involved on their own initiative. One means of increasing the likelihood of implementation of Commission decisions is for the national human rights commission to be a party to the communication, so that it has some responsibility or role to play after the issue of the decision.

African Court of Human and Peoples' Rights

The Protocol establishing the Court was adopted in 1998 and entered into force on 1 January 2004. The Protocol provides that actions may be brought before the Court on the basis of any human rights instrument which has been ratified by the state party in question.[15] This would include international human rights treaties. Decisions of the Court will be binding. Moreover, advisory opinions can be asked for by not only states parties and AU organs, but by any African NGO that has been recognized by the AU, provided that at the time of ratifying the Protocol or thereafter, the state in question has made a declaration accepting the jurisdiction of the Court to hear such cases.

The statute for the Court has not yet been promulgated and the seat of the Court is yet to be determined. At this stage it appears that the Court may be established as a special chamber of the African Court of Justice. In July 2004 the AU determined that the Court should be merged with the Court of Justice, and a draft instrument establishing the merged court is supposed to be completed for consideration at the AU's ordinary session in January 2006. It appears to be hoped that the Court will be operational by mid-2006.

Of concern is the fact that to date only one State has filed a declaration accepting the jurisdiction of the Court to hear cases filed by individuals. Unless more states parties file such declarations, standing before the Court could end up being the preserve only of the Commission.

Professor Hansungule pointed out that approaching the Court at this time to discuss its use in our context could be worthwhile given that the instrument establishing the merged court is still a work in progress.

Sub-Regional Courts in Africa

Following the above discussion, during which it was recognized that the African human rights system may be of only limited use to parties to intrastate peace agreements in the manner that we are seeking, there was considerable interest in the opportunities presented by Africa's sub-regional courts, particularly the East African Court of Justice.

[15] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Article 3.1.

East African Court of Justice

The East African Court of Justice became operational in late 2001, having been established under the 1999 East African Community Treaty to which Kenya, Uganda and Tanzania are parties. The Court has a broad mandate to interpret, apply and ensure compliance with the Treaty. Professor Hansungule pointed out that while the Treaty was intended largely to foster cooperation between the member states in various fields such as trade, investment, and agriculture, it allows for expansion of the Court's mandate to human rights matters and calls are currently being made for that expansion to occur. One of the objectives of the Community is stated to be the promotion of peace, security and stability within the member states, and a fundamental principle governing the achievement of the objectives of the Community by the member states is the peaceful settlement of disputes.

Of particular interest to the meeting was the provision giving jurisdiction to the Court over any matter "arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court."[16] Also of interest is the similar clause conferring jurisdiction in respect of any matter "arising from an arbitration clause contained in such a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party."[17] Such jurisdiction appears to be fairly unique, as does the fact that the Court has adopted its own arbitration rules. It is worth exploring whether there is any possibility of these jurisdictional provisions being broadened if and when the Court's mandate is extended to cover human rights matters, in a manner that would enable parties to include an arbitration clause conferring jurisdiction on the Court in their intrastate peace agreements.

Professor Hansungule informed the meeting that three cases have been heard and determined by the Court to date, and that in each case the decision has been implemented. He also pointed out that while the membership of the Community is small, other states are interested in joining.

The level of interest in this court led to a proposal to analyse its mandate and procedures in greater depth, to investigate how it came to be established in this way, and to determine whether there are other courts whose mandates could be interpreted in this manner. Consideration should be given to whether it is a model that could be exported to other regions. As noted later in this report, it is intended that an approach be made to the Court once further research has been carried out.

ECOWAS Community Court of Justice

This Court was established by the 1991 ECOWAS Treaty (revising the 1975 Treaty) but is not yet fully operational. 15 West African countries are parties to the Treaty.

[16] EAC Treaty, Article 32(c).

[17] *Ibid*, Article 32(a).

The Treaty has as its focus the establishment of an economic community, but like the EAC Treaty, it contains broad provisions under which member states declare their adherence to "promotion of a peaceful environment as a prerequisite for economic development" and "recognition, promotion and protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights".

A January 2005 amendment to the Protocol establishing the Court gave individuals the ability to institute proceedings against any of the member states relating to interpretation of provisions of the Treaty. Significantly, the draft Supplementary Protocol considered at that time also gave the court the power to act as arbitrator pending establishment of the arbitral tribunal provided for in the Treaty, and jurisdiction over "any matter provided for in an agreement where the parties provide that the Court shall settle disputes arising from the agreement."[18] Preliminary research since this meeting has not revealed whether these provisions were in fact adopted.

Also of interest is the ECOWAS Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security adopted in 1999. This Protocol established a mechanism for collective security and peace in the region and created a Mediation and Security Council.

Professor Hansungule noted that the ECOWAS Council of Ministers has issued a number of recommendations on the resolution of disputes in the region.

This Court also appears to be worthy of further investigation.

South African Development Community (SADC) Tribunal

Brief mention was made by Professor Hansungule of this Tribunal, established very recently in November 2005. The Tribunal has a human rights mandate, and has just registered its first case, relating to the eviction of squatters in Zimbabwe. It may also warrant further investigation.

Other Regional Mechanisms

African Peer Review Mechanism (APRM)

Professor Hansungule urged the meeting to give consideration to this relatively new, self-monitoring mechanism which is voluntarily acceded to by members of the AU. It is a non-binding mechanism whereby volunteering states undertake a self-assessment of their compliance with agreed political, economic and corporate governance values, codes and standards contained in the Declaration on Democracy, Political, Economic and Corporate Governance.

[18] Supplementary Protocol A/SP.1/11/04 amending the Preamble and Articles 1, 2, 9, 22 and 30 of Protocol A/P,1/7/91 relating to the Community Court of Justice and Article 4 paragraph 1 of the English version of the Protocol, Article 3.

A Secretariat and Panel of Eminent Persons has been established, and review teams make visits to the volunteering states to assist in the process. These teams produce reports which are discussed with the government in question before being submitted to the participating heads of state and government through the APRM Secretariat. Participating governments provide assistance to the government under review to rectify identified shortcomings. If the necessary political will is not forthcoming from that government, participating governments attempt to engage it in constructive dialogue while offering technical and other appropriate assistance.

To date, Ghana and Rwanda have submitted to the review process and another five states are in line for upcoming reviews.

It was felt that this mechanism warranted further examination. Questions to consider include whether parties to intrastate peace agreements could agree that the government would submit itself to peer review at appropriate regular intervals in the implementation process, how such agreement could be enforced should the government renege on that promise, whether it would be possible to ensure that implementation of the agreement was included in the peer review process, and whether the report produced would be available to the population group as well as the government in question. If this mechanism appears to have real potential in our context, it should be considered whether it could be exported elsewhere.

AU Peace and Security Council

Brief mention was made of this body by Professor Hansungule. The Council is an organ of the AU, established in 2002 for the prevention, management and resolution of conflicts. It is composed of 15 elected member states. It has as one of its functions "peacemaking, including the use of good offices, mediation, conciliation and enquiry."[19]

This mechanism also warrants further examination.

[19] Protocol Relating to the Establishment of the Peace and Security Council of the African Union, Article 6(c).

Other Regions

Europe

It was noted that certain states in which intrastate conflicts currently exist are members of the Council of Europe. Consideration should be given to whether there are any potential mechanisms within this organization.

It was also suggested that the European Court of Human Rights could perhaps over time provide a mechanism, such as the provision of technical assistance regarding the implementation of peace agreements. This should be investigated further, while bearing in mind that establishing such a mechanism would take quite some time, if it was indeed possible.

Asia Pacific

There was very little discussion of potential mechanisms in this region, owing to participants knowing little about the institutions and their activities in the region. Mr. van Walt suggested looking into what might be available at ASEAN, through its Secretariat in Jakarta, which he understood worked together with the Indonesian human rights commission. Investigations should also be carried out with respect to the South Pacific Forum.

United Nations

Discussions on potential UN mechanisms benefited greatly from the participation of Professor Danilo Turk, who served as Assistant Secretary-General for Political Affairs from 2000 to 2005 after 20 years of involvement with the UN.

In his presentation, Professor Turk noted that the UN now involves itself in post-conflict situations in a variety of ways, although not necessarily in a systematic manner. With the High Level Panel Report concluding that, due largely to interventions by third parties including the UN, the number of conflicts worldwide is on the decline, there is now an emphasis on peacebuilding in post-conflict situations. This shift in emphasis is evident in the decision last year to establish a Peacebuilding Commission and Support Office.

A positive development is the increasing acceptance of the importance of focusing attention on human rights and the rule of law in post-conflict situations. This dynamic looks set to continue. Professor Turk cautioned, however, that some of the conflicts of the nature with which we are concerned may not have the necessary profile to attract UN attention. He also expressed the view that it was most likely that the UN could provide parties to intrastate peace agreements with *ad hoc* mechanisms rather than a permanent body to which they could be certain they could take their disputes. In spite of this, however, he considered that it was still worth trying to innovate through bodies such as the new Peacebuilding Commission and the UNHCHR.

UN Secretary General

There was some discussion as to the use of the Secretary General's good offices. Professor Turk advised that UN involvement in the peace process was not a prerequisite to the Secretary General offering his good offices, but that it would be crucial to keep his Office informed throughout that process if it was anticipated that use of this mechanism would be desired. The Aceh peace process was noted as an example of one where the Secretary General was kept fully informed of developments in order that he could get involved if necessary. In Nepal, the Secretary General has offered his good offices to assist in resolving the conflict between the government and the Maoists but this offer has been rebuffed.

It was emphasised that if the parties to an intrastate peace agreement wished to agree that any future disputes as to implementation would be taken to the Secretary General for resolution, it would be essential to involve the UN (probably the Office of Legal Affairs) at the time of the drafting of the peace agreement. Whether it would be possible to obtain the agreement of the Secretary General to take on such a role would depend in part on the UN's perception of the conflict and its destabilizing effect in the region.

It was felt that this potential mechanism should be explored further, and an approach made at an appropriate time to the UN Office of Legal Affairs.

UN Peacebuilding Commission and Support Office

As noted in the background paper for the meeting, the Peacebuilding Commission is a welcome institutional innovation which arose out of a recognition by UN member states of 'the need for a dedicated institutional mechanism to address the special needs of countries emerging from conflict towards recovery, reintegration and reconstruction.'[20] It is likely to be established during 2006, and is expected to work in a country-specific manner.

It was suggested that Kreddha follow developments closely as to the creation of the Commission, and make contact with the Office of Legal Affairs. It might be possible for the Commission to play a role in resolving disputes over implementation of specific intrastate peace agreements, although whether it could play an adjudicatory role is uncertain. Professor Turk took the view that West Africa was likely to feature as a priority in the Commission's agenda.

At the 2005 UN Summit the General Assembly also supported the creation of a dedicated "Rule of Law Assistance Unit" within the UN Secretariat. This unit is

[20] A/RES/60/1, para. 97.

intended to help national efforts to re-establish the rule of law in societies emerging from instability and war. It will do so by, amongst other activities, providing technical assistance and capacity building. The Unit as supported by the General Assembly is very much in line with an initiative submitted by Jordan, Finland and Germany some time ago to the Secretary General. It appears that it will be established as part of the Peacebuilding Support Office, although the details of how it will be structured will be supplied by a report that the Secretary-General is yet to submit to the General Assembly.

There was a great deal of interest in the idea of this Unit providing parties to intrastate peace agreements with a mechanism for resolving implementation disputes, proffered as technical assistance. While such a mechanism would presumably be less binding than adjudication, it was felt that it could still be very useful. Mention was made of the way in which states have been increasingly willing to accept electoral assistance from the UN, leading to the creation of a dedicated Electoral Assistance Division in the Department of Political Affairs. Perhaps a similar accepted 'system' could be created under which the Rule of Law Assistance Unit was available to parties for the resolution of their implementation disputes.

Mention was also made of the rule of law thematic debates that have been taking place at the UN. These debates were initiated by the UK during its Presidency of the Security Council. It was suggested that Kreddha get involved in these debates, ideally through a receptive Security Council member, and attempt to introduce the topic of this meeting into the debates.

It was emphasized how important it will be for Kreddha to establish good working relationships with key individuals within the UN, particularly in the Office of Legal Affairs, and to approach these individuals in the appropriate manner. There is some urgency to do so given that discussions are currently taking place within the UN as to the establishment of the Peacebuilding Commission and Support Office.

Professor Turk suggested that the International Peace Academy in New York might be a potential partner for Kreddha on developing the UN mechanisms under discussion. The IPA was involved in facilitating the work of the High Level Panel and is currently planning its future programs and projects. An approach to this organization in the near future could be fruitful.

UNHCHR In-Country Offices

Brief mention was made of UN human rights field presences in certain states. In Nepal, the Office of the High Commissioner on Human Rights is implementing a joint programme with UNDP aimed at providing capacity building to Nepal's national human rights commission. It also maintains a senior human rights adviser attached to the UN country team there. Another example of such a field presence is in Guyana, where in June 2004 a human rights advisor was appointed to work as part of the UN country team in that state.

Professor Turk was of the view that it would be worth exploring whether a mechanism of the type desired could be provided by the UNHCHR through its field presences.

International Arbitration

It was explained by Mr. van Walt that Kreddha's interest in arbitration as a dispute resolution mechanism that could be used by parties to intrastate peace agreements arose out of a paper presented by Ms. Wendy Miles at the Sitges meeting in 2003. In that paper Ms. Miles explored the possible use of existing international dispute resolution bodies for the adjudication of intrastate disputes, and concluded that there are very few, if any such bodies to which population groups and states can bring their disputes for resolution. She was firmly of the view, however, that international arbitration provides a promising mechanism for the resolution of such disputes. She also suggested that a particularly interesting form of arbitration to explore was that conducted under the auspices of the Permanent Court of Arbitration (PCA).

Discussions on this potential mechanism benefited greatly from the participation of Mr. Tjaco van den Hout, Secretary General of the PCA, and Mr. Gary Born and Ms. Miles, international arbitration partners at Wilmer Cutler Pickering Hale and Dorr. Mr. van den Hout gave a presentation on the services of the PCA and Ms. Miles provided and presented a paper on the issues of enforcement and immunity.

Nature and Appeal of International Arbitration

As noted in Ms. Miles' paper, arbitration is a dispute resolution method that provides an alternative to negotiation, mediation, conciliation or litigation. It differs from these forms of dispute resolution because it is agreed to by the parties, provides for resolution of disputes by independent decision makers and, significantly, creates a binding and enforceable award.

Ms. Miles emphasized that on the international stage, the arbitral process has both familiarity and credibility. It has a great deal of support internationally as a means of resolving both commercial and non-commercial disputes. States generally tend to have confidence in and respect the outcome of international arbitral proceedings.

The advantages of arbitration as outlined by Ms. Miles are numerous. It is less formal and more flexible than court proceedings, yet arbitral decisions are still final and binding. The outcome can be kept confidential. The arbitral tribunal's terms of reference are stipulated by the parties. The arbitrators themselves are also chosen by the parties, meaning that they can be selected on the basis of their specialized knowledge of the issues involved. The parties have a wide degree of autonomy in choosing what procedures will be followed, what law will apply, and the location and language of the hearings. As Mr. Born put it, the overriding advantage of arbitration is that it is a creature of contract, and thus it can be whatever the parties agree it to be.

Mr. Born explained that, generally speaking, arbitration can be divided into two types: technical, speedy arbitration where tribunals determine very technical issues on the basis of documents alone, such as sports arbitration and some trade arbitration; and lengthier arbitration involving more difficult value judgments by the arbitrators, such as arbitration based on bilateral investment treaties. The choice of which type of arbitration to use in our context should be driven by the nature of the disputes likely to arise. It is possible to stipulate that certain disputes will be resolved by the first, more straightforward form of arbitration while others will be referred to specialized arbitral tribunals.

Mr. Born considered that a useful approach may be for parties to commit to the principle of arbitration at an early stage in negotiations, and then agree on the form of arbitration to be used once specific obligations are settled on and the types of disputes likely to arise become clearer. He gave the analogy of a term sheet used in commercial negotiations, setting out the basic terms to which the parties commit at the outset of those negotiations.

Ms. Miles explained the common use of multilayered, or tiered dispute resolution clauses, where arbitration is provided for as a last resort mechanism after recourse to other mechanisms has failed. Arbitration could be preceded by good faith high level negotiations, mediation, fact finding, expert determination, or conciliation in whichever combination appears appropriate. Participants expressed some reservations about the usefulness of good faith negotiations, and pointed out that in some situations the parties (especially the population group) may want to proceed directly to arbitration rather than be required to engage in what they perceive as pointless negotiations. It was explained that this concern could be addressed by providing for direct recourse to arbitration for certain straightforward and perhaps technical disputes. Where the dispute was over implementation delays, however, it may be preferable to require the parties to negotiate as a first step. There was particular interest amongst the participants in the use of conciliation, followed by arbitration where the former mechanism fails to resolve the dispute. This was addressed in more detail by Mr. van den Hout (see below).

Participants agreed that the choice of arbitrators would be critical to the success of arbitration in this context. Mention was made of the usual practice in investment arbitration, where each party chooses one arbitrator and those two party appointed arbitrators then appoint the third arbitrator who chairs the tribunal. In significant cases there may be a five member tribunal, with each party choosing two arbitrators. This was the case in the Eritrea Yemen arbitration, and it was seen to be useful in that it allowed each party to choose both a regional and an international arbitrator. It was emphasized that the personality and stature of the chair of the tribunal is also critical. In the former Yugoslavia, for example, the President of the Arbitration Commission, Robert Badinter, was highly respected in the region. It was felt that this played a significant part in the success of the arbitrations he presided over.

There was some discussion as to the desirability of institutional as opposed to *ad hoc*

Many felt that the involvement of an international and well respected institution such as the PCA would lend further credibility to the arbitral process, and may increase international political pressure on the parties to honor the arbitral award. Examples of *ad hoc* arbitration in contexts similar to that of intrastate conflicts do exist, however, and these were felt worthy of further examination and consideration also.

Permanent Court of Arbitration

Mr. van den Hout, Secretary General of the PCA, addressed the meeting on the potential use of the services offered by the PCA by parties to intrastate peace agreements. Referring to the preamble of the PCA's founding conventions, which states that one of the prime objectives of the institution is to work for the maintenance of general peace, Mr. van den Hout felt that Kreddha's work and objectives resonate with those of the PCA. He indicated that the PCA could perhaps play a role in resolving intrastate disputes of the type under discussion by way of fact finding, conciliation or arbitration. He also noted that discussions were taking place between the PCA and the UN regarding the use of the PCA's dispute resolution services to support the Secretary General in his good offices function. The outcome of these discussions could be of much relevance to this topic.

Mr. van den Hout urged the meeting not to underestimate the value of dispute resolution methods short of arbitration, which while not producing final and binding arbitral awards can accommodate parties' cultural and psychological needs. The PCA developed modern Rules of Procedure for fact finding and conciliation in the 1990s, and it would be interested in promoting the use of these by parties to intrastate peace agreements.

Fact finding has recently seen a revival as a dispute resolution method, and is often used in international water disputes. The PCA Optional Rules of Procedure for Fact-Finding Commissions of Inquiry entered into effect in 1997. They provide a self-contained procedural framework for commissions of inquiry which parties can choose to adopt. Given that implementation disputes between parties to intrastate agreements will often involve a difference of opinion on certain critical facts, this process may be particularly appealing. Parties have the freedom to identify the type of facts to be found by the commission, and are entitled to determine the place at which the commission meets. The commission may consist of one, three or five commissioners, and parties may enlist the assistance of the PCA in the appointment of commissioners with the required technical expertise. The parties are free to make the commission's report public if they so agree.

The PCA's Optional Conciliation Rules entered into effect in 1996. They describe how to start a conciliation, how to appoint conciliators, what functions conciliators are expected to perform, and how to encourage parties to speak freely and candidly with conciliators while at the same time preserving necessary confidentiality. The Rules also describe how, if the conciliation is unsuccessful, it may be easily terminated so as not to delay or prejudice recourse to arbitration or other means for ultimately resolving the dispute. The role of the conciliator(s) is to assist parties to understand

the issues and to reach an amicable settlement of their dispute. The conciliator may recommend terms of settlement if and when it is considered wise to do so, but is not required to give a recommendation.

There was some discussion of the ability of parties to intrastate peace agreements to agree that the outcome of conciliation will be embodied in a settlement agreement which they will treat as binding, bringing the process closer to arbitration. This was seen as particularly desirable, and was confirmed to be possible. Although the PCA does not have any experience of parties making such an agreement in advance of the process, it is often done in the commercial sphere. Mention was also made of the recent PCA arbitration between Malaysia and Singapore where the parties settled their dispute before the hearings commenced and the arbitral tribunal then issued an Award on Agreed Terms. It might also be possible for the parties to agree that the conciliator(s) will issue a public report, which would place more pressure on the parties to abide by the result. Finally, mention was made of the possibility of creating a monitoring body to oversee the implementation of the conciliated settlement. There is provision for creating such a body in the PCA's Optional Rules for Conciliation of Disputes Relating to Natural Resources and the Environment, and the parties to intrastate peace agreements could also consider agreeing to create such a body.

Mr. van den Hout then turned to discuss arbitration under the auspices of the PCA. As noted in Kreddha's background paper, the PCA has adopted Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State which could potentially be used by parties to intrastate peace agreements.

Mr. van den Hout told the meeting that the PCA would consider administering arbitrations of intrastate disputes of the type under discussion provided that the parties had unequivocally agreed to the use of these Rules. He issued a caution however that the PCA would set the bar high in its prima facie screening of a request for it to administer an arbitration of this nature. The key criteria to be met are that there is written agreement to the process (ideally in the substantive agreement between the parties), that the dispute is legal in nature, and that it does not involve third parties. With respect to the involvement of third parties, he gave the example of the Larsen/Hawaiian Kingdom arbitration in which the tribunal found that it did not have jurisdiction owing to the fact that it could not issue an award without ruling on the legality of acts of the United States, which was not a party to the proceedings and had not consented to them. The PCA would in all cases need to check that no third party rights were affected by the dispute before accepting a request to administer an arbitration.

A note of caution was also sounded about the enforceability of arbitral awards. Mention was made of the continuing refusal of Ethiopia to abide by the 2001 decision of the Eritrea Ethiopia Boundary Commission. Ethiopia's rejection of the decision as illegal and unjust continues despite Security Council resolutions urging it to abide by that decision and cooperate in the border demarcation process. This situation is disappointing and demonstrates the difficulty of enforcing an award when one party refuses to abide by it. It would presumably be even more difficult when the dispute is intrastate in nature.

In response to questions from the participants, Mr. van den Hout acknowledged that the PCA does have certain institutional concerns about taking on cases of the type under discussion. Its main concern relates to the possibility that another state may have an interest in the dispute. Such an interest would need to be legal rather than political, however, for it to preclude the PCA's involvement, and it would be possible for the third state to consent to the process. It was suggested that the parties could discuss their proposed dispute resolution clause with the PCA at the time of negotiations, and Mr. van den Hout confirmed that the PCA would be willing to engage in this type of exploratory talks. From the parties' perspective this would be crucial in order to give them the certainty they need that their chosen dispute resolution mechanism will be effective. Mr. van den Hout also encouraged once again the use of fact finding commissions, and noted that where parties had agreed to this process the PCA would be much freer to take on an administrative role.

The meeting acknowledged the PCA's cautious attitude to the possibility of administering arbitrations between parties to intrastate peace agreements. It appeared that this was due in part to its uncomfortable experience with the Larsen/Hawaiian Kingdom arbitration. It was felt that matters should be further discussed with the PCA and the PCA be kept informed of progress on this topic. A helpful approach may be to seek feedback from the PCA on model arbitration clauses drafted as part of the contemplated follow up activities to this meeting.

Examples of *Ad Hoc* Arbitration

There was also a great deal of interest in *ad hoc* arbitration, two particular examples of which were discussed. The first, mentioned by Mr. van den Hout, was the dispute settlement clause contained in the Liberation Tigers of Tamil Eelam (LTTE) October 2003 proposal for the establishment of an interim self-governing authority for the northeast region.[21] That clause, which it should be emphasized is contained in a proposal that has not been accepted by the Sri Lankan government, provides as follows:

> Where a dispute arises between the Parties to this Agreement as to its interpretation or implementation, and it cannot be resolved by any other means acceptable to the Parties including conciliation by the Royal Norwegian Government, there shall be an arbitration before a tribunal consisting of three members, two of whom shall be appointed by each Party. The third member**,** who shall be the Chairperson of the tribunal**,** shall be appointed jointly by the Parties concerned. In the event of any disagreement over the appointment of the Chairperson, the Parties shall ask the President of the International Court of Justice to appoint the Chairperson.

[21] The Proposal by The Liberation Tigers of Tamil Eelam on Behalf of the Tamil People for an Agreement to Establish an Interim Self-Governing Authority for the Northeast of the Island of Sri Lanka, clause 22, available at www.ltteps.org.

> In the determination of any dispute the arbitrators shall ensure the parity of status of the LTTE and the GOSL and shall resolve disputes by reference only to the provisions of this Agreement.
> The decision of the arbitrators shall be final and conclusive and it shall be binding on the Parties to the dispute.

This was the only arbitration clause contained in either a proposed or concluded intrastate peace agreement of which the participants were aware. It was of great interest to the meeting, and it was decided that its genesis should be investigated and the clause itself examined more closely. An interesting aspect is its provision for the President of the International Court of Justice to act as appointing authority. A better choice may be the Secretary General of the PCA, given that that institution would be able to administer the arbitration if the parties so agreed (and the criteria mentioned by Mr. van den Hout were met), unlike the ICJ.

Mention was also made of the Brcko arbitration provided for in the Dayton Agreement. That agreement called for an arbitral tribunal to decide which ethnic group would control the strategically important city of Brcko in Republika Srpska. Participants did not know much about the workings of the tribunal but understood that the process had been successful, and it was considered worthwhile investigating it further to see if there were aspects that could be applied in our context.

Issues of Enforcement and Immunity

The difficult issue of enforcement of arbitral awards was discussed in some depth, aided by Ms. Miles' paper and presentation. Ms. Miles explained that enforcing an arbitration *clause*, as opposed to an *award*, should not pose a problem so long as the clause has been carefully drafted. A good arbitration clause will provide for default situations such as where one party refuses to participate or to appoint an arbitrator, or maintains that no arbitrable dispute exists, allowing the other party to nonetheless initiate and participate in arbitration proceedings.

As for arbitral awards, it is unlikely that the enforcement framework provided by the New York Convention for commercial arbitral awards could be invoked in our context. While it might be possible for parties to intrastate peace agreements to agree that any award will be enforceable in the national courts of the state party, it is not certain that this would be sufficient. The enforcement framework provided by the New York Convention allows parties to enforce a foreign award in the national courts of a state party to that Convention in order that they can gain access to assets held by the opposing party in that state. The question was asked whether parties to intrastate peace agreements would have any need to take such action in a third state. This question led to a creative discussion about population groups seeking to enforce an award against the government party in a state where the government owns assets, and the possibility of a population group seeking financial compensation for non-implementation. This discussion is summarized below.

It was acknowledged that further thought will need to be given to the issue of enforcement of arbitral awards.

Sovereign immunity was touched upon only briefly, but was addressed in some detail in Ms. Miles' paper. It was noted that entry by a state into an arbitration agreement is generally accepted as a waiver of immunity to the jurisdiction of the arbitral tribunal. It is arguable however that such a waiver may not extend to execution of the award, meaning that arbitration clauses need to be carefully worded so as to make it clear that immunity from execution is waived as well as immunity from arbitration. Ms. Miles' view was that at the end of the day, traditional concepts of sovereign or state immunity were unlikely to be a bar to arbitration.

Other suggested mechanisms

Panel of Experts

Participants briefly discussed a suggestion made by Professor Gudmundur Alfredsson, who was unable to attend the meeting but sent his preliminary thoughts to Kreddha in advance of the meeting. Professor Alfredsson suggested setting up a panel of experts comprising appropriate eminent persons such as former senior staff of the UN Secretariat, retired ICJ judges, former members of the International Law Commission or senior academics. Such a panel could perhaps deliver expert opinions or even quasi-judgments on the applicable laws and legal options regarding autonomy legislation and agreements, upon the request of the parties. Over time, the panel's influence as well as confidence in it would come to be established.

Participants were interested in this suggestion but felt that it could prove difficult to set up such a panel, as practical problems and political issues would inevitably arise. Mention was made of the debate in the international arbitration sphere of the usefulness of lists of arbitrators or standing panels. The general consensus was that this suggestion should be revisited at a later date, after the important work of approaching relevant identified institutions and organizations in a bid to begin a mutual education process has been undertaken.

Separate Mechanisms for Economic Components of Peace Agreements

While discussing the issue of enforceability of arbitral awards, the idea was raised of including in a peace agreement a liquidated damages clause under which a failure by one party to comply with an obligation in the agreement by a certain date would incur a financial penalty. Participants noted that there are often significant amounts of money involved in intrastate conflicts, in the form of oil, forestry or other natural resources. It was acknowledged that this was a novel approach to intrastate peace agreements, but many felt that it was one worth exploring further.

Participants discussed examples of obligations typically found in peace agreements that touched upon economic interests in some way and could perhaps be quantified in monetary terms. One example mentioned was the obligation of the central government to subsidize the new autonomous government for a certain period of time. A financial penalty could be built into the agreement which could be invoked if the required funds were not transferred. Another example given was a provision under which a percentage of the revenue from the extraction of copper was to be paid to the population group.

The suggestion was made that provisions such as these could be separated out and put in an annex to the agreement, or even a separate agreement, with its own dispute resolution mechanisms. The parties could be required to put funds in an escrow account so that they would be available if and when a dispute arose. By separating out the more 'commercial' aspects of an agreement in this way, it might be possible to take advantage of the international arbitration enforcement framework mentioned above. It was also felt that, irrespective of the impact that this approach had on enforceability, it was well worth considering. It might encourage parties to examine what they stand to gain or lose in financial terms during negotiations, and this could in turn help to depoliticize the conflict.

While there was much stimulating discussion of and enthusiasm about this idea, some words of caution were also given. It was noted that power sharing arrangements are very complex and many elements will not be able to be framed in monetary terms. Many conflict areas are not rich in natural resources, and many agreements contain provisions regarding the sharing of taxes rather than revenue, making it more difficult to quantify obligations in financial terms. It was also felt that even if certain disputes could be 'commercialized' in this manner, it was still unlikely that commercial arbitration institutions such as the ICC would be open to administering them. It was agreed by all participants that this idea called for further rigorous discussion to ascertain whether it was viable.

Finally, mention was made of the current reparations 'movement' for historical damage to peoples. It was wondered whether an argument could be made that a failure to implement an intrastate peace agreement further added to such historical damage, and that financial compensation was therefore payable. Professor Anaya noted that economists at the University of Arizona do a great deal of work relating to the Indian reservations, developing economic models and examining various economic indicators. This work could perhaps be relevant to this idea. Once again, while it was acknowledged that pursuing this line of argument would be a very novel approach, it was felt that the suggestion should be considered further.

CHALLENGES AND CONCERNS

Throughout the meeting a number of recurring issues, challenges and concerns were discussed in depth. These related to, *inter alia*, the nature of the disputes likely to arise, the nature and palatability of the mechanisms sought and the impact of their availability, the problem of compliance and enforcement, the challenge of system building, the cultural needs of the parties, the structure of dispute resolution clauses and the importance of awareness raising. The key points made during these discussions are recorded below.

Nature of Disputes

It was made clear at the outset of the meeting that the mechanisms that we are seeking to identify or create are aimed at resolving disputes that arise after an intrastate peace agreement has been signed by the parties. It is during this implementation phase, which often lasts a number of years, that disputes inevitably arise as to the implementation of the specific terms of the agreement (most often involving a failure to implement) or as to their interpretation.

During the meeting the nature of the disputes likely to arise was clarified. While this is obviously dependent on the specific terms of the peace agreement in question, certain terms are common to many of these agreements. Bearing in mind that in its work Kreddha is most frequently involved in facilitating peace processes where a likely outcome is the granting of autonomy to the population group, the terms which can often give rise to disputes include those relating to:

- the establishment and/or modification of institutions and mechanisms required to implement an agreed power sharing arrangement;
- control over natural resources;
- boundary delimitation and demarcation;
- defence issues;
- transformation or demobilization of armed groups and redeployment of government armed forces.

Unfortunately terms such are these are sometimes entirely absent from a peace agreement, making it almost inevitable that disputes will arise as to what exactly is required to implement the power sharing arrangement.

It was emphasized that disputes can also arise in relation to relatively minor, technical terms in an agreement. Without a mechanism to resolve such disputes, then however minor the terms may be the dispute can lead to stalled implementation of other more major terms and even renewed violence.

Nature of Mechanism Sought

A prerequisite for exploring any mechanism further was that it had to be one to which both parties to an intrastate peace agreement could have recourse, that is, that both population groups and states would have standing before the court or tribunal in question, or could initiate the process in question. It was emphasized throughout the meeting that our search is for international adjudication mechanisms that can be used by these parties *in addition to* other, possibly domestic, dispute resolution mechanisms**.** The value of the latter mechanisms was fully acknowledged, but it was felt that an adjudicatory mechanism should at least be available to the parties as a last resort. It was also recognized that, if used properly, some less adversarial mechanisms may in certain situations be more effective. An example cited was mediation through a body such as the African Commission, which could perhaps lead to speedier implementation given that it would involve less loss of face for the government side than a well publicized decision or judgment.

There was some discussion as to whether identifying a suitable *ad hoc* mechanism, such as a specially created *ad hoc* body, was preferable to seeking to make use of an existing body such as a regional court. It was recognized that if the parties were to have recourse to a specially created *ad hoc* body such as an international monitoring mission with authority to resolve disputes, there would be no question as to whether that body had jurisdiction over disputes when they arose. In contrast, there is much uncertainty as to whether a number of the courts, commissions and UN bodies discussed in the previous section would have the required jurisdiction or mandate. It is essential that parties know when including a mechanism in their peace agreement that when disputes arise in the future they will not face obstacles in having recourse to it.

The outcome of discussions on this issue was that both *ad hoc* and institutional mechanisms need to be identified. When investigating the use of existing bodies, much attention needs to be paid to how their constituent instruments could be modified to give them jurisdiction over implementation disputes and whether this is politically realistic. Much will depend on how creative we can be, how we approach these bodies and what sort of reception we receive when we do so.

A perceived advantage of achieving the modifications necessary to allow parties to have recourse to existing, or even new, permanent bodies was that in doing so we might create a 'system' which would be visible to parties and others in the international community and over time would become acceptable to states. Participants gave the analogy of the ICSID (International Centre for Settlement of Investment Disputes) system, which has well established rules and a great deal of support from governments. The stimulating and creative discussions that followed are recorded below under the subheading 'The Challenge of System Building'.

In discussing the use of existing bodies, the limitations of human rights courts was acknowledged. These bodies are empowered to find violations of applicable human rights treaties and to award financial reparations where appropriate. Such powers are of limited assistance to parties to intrastate peace agreements who are seeking a ruling that directs one or both parties to take certain action required to implement those agreements. In many cases the disputes that arise will not involve violations of specified human rights. Moreover, both human rights courts and commissions would tend to be seen as partisan by states, given that they exist for the protection of non-state parties. There may be a great deal of reluctance by states to accept any mechanism provided such bodies, if indeed a mechanism could be found. It was agreed that these and other limitations must be borne in mind when further investigating the use of human rights bodies.

Impact of Availability of Mechanisms

Participants discussed whether and how the negotiating behaviour of parties to intrastate peace agreements might be affected once the type of mechanisms sought were actually available for inclusion in dispute resolution clauses. Some expressed the view that it could make it even more difficult for parties to reach an eventual agreement, because they would be aware that the agreement was more likely to be implemented with such a mechanism available. It was agreed that having these mechanisms available could indeed slow down the negotiating process, but that it could also lead to 'better' agreements as the parties would presumably give greater thought to what they were willing to commit to and actually implement.

The Problem of Compliance and Enforcement

A great deal of discussion centered around the overarching issue of ensuring that the outcome produced by having recourse to an identified mechanism would be complied with and was able to be enforced. Note was taken of the frequent failure of governments to comply with the recommendations of human rights commissions. The view was also expressed that governments would be unwilling to give such commissions the competence to issue binding pronouncements.

Some participants felt that governments would be more likely to comply with commission recommendations if they had agreed in the peace agreement to treat those recommendations as binding. This may be a possible solution to the problem. Others however felt that compliance would be no more likely if such an agreement was reached.

It was agreed that this is a difficult issue no matter which mechanism is under consideration, and that, as ambitious as it may be, it is essential that any mechanism identified as having real potential in our context can be enforced by the parties in the domestic setting.

The Challenge of System Building

As mentioned above, participants noted the success of the ICSID system and discussed whether such a system could be created for the settlement of intrastate peace agreement implementation disputes.

Despite initial reluctance from some states to create and join the ICSID system, provisions on ICSID arbitration are now commonly found in investment contracts between governments of member countries and investors from other member countries. Advance consents by governments to submit investment disputes to ICSID arbitration can also be found in over 900 bilateral investment treaties.

It was acknowledged that creating a similar system in our context would be an ambitious task and would take considerable time and effort. Much work would need to be undertaken to determine what the essential elements of such a system would be and how states could be attracted to join. It would need to be demonstrated that joining such a system would be of great benefit to them. There is a clear financial incentive for states to belong to the ICSID system as membership is seen to encourage foreign investment. However consideration should be given to what other reasons lie behind states' willingness to submit themselves to arbitration under the ICSID system. Are there particular elements that we could replicate that give states a sufficient level of comfort?

The caution was sounded that if it was desired to create such a system within the UN system, this would not only take a great deal of time and effort but might also prove not to be possible due to the UN's limited resources. It may also not be able to provide sufficient experts to sit on arbitral tribunals if this was the mechanism chosen.

There was considerable interest in exploring this idea further, along with an acknowledgment of the significant amount of work that would need to be undertaken before actively pursuing it further.

Palatability of Mechanisms

This issue was one that arose often during the meeting. It was acknowledged by all participants that convincing governments to include international adjudication mechanisms would be a significant challenge. Many intrastate conflicts do not have a high profile in the international community and many governments remain steadfast in their characterization of such conflicts as domestic matters. With this attitude so prevalent, it will be difficult to encourage governments to sign up to an international dispute resolution mechanism.

A number of ways of 'packaging' identified international adjudication mechanisms so as to make them more palatable to governments were discussed. Many considered that a mechanism offered through the proposed UN Rule of Law Assistance Unit could be put forward in a way that made it acceptable to governments, by emphasizing that what is offered is practical, technical assistance similar to that provided by the UN Electoral Assistance Division. It was noted however that many

states accepted electoral assistance out of self-interest, as UN involvement helps to create legitimacy and investor confidence. It was asked whether states would feel the same need for approval from and confidence of the international community when it came to group rights issues. International assistance has typically been seen by many states as intrusive and dangerous. There will be a need to package assistance as non-political, technical and perhaps non-human rights related in order to create a climate in which states are as open to assistance in resolving implementation disputes as they are, increasingly, to electoral assistance.

It was also suggested that governments should be encouraged to see intrastate peace agreements and commercial contracts as no different as far as dispute settlement provisions are concerned. Governments would very rarely sign up to commercial contracts without such provisions, and disputes over implementation of peace agreements will benefit from receiving focused, legal and technical attention in just the same as do commercial disputes.

A further suggestion was that mechanisms once identified be put forward to states as 'neutral' rather than 'international'. They could also be urged to accept that the most effective route to resolution of implementation disputes is via existing bodies with the necessary resources and expertise, and that these bodies just happen to be international rather than domestic organizations and institutions.

In addressing this issue it was also considered crucial that the international adjudication mechanism be provided for in a dispute resolution clause as the 'last resort method', after less adversarial mechanisms that are more readily acceptable. Tiered clauses could in fact provide states with an incentive to settle their disputes by such mechanisms in order to avoid ending up in adjudication.

It was felt by a number of participants that once packaged in a way that led to acceptance by just one state, international adjudication mechanisms could well then gain increasing acceptance amongst other states, so long as they have seen that acceptance did not lead to loss of face for the government side. A caution was sounded, however, that we should not be too optimistic about this domino effect occurring, as other states may not know of or properly understand the conflicts for which the mechanisms have been accepted.

Finally, the suggestion was made that an effective means of encouraging states to accept these mechanisms might be to convince international and regional financial institutions of their usefulness in resolving intrastate conflicts. Many of these institutions commit large sums of money to states and regions struggling to emerge from conflict. The example was given of the Asian Development Bank, which together with a number of governments in the region granted a loan to the Bangladesh government, after the signing of the 1997 Chittagong Hill Tracts Accord, to finance a rural development project in that area. This was offered as a type of peace dividend, and while it has not been particularly successful, it would be worth discussing our topic with this and other such institutions. It may be possible to convince them to add to the criteria for the commitment of funds, which often include the re-establishment of the rule of law, the inclusion of effective dispute resolution mechanisms in peace agreements.

Cultural Needs of Parties

Some mention was made of the need to consider the cultural needs of the parties in identifying or devising adjudication mechanisms. It was acknowledged that doing so would help to increase the likelihood of the award/ruling/decision being complied with by the parties.

Elements to consider include the location of the hearings, the language used, whether account is taken of local traditions, and whether there is local participation by way of, for example, live witness testimony. It was also suggested that the nationality of the decision makers could play a part in achieving local 'buy-in'. The Eritrea Yemen arbitration was cited as an example, as it was considered helpful in that case that Yemen appointed both an international and a regional arbitrator to the tribunal.

Dispute Resolution Clauses

The structure of dispute resolution clauses was discussed in great depth when considering the use of international arbitration, as is evident from the record of those discussions earlier in this report. As has already been mentioned, participants considered it crucial that clauses be drafted so that they are multilayered, with mechanisms such as negotiations, mediation and expert determination preceding adjudication.

It was also emphasized that dispute resolution clauses must be worded very carefully, in such a way that it is clear to the parties what will trigger the operation of the clause. It is imperative to avoid the situation where there is a dispute as to whether the clause applies. It was pointed out that where the mechanism chosen is arbitration or expert determination, this situation is addressed by competence being given to the arbitrator or expert to determine whether a dispute over which they have jurisdiction exists. It would be crucial to educate parties on the need to engage skilled lawyers in the drafting of peace agreements so as to avoid problems when disputes arise.

Awareness Raising

It was agreed by all that it will be imperative to raise awareness amongst relevant individuals, organizations or institutions of the importance of this topic and the need to find or create international adjudication mechanisms. A number of ways of doing so were suggested and others will need to be identified as soon as possible. Some of these have already been mentioned in the course of this report, such as raising the topic at relevant UN thematic debates through a Security Council member and approaching the International Peace Academy in New York as a potential partner. Another suggestion was to write and publish in relevant journals articles about the topic. An article on the LTTE proposed arbitration clause and the potential use

of arbitration in our context could, for example, be published in an international arbitration journal.

Further awareness raising activities are addressed in the following section.

Follow-up Activities

On the final day of the meeting, participants discussed what steps should be taken to advance this initiative. It was proposed that follow-up action should comprise the following broadly described activities:

- undertake research on and focused exploration of mechanisms identified as having the most potential;
- approach relevant organizations, institutions and individuals; and
- publish an end product, most likely in the form of a manual.

The objective of undertaking these activities would be to advance the thematic issue and thereby create the international climate required for international adjudication mechanisms to be included in intrastate peace agreements, and to apply these mechanisms to specific intrastate conflicts.

Assuming that the necessary funding can be obtained, Kreddha intends to commit appropriate resources to this initiative and to undertake these and other follow-up activities with the assistance and cooperation of interested institutions and individuals over the coming years. All participants at the meeting expressed a willingness to be associated with and, to the extent possible, provide targeted assistance to the initiative.

In discussing the contemplated end product, mention was made of a manual produced by the Watson Institute for International Studies, in cooperation with the Swiss Mission to the UN and the UN Secretariat, on targeted sanctions.[22] This manual contains model language for UN sanctions resolutions and model legislation for effective sanctions implementation at the national level. It is intended as a practical guide, and is used by the Security Council when drafting resolutions as well as by officials in national governments responsible for implementing measures after the Security Council has acted.

It was suggested that Kreddha could produce a manual similar in style to the abovementioned, for use by parties negotiating intrastate peace agreements, facilitators of peace processes and others involved in the drafting of such agreements. Ideally the manual would contain a 'tool box' of dispute resolution mechanisms that parties could choose from when drafting agreements, with model clauses and commentary on those clauses. The commentary would explain how the clauses are intended to operate, which mechanisms are most appropriate in particular situations,

[22] Targeted Financial Sanctions: A Manual for Design and Implementation**,** The Swiss Confederation in cooperation with the UN Secretariat and the Watson Institute for International Studies, Brown University, October 2001.

and the nature and procedures of the institution or organization under the auspices of which certain mechanisms would be provided.

The model clauses would need to be drafted in consultation with the relevant institutions and organizations, such as the Permanent Court of Arbitration and the UN Office of Legal Affairs. This process would in itself help to increase acceptance of the idea of including international adjudication mechanisms in intrastate peace agreements, including amongst states.

Research and Focused Exploration of Potential Mechanisms

Research should be undertaken on dispute resolution mechanisms, and particularly adjudication mechanisms, that could be offered by the following existing bodies:

- Americas
    - Inter-American Commission on Human Rights
    - Organization of American States (Office of Secretary General; Inter-American Juridical Committee)

- Africa
    - African Commission and Court on Human and Peoples' Rights
    - East African Court of Justice
    - ECOWAS Community Court of Justice
    - South African Development Community Tribunal
    - African Peer Review Mechanism
    - African Union Peace and Security Council

- Europe
    - European Court of Human Rights
    - Council of Europe
    - OSCE

- Asia Pacific
    - ASEAN
    - South Pacific Forum
    - Other organizations yet to be identified

- United Nations
    - Office of Secretary General
    - Peacebuilding Commission and Support Office
    - UNHCHR

- Permanent Court of Arbitration

In addition, research should be undertaken on *ad hoc* arbitration as a potential mechanism, by examining the Brcko arbitration and other examples.

In respect of each potential mechanism, the following criteria were identified for consideration:

- Neutrality and independence;
- Ability to depoliticize disputes;
- Ability of parties to agree to have recourse to mechanism in advance of dispute

arising;
- Competence/jurisdiction – ability to hear all types of disputes that may arise;
- Standing – ability of either party to initiate process;
- Process not unreasonably lengthy;
- Modifications required are politically realistic;
- Political weight and enforceability of result;
- Flexibility;
- Cultural acceptability;
- Ability to be 'packaged' so that it is palatable to parties;
- Affordability;
- No obstacles such as sovereign immunity or other legal or technical issues.

Approach Institutions, Organizations and Individuals

The above institutions and organizations should be approached with the objective of obtaining a sense of their receptiveness to this initiative and to further the research undertaken. It was contemplated that this would be done through certain individuals suggested by participants at the meeting, in many cases with the assistance of those participants, and through others who have expressed interest in being involved with this initiative such as Sir Arthur Watts QC and the Norwegian Ministry of Foreign Affairs.

In addition, Kreddha would like to make contact with the following institutions, organizations and individuals to discuss the initiative and investigate whether they can contribute to it by way of further substantive suggestions or contacts. Once again, these institutions and organizations would be approached largely via individuals suggested by participants at the meeting.

- African Union;
- International Conference on the Great Lakes Region;
- University for Peace, Africa Programme Office;
- ICSID;
- International Peace Academy;
- International commercial arbitrators such as Sir Arthur Watts QC and Fali Nariman;
- Identified government negotiators and drafters of intrastate peace agreements.

Finally, the following international and regional financial organizations and national donor agencies could be approached. Discussions would be initiated with the aim of ascertaining whether they might have an interest in playing a role in promoting the use of dispute resolution mechanisms in intrastate peace agreements and/or financing the required capacity building of certain existing dispute resolution bodies. It was felt that these approaches should be made only after substantial research has been carried out on the role they might play, and the initiative as a whole has progressed significantly.

- World Bank;
- Asian Development Bank;
- African Development Bank;
- Southern African Development Bank;
- Inter-American Development Bank;
- USAID;
- DFID (UK);
- National donor agencies of Sweden, Denmark, Norway and Switzerland.

Other Activities

Numerous other activities were suggested to support, strengthen and add to those listed above. These include:

- Compiling an extensive collection of existing intrastate and interstate peace agreements containing dispute resolution clauses;
- Drafting model clauses. For those containing international arbitration as a mechanism, this can be done with the assistance of Wilmer Cutler Pickering, and, where appropriate, feedback sought from the Permanent Court of Arbitration;
- Writing articles for publication by appropriate journals;
- Carrying out substantial research on the idea of devising separate mechanisms for elements of peace agreements that have an economic aspect, and identify helpful contacts. Wilmer Cutler Pickering expressed an interest in assisting in this work;
- Establishing contacts at and possibly seeking research assistance from appropriate universities;
- Designing future meetings on this topic. These could include meetings attended by drafters of intrastate peace agreements, by government negotiators, and by experts who can assist in taking the above proposal on economic aspects of agreements further.

It is intended that all activities would be undertaken with the aim of contributing to the contemplated manual, or other end-product, described at the beginning of this section.

LIST OF PARTICIPANTS

Invited Experts

Professor James Anaya, James J. Lenoir Professor of Human Rights Law and Policy, University of Arizona Rogers College of Law, United States

Gary Born, Partner and Chair of International Arbitration Practice Group, Wilmer Cutler Pickering Hale and Dorr, London, United Kingdom

Michelo Hansungule, Professor in Human Rights Law, Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa

Wendy Miles, Partner, Wilmer Cutler Pickering Hale and Dorr, London, United Kingdom

Ledum Mitee, Barrister, Specialist in human rights and constitutional law, Nigeria

Pete Swanson, Senior Partner, Carr Swanson & Randolph, LLC, Virginia, United States

Professor Danilo Turk, Professor of International Law, Ljubljana University, Slovenia

Tjaco van den Hout, Secretary General, Permanent Court of Arbitration, The Hague, The Netherlands

Kreddha Staff

Miek Boltjes, Director of Dialogue Facilitation

Davin Bremner, Director of Research and Analysis

Inga Frengley, Consultant (Rapporteur)

Michael van Walt, Executive President

Other Individuals Connected to the Initiative

Professor Gudmundur Alfredsson, Director of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund, Sweden

Sir Arthur Watts QC, Barrister, 20 Essex St Chambers, London, United Kingdom

PARTICIPANTS' BIOGRAPHIES

Gudmundur Alfredsson is Professor of International Law at the Law Faculty of Lund University in Sweden and Director of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (since 1995, currently on paternity leave till summer 2006). He has a law degree from the University of Iceland (1975), a master degree from New York University School of Law (1976) and a doctorate from Harvard Law School (1982). He has served as a staff member with the UN Secretariat in New York (Legal Office 1983-85) and in Geneva (Centre for Human Rights and OHCHR 1985-1995). He is a member of the UN Sub-Commission on Promotion and Protection of Human Rights (from 2004) and a member of some of its subsidiary bodies, like the Working Group on Minorities.

S. James Anaya is the James J. Lenoir Professor of Human Rights Law and Policy at the University of Arizona Rogers College of Law (USA). He teaches and writes in the areas of international law, constitutional law, and issues concerning indigenous peoples. Among his numerous publications is his book, *Indigenous Peoples in International Law* (Oxford Univ. Press, 1996, 2d. ed. 2004). Professor Anaya received his B.A. from the University of New Mexico (1980) and his J.D. from Harvard (1983). He was on the law faculty at the University of Iowa from 1988 to 1999, and he has been a visiting professor at Harvard Law School, the University of Toronto, and the University of Tulsa. Prior to becoming a full time law professor, he practiced law in Albuquerque, New Mexico, representing Native American peoples and other minority groups. Professor Anaya has lectured in many countries in all continents of the globe. He has been a consultant for numerous organizations and government agencies in several countries on matters of human rights and indigenous peoples, and he has represented indigenous groups from many parts of North and Central America before courts and international organizations. He was the lead counsel for the indigenous parties in the landmark case of *Awas Tingni v. Nicaragua*, in which the Inter-American Court of Human Rights upheld indigenous land rights as a matter of international law.

Miek Boltjes is Director of Dialogue Facilitation for Kreddha Europe. She holds advanced degrees in international organisations and communication sciences from the University of Groningen, The Netherlands. She is a consultant and trainer in negotiation, conflict resolution and strategic planning. She is a board member of the International Institute for Self Determination and Project Director at the Baak Management Institute in Noordwijk, The Netherlands. Previously she worked as Project Coordinator for the Tibetan Parliamentary and Policy Research Center in India, and as Executive Director for the Alternative Dispute Resolution Institute in The Hague, The Netherlands, which she co-founded. Prior to that she worked for the Conflict Management Group in Cambridge, the Foundation on Inter-Ethnic Relations (linked to the office of the OSCE High Commissioner on National

Minorities) and the Unrepresented Nations and Peoples Organisation (UNPO), both in The Hague. She has taught university courses in negotiation and conflict resolution and has authored various publications on conflict management and mediation. In 2002 she worked as Special Assistant to the Foreign Minister of East Timor during the country's transition to full independence. Among her responsibilities was liaison with the Truth and Reconciliation Commission in East Timor.

Gary Born is a partner at Wilmer Cutler Pickering Hale and Dorr's London office and Chair of that firm's International Arbitration practice. He works primarily in the fields of international commercial arbitration and international litigation, and is widely regarded as one of the world's leading authorities and practitioners in both fields. He has participated in more than 250 international arbitrations. He also sits as arbitrator (presiding arbitrator, sole arbitrator and co-arbitrator), and has served as arbitrator in more than 30 institutional and *ad hoc* arbitrations. He has represented states and corporate parties in disputes involving public international law disputes, including Eritrea in an arbitration against Yemen, and private parties in controversies under various bilateral investment treaties. Among his recent significant litigation matters are representation of various European entities in the Holocaust Assets and Forced Labour Litigations. He has taught law at Georgetown University Law Center, University of Virginia College of Law, University College London and the University of Arizona College of Law. He has served on the Executive Council of the American Society of International Law, and as co-chair of the ABA International Section, Committee on International Aspects of Litigation.

Davin Bremner is Director of Research and Analysis for Kreddha Europe. He has a Ph.D. in International Relations from the London School of Economics based on conflict resolution work done in the country of Georgia between 2000-2003, while working for International Alert. He was involved in community conflict resolution and all aspects of the South African political transition, including the South African Peace Accord structures, while living in South Africa between 1990–1995. He has been a facilitator, mediator, conflict resolution skills trainer, and researcher in Sierra Leone, Kenya, Liberia, the Basque country of Spain, several countries in the former Soviet Union including Moldova, Azerbaijan, and the regions of Abkhazia and South Ossetia. He has researched UN Peacekeeping in Cyprus, Croatia, and Bosnia. He has a M.S. degree in Conflict Analysis and Resolution from George Mason University.

Michelo Hansungule is Professor in Human Rights Law at the Centre for Human Rights, Faculty of Law, University of Pretoria. He has taught human rights law at the University of Zambia, the University of Mahidol, Thailand, the University of Lund, Sweden, and others. He has a law degree from the University of Zambia, masters degrees from the University of Zambia and the University of Graz, Austria, and a doctorate from the University of Vienna. He has lectured on the African human rights system in Zambia, Sweden, Thailand and various other countries. He is a member of the Working Group on Economic, Social and Cultural Rights in the African Commission and of the Consultative Committee of Experts on Important National and International Matters, put together by the South African government. He has published on land rights, indigenous and minority rights and general human rights with a specific focus on Africa.

Wendy Miles is a partner at Wilmer Cutler Pickering Hale and Dorr's London

office and a member of that firm's International Arbitration and International Litigation practices. She holds degrees in law and arts, including a Masters of Law (with First Class Honours) from the University of Canterbury, New Zealand. She is admitted as a barrister and solicitor in New Zealand and as a solicitor in England and Wales, where she also has Higher Rights of Audience. Prior to joining Wilmer Cutler Pickering she worked as a Research Associate at the Tibetan Centre for Human Rights and Democracy in Dharamsala, India, in 1998 and 1999. Her current focus is on international dispute resolution dealing with both private and public international law issues. She has acted as advisor and advocate for a number of international companies and states or state parties in proceedings conducted in various jurisdictions, governed by various substantive and procedural laws and rules. She acts as counsel in international arbitration proceedings administered under several international arbitral institutions (primarily the International Chamber of Commerce (ICC) International Court of Arbitration and the London Court of International Arbitration), as well as in ad hoc proceedings. In 2003 she was appointed alternate New Zealand representative to the ICC Commission on International Arbitration.

Ledum Mitee is a barrister based in Port Harcourt, Nigeria, specialising in human rights and constitutional law. He received his law degree from the University of Nigeria and has been in private practice since 1981. He frequently represents communities in the oil producing areas of Nigeria. He is President of the Movement for the Survival of the Ogoni People (MOSOP).

Pete Swanson is a senior partner at Carr Swanson & Randolph, LLC, Virginia. He specializes in all aspects of mediation, facilitation, training, partnering, dispute systems design and other dispute resolution services. His international work has focused on mediation, facilitation, dispute systems design services and training in Bosnia, Croatia, Bulgaria, Serbia, Cyprus, Argentina, Dominican Republic, Guatemala, Panama, India, Sweden, Greece, Japan and Korea. Before joining Carr Swanson & Randolph, he worked as mediator with the Federal Mediation and Conciliation Service (FMCS) from 1989-2001. At FMCS he worked in the Office of International and Dispute Resolution Affairs and was responsible for developing FMCS' international and Alternative Dispute Resolution (ADR) programs. Before joining FMCS, he was a project developer for the Center for Conflict Analysis and Resolution at George Mason University and a consultant in conflict resolution to the Tibetan Government in-exile in Northern India. Mr. Swanson received his M.S. in Conflict Management and Resolution in 1988 and B.A. in Cultural Anthropology in 1986 from George Mason University.

Danilo Turk is Professor of International Law at Ljubljana University, Slovenia. He has a law degree from the University of Ljubljana (1975), a master degree from Belgrade University (1978) and a doctorate from the University of Ljubljana (1982). He was UN Assistant Secretary-General for Political Affairs from 2000 to 2005, and Permanent Representative of Slovenia to the UN from 1992 to 2000. During 1998-1999 he was Head of the Delegation of Slovenia to the Security Council. His involvement with the UN began in 1981, when he was elected Vice-Chairman of the Working Group on the Right to Development, a post he held until 1984. He was also an alternate member (1984-1988) and member (1988-1992) of the

Sub-Commission on Prevention of Discrimination and Protection of Minorities, an expert body of the Commission on Human Rights. In 1990 he was the Chairman of the Sub-Commission. As a member of the Sub-Commission he served as a Special Rapporteur and prepared a report on the right to freedom of opinion and expression and a series of reports on the realization of economic, social and cultural rights. Since 1989 he has been a member of the Institute of Human Rights, based in Strasbourg, France. He served as a member of the Human Rights Committee (1997-1998).

Tjaco van den Hout is Secretary General of the Permanent Court of Arbitration, which is housed in the Peace Palace in The Hague. He studied law at the University of Leiden, graduating with honours in 1973, and joined the Dutch diplomatic service the following year. He has served abroad at various bilateral and multilateral posts (including the UN in New York). In addition, he has held various positions of increasing managerial responsibility at the Ministry of Foreign Affairs in The Hague the last of which was that of Deputy Secretary-General – a post he held from early 1997 until early 1999. In May 1999 he was elected to the post of Secretary-General of the Permanent Court of Arbitration for a five-year term. He was re-elected to this post in May 2004.

Michael van Walt is Executive President of Kreddha International. He is Legal Advisor to the Office of His Holiness The Dalai Lama and to the Tibetan Government in Exile as well as Special Counsel for United Nations Affairs. He is a member of the Netherlands Development Assistance Research Council, an advisory body of the Netherlands Foreign Ministry, and teaches a graduate course on international law, international security and globalization at the Golden Gate University School of Law in San Francisco, California. From 1991 to 1998 he was the General Secretary of the Unrepresented Nations and Peoples Organization (UNPO). Responsible for founding the organisation and leading its work, Michael van Walt conducted sensitive negotiations with governments and international organisations, including the UN and the OSCE; carried out on the spot assessment of and reporting on human rights situations and conflict situations in all parts of the world; developed strategies for the promotion of human rights and good governance and for the prevention or resolution of violent conflicts; provided strategic advice and advice in negotiation processes to leaders of movements and of governments; and mediated in intrastate disputes. In this capacity he headed fact-finding, election monitoring, and diplomatic missions to Kosova, Georgia and Abkhazia, Chuvash, the FYR Macedonia, Albania and Greece, Rwanda, Taiwan, Ingushetia and Chechnya, the Lakota, Hawaii, Tanzania and Zanzibar. He served as a consultant for the UNDP regarding the political, economic and human rights situation of indigenous peoples in the Sakha Republic of the Russian Federation; legal advisor to the All-Bougainville Leaders Peace Talks in Cairns, Australia, laying the ground for a peace process between the leaders of Bougainville and the government of Papua New Guinea; advisor to the Chechen Government delegation in negotiations between the Chechen Republic and the Russian Federation in Grozny, Chechnya; and advisor to the Abkhazian Government delegation in peace talks between Georgia and Abkhazia. In 2002, he served as Senior Legal Advisor to the Minister of Foreign Affairs of the East Timor Transitional Government, on behalf of the United Nations. With law degrees and

a Doctorate in the Science of Jurisprudence from the University of Utrecht and Wayne State University in Detroit, he practised law in Washington D.C. and San Francisco with the law firms of Wilmer, Cutler and Pickering, and Pettit and Martin. He has taught international law at various institutions around the world.

Sir Arthur Watts QC is a barrister at 20 Essex St Chambers in London, United Kingdom, who specialises in public international law. He has been a barrister since 1957 and a Queen's Counsel since 1988. From 1987 to 1991 he was the Legal Adviser to the Foreign and Commonwealth Office in London. From 1996 to 2001 he was the internationally appointed mediator for the resolution of problems of state succession arising on the break-up of the former state of Yugoslavia. Currently he is serving as President of an arbitration tribunal hearing a dispute (arising out of a state's currency collapse) between a state and a private party under a bilateral investment treaty. He is also a member of arbitration tribunals hearing four inter-state arbitrations (between Ethiopia and Eritrea, between Ireland and the United Kingdom, between Barbados and Trinidad and Tobago, and between Malaysia and Singapore). He has acted as advocate before the International Court of Justice on behalf of a number of states, and has advised the British Government and over two dozen foreign Governments on a variety of international law issues. He has written extensively on matters of international law. He is currently a member of the UK National Group of the Permanent Court of Arbitration, and is a member of the prestigious Institut du Droit International.

Rapporteur:

Inga Frengley is a consultant for Kreddha Europe. She holds degrees in arts and law (with first class honours) from the University of Canterbury, New Zealand, and a Masters in Public International Law (cum laude) from the University of Leiden, The Netherlands. She is admitted as a barrister and solicitor in New Zealand, where she practised as a litigation solicitor for six years before undertaking her masters degree in 2003. In 1998-1999 she worked in London, as a member of the legal team at the BSE Inquiry (the government inquiry into BSE and variant CJD in the UK) and the in-house legal team at Formula One Management Limited. After completing her masters degree she worked as a legal intern for the Kurdish Human Rights Project in London and as a legal fellow at the Permanent Court of Arbitration (PCA) in The Hague. While at the PCA she acted as assistant to the Registrar at the April 2005 hearings of the Eritrea-Ethiopia Claims Commission.

APPENDIX 3: MEETING AGENDA

Wednesday 30 November, 2005

11:00am – 1:00pm	Introductory Session, and paper presentation by by Kreddha. Facilitated discussion on the basic problem we are seeking to address.
3:00pm – 4:30pm	Experiences and case specific perspectives – working discussion on intrastate peace processes, including presentation by Ledum Mitee.
5:00pm – 7:00pm	Expanding and setting our agenda – facilitated discussion.

Thursday 1 December, 2005

9:00am – 11:00am	Working discussion on UN structures and peacebuilding mechanisms, including presentation by Danilo Turk.
11:30am – 1:00pm	Paper presentation by Jim Anaya. Working discussion on Inter-American regional human rights system.
3:00pm – 4:30pm	Paper presentation by Michelo Hansungule. Working discussion on African regional human rights system.
5:00pm – 7:00pm	Facilitated discussion of potential adjudication mechanisms within the UN system and the regional human rights systems.

Friday 2 December, 2005

9:00am – 11:00am	Facilitated discussion on international arbitration mechanisms.
11:30am – 1:00pm	Working discussion on the dispute resolution services of the Permanent Court of Arbitration, including presentation by Tjaco van den Hout.

3:00pm – 4:30pm	Paper presentation by Wendy Miles. Working discussion on sovereign immunity and enforceability issues.
5:00pm – 7:00pm	Facilitated discussion summarising international arbitration mechanisms and structures.

Saturday 3 December, 2005

9:00am – 11:00am	Facilitated discussion on potential solutions to the problem: adjudication mechanisms for resolution of intrastate conflicts.
11:30am – 1:00pm	Actualising and/or institutionalising plans for creating/modifying identified adjudication mechanisms.
3:00pm – 5:00pm	Conclusions and closing activities.