

# Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection

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## INTRODUCTION

The enterprise of building or strengthening democratic institutions in societies emerging from civil conflict or non-democratic regimes can be immense, complex, and time-consuming. Each nation faced with such a task must address matters such as the redesign of state governance structures, law reform in many sectors and the strengthening of civil society. Although the state itself bears the prime responsibility in undertaking such an enterprise and the sovereign right to decide on the models and methods, it may be assisted by multilateral international organizations and bilateral donors.

The areas where rebuilding of democratic institutions can occur is broad indeed. Democratic governance structures, including the legislative, executive/administrative, and judicial branches, can be reformed. The rule of law can be strengthened. Human rights protection can be improved. Civil society groups can be fostered and a free press supported. A free market economic system can be developed and subjected to appropriate state regulation to prevent unfairness and obtain an appropriate level of tax revenue to support important state functions. The concept of good governance has developed in the practice of relevant international organizations and some donor governments as a guide for rebuilding or reforming governance structures. State institutions that act as oversight mechanisms to prevent improper state action and improve governance can also be established in the pursuit of good governance. These institutions include state auditors, electoral commissions,

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\* Faculty of Law, University of Alberta; Editor, International Ombudsman Institute. I am grateful to the University of Alberta EFF Support for the Advancement of Scholarship Small Faculties Fund for financial assistance to support the research for this Article and to present an earlier version of the paper at the 1999 Academic Council on the United Nations System (ACUNS) Annual Meeting, United Nations Headquarters, New York City. I would also like to thank Barbara von Tigerstrom, Emeka Duruigbo, and Remigius Chibueze for their research assistance. The views expressed in this Article are my own.

anti-corruption commissions, and various forms of national human rights institutions.<sup>1</sup>

Many national human rights institutions have now been established, mainly in the past two to three decades and especially in the past ten years, as more states have turned to democratic forms of governance or have attempted to improve their democratic structure. International organizations, including the United Nations, are also paying more attention to the importance of national human rights institutions in improving governance and human rights protection in states.

In this Article, I will argue that national human rights institutions—defined as the ombudsman,<sup>2</sup> human rights commissions and hybrid human rights ombudsmen—can assist in building good governance in a state in two ways. First, ombudsman and hybrid human rights ombudsman offices can improve the legality and fairness of government administration, thereby increasing government accountability. Second, all types of national human rights institutions can act as mechanisms for the domestic implementation of the international human rights obligations of the state and assist in strengthening human rights protection. I will also argue, however, that the degree of success of national human rights institutions in achieving these objectives is dependent on the existence and strength of particular legal, financial, political, and social factors. These factors are applicable to national human rights institutions both in established democracies and in states that are at various stages of democratic transition and consolidation.

Finally, I will argue that although national human rights institutions typically do not have the power to make binding decisions in response to complaints of human rights violations or maladministration by government, they still can play a valuable role in human rights protection and oversight of administrative behavior. In established or consolidated democracies, national human rights institutions exercise their functions usually as part of a wider network of domestic machinery, including courts and specialized tribunals. In democratizing states, national human rights institutions may play a more central role, as they provide a viable forum for the investigation and resolution of human rights complaints in countries where the judicial system is weak, politicized, slow or otherwise incapacitated. In addition, a national human rights institution may be able to develop a stronger human rights culture in the state in transition, and thereby contribute to the democratization process. Also, regardless of the level of democracy in a state, a national human rights institution may be resorted to by persons who have problems that are not justiciable in that state—for example, economic, so-

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1. See *THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES* (Andreas Schedler et al. eds., 1999).

2. The "ombudsman" has its origin in Sweden and means "representative." It is still used to designate the office in a number of countries around the world and is the term commonly used to denote the national institution that monitors public administration. Ombudsmen are women and men. The pronouns used in this paper are used indiscriminately to reflect this fact.

cial, and cultural rights violations and faulty administrative conduct that is not contrary to law—or by individuals who cannot afford to litigate the problems they experience.

This Article will begin by describing the various types of national human rights institutions and the role of the United Nations and the international community in supporting the establishment of national human rights institutions. Next, the paper will explore how national human rights institutions can improve government administration and promote and protect human rights, and thereby build good governance. The Article will also examine factors that affect the effectiveness of national human rights institutions and analyze their mainly soft powers of recommendation. Finally, a selection of case studies of national human rights institutions will illustrate how these institutions are being structured in an attempt to build and improve the quality of administration and the protection of human rights.

## I. NATIONAL HUMAN RIGHTS INSTITUTIONS: OMBUDSMEN, HUMAN RIGHTS COMMISSIONS, HYBRIDS, AND VARIATIONS

### *A. Recognition of National Human Rights Institutions by the International Community*

The protection of human rights is furthered both at the international and national levels of governance. There is an interface between the two levels as international human rights law obligations of states must be implemented into domestic laws and procedures in order to obtain effective enforcement of these rights in most cases. Effective domestic protection of human rights requires a network of complementary norms and mechanisms. These include the following: state adherence to human rights treaties; implementation of international human rights obligations in domestic law; a domestic legal system that provides comprehensive substantive and procedural human rights laws; effective and accessible state institutions where individuals can obtain redress for human rights breaches, such as independent courts and national human rights institutions; a lively human rights NGO community; and a population that has developed a strong human rights culture.

The international community has increasingly recognized the importance of national human rights institutions. United Nations human rights bodies have addressed the subject of national human rights institutions since 1946.<sup>3</sup> In particular, a 1991 U.N. International Workshop on National Institutions for the Promotion and Protection of Human Rights resulted in the drafting of guiding principles that were adopted by the U.N. Commission on Human Rights as “Principles Relating to the Status of National In-

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3. See UNITED NATIONS CENTRE FOR HUMAN RIGHTS, NATIONAL HUMAN RIGHTS INSTITUTIONS: A HANDBOOK ON THE ESTABLISHMENT AND STRENGTHENING OF NATIONAL INSTITUTIONS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS, Professional Training Series No. 4 at 4–6, U.N. Doc. HR/P/PT/4, U.N. Sales No. E.95.XIV.2 (1995) [hereinafter NATIONAL HUMAN RIGHTS INSTITUTIONS: A HANDBOOK].

stitutions" in 1992 (popularly called the "Paris Principles") and by the General Assembly in 1993.<sup>4</sup> The 1993 Vienna Declaration and Programme of Action, adopted at the conclusion of the Vienna World Conference on Human Rights, states that national human rights institutions play an important role in promoting and protecting human rights, disseminating human rights information, and providing human rights education.<sup>5</sup> The Vienna Declaration also encourages the establishment and strengthening of national institutions, having regard to the Paris Principles.<sup>6</sup> The United Nations has increased its focus on encouraging domestic enforcement of human rights, and providing assistance in the strengthening of national human rights institutions has become an important strategy used by the United Nations to improve human rights protection and promotion at this level. In the past five years, the Office of the United Nations High Commissioner for Human Rights has placed considerable emphasis on capacity-building and technical assistance to support the establishment and operation of national human rights institutions.<sup>7</sup> Mary Robinson, United Nations High Commissioner for Human Rights, has stated:

4. G.A. Res. 134, UN GAOR, 48th Sess., 85th mtg., U.N. Doc. A/RES/48/134(1993), reprinted in NATIONAL HUMAN RIGHTS INSTITUTIONS: A HANDBOOK, *id.* at 37-38 [hereinafter Paris Principles].

5. See Vienna Declaration and Programme of Action, adopted June 25, 1993, 32 I.L.M. 1661, 1672 para. 36 (1993):

The World Conference on Human Rights reaffirms the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights.

The World Conference on Human Rights encourages the establishment and strengthening of national institutions, having regard to the "Principles relating to the status of national institutions" and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level.

6. See *id.* paras. 67-69, 74. Paras. 83-85 also call for special measures to aid in the strengthening and building of institutions relating to human rights, the strengthening of U.N. technical and advisory assistance in the building and strengthening of national human rights structures, and the provision of more resources from governments, agencies, and institutions. See also Fourth World Conference on Women, *Report of the Fourth World Conference on Women*, A/CONF.177/20 (Oct. 17, 1995), reprinted in 35 I.L.M. 405 (1996), ch. 1, res. 1 annex II, para. 230 (e) (calling on governments to create or strengthen independent national institutions for the protection and promotion of human rights, including the human rights of women).

7. See NATIONAL HUMAN RIGHTS INSTITUTIONS: A HANDBOOK, *supra* note 3; U.N. Briefing Papers, *Human Rights Today* 25-28 (1998). The U.N. Human Rights Technical Cooperation Programme is used for this purpose, and establishment and strengthening national human rights institutions form an important component thereof. In 1997, 18 states received U.N. assistance or advice in establishing institutions. See *id.* at 25, 27. This initiative has been supported by the Commission on Human Rights and the General Assembly. See U.N.C.H.R. Res. 55, U.N. ESCOR, 55th Sess., 52d mtg., U.N. Doc. E/CN.4/1998/55 (1998) and U.N.C.H.R. Res. 72, U.N. ESCOR, 56th Sess., 59th mtg., U.N.Doc. E/CN.4/1999/72 (1999); G.A. Res. 128, U.N. GAOR, 52nd Sess., Agenda Item 112(b), U.N. Doc. A/RES/52/128 (1998) and G.A. Res. 176, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/176 (1999); *Effective Functioning of Human Rights Mechanisms: National Institutions for the Promotion and Protection of Human Rights: Report of the Secretary-General*, U.N. SCOR, 55th Sess., U.N. Doc. E/CN.4/1999/95 (1999); and *National Institutions for the Promotion and Protection of Human Rights: Report of the Secretary General*, U.N. GAOR, 54th Sess., Provisional Agenda Item 117(b), U.N. Doc. A/54/336 (1999).

I have become increasingly convinced of the necessity to focus on *preventive* strategies. This has convinced me of the importance of creating strong, independent national human rights institutions to provide accessible remedies, particularly for those who are most vulnerable and disadvantaged. Frequently these institutions are "human rights commissions," but in many countries, drawing on traditions originating . . . in Sweden, they are related to or identified as a human rights "ombudsman" or "ombudsperson." . . . It is precisely their capacity to contribute substantially to the realization of individual human rights which makes independent institutions so significant.<sup>8</sup>

Also, as discussed further below, some of the peace agreements negotiated under United Nations auspices and Security Council resolutions on civil reconstruction have included provisions for the establishment or strengthening of national human rights institutions as one component of the domestic human rights protection provisions in the accords.

Further, regional international organizations have recognized the role of national human rights institutions. The Council of Europe Committee of Ministers has recommended the establishment and strengthening of national human rights institutions.<sup>9</sup> The General Assembly of the Organization of American States (OAS) has also given its support to the various national human rights institutions working in the hemisphere, has called for the establishment of such institutions in member countries that have not yet established the office, and recommended that the independence of national institutions be promoted.<sup>10</sup>

### *B. National Human Rights Institutions: Ombudsman, Human Rights Commissions, Hybrid Human Rights Ombudsman, and Other Variations*

While a precise definition has not been developed, a national human rights institution has been described as "a body which is established by a Government under the constitution, or by law or decree, the functions of

8. Mary Robinson, *Human Rights: Challenges for the 21st Century*, First Annual Dag Hammarskjöld Lecture (Oct. 1, 1998) (emphasis added).

9. See Council of Europe, Committee of Ministers, *Recommendation on the Establishment of Independent National Human Rights Institutions*, Recommendation No. R(97) 14 para. a (1997) (stating that the Committee of Ministers recommends that member state governments: "consider, taking account of the specific requirements of each member State, the possibility of establishing effective national human rights institutions, in particular human rights commissions which are pluralist in their membership, ombudsmen or comparable institutions.")

10. OAS General Assembly, *Support for the Work of Defenders of the People, Defenders of the Population, Human Rights Attorneys, and Human Rights Commissioners (Ombudsmen) in the Context of Strengthening Democracy in the Hemisphere*, OAS AG/RES 1601, XXVIII-O/98 (1998). Also, in a 1996 paper, the OAS Secretary-General made proposals for reform of the Inter-American human rights system, including the possibility of the OAS "developing a new, functional-institutional linkage between the human rights protection mechanism and the *fiscalías*, *defensorías del pueblo* and/or ombudsman offices in the Hemisphere." César Gaviria, *Toward a New Vision of the Inter-American Human Rights System*, abbreviated version of the original text reprinted in 4 J. LAT. AM. AFF. 4, 18 (1996).

which are specifically defined in terms of the promotion and protection of human rights."<sup>11</sup> Although courts have the most important role to play in protecting the human rights of the individual against the state, they have many other judicial functions and are not usually included within the concept of the national human rights institution as it is currently understood.

There is considerable variance in the structure and number of national human rights institutions between countries, based on the unique political, historical, cultural, and economic environment of each state. For classification purposes, the United Nations has identified the ombudsman and human rights commissions as comprising the majority of national institutions.<sup>12</sup> In my view, it is also valuable to recognize contemporary adaptations of the two offices that have evolved, particularly the hybrid human rights ombudsman and ombudsman offices with an anti-corruption element.<sup>13</sup> Many of the institutions established in democratizing nations in the past fifteen years are hybrids.

While many national human rights institutions are established at the national level, in federal states there may be additional offices at the sub-national level (e.g., province, state, region, municipality), or only at the sub-national level in the absence of a federal office.

A national human rights institution may be established in the Constitution or by the legislative or executive branch of government. It may be structured as a distinct institution in its own right responsible only to the legislature, an independent office of the legislature or an arm's-length office of the executive branch. Its mandate to protect and promote human rights may cover government conduct only or may, especially with respect to human rights commissions, also extend to cover cases in the private sector (e.g., discrimination in employment and the provision of services). However, where the investigation of government conduct is concerned, which is an important focus of many national human rights institutions and often the sole focus of offices with an ombudsman role, most institutions can only investigate conduct falling within the scope of public administration; the con-

11. NATIONAL HUMAN RIGHTS INSTITUTIONS: A HANDBOOK, *supra* note 3, at para. 39.

12. See *id.* at 7. This is despite the fact that ombudsman offices structured on the classical model do not have an explicit human rights protection function. A truth commission should not be classified as a national human rights institution. Although it has human rights functions in its fact-finding investigation into alleged human rights violations occurring prior to the date of establishment of the commission, in its truth-telling and other roles it may have (e.g., making recommendations for reform and redress, promoting national reconciliation), a truth commission is established for a relatively brief period of time and dissolves after its mandate is completed. See generally Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597 (1994); Jo M. Pasqualucci, *The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity, and the Inter American Human Rights System*, 12 B.U. INT'L L.J. 321 (1994); Michael P. Scharf, *The Case for a Permanent International Truth Commission*, 7 DUKE J. COMP. & INT'L L. 375 (1997).

13. This Article will focus on general-jurisdiction institutions. There are a variety of special-sector national human rights institutions, e.g., the gender equality commission, privacy commissioner, ombudsman for children.

duct of the legislature, the judiciary, and the policy-making element of the executive branch are usually excluded from jurisdiction.<sup>14</sup>

All ombudsmen and hybrid human rights ombudsmen and many human rights commissions have the power to investigate complaints made by persons.<sup>15</sup> If a national human rights institution can undertake investigations, it often can only make recommendations if it finds that there has been wrongdoing, and cannot make legally binding decisions. However, some institutions have been given stronger powers of enforcement, such as the power to make decisions, prosecute and refer or take cases to court or other tribunals for a judicial determination.<sup>16</sup> Similarly, it cannot make or change laws, although it may have the jurisdiction to recommend statutory amendments to the legislative body. Persons can lodge complaints with a national human rights institution free of charge—in contrast to the courts, where the costs of litigation may render access to justice illusory for many.

A crucial condition for the effectiveness of every national human rights institution is its independence in law and fact from all branches of government, and especially from the executive/administrative branch, which is usually the main target of its work. Thus, it is often the case that an institution appointed by the legislature, with other guarantees of independence in areas such as tenure of office and budget, will be in a better position to fulfill its mandate without interference—especially when scrutiny of the government is in question.

Until the 1980s, national human rights institutions were established mainly in Western Europe, North America and some Commonwealth countries around the world. These offices were primarily in the form of classical ombudsman and human rights commissions. As states started to emerge from authoritarian and other non-democratic regimes during the 1970s and 1980s, such as in Southern Europe, Latin America, and Central and Eastern Europe, their transition to democracy has included the establishment of national human rights institutions, including variations and combinations of the ombudsman and human rights complaint office.

### 1. The Ombudsman

The ombudsman in its “classical” form has its modern roots in the office of *justitieombudsman* (ombudsman for justice) created in Sweden in 1809.<sup>17</sup>

14. There are a few exceptions. The ombudsmen in Sweden and Finland, for example, can investigate the judiciary.

15. See NATIONAL HUMAN RIGHTS INSTITUTIONS: A HANDBOOK, *supra* note 3, at 7; Paris Principles, *supra* note 4, Annex (*Additional principles concerning the status of commissions with quasi-judisdictional competence*).

16. NATIONAL HUMAN RIGHTS INSTITUTIONS: A HANDBOOK, *supra* note 3, at 33–34.

17. See Ulf Lundvik, *Sweden*, in 2 INTERNATIONAL HANDBOOK OF THE OMBUDSMAN 179, 179 (Gerald E. Caiden ed. 1983) [hereinafter INT'L HANDBOOK]; Walter Gellhorn, *The Swedish Justitieombudsman*, 75 YALE L.J. 1 (1965). Even earlier, in 1713, the Swedish monarch appointed an official, the Chancellor of Justice, to inspect the activities of the administration. In 1766, the Swedish parliament began electing

The institution spread through Scandinavia in the early to mid-twentieth century.<sup>18</sup> However, the institution only started to proliferate in the 1960s after the extensive spread of government bureaucracy in many nations. The ombudsman found in Denmark and Norway, which does not have the power to investigate the judiciary, was the model copied by other countries. New Zealand established an ombudsman based on the Danish format in 1962, followed by a long wave of new offices in other Commonwealth countries around the world.<sup>19</sup> Further, since the 1970s, other countries have used the classical model, ranging from established democracies wishing to reform their governance structure (e.g., western European countries, a few U.S. states) to states in various stages of democratization.<sup>20</sup> Also, as discussed further below, a number of countries in these latter categories have created a hybrid office: the human rights ombudsman.

The classical ombudsman is a mechanism that monitors the conduct of public administration to ensure that it is conducted legally and fairly.<sup>21</sup> The

the Chancellor of Justice for a period of time. The *Justitieombudsman*, established in the Constitution of 1809, was appointed by the legislative branch to monitor public administration and the courts, and report to the legislature. *See id.*

18. Finland (1919), Denmark (1953, appointed in 1955), Norway (1962).

19. E.g., Tanzania (Permanent Commission of Enquiry, 1966), Guyana (Ombudsman, 1966), most Canadian provinces and territories (starting in 1967), the United Kingdom (Parliamentary Commissioner for Administration, 1967), Mauritius (Ombudsman, 1968, commencing activities in 1970), India (*Lok Ayuktta*, in some states commencing in 1971), Australia (starting at the state level in 1972, Commonwealth Ombudsman started in 1977), Zambia (Investigator-General, 1974), Papua New Guinea (Ombudsman Commission, 1975), Nigeria (Public Complaints Commission, 1975), Trinidad and Tobago (Ombudsman, 1976), Jamaica (Parliamentary Ombudsman, 1978), St. Lucia (Parliamentary Commissioner, 1979, started operations in 1983), Solomon Islands (1980), Zimbabwe (Ombudsman, 1982), Barbados (Ombudsman, 1980), Sri Lanka (Parliamentary Commissioner for Administration, 1981), Pakistan (*Wafaqi Mohtashib*, 1983), Uganda (Inspector-General of Government, 1987), Western Samoa (1988, in operation 1990); Lesotho (Ombudsman, 1993), Malawi (Ombudsman, 1994), Botswana (Ombudsman, 1995), Antigua and Barbuda (Ombudsman, 1981, commenced activities in 1995), South Africa (Public Protector, 1995), Malta (Ombudsman, 1995), Vanuatu (Ombudsman, 1995), Belize (1994, commenced activities in 1999). *See, e.g., J. HATCHARD, NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE COMMONWEALTH: DIRECTORY* (3d ed. 1998). An Ombudsman for the Overseas British Territory of Gibraltar was appointed in 1999. The Bangladesh Constitution contains provisions for an ombudsman, The Gambia has recently appointed an ombudsman and Kenya is contemplating establishing an ombudsman.

20. E.g., Israel (1971), France (1973), Austria (1977), the Netherlands (1981), Italy (in most regions and provinces), Iceland (1988), Ireland (1980, commenced activities in 1984), Belgium (federal office 1995, in operation 1997, also Flemish Community and Walloon Community offices), Lithuania (1995), Haiti (1995-6), Greece (1997, in operation 1998). The U.S. states and dependencies with ombudsman offices are: Hawaii (1969), Nebraska (1969), Iowa (1972), Alaska (1975), Puerto Rico (1977), Guam (1978), Arizona (1996). A state bill has been introduced to create an Oregon ombudsman. In Africa, some Francophone nations have an ombudsman (*médiateur*) and Ethiopia is in the process of establishing one. There are various developments in Asia, e.g., Hong Kong (China) (Ombudsman), Macau (China) (High Commission Against Corruption and Administrative Illegality), South Korea (Ombudsman), and Taiwan's variation (*Control Yuan*). Thailand passed legislation for a three-member ombudsman institution in 1999. There are also ombudsmen in the Pacific island states of Cook Islands and Fiji.

21. *See generally THE INTERNATIONAL OMBUDSMAN ANTHOLOGY: SELECTED WRITINGS FROM THE INTERNATIONAL OMBUDSMAN INSTITUTE* (Linda C. Reif ed. 1999) [hereinafter *THE INTERNATIONAL OMBUDSMAN ANTHOLOGY*]; Mary A. Marshall & Linda C. Reif, *The Ombudsman: Maladministration and Alternative Dispute Resolution*, 34 *ALTA. L. REV.* 215 (1995); *THE OMBUDSMAN IN EUROPE—THE INSTITUTION* (Franz Matscher ed. 1994); DONALD C. ROWAT, *THE OMBUDSMAN PLAN: THE WORLDWIDE*



ombudsman is usually a single individual, but occasionally the institution may comprise a number of persons. An ombudsman is usually appointed by the legislative branch of government to investigate the administrative activities of the executive; the conduct of the judiciary and the legislature itself are usually excluded from the jurisdiction of the office.<sup>22</sup> Almost invariably, ombudsmen do not have the power to examine complaints in the private sector. An ombudsman has the power to launch investigations on receipt of a complaint or on her own motion, conduct an impartial investigation into the administrative conduct in question, make recommendations to eliminate the illegality or unfairness if faulty administration is found, and report to the government and legislature on the activities of the office. The classical ombudsman does not have the power to make legally binding decisions. Rather, the office relies on "soft" powers of persuasion and the ability to publicize, including when the government fails to implement recommendations made. Although many countries have maintained the name "ombudsman," other countries have used different titles that are expressive of the duties of the institution, such as Parliamentary Commissioner for Administration (United Kingdom, Sri Lanka), Public Protector (South Africa), *Protecteur du Citoyen* (Protector of the Citizen, Quebec, Canada), *Volksanwaltschaft* (People's Advocate, Austria), and *Difensore Civico* (Civic Defender, Italian regions and provinces).

The classical ombudsman does not have an express human rights mandate. However, in practice, some of these ombudsmen handle some cases that raise a jurisdictional human rights issue that is dealt with by using human rights norms. This aspect of classical ombudsman work will be addressed in more detail below.

## 2. Human Rights Commissions

Human rights commissions have been established in a number of Commonwealth member states primarily over the past thirty to forty years in countries such as Canada, Australia, New Zealand, India, Sri Lanka, and some African nations.<sup>23</sup> Other nations have also established human rights

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SPREAD OF AN IDEA (2d ed. 1985); INT'L HANDBOOK, *supra* note 17.

22. In some countries, however, the ombudsman is appointed by the executive branch, e.g., the President, sometimes after nomination by the legislature. There has been continuing debate on the independence and effectiveness of "executive ombudsmen." Also, in a few countries the ombudsman has jurisdiction to investigate the judiciary.

23. E.g., Australian National Commission for Human Rights and Equal Opportunity (1986), some state-level equal opportunity commissions; Canadian Human Rights Commission (1977), provincial-level human rights commissions and councils starting with Ontario (1961); New Zealand Human Rights Commission (1971); United Kingdom Commission for Racial Equality (1976), Equal Opportunities Commission (1975), Northern Ireland Equal Opportunity Commission and Fair Employment Commission, Bermuda Human Rights Commission (1982); Cameroon National Commission for Human Rights and Freedoms (1992); India's National Commission for Human Rights (1993), and some state-level commissions; South Africa's Human Rights Commission (1995), Commission for Gender Equality (1997), and Commission for the Promotion and Protection of Cultural, Religious and Linguistic Com-

commissions or complaints offices.<sup>24</sup> A growing number of these institutions have been established in the past decade in order to strengthen the domestic mechanisms for human rights protection, such as in India, Indonesia, Sri Lanka, Uganda, and South Africa. In some countries, a separate human rights commission and ombudsman have been created. In others, only one institution has been adopted.

The human rights commission has as its express mandate the protection and promotion of human rights. A human rights commission is composed of a number of members who should have human rights expertise.<sup>25</sup> The human rights commission may be appointed by the executive, the legislature or some combination of the two. The powers of a human rights commission generally include some or all of the following: providing advice to government on human rights law and policy, conducting research, undertaking human rights education and investigating complaints made by members of the public that their human rights have been violated.<sup>26</sup> Human rights commissions have jurisdiction to take complaints alleging human rights violations, with some only covering discrimination and others having the mandate to protect civil and political rights and sometimes also economic, social and cultural rights. A human rights commission may have jurisdiction over both the public and the private sector or may be confined to conduct in only one sector. In their investigatory function, although commissions have the power to make recommendations to resolve the matter, many also can use conciliation to try to reach an amicable settlement and, if this is

munities; Malawi Human Rights Commission (1996); Uganda Human Rights Commission (1996); Sri Lanka Human Rights Commission (1996); Nigeria Human Rights Commission (1996); Zambia Human Rights Commission. See, e.g., John Hucker, *Antidiscrimination Laws in Canada: Human Rights Commissions and the Search for Equality*, 19 HUM. RTS. Q. 547 (1997); Mario Gomez, *Sri Lanka's New Human Rights Commission*, 20 HUM. RTS. Q. 281 (1998). Malaysia passed legislation in 1999 to establish a human rights commission. See Amnesty International, *Malaysia Under International Scrutiny 29 Commentary: International Movement for a Just World* (1999). The July 1999 Sierra Leone Peace Agreement includes a provision on establishment of a human rights commission. See *infra* notes 40–41.

24. For example, Algeria's National Observer of Human Rights, Armenia's Human Rights and Democracy Centre, Benin Human Rights Commission, Cameroon National Commission for Human Rights and Freedoms, Central African Republic Human Rights Commission, Chad's National Human Rights Commission, Denmark's Centre for Human Rights, Estonia's Centre for Legal Information on Human Rights, France's National Consultative Commission for Human Rights, Indonesia's National Commission for Human Rights, Kazakhstan's Human Rights Office, Lithuanian Human Rights Centre, Mali's National Consultative Commission on Human Rights, Mexico's National Commission for Human Rights and state-level offices, Moldova's Human Rights Centre, Morocco's Human Rights Advisory Council, Human Rights Commission of the Philippines, Rwanda's Human Rights Commission, Senegal's Human Rights Committee, Sudan's Advisory Council on Human Rights, Togo's National Commission on Human Rights, Tunisia's Higher Committee for Human Rights and Fundamental Freedoms. Ethiopia is also creating a human rights commission. The Northern Ireland Peace Agreement provides for the establishment of human rights commissions in Ireland and in Northern Ireland. See *Agreement Reached in the Multi-Party Negotiations*, 37 I.L.M. 751, 767–68 (1998) [hereinafter Northern Ireland Peace Agreement].

25. U.N. High Commissioner for Human Rights, *Fact Sheet No. 19, National Institutions for the Promotion and Protection of Human Rights* 6 (1993) (visited Dec. 1, 1999) <<http://www.unhchr.ch/html/menu6/fs19.html>>.

26. See NATIONAL HUMAN RIGHTS INSTITUTIONS: A HANDBOOK, *supra* note 3, at 7.

unsuccessful, they can refer the dispute to binding forms of settlement such as human rights tribunals and the courts.<sup>27</sup>

### 3. Variations: From the Hybrid Human Rights Ombudsman to Corruption Fighters

Although some countries continue to create the classical forms of the ombudsman and/or human rights commission, many of the recent national institutions for the protection of human rights have been given new roles or governments have created hybrid offices. These adaptations of the ombudsman and human rights commission started to appear in the mid-1970s. They are particularly favored in Latin America and in Central and Eastern Europe.

As a result, it is increasingly difficult to categorize new institutions as either ombudsman or human rights commission. For example, some recent human rights offices are centered around a single individual, as in Russia, Latvia, and Uzbekistan. Other human rights offices self-identify with the ombudsman concept although they essentially are human rights complaints institutions, as in the case of the Bosnia and Herzegovina Human Rights Ombudsman created in the Dayton Peace Agreement. Other institutions resemble a pure human rights commission or complaints office, although they can be said to have elements of the ombudsman concept in the types of complaints against the administration that they handle, such as the Mexican National Commission for Human Rights and the Honduran National Commission for the Protection of Human Rights. Classical ombudsmen in some countries conduct investigations that involve human rights issues and norms. Branching out in another direction, some of the newer ombudsman offices have been given corruption-fighting mandates, such as in Papua New Guinea, the Philippines, Macau, Uganda, South Africa, Namibia, Ghana, and Belize.

The hybrid human rights ombudsman can be defined as an institution that expressly has been given or that in practice undertakes two roles: to protect and promote human rights and monitor government administration. In some aspects, the hybrid institutions resemble the ombudsman rather than the commission model, in that it is more common for one person to hold the office, and the combination office usually does not have the power to examine complaints in the private sector. Also, the human rights ombudsman is often appointed by the legislature. In other aspects, hybrid institutions resemble the commission model when their main role is human rights education, advice and protection. In addition, these hybrid institutions may have new powers not associated with the earlier institutions, such as the power to bring cases to constitutional courts.

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27. *See id.*

The concept of a hybrid human rights ombudsman started with the "third wave" democratization movement in Southern Europe<sup>28</sup> and the creation of such institutions in Portugal and Spain. The 1975 *Provedor de Justiça* of Portugal was given the power to defend and promote rights and freedoms as well as to monitor public administration.<sup>29</sup> The Spanish transition to democracy brought with it a new constitution in 1978 that provided for a governance structure that included the office of *Defensor del Pueblo* (Defender of the People) with the power to supervise the activity of the administration and the protection of human rights in the Constitution.<sup>30</sup>

Starting in the 1980s, countries in Latin America began to shed their authoritarian regimes and move to democratic governance structures. Along with reform of the public administration, most of these countries had suffered from massive human rights abuses, usually committed by the government, and most, if not all, were continuing to face human rights problems of one form or another. The response was to look to the Iberian model and to create offices that for the most part adopted the hybrid human rights ombudsman form. These include the office of *Defensor del Pueblo* in Colombia (1991), Argentina (1994), Peru (1993, commenced activities 1996), Panama (1997), Bolivia (1998), and Ecuador (1998); the *Procurador para la Defensa de los Derechos Humanos* of El Salvador (Attorney or Counsel for the Defense of Human Rights, 1992); and the *Procurador de los Derechos Humanos* of Guatemala (Human Rights Attorney or Counsel, 1987).

In addition, the end of the Cold War led to the rebuilding of Central and Eastern European states, including their democratic development. Not only was radical restructuring of the public administration in order, but also the development of the rule of law and human rights protection mechanisms. In reforming their governance structures, a growing number of states have adopted the hybrid human rights ombudsman. Some of the nations that have established the hybrid are Poland (Commissioner for Civil Rights Protection, 1987), Croatia (National Ombudsman, 1992), Slovenia (Human Rights Ombudsman, 1995), Bosnia and Herzegovina (Federation Ombudsmen, Bosnia and Herzegovina Human Rights Ombudsman, 1995), Hungary (Parliamentary Commissioner for Civil Rights, Parliamentary Commissioner for the Protection of National and Ethnic Minority Rights, 1995), Russia (Plenipotentiary for Human Rights, 1997), Romania (Advocate of the People, 1997), Moldova (Parliamentary Advocates), Georgia (Public Defender, 1995, started operations in 1998), and Albania (People's Advocate, 1998, appointed in 2000).

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28. See SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991).

29. The office was created by Decree in 1975 and was included in the 1976 Constitution. See Branca Amaral, *Portugal*, in *INT'L HANDBOOK*, *supra* note 17, at 345-46.

30. See discussion *infra* notes 127-137.

There have also been a few hybrid offices established in Africa, either at the time of independence or as a result of more recent reform initiatives. This has occurred, for example, in Namibia (Ombudsman, 1990), Ghana (Commissioner for Human Rights and Administrative Justice, 1993), and the Seychelles (Ombudsman, 1994).<sup>31</sup>

In other regions, Cyprus established a hybrid Commissioner for Administration in 1991, and the Palestinian Authority has created a hybrid in the Palestinian Citizens' Rights Commission.<sup>32</sup>

In sum, no hybrid human rights ombudsman is identical to any other. Each institution has been structured according to historical and current political and legal factors. A rough spectrum can be identified where some offices are much closer to the human rights commission model in the nature of their functions and complaints. In other offices, the ombudsman component may have a stronger role to play. The reasons for creating these combination offices are varied. Economic concerns have been one factor—fewer financial resources are needed to operate one office rather than two. Historical and political ties as well as common cultural and legal heritages are others that make a certain model persuasive when a state is undertaking constitutional and institutional reform. Thus, for example, most Commonwealth nations have established separate human rights commission and/or ombudsman offices, while Latin American nations have looked to the Iberian/Spanish model and their Latin neighbors to adopt variations on the human rights ombudsman theme.

### *C. International Peace Processes: The Use of the National Human Rights Institution in the Reconstruction of Government Institutions and in Human Rights Protection*

A growing number of international peace processes, many under the auspices of the United Nations, have also addressed the construction or strengthening of democratic institutions and the protection of human rights. Some of these peace accords and civil reconstruction missions have also included provisions for the creation or strengthening of national human rights institutions as an instrument to protect human rights.

The United Nations–sponsored peace agreements for El Salvador created the *Procurador para la Defensa de los Derechos Humanos* in 1992, and the 1996 Guatemala peace accords attempted to strengthen the *Procurador de los Derechos Humanos*, in operation since 1987.<sup>33</sup> The 1995 Dayton/Paris Peace Ac-

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31. When the Uganda Inspector General of Government was established in the 1980s, it had a dual human rights ombudsman function. Recent reforms in Uganda, however, have led to the establishment of a separate human rights commission, with the Inspector General now fulfilling only an ombudsman role.

32. See Fatih Samih Azzam, *Update: The Palestinian Independent Commission for Citizen's Rights*, 20 HUM. RTS. Q. 338 (1998).

33. See *infra* text accompanying notes 236–257 for further details on the El Salvador *Procurador* and text accompanying notes 214–235 on the Guatemala *Procurador*.

cords contained human rights guarantees and procedures, including the establishment of a Human Rights Ombudsman for Bosnia and Herzegovina.<sup>34</sup>

In the Kosovo conflict, the failed NATO-led Rambouillet peace proposal of March 1999 included provisions for a human rights ombudsman.<sup>35</sup> At the end of the NATO bombing of the former Yugoslavia, United Nations Security Council Resolution 1244 authorized the deployment of international civil and security presences in Kosovo under UN auspices, and authorized the Secretary-General, with the assistance of other relevant international organizations, to establish an international civil presence in Kosovo (United Nations Interim Administration Mission in Kosovo or UNMIK) to provide transitional administration and assist in the development of democratic self-governing institutions in Kosovo.<sup>36</sup> It is likely that a national human rights institution will be established in Kosovo. Resolution 1244 stated that the main responsibilities of the international presence include the promotion of self-government in Kosovo, taking full account of the Rambouillet accords, and the protection and promotion of human rights.<sup>37</sup> In early July 1999 the Permanent Council of the Organization for Security and Cooperation in Europe (OSCE) agreed on the mandate of the OSCE Mission in Kosovo, which will act under the umbrella of UNMIK and take on the main tasks of building institutions and democracy and protecting human rights.<sup>38</sup> Among the stated duties of the OSCE Mission in Kosovo is the "[m]onitoring, protection and promotion of human rights, including, *inter alia*, the establishment of an Ombudsman institution, in co-operation, *inter alia*, with the UNHCHR [United Nations High Commissioner for Human Rights]."<sup>39</sup> Thus, a human rights ombudsman is contemplated for Kosovo and, in this respect, the Bosnia and Herzegovina Human Rights Ombudsman should prove influential as a precedent for the framework and powers of any new institution.

On July 7, 1999, the warring factions in Sierra Leone signed the Lomé Peace Agreement to end the civil conflict.<sup>40</sup> The Lomé Peace Agreement includes provisions for the establishment of a human rights commission and a truth and reconciliation commission.<sup>41</sup> The United Nations Security

34. See *infra* text accompanying notes 175–211 for further details on the Bosnia and Herzegovina Human Rights Ombudsman.

35. See Paul Goring, *Serbs Scorn Kosovo Peace Pact*, GLOBE & MAIL, Mar. 19, 1999, at A1.

36. See S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg. ¶¶ 5, 10–11, U.N. Doc. S/RES/1244 (1999).

37. See *id.* ¶¶ 11(a), (j).

38. See Organization for Security and Cooperation in Europe Secretariat, *OSCE Permanent Council Decides on Mandate for Kosovo Mission, Council Places Stability Pact for Southeastern Europe under OSCE Auspices*, OSCE Press Release No. 46/99 (1999) (visited Dec. 1, 1999) <<http://www.osce.org/e/docs/presrel/pr46-99.html>>.

39. See *id.*

40. See Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (July 7, 1999) (visited Dec. 1, 1999) <[http://www.sierra-leone.gov.sl/peace\\_agreement.htm](http://www.sierra-leone.gov.sl/peace_agreement.htm)>.

41. See *id.* arts. XXV(1) (agreeing to create, not later than 90 days after the signing of the agreement,

Council is supporting the Peace Agreement, *inter alia* emphasizing the importance of establishing these commissions promptly within the time period stipulated in the Agreement and ensuring their effective functioning because of the "urgent need to promote peace and national reconciliation and to foster accountability and respect for human rights in Sierra Leone."<sup>42</sup> Security Council Resolution 1270 creates the United Nations Mission in Sierra Leone (UNAMSIL) with a mandate that includes cooperating with the parties to the Peace Agreement in implementing its terms, presumably also covering the establishment of the commissions.<sup>43</sup>

Most recently, the 1999 East Timor situation resulted, *inter alia*, in the Security Council taking action under Chapter VII of the United Nations Charter to establish, first, a multinational force to restore peace and security in East Timor and protect and support the United Nations Mission in East Timor (UNAMET)<sup>44</sup> and, second, the United Nations Transitional Administration in East Timor (UNTAET)<sup>45</sup> to exercise legislative and executive authority in East Timor and build a civil administration. The mandate of UNTAET includes the establishment of an effective administration, assistance in the development of civil and social services, and support for capacity-building for self-government.<sup>46</sup> In particular, the development of local democratic institutions is envisaged, "including an independent East Timorese human rights institution."<sup>47</sup>

Also, the 1998 Northern Ireland Peace Agreement included provisions for creating human rights commissions on a bilateral basis in both Ireland and Northern Ireland.<sup>48</sup> Both Ireland and Northern Ireland already have ombudsman offices.

Looking to the future, it is probable that the United Nations and other regional international organizations will continue to become involved in peace-building processes in states emerging from civil and other complex conflicts. Given the precedents of El Salvador, Guatemala, Bosnia, Kosovo, and East Timor, the establishment or strengthening of national human

an "autonomous quasi-judicial national Human Rights Commission") and XXVI(1) (establishing a truth and reconciliation commission to examine human rights violations since the start of the conflict in 1991).

42. S.C. Res. 1270, U.N. SCOR, 54th Sess., 4054th mtg. ¶ 17, U.N. Doc. S/RES/1270 (1999); *see also* S.C. Res. 1260, U.N. SCOR, 54th Sess., 4035th mtg. ¶ 10, U.N. Doc. S/RES/1260 (1999) (calling upon the Government of Sierra Leone to ensure compliance with its obligations under the Peace Agreement to promote peace and national reconciliation and to foster respect for human rights).

43. *See* S.C. Res. 1270, *supra* note 42; *see* Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, *supra* note 40, Annex 5. The Lomé Peace Agreement also envisages that requests for technical and other assistance in the establishment of the human rights commission shall be made to the U.N. High Commissioner for Human Rights, the African Commission on Human and Peoples Rights, and other relevant organizations.

44. *See* S.C. Res. 1264, U.N. SCOR, 54th Sess., 4045th mtg. ¶ 3, U.N. Doc. S/RES/1264 (1999) (creating multinational force)

45. S.C. Res. 1272, U.N. SCOR, 54th Sess., 4057th mtg. ¶ 1, U.N. Doc. S/RES/1272 (1999) (creating UNTAET).

46. *See id.* ¶ 2.

47. *Id.* ¶ 8.

48. *See* Northern Ireland Peace Agreement, *supra* note 24.

rights institutions can be expected to feature increasingly in international peace initiatives. As the United Nations and other international organizations continue to devote more attention to good governance and domestic human rights protection matters in their member states, these concerns are also likely to be reflected in those UN missions or peace accords that encompass provisions on democratic institution building, including the establishment or strengthening of national human rights institutions. All the national human rights institutions created in peace agreements to date have had a strong or predominant human rights protection mandate, rather than a traditional ombudsman focus on administrative justice. Given the severe human rights problems in most war-torn societies, national institutions with a strong human rights protection role will probably continue to be most relevant for potential inclusion in future peace agreements or as elements of civil reconstruction.

## II. THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN PROMOTING GOOD GOVERNANCE AND PROTECTING HUMAN RIGHTS

### A. *The Role of National Human Rights Institutions in Building Good Governance*

The concept of good governance is being increasingly accepted by the international community as the standard for domestic governance.<sup>49</sup> Although I will not examine the question whether there is an evolving international norm that states must practice good governance,<sup>50</sup> international organizations involved in development activities and some donor states are emphasizing the need for states to implement good governance reforms and practices as one way of building and consolidating democracies.

Good governance can be defined broadly as "the responsible use of political authority to manage a nation's affairs."<sup>51</sup> Good governance is often treated as a basket of many practices: a professional civil service, elimination of corruption in government, a predictable, transparent and accountable administration, democratic decision-making, the supremacy of the rule of law, effective protection of human rights, an independent judiciary, a fair economic system, appropriate devolution and decentralization of govern-

49. See Ngaire Woods, *Good Governance in International Organizations*, 5 GLOBAL GOVERNANCE 39 (1999) (exploring how good governance is a gauge of behavior inside international organizations among member states).

50. Although there has been little or no consideration of this issue to date, Thomas Franck has argued that there is an evolving right to democratic governance under international law. See THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 83-139 (1995) (positing an emerging right to democratic governance and a participatory electoral process); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM.J.INT'L L. 46 (1992); James Crawford, *Democracy and International Law*, 64 BRIT. Y.B. INT'L L. 113 (1993).

51. CLARENCE J. DIAS & DAVID GILLIES, HUMAN RIGHTS, DEMOCRACY AND DEVELOPMENT 10 (1993).



ment, appropriate levels of military spending, and so on. Kofi Annan, United Nations Secretary-General, has stated that:

U.N. programs now target virtually all the key elements of good governance: safeguarding the rule of law; verifying elections; training police; monitoring human rights; fostering investments; and promoting accountable administration. Good governance is also a component of our work for peace. It has a strong preventive aspect; it gives societies sound structures for economic and social development. In postconflict settings, good governance can promote reconciliation and offer a path for consolidating peace.<sup>52</sup>

The United Nations Development Programme (UNDP) has connected the practice of good governance with the improvement of human development.<sup>53</sup> Similarly, the World Bank has promoted good governance practices, including reform of the public sector.<sup>54</sup> The IMF has implemented a policy of promoting those components of good governance that relate to economic performance.<sup>55</sup> Other international and supranational organizations, such as the Organization for Economic Cooperation and Development (OECD), the Commonwealth, and the European Union (EU), have also developed good governance standards for their development assistance activities.<sup>56</sup> In terms of individual donor states, Canada, for example, has developed a development assistance policy that includes good governance.<sup>57</sup>

52. Kofi Annan, *The Quiet Revolution*, 4 GLOBAL GOVERNANCE 123, 123 (1998).

53. See U.N. Development Programme, *Governance for Sustainable Human Development*, (UNDP Policy Document) (1997) (visited Nov. 17, 1999) <<http://magnet.undp.org/policy/default.html>>; U.N. Development Programme, *Reconceptualising Governance, U.N. Discussion Paper*, (visited Feb. 22, 1999) <<http://magnet.undp.org/Docs/!UN98-21.PDF/Recon.htm>>.

54. See generally WORLD BANK, GOVERNANCE AND DEVELOPMENT (1992); WORLD BANK, GOVERNANCE: THE WORLD BANK'S EXPERIENCE (1994); WORLD BANK, THE STATE IN A CHANGING WORLD, WORLD DEVELOPMENT REPORT (1997).

55. See INTERNATIONAL MONETARY FUND, GOOD GOVERNANCE: THE IMF'S ROLE (1997). The IMF Guidance Note on the Role of the IMF in Governance Issues referred to transparency in financial transactions in the public sector, reform of public administration, and ridding government of corruption and fraud.

56. See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, PARTICIPATORY DEVELOPMENT AND GOOD GOVERNANCE (1995); *Resolution to the Council and Representative Meeting in the Council on Human Rights, Democracy, and Development*, European Union, at 122-23, Bull. EC 11/1991 (1991); *Common Position on Human Rights, Democratic Principles, the Rule of Law and Good Governance in Africa*, O.J.C.L., 158/1 (1998); T. King, *Human Rights in the Development Policy of the European Community: Towards a European World Order?*, 28 NETH. Y.B. OF INT'L L. 51 (1997). See also Commonwealth Heads of Government, *The Durban Communiqué*, Commonwealth Press Release 99/68 para. 41 (Nov. 15, 1999) (visited Feb. 22, 2000) <<http://www.thecommonwealth.org/html/info/info/communiques/9968.htm>> (adopting the Commonwealth 1998 Expert Group on Good Governance and the Elimination of Corruption on Economic Management report, *Framework for Principles for Promoting Good Governance and Combating Corruption*). The Commonwealth Heads of Government also renewed their commitment to the principles of good governance. See *id.* para. 10; Commonwealth Heads of Government, *Harare Declaration* (Oct. 20, 1991) (visited Feb. 22, 2000) <<http://www.tcol.co.uk/harare.htm>>.

57. See CANADIAN INTERNATIONAL DEVELOPMENT AGENCY, GOVERNMENT OF CANADA POLICY FOR CIDA ON HUMAN RIGHTS, DEMOCRATIZATION AND GOOD GOVERNANCE, 21-22 (1996).

There is an interface between a democratic system of government in a state and good governance, although the former does not guarantee the latter.<sup>58</sup> Human rights protection is often included within the ambit of good governance, although it should also be considered as a separate important element in its own right in rebuilding torn societies and in democratic development. Further, although the conduct of the public sector is an important component of good governance, the behavior of the private sector and civil society, and the interrelationships between the three areas, have also been incorporated into the concept.<sup>59</sup>

In examining its essential characteristics, the UNDP has stated that “[g]ood governance is, among other things, participatory, transparent and accountable. It is also effective and equitable. And it promotes the rule of law.”<sup>60</sup> In a similar vein, it has been argued that the three core elements of good governance are participation, accountability, and fairness.<sup>61</sup> Participation involves members of the public in the decision-making and implementation of public projects or other government activity.<sup>62</sup> Accountability involves establishing “appropriate lines or forms of accountability” between the government and the public, which can include access to information, transparency in decision-making, and rules of procedural fairness such as the communication of decisions and the reasons on which they are based.<sup>63</sup> Fairness is broken down into substantive and procedural elements, with substantive fairness requiring the actual fairness of results and procedural fairness holding that “the processes of representation, decision making, and enforcement in an institution . . . be clearly specified, nondiscretionary, and internally consistent.”<sup>64</sup>

National human rights institutions can build good governance in a state by realizing all three of these core principles of good governance. These institutions act as mechanisms by which members of the public can participate in the regulation of the conduct of public administration by initiating complaints that lead to investigations of human rights abuses or faulty administration. Accountability of the administration is improved—lines of accountability are drawn between the public, the national institution and

58. BOUTROS BOUTROS-GHALI, AN AGENDA FOR PEACE 17, U.N. Doc. A/47/277 (1995); BOUTROS BOUTROS-GHALI, AN AGENDA FOR DEVELOPMENT 22–25, U.N. Doc. A/48/935 (1995).

59. See WORLD BANK, GOVERNANCE AND DEVELOPMENT (1992); WORLD BANK, GOVERNANCE: THE WORLD BANK'S EXPERIENCE (1994); WORLD BANK, THE STATE IN A CHANGING WORLD, WORLD DEVELOPMENT REPORT (1997); *Reconceptualising Governance*, *supra* note 53.

60. *Governance for Sustainable Human Development*, *supra* note 53, at 3.

61. See Woods, *supra* note 49, at 41, 43–46.

62. See *id.* at 43–44.

63. *Id.* at 44; see BOUTROS-GHALI, AN AGENDA FOR DEVELOPMENT, *supra* note 58, at para. 126 (improving governance “means accountability for actions and transparency in decision-making”); Konrad Ginther, *Sustainable Development and Good Governance: Development and Evolution of Constitutional Orders*, in SUSTAINABLE DEVELOPMENT AND GOOD GOVERNANCE 150, 157 (Konrad Ginther et al. eds., 1995) (defining good governance as “promoting limited government through strengthening public accountability”).

64. Woods, *supra* note 49, at 46.

the executive/administrative branch, and the latter has to comply with the investigation, have its behavior scrutinized according to standards of law and equity, and respond to recommendations or other stronger remedial action. Transparency of government conduct is heightened through formal, objective scrutiny and public reporting by the national human rights institution. Fairness of government is also improved by national human rights institutions. An ombudsman is expressly designed to investigate broad areas of administrative unfairness and legality with the objective of improving procedural fairness in administration. National human rights institutions, including the ombudsman, can also build substantive fairness in recommendations for changes in law and policy and in combating corruption.<sup>65</sup> All national institutions with a human rights role attempt to reduce human rights breaches by the administration, thereby improving substantive fairness.

### *B. National Human Rights Institutions and Human Rights Protection and Promotion*

Clearly, those national institutions with an express human rights mandate can act as a domestic mechanism for protecting and promoting human rights, i.e., the human rights commission (which may go by another name, e.g., human rights office or commissioner) and the hybrid human rights ombudsman. As discussed earlier, their human rights activities are varied, and include research, advice, education, investigations, and some remedial activities. These national institutions rely on the domestic constitutional and/or other law structuring their office that directs them to promote and uphold specified human rights laws. These human rights guarantees may explicitly include international human rights norms among the legal standards that the national human rights institution must apply. The human rights norms upheld by the institution are typically found in the constitution and/or statute law. International human rights treaties and/or customary norms may be expressly incorporated in the constitution or through legislation. Alternatively, the substantive norms deriving from the international human rights obligations of the state may be translated into constitutional or statutory language. Customary international law norms may be applied by the courts and thereby form part of domestic jurisprudence. Thus, national human rights institutions can apply the international human rights law obligations of the state in which they operate—with express or implied power to do so—to the extent that these international norms have become legally binding on the state under international law and have been incorporated into the domestic law of the nation through the constitution and/or other law.

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65. See BOUTROS-GHALI, *AN AGENDA FOR DEVELOPMENT*, *supra* note 58, at para. 127 (“improved governance means that bureaucratic procedures help ensure fairness rather than enrich officials.”).

In contrast, the classical ombudsman does not have an express human rights protection function. However, the classical ombudsman can and sometimes does protect and promote human rights.<sup>66</sup> Ombudsman offices do receive jurisdictional complaints that involve human rights issues and cannot be referred to another human rights institution—another human rights institution may not exist and/or the human rights issue may be intertwined with a maladministration complaint. The ombudsman can use human rights laws to resolve such an investigation because she typically has the power to determine whether administrative conduct is illegal, as well as whether it is procedurally unfair or wrong. As a result, a classical ombudsman can apply domestic law, including human rights law, to determine both the legality and fairness of administrative conduct. Again, these domestic laws can be constitutional and/or statutory in nature, and may be the internal implementation of international human rights obligations of the state. Thus, the ombudsman may also serve as a domestic mechanism for the implementation of international human rights law.

There are many areas of administrative conduct that may fall within ombudsman and human rights ombudsman jurisdiction that raise human rights complaints. Further, there are greater possibilities for an ombudsman to receive human rights complaints if the office has jurisdiction over the prison system, the police and the military.<sup>67</sup> Both classical ombudsmen and hybrid institutions have undertaken investigations that involve civil and political rights,<sup>68</sup> and a number of both types of institutions take cases that raise economic, social, cultural, and labor rights issues.<sup>69</sup> Indeed, as will be seen further below, economic and social rights complaints form large components of the caseload in hybrid offices in countries in Central and Eastern Europe and in other countries, such as Argentina. Human rights complaints about discrimination in the provision of administrative services, restrictions

66. See generally Linda C. Reif, *Ombudsman and Human Rights Protection and Promotion in the Caribbean: Issues and Strategies*, in STRENGTHENING NATIONAL OMBUDSMAN AND HUMAN RIGHTS INSTITUTIONS IN COMMONWEALTH SMALL AND ISLAND STATES—THE CARIBBEAN EXPERIENCE (Victor Ayeni et al. eds., forthcoming 2000) [hereinafter STRENGTHENING NATIONAL OMBUDSMAN AND HUMAN RIGHTS INSTITUTIONS]; Linda C. Reif, *The Promotion of International Human Rights Law by the Office of the Ombudsman*, in THE OMBUDSMAN: DIVERSITY AND DEVELOPMENT at 87 (Linda C. Reif et al. eds., 1993), reprinted in THE INTERNATIONAL OMBUDSMAN ANTHOLOGY, *supra* note 21, at 271.

67. While hybrid human rights ombudsmen often have jurisdiction over police, security forces, and armed forces, only some traditional ombudsmen have jurisdiction over the police and/or military forces. In a few countries there are specialized ombudsmen for the military.

68. See, e.g., Marten Oosting, *The National Ombudsman of the Netherlands and Human Rights*, 12 THE INT'L OMBUDSMAN J. 1 (1994), reprinted in THE INTERNATIONAL OMBUDSMAN ANTHOLOGY, *supra* note 21, at 317; Ivan Bizjak, *The Role and Experience of an Ombudsman in a New Democracy*, 2 INT'L OMBUDSMAN Y.B. 57 (1998); Ivan Bizjak, *European Ombudsmen and the Rights of People Deprived of Their Liberty*, in 3 INT'L OMBUDSMAN Y.B. 89 (1999).

69. See Barbara von Tigerstrom, *The Role of the Ombudsman in Protecting Economic, Social and Cultural Rights*, 2 INT'L OMBUDSMAN Y.B. 3, 16–18 (1998); Bizjak, *The Role and Experience of an Ombudsman in a New Democracy*, *supra* note 68; Constance Thomas, *International Labor Standards and Fundamental Human Rights: Applications in the Caribbean*, in STRENGTHENING NATIONAL OMBUDSMAN AND HUMAN RIGHTS INSTITUTIONS, *supra* note 66, at 193.

on freedom of expression, threats to security of the person in health care facilities, treatment during the criminal process, rights of the child in the care of the state, and breaches of economic and social rights in the realm of health and social services are some examples of jurisdictional ombudsman cases.

A national human rights institution may be able to use international and domestic human rights laws directly or indirectly in the investigation of a complaint.<sup>70</sup> The direct use of human rights norms occurs when international law has been incorporated into domestic law, alongside other supporting human rights laws and jurisprudence. The national institution can use the domestic human rights law as the foundation for recommendations and other action at the conclusion of an investigation. Human rights commissions and mixed human rights ombudsmen will be expressly directed to apply this law, whereas classical ombudsmen can use domestic human rights law as one component of the domestic legal system that is the standard by which the ombudsman can determine whether administrative conduct is illegal or procedurally unfair.

In a broader sense, indirect use of international human rights norms can occur in two ways. First, depending on the legal system, it may be possible to use international human rights obligations of the state to interpret how the national constitutional or statutory guarantees of rights comply with international obligations in a specific situation. Second, for national human rights institutions—such as ombudsman and hybrid human rights offices that have the power to use wider notions of fairness and equity in the identification of poor government conduct—the international human rights law obligations of the state can be used as guiding principles or examples of “good practices” even if the international law has not been implemented into domestic law.

The extent to which the state that has created the national human rights institution has become bound by human rights treaties influences the relevance of these treaties for the various offices. Clearly, the United Nations treaties on human rights, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and many subject-specific treaties, are important sources of norms for offices in states throughout the world that have become parties to them.<sup>71</sup> In addition, there are regional human rights treaties. The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (ECHR) are being used by national

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70. See Reif, *The Promotion of International Human Rights Law by the Office of the Ombudsman*, *supra* note 66, at 280–82.

71. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 51, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171; International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 3.

human rights institutions throughout Europe.<sup>72</sup> In the Americas, the Inter-American human rights system, which revolves around the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man, is important for national human rights institutions in that region.<sup>73</sup> For institutions in Africa, the African Charter of Human Rights and Peoples' Rights is relevant.<sup>74</sup>

The types of human rights norms that a national human rights institution can promote and protect are also expanding. Civil and political rights are extensively covered in international human rights law and are implemented in domestic constitutions and law. Increasingly, economic, social and cultural human rights are evolving in the international system, and in growing numbers of countries, these rights are also being translated into constitutional and statutory norms. National human rights institutions, therefore, potentially have a full spectrum of human rights to work with.

The ICESCR Committee on Economic, Social and Cultural Rights issued its General Comment No. 10 in December 1998 on the role of national human rights institutions in the protection of economic, social, and cultural rights.<sup>75</sup> The Committee stated that:

National institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights. Unfortunately this role has too often either not been accorded to the institution or has been neglected or given a low priority by it. It is therefore essential that full attention be given to economic, social and cultural rights in all of the relevant activities of these institutions.<sup>76</sup>

The Committee also called on state parties to include an appropriate economic, social and cultural rights protection role in the powers of all their national human rights institutions.<sup>77</sup>

From a bottom-up perspective, national human rights institutions can also be a source of human rights information for governments to use in compiling their state reports, which must be submitted periodically to the committees established under human rights treaties to which the state is a

72. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Apr. 11, 1950, 213 U.N.T.S. 222 (1950). Forty-one European states are contracting parties to the ECHR.

73. American Convention on Human Rights, *signed* Nov. 22, 1969, 1144 U.N.T.S. 123; American Declaration on the Rights and Duties of Man, *adopted* May 2, 1948, O.A.S. Res. XXX, *reprinted in* OEA/Ser.L.V/II.82, at 17 (1992).

74. African Charter of Human Rights and People's Rights, *adopted* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev.5 (1986), 21 I.L.M. 58 (1982).

75. *See General Comment on the Role of the National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights*, H.R.C. General Comment 10, U.N. Doc. E/C.12/1998/25 (1998).

76. *Id.* ¶ 3.

77. *See id.* ¶ 4.

contracting party.<sup>78</sup> In addition, international organizations can directly scrutinize annual and special reports of national human rights institutions to determine the extent of state compliance with international law obligations.

### III. THE EFFECTIVENESS OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN DEMOCRATIC STATES

The fact that a national human rights institution has been established does not automatically lead to the conclusion that it will be effective in building good governance and protecting human rights. National human rights institutions may be established by a government with the best of intentions, such as when a state is making the transition to democratic government, or consolidating its democratic structure, or when established democracies wish to fine tune their institutions. However, national human rights institutions can be established by governments that are not democratic or by governments who want to give the appearance that they are taking steps to improve the human rights and administrative justice situation in their countries, while the reality is that there is little material change after the institution starts operations.

The degree of success that a national human rights institution will have in building good governance and protecting human rights depends on a number of legal, political, financial, and social factors affecting the institution. These factors are sometimes interrelated. All of the factors need to be addressed in at least a satisfactory manner in order for a national human rights institution to operate effectively. Also, these factors need to be re-evaluated periodically. Weaknesses in one or more of these factors may occur from time to time in offices in both established democracies and in democratizing states and need to be remedied if the institution is to continue to operate effectively or in order to strengthen the institution. Further, in a democratizing state, the success or failure of a national human rights institution often cannot be judged on a short-term basis; rather, its effectiveness can only be determined over a longer time frame after giving the government the opportunity to address and strengthen the various factors that enhance the effectiveness of an institution.

#### A. Effectiveness Factors

The United Nations High Commission for Human Rights has stated that there are six "effectiveness factors" generally applicable to all national human rights institutions: independence, defined jurisdiction, and adequate powers, accessibility, cooperation, operational efficiency, and accountabil-

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78. *See id.* The Committee on Economic, Social and Cultural Rights of the ICESCR has requested that state parties to the ICESCR include information on the mandates and principal activities of national institutions relating to economic, social and cultural rights in the reports that they must submit.

ity.<sup>79</sup> I include these six within a larger group of effectiveness factors. Some of these six factors are present in the Paris Principles, although the Principles can be criticized on several grounds.<sup>80</sup> The Paris Principles are drafted with only the classical human rights commission model in mind, and the Principles do not adequately address the structure and role of the ombudsman or, in some respects, even hybrid institutions, in the protection of human rights. In particular, the Paris Principles consider the power of investigation to be an optional function that may be given to a national human rights institution, a decision that in practice is taken only with respect to human rights commissions.<sup>81</sup> In contrast, the power to investigate is considered an essential power for all ombudsmen and hybrid human rights ombudsmen. Arguably, the investigatory power should be included as an essential component of all national human rights institutions in order to strengthen their ability to promote and protect human rights and build good governance.<sup>82</sup>

In my view, all of the following factors contribute to the effectiveness of national human rights institutions: the democratic governance structure of the state; the degree of independence of the institution from government; the extent of the institution's jurisdiction; the adequacy of the powers given to the institution, including the power to investigate; the accessibility of the institution to members of the public; the level of cooperation of the institution with other bodies; the operational efficiency of the institution; the accountability of the institution, the personal character of the person(s) appointed to head the institution; the behavior of government in not politicizing the institution and in having a receptive attitude toward its activities; and the credibility of the office in the eyes of the populace.

At the foundational level, national human rights institutions usually cannot fulfill their functions effectively in states that do not have some minimum level of democratic governance.<sup>83</sup> As an accountability mechanism, a national human rights institution will find it extremely difficult to function in a state without a democratic system of checks on the exercise of power, where real independence from the ruling power is not possible and where human rights are not respected in law and/or practice. In contrast, as demo-

79. See NATIONAL HUMAN RIGHTS INSTITUTIONS: A HANDBOOK, *supra* note 3, at 10.

80. See Paris Principles, *supra* note 4.

81. The Paris Principles contain a final section covering those offices that can hear individual complaints. See *id.*, Annex (*Additional principles concerning the status of commissions with quasi-jurisdictional competence*).

82. The opposing argument holds that if the government is not comfortable with a human rights commission with investigatory powers, then a commission with only educational, research, and advisory capabilities is better than none at all. Also, if the state deepens its commitment to democracy and human rights, stronger powers may be given to the institution later in time. For example, the Indonesian legislature introduced a bill in 1999 to give stronger powers to the Indonesian Human Rights Commission.

83. Larry Diamond has classified states into liberal democracies, nonliberal electoral democracies, pseudo-democracies and authoritarian regimes. See LARRY DIAMOND, *DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION* 279-80 (1999).



cratic governance in a state deepens and matures, any national human rights institution established within the state should experience a more conducive environment for operational effectiveness. However, occasionally, a national human rights institution that is established in a state that is nearing a transition to democratic governance may be able to contribute through its activities to the growth of an environment that positively supports the transition and greater respect for human rights.

Maximizing the independence of the institution from government is important for effectiveness and can be achieved through various means. The independence factor requires that heads of national institutions are appointed in a manner (e.g., appointment by the legislative branch, inserting the office in the Constitution) that gives them independence from influence or control by the arm of government the office is designed to investigate—the executive/administrative branch—and other government and non-government bodies that could influence its activities.<sup>84</sup> Independence of the institution is also enhanced by giving the head of the institution security of tenure and giving the institution independence in matters such as the investigation and reporting process, the budget, and the hiring of personnel.<sup>85</sup>

A national human rights institution should be given broad jurisdiction and powers that are sufficiently strong to enable it to accomplish its mandate effectively. It is important that the jurisdiction of the institution be defined precisely in order for the institution to pursue its work efficiently and to avoid jurisdictional conflicts with other state institutions.<sup>86</sup> The jurisdiction of the office should be made as wide as possible.<sup>87</sup> For example, the police, security forces, defense forces, prisons, and other detention centers, which are often the sources of human rights problems and need civilian-oversight mechanisms, should be included within the jurisdiction of the institution. Also, consideration should be given whether the courts may be granted jurisdiction, perhaps even in a more limited way, such as where there has been unreasonable delay in rendering decisions.<sup>88</sup>

84. See NATIONAL HUMAN RIGHTS INSTITUTIONS: A HANDBOOK, *supra* note 3, at 10; Paris Principles, *supra* note 4, Annex (*Composition and guarantees of independence and pluralism*). On the Ombudsman see Roy Gregory, *Building an Ombudsman Scheme: Provisions and Operating Practices*, 12 OMBUDSMAN J. 83 (1994), reprinted in THE INTERNATIONAL OMBUDSMAN ANTHOLOGY, *supra* note 21, at 132.

85. See NATIONAL HUMAN RIGHTS INSTITUTIONS: A HANDBOOK, *supra* note 3, at 10–12; Paris Principles, *supra* note 4, Annex (*Composition and guarantees of independence and pluralism*) art. 2 (stressing importance of independence of national institution); Gregory, *supra* note 84, at 132–136.

86. See NATIONAL HUMAN RIGHTS INSTITUTIONS: A HANDBOOK, *supra* note 3, at 12–13; Paris Principles, *supra* note 4, Annex (*Competence and responsibilities*) and (*Additional principles concerning the status of commissions with quasi-judicial competence*) (listing the functions that national human rights institutions must and may be granted).

87. See Paris Principles, *supra* note 4, Annex (*Competence and responsibilities*); Gregory, *supra* note 84, at 138–42.

88. For example, although the ombudsman offices in Sweden and Finland have general jurisdiction over the courts, the Slovene Human Rights Ombudsman has a more limited role. *But see* Timothy J. Christian, *Why No Ombudsman to Supervise the Courts in Canada?*, in THE OMBUDSMAN CONCEPT at 139, reprinted in THE INTERNATIONAL OMBUDSMAN ANTHOLOGY, *supra* note 21, 129 at 539 (arguing that the ombudsman could not be given jurisdiction over the judiciary in Canada for constitutional reasons).

The institution should also be given adequate powers in its legal framework in the investigatory process, at the implementation stage and in the other roles, such as advice and education, that the institution may undertake.<sup>89</sup> As discussed above, giving the institution powers of investigation is important to enable individual cases of human rights and unfairness to be addressed. All ombudsman and hybrid human rights ombudsman institutions are given powers of investigation that should be as strong as possible, and all human rights commissions should also be given similar powers.

The accessibility factor requires the national human rights institution to be accessible to the population that the office is designed to protect, looking at issues such as public knowledge of the institution, physical location and diversity of composition.<sup>90</sup> Institutions can improve accessibility by various devices, which have different costs, ranging from advertising the office through radio, TV and brochures to opening up regional offices. Also, the institution should be free of charge to the complainant and there should be direct access to the office, e.g., the complainant should not have to complain first to a member of the legislature who then passes the complaint on to the institution.<sup>91</sup> The access needs of disabled and confined complainants should also be met by institutions.

Promoting cooperation refers to developing relationships and cooperating with NGOs, other national human rights institutions and international organizations.<sup>92</sup> Exchanging views and information with other relevant organizations should enhance the activities of a national human rights institution. Developing good relationships with NGOs provides the institution with information on human rights issues, feedback on their own work and partnerships for joint activities.

Operational efficiency requires that the institution's structures are given adequate financial and human resources, that the institution is given the freedom to select and employ its own personnel (i.e., it is not forced to hire from the existing civil service complement), and that the institution has appropriate internal working and evaluation procedures.<sup>93</sup>

The effectiveness of the institution should also be improved if it has an accountability system, which is usually implemented through the reporting

89. See NATIONAL HUMAN RIGHTS INSTITUTIONS: A HANDBOOK, *supra* note 3, at 13; Paris Principles, *supra* note 4, Annex, *Methods of operation* and *Additional principles concerning the status of commissions with quasi-judicial competence*; Gregory, *supra* note 84, at 142-43.

90. See NATIONAL HUMAN RIGHTS INSTITUTIONS: A HANDBOOK, *supra* note 3, at 13-14. Diversity of composition applies directly to human rights commissions and multiple-member ombudsmen based on the argument that an institution that is reflective of the different groups in civil society should strengthen both accessibility and independence. In addition, the staff of an institution should also reflect the diversity of the society served.

91. For example, the United Kingdom Parliamentary Commissioner for Administration follows this procedure. See Gregory, *supra* note 84, at 136-38.

92. See NATIONAL HUMAN RIGHTS INSTITUTIONS: A HANDBOOK, *supra* note 3, at 14-15; Paris Principles, *supra* note 4, Annex (*Competence and responsibilities*) § 3(d), (e); Paris Principles, *supra* note 4, Annex (*Methods of operation*) § (f), (g).

93. See NATIONAL HUMAN RIGHTS INSTITUTIONS: A HANDBOOK, *supra* note 3, at 15-16.

requirements imposed on institutions in their legal framework in the form of annual, and sometimes special, public reports to the legislature.<sup>94</sup> The institution should also be accountable to the members of the public who it is mandated to protect.<sup>95</sup> Accountability to the public can be enhanced through actions such as making sure the annual and special reports are distributed widely in the public sphere, and ensuring that there is a regular flow of communication between the institution and the complainant during an investigation. Also, where there is both an ombudsman and a human rights commission in a territory (as is the case in a number of Commonwealth countries), when the commission is established as a government agency, the ombudsman may have the jurisdiction to investigate complaints of maladministration made against the human rights commission.<sup>96</sup>

Also, other effectiveness factors can be added. It is extremely important to appoint an individual or individuals to head a national human rights institution who have expertise, integrity, and credibility in the eyes of both the government and the populace. The strength of character and, occasionally, the courage needed to operate an effective national human rights institution should not be underestimated. In both democratizing states and established democracies, a strong, competent, and credible commission, ombudsman, or human rights ombudsman can be the determining factor in the effectiveness of the institution.

In addition, there is the risk that the office will become politicized if the legislature or executive appoints persons too closely connected with the government, who thus may be perceived to be aligning themselves with government positions. Accordingly, individuals who have an established history of independence from government should be appointed to head national human rights institutions. Further, political and government support must be given to the institution, its work, and its recommendations. A responsive government in the positive sense is crucial to the effectiveness of a national human rights institution. If the work and recommendations of the institution are ignored or unreasonably criticized by government, the effectiveness of the institution will suffer.

Finally, the populace served by the institution must perceive that the institution can provide it with real benefits: through its right to complain about poor administration or human rights breaches, to obtain an impartial

94. See *id.* at 17; Gregory, *supra* note 84, at 145–47.

95. See NATIONAL HUMAN RIGHTS INSTITUTIONS: A HANDBOOK, *supra* note 3, at 17; Paris Principles, *supra* note 4, Annex (Competence and responsibilities) § 3; Paris Principles, *supra* note 4, Annex (Additional principles concerning the status of commissions with quasi-jurisdictional competence).

96. Ombudsman of Ontario and other Canadian provincial ombudsman offices have such jurisdiction. See Ombudsman Ontario, *Timeliness of the Ontario Human Rights Commission's Investigative Process and Refusal of the Ontario Human Rights Commission to Hear a Complaint on the Grounds that the Complainant Should Have Pursued a Remedy Under the Worker's Compensation Act*, in OMBUDSMAN ONTARIO 1999 REPORTS (visited Feb. 22, 2000) <<http://www.ombudsman.on.ca>>. Yet, this raises the question whether there should be an oversight body to monitor the ombudsman. It is argued that an ombudsman or other national institution that is an office of, or appointed by, the legislature should be responsible only to the legislature.

investigation of the matter, and to have some positive results if wrongdoing is found. The status of all of the other effectiveness factors with respect to a particular national human rights institutions will affect the public's perception of that institution. If the public develops a negative perception about the institution, this attitude may not be easily altered and members of the public may become disinclined to use the institution. From another perspective, a national human rights institution in a newly democratizing country may be faced with the remnants of the public's distrust in government carried over from the prior authoritarian regime. In such a situation, in order for the new institution to build a positive public perception, the new government needs to ensure that the institution is structured with attention to all the effectiveness factors, and the institution needs to develop public confidence through its activities.

### B. *The Effectiveness of the Power to Recommend*

Even if all factors for optimizing the effectiveness of a national human rights institution are present, it still is the case that most national human rights institutions cannot make binding decisions and are confined to giving non-binding recommendations, advice and reports, plus sometimes being able to refer matters to tribunals for a legally binding decision. Only a minority of institutions have stronger powers, such as launching court actions to determine the constitutionality of laws and prosecuting for corruption or breach of law. This raises the question of the effectiveness of a national human rights institution that cannot legally enforce the results of its investigations.

Examining the issue from the perspective of the accountability provided by self-regulatory state institutions, Schedler believes political accountability is composed of "answerability" and "enforcement" elements.<sup>97</sup> Answerability is defined as the power given to an institution to ask "accountable actors" to give information on their decisions and to explain the facts and the reasons upon which these decisions are based, whereas the enforcement element of accountability is composed of punishment or other negative sanctions for inappropriate behavior.<sup>98</sup>

Schedler does conclude that state institutions can still offer accountability if either the answerability or the enforcement element is missing, stating that:

accountability does not represent a "classical" concept displaying a hard core of invariable basic characteristics. Instead, it must be regarded as a "radial" concept whose "subtypes" or "secondary" ex-

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97. See Andreas Schedler, *Conceptualizing Accountability, in THE SELF-RESTRAINING STATE*, *supra* note 1, at 14-17.

98. See *id.*

pressions do not share a common core but lack one or more elements that characterize the prototypical "primary" category.<sup>99</sup>

In classifying the forms of accountability engendered by national human rights institutions, most provide legal and constitutional accountability, those with an ombudsman component also provide administrative accountability, and institutions with an anti-corruption mandate supply financial accountability.<sup>100</sup> Yet, at first glance, according to Schedler's classification, most national human rights institutions would be classified as state mechanisms that have only the answerability element of accountability—a secondary or subtype example of a state accountability mechanism. If the enforcement aspect of accountability is considered to be present only when the institution is given the power to legally impose punishment, then most national institutions will be considered to lack this element unless "soft" types of sanctions are included, such as negative publicity in reports and recommendations, and the power to refer cases on to other tribunals that can issue legally binding decisions.

However, Schedler's bipartite categorization does not account for the powers of investigation, reporting, persuasion, and forms of alternate dispute resolution undertaken by many national human rights institutions. The ability to investigate a complaint thoroughly and impartially, to analyze the case according to law (and, in the case of many ombudsman institutions, fairness considerations), and to make recommendations to government for changes in law and policy—all of which are reported to the government—goes beyond his concept of answerability accountability. Also, after a report on an investigation is issued, national human rights institutions will often engage in informal discussions with the executive/administrative branch to try to persuade the government to make the recommended changes. Accordingly, it is more accurate to classify most national human rights institutions as providing a third, intermediate form of accountability that lies somewhere between answerability and enforcement accountability on Schedler's spectrum.

From another perspective, the accountability concept can be explained through types of control mechanisms that can operate to obtain compliance with the law in question. A clear distinction can be made between enforcement and compliance. If the focus is on compliance, it is possible to look not only at the effectiveness of mechanisms to obtain enforcement of the law (the "sticks" approach), but also at approaches or incentives that engender voluntary conformity with the law (the "carrots" approach). In the area of control

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99. *Id.* at 18.

100. "[A]dministrative accountability reviews the expediency and procedural correctness of bureaucratic acts . . . financial accountability subjects the use of public money by state officials to norms of austerity, efficiency, and propriety; . . . legal accountability monitors the observance of legal rules; and constitutional accountability evaluates whether legislative acts are in accordance with constitutional rules." *Id.* at 22.

of administrative action, Hertogh and Oosting have applied the different forms of law enforcement seen in various areas of government, classifying the ombudsman generally as a mechanism of "cooperative control" as opposed to the "coercive control" of the courts.<sup>101</sup> Cooperative control is facilitative and proactive, using advice and persuasion, wherein the actors confer and dialogue to try to obtain the desired result and change behavior.<sup>102</sup> In contrast, coercive control is reactive, and control is imposed by unilateral decision.<sup>103</sup> Therefore, most national human rights institutions can be considered to be forms of cooperative control, with some powers of a few offices moving into the coercive control sphere. This intermediate level of accountability provided by national human rights institutions interfaces with building good governance in a state and protecting human rights. Since national human rights institutions are overwhelmingly cooperative control mechanisms, the factors that influence the effectiveness of an institution will also affect the ability of the institution to exercise cooperative control successfully.

#### IV. NATIONAL HUMAN RIGHTS INSTITUTIONS: SELECTED CASE STUDIES

In this Part, I will provide some case studies selected from over one hundred national human rights institutions that have been established around the world in order to illustrate the different ways in which these institutions can build good governance and/or protect and promote human rights. An evaluation of the effectiveness of the institutions in each region will also be attempted. Although the focus is on relatively new institutions, some established offices are also examined. Many of the case studies explore the adaptations of the human rights commission and ombudsman models that have been established. The selections are taken from the following regions: Northern, Western, and Southern Europe; Central and Eastern Europe; Latin America; and Africa. Given the large number and variety of national human rights institutions that now exist, the examples provided in this paper can only provide a partial view of the contemporary landscape.

##### A. Northern, Western, and Southern Europe

There are many classical ombudsmen in Northern and Western Europe, with Southern Europe favoring the human rights ombudsman, but there are only a handful of human rights commissions. There are national ombuds-

101. See Marc Hertogh and Marten Oosting, *Introduction: The Ombudsman and the Quality of Government*, in 3 EUR. Y.B. COMP. GOV'T & PUB. ADMIN. 259, 265 (J.J. Hesse and T.A.J. Toonen eds., 1996) [hereinafter 3 EUR. Y.B.]; Marc Hertogh, *The Policy Impact of the Ombudsman and the Administrative Courts: A Heuristic Model*, in 2 INT'L OMBUDSMAN Y.B. 63, 69 (1998) (using the terms "reflexive control" and "repressive control" respectively). However, this conceptualization recognizes that some specific ombudsman powers may be coercive in nature, for example strong powers of investigation or the ability to prosecute.

102. See Hertogh, *supra* note 101.

103. See *id.*

men, including several human rights ombudsmen, in twelve of the fifteen European Union states and, of the remaining three, Italy has ombudsmen at the sub-national level, Germany has one regional ombudsman, and only Luxembourg has not established the institution at all (the latter two nations rely on legislative petitions committees at the national level). The ombudsman is found throughout Scandinavia. Switzerland, however, has not established a national ombudsman, although there are a few cantonal and municipal ombudsmen.

### 1. Norway

In Norway, the institution of the Parliamentary Ombudsman is enshrined in the Constitution, and is appointed by the *Storting* "to supervise the public administration and all who work in its service, to assure that no injustice is done against the individual citizen."<sup>104</sup> Pursuant to the subsidiary legislation, the Ombudsman, in giving his opinion at the conclusion of an investigation into the administration, can point out errors and negligence, notify the government of shortcomings in law and administrative practice, inform prosecuting authorities of what steps he thinks should be taken, and recommend the payment of damages.<sup>105</sup>

Although it is a classical ombudsman whose main activity is the investigation of poor administration, the Norwegian Ombudsman has stated that the institution should play an active role in ensuring that Norway's obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR" or "European Convention") and other human rights treaties are implemented in the domestic legal system and respected by the public administration.<sup>106</sup> Ombudsman Arne Fliflet has stated:

{i}n practice, when investigating the individual cases, I will also verify that the public administration has taken due account of any international human rights obligations by which Norway might be bound. If it is not clearly evident from the decisions of the public administration that relevant provisions of the [European] Convention have been considered, the administration will be asked to reconsider the matter. Furthermore, within the framework of sec-

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104. NOR. CONST. art. 75; Act Concerning the Storting's Ombudsman for Public Administration (Nor.); Directive to the Storting's Ombudsman for Public Administration (Nor.). These Acts are reprinted in a volume that compiles a variety of national statutes creating ombudsman and hybrid institutions. See COMMISSIONER FOR CIVIL RIGHTS OF POLAND, NATIONAL OMBUDSMEN: COLLECTION OF LEGISLATION FROM 27 COUNTRIES (1998) [hereinafter NATIONAL OMBUDSMEN: COLLECTION]. The Norwegian Act and Directive are reprinted in NATIONAL OMBUDSMEN: COLLECTION, at 199, 202-03.

105. See Act Concerning the Storting's Ombudsman for Public Administration, *supra* note 104, §§ 10-11; Directive to the Storting's Ombudsman for Public Administration, *supra* note 104, § 9.

106. See NORWEGIAN PARLIAMENTARY OMBUDSMAN, ANNUAL REPORT 1990 22-23 (1990) [hereinafter NORWEGIAN ANNUAL REPORT]; see also ARNE FLIFLET, THE PARLIAMENTARY OMBUDSMAN AND HUMAN RIGHTS (1996).

tions 11 and 12 of the Act relating to the Parliamentary Ombudsman, I will draw the attention of the *Storting* and the public administration to any discrepancies that I might discover between conventions and Norwegian laws and regulations.<sup>107</sup>

The Ombudsman of Norway has dealt with a few cases expressly involving human rights. Human rights obligations and Norwegian constitutional provisions have been used to support the opinion of the Ombudsman in investigations concerning freedom of expression (ECHR, Article 10), freedom of association (ECHR, Article 11), and the right to receive a decision within a reasonable period of time (ECHR, Article 6).<sup>108</sup>

The Norwegian Ombudsman illustrates how a classical ombudsman can still involve international human rights law in the resolution of cases. This approach requires the ombudsman to interpret her mandate to include human rights laws within the norms that the ombudsman takes into consideration in processing investigations. Norway's Ombudsman, like other Scandinavian offices, scores very well on all of the effectiveness factors and plays a respected role in building good governance. However, since human rights protection and the associated law is not expressly inscribed in the office's legal framework, inclusion of human rights concerns in the work of the office will likely depend on the approach of the ombudsman in office at any particular time, and her interpretation of the mandate of the office.

In addition, this office and other examples discussed below—i.e., Finland, the Netherlands, Spain, Poland, Slovenia, and Bosnia and Herzegovina—demonstrate how different types of national human rights institutions in Europe can all act as non-judicial domestic mechanisms for the implementation of the regional European human rights treaty system.

## 2. Finland

Until recently, the Ombudsman of Finland, established in 1919 as one of the earliest national human rights institutions, was based purely on the Swedish ombudsman model with the additional power to investigate the courts of law, to ensure that both the public authorities and the courts observe the law.<sup>109</sup> Also, unlike most ombudsman offices, the Finnish Ombudsman has the power to bring criminal charges against public officials and judges and to prosecute them, although this is rarely used. The Finnish Ombudsman addressed human rights matters within its original, classical

107. NORWEGIAN ANNUAL REPORT, *supra* note 106, at 22–23; *See also* FLIFLET, *supra* note 106, at 1.

108. *See* FLIFLET, *supra* note 106, at 4.

109. *See* REPORT OF THE FINNISH PARLIAMENTARY OMBUDSMAN 1997 33–34 (1997); CONSTITUTION ACT OF FINLAND art. 59, *reprinted in* NATIONAL OMBUDSMEN: COLLECTION, *supra* note 104, at 48. The Constitution Act of Finland will be replaced by the new Constitution of Finland, which will enter into force Mar. 1, 2000. *See* FIN. CONST. §§ 109–113 *translated in* (visited Jan. 26, 2000) <<http://www.om.fi/1257.htm>> (publishing the unofficial Ministry of Justice translation of the Constitution of Finland). The ombudsman statute will be updated in 2000.



mandate.<sup>110</sup> However, since 1995, following Finland's modernizing revision of the human rights included in its Constitution in light of the country's obligations under the European Convention and various U.N. treaties, the Ombudsman has been given the express and additional duty to "monitor the realization of basic rights and human rights."<sup>111</sup> The revised human rights obligations contained in Chapter 2 of the Constitution cover civil, political, economic, social, cultural, and environmental rights.<sup>112</sup>

The Finnish Ombudsman has received cases involving the entire spectrum of rights in the Constitution—to equality before the law and the prohibition of discrimination, life, liberty, and security of the person, a fair trial, freedom of movement, a secure private life, freedom of religion, freedom of expression, freedom of assembly, participation in public life, protection of property, language and culture, the environment, labour, social security—and the complainants have come from all sectors of society, including children, prisoners and soldiers.<sup>113</sup> The Ombudsman of Finland has also taken cases that cover police conduct and the conduct of public employees in institutions where individuals are involuntarily detained (e.g., prisons, mental health centers), and they are considered to be "part of the core area of the Ombudsman's oversight of legality."<sup>114</sup> In 1998, out of a total of 2,361 resolved cases, the greatest number of complaints concerned the civil and criminal courts (17%), social welfare authorities (15%), the police (10%) and public health authorities (5%).<sup>115</sup>

The Finnish Ombudsman, one of the earliest national human rights institutions to be established, is an example of an ombudsman with powers that are stronger than those typically given to the traditional ombudsman. The office also illustrates how even an established democracy with a national institution that functions effectively can continue to expand the function of the office to include monitoring the implementation of the state's international human rights obligations. As a result, the Ombudsman of Finland not only promotes good governance, but also now has a definite mandate in human rights protection.

### 3. The Netherlands

The National Ombudsman of the Netherlands was created in 1981 and the institution was enshrined in the Constitution in early 1999.<sup>116</sup> As an ombudsman based on the traditional model, the main role of the institution

110. See REPORT OF THE FINNISH PARLIAMENTARY OMBUDSMAN 1997, *supra* note 109, at 48.

111. FIN. CONST., § 109(1) (replacing CONST. ACT OF FIN. art. 49(2)).

112. See FIN. CONST., ch. 2, §§ 6–23 (replacing CONST. ACT OF FIN., ch. II, arts. 5–16a).

113. See REPORT OF THE FINNISH PARLIAMENTARY OMBUDSMAN 1997, *supra* note 109, at 49–121.

114. *Id.* at 60.

115. *Finland, Statistical Data Concerning the Year 1998*, 18 EUR. OMBUDSMEN NEWSL. 7, June 1990, at 8.

116. See NETH. CONST. ch. 4, art. 78a; National Ombudsman Act, Bulletin of Acts and Decrees 1981 (Neth.), reprinted in NATIONAL OMBUDSMEN: COLLECTION, *supra* note 104, at 185.

is to promote good governance in public administration. However, the ombudsman does receive some jurisdictional complaints that raise human rights issues, partly due to the fact that he has jurisdiction over the police and the security service, and thus is able to act as a mechanism for the enforcement of the human rights obligations of the Netherlands.<sup>117</sup>

The Dutch Ombudsman is able to use international human rights treaties, in particular the ICCPR and the European Convention, in the resolution of these complaints based on several factors. Under the law of the Netherlands, self-executing treaties by which the country is bound automatically become part of the domestic law after publication and are directly enforceable by the courts. Statutes shall not be applied if they conflict with the treaty obligations.<sup>118</sup> Also, the Constitution of the Netherlands codifies some of the human rights found in the treaty law. Moreover, the ombudsman statute gives the National Ombudsman a broad standard by which to assess government administration, which permits the use of human rights in the resolution of an investigation.<sup>119</sup> Although the direct use of human rights norms is rare, the National Ombudsman more commonly uses these norms as "orientation criteria" in his assessment of the administrative conduct in question, i.e., "review criteria which, at present, are not (yet) included or widely accepted in the range of legal principles accepted by the courts."<sup>120</sup> The cases that the National Ombudsman receives tend to be "specific, physical acts" committed by public servants, especially the police, and, in this respect:

Police actions might only be considered by the criminal courts in the event of a prosecution. In practice, this means that most police actions fall outside the scrutiny of the criminal courts. The civil courts rarely consider police actions. Thus, for most police actions the National Ombudsman is the only fully independent review body.<sup>121</sup>

However, there are a few investigations, especially involving the police, wherein the National Ombudsman makes more direct use of human rights norms found in the Constitution and other sources.<sup>122</sup>

117. See Oosting, *supra* note 68.

118. See Pieter van Dijk, *Domestic Status of Human Rights Treaties and the Attitude of the Judiciary: The Dutch Case*, in *FESTSCHRIFT FÜR FELIX ERMACORA* 631, 636-39 (M. Nowak et al. eds., 1988).

119. See Oosting, *supra* note 68, at 318. The statute states that "[t]he Ombudsman shall determine whether or not the administrative authority acted properly in the matter under investigation." National Ombudsman Act (Neth.), para. 26(1), translated in NATIONAL OMBUDSMEN: COLLECTION, *supra* note 104, at 196.

120. See Oosting, *supra* note 68, at 318, 320-21.

121. *Id.* at 322. In 1998, the Ombudsman received 532 complaints about the police, out of a total of 8437 complaints. See THE NATIONAL OMBUDSMAN OF THE NETHERLANDS, ANNUAL REPORT 1998: SUMMARY 12 (1999) [hereinafter NETHERLANDS ANNUAL REPORT].

122. See Oosting, *supra* note 68, at 322.

Following this route, the Dutch Ombudsman has used provisions of the European Convention and the ICCPR, embodied in the Constitution and other legislation, to determine whether the authorities have complied with their human rights obligations. Further, "[t]he effect of such a review is also that the relevant norm is expressly laid before the competent authorities, which may help to reaffirm the value of the norm and its observance."<sup>123</sup> The National Ombudsman has used human rights norms in cases concerning the rights to: liberty (e.g., police arrests without reasonable suspicion that a crime has been committed, detention by police without arrest, arrest without the knowledge of the Public Prosecutor); inviolability of the person (wrongful use of handcuffs by the police, reasonableness of police body and clothing searches, unreasonable use of force by the police); privacy (improper transfer of information by police to third parties, lapses in tax department record keeping and privacy); respect for the home (improper police entry, improper entry by the tax department bailiff); protection against inhuman or degrading treatment (treatment in police cells) and equality (conduct by police, tax department, and public service recruiters).<sup>124</sup>

In another sector, also related to human rights, the National Ombudsman reviews the government administration of matters relating to asylum seekers and refugee claimants, a large source of complaints to his office.<sup>125</sup> In some cases, he has relied on international human rights instruments and domestic law relating to the right to asylum, the principle of *nonrefoulement* of refugees, and the rights involved in the determination of refugee status and deportation processes.<sup>126</sup>

Similar to the Norwegian Ombudsman, the National Ombudsman of the Netherlands is a classical ombudsman, whose mandate has been interpreted to include human rights matters that pertain to jurisdictional complaints. In this respect, the Dutch Ombudsman is aided by a broad jurisdiction including complaints against the police and security services. Like the Scandinavian ombudsman offices, the Dutch Ombudsman performs well in terms of the effectiveness factors. However, also similar to the Norwegian Ombudsman, since there is no express human rights mandate in the office structure, the extent to which the National Ombudsman of the Netherlands will rely on international human rights norms in resolving complaints will be contingent on the orientation of the appointee.

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123. *Id.* at 323.

124. *See id.* at 324–31.

125. *See* Marten Oosting, *Rights of Refugees and Asylum-Seekers*, 3 INT'L OMBUDSMAN Y.B. 114 (1999). In 1998, 2,352 out of the total 8,437 complaints received were against the Immigration and Naturalization Service. *See* NETHERLANDS ANNUAL REPORT, *supra* note 121, at 6.

126. *See* NETHERLANDS ANNUAL REPORT, *supra* note 121, at 4–6.

## 4. Spain

In Southern Europe, the Portuguese *Provedor de Justiça* and the *Defensor del Pueblo* (Defender of the People) of Spain are important models, as they are the first hybrid human rights ombudsman institutions to have been established.

In the mid-1970s, the Iberian peninsula started the transition to democratic governance. As described above, the democratization of post-Franco Spain produced a new governance structure in the 1978 Constitution that included the hybrid *Defensor del Pueblo* as a High Commissioner of the *Cortes Generales* (Parliament) appointed by the *Cortes* to protect the human rights contained in Title I of the Constitution "for which purpose he may supervise the activity of the administration, informing the General *Cortes* of it."<sup>127</sup> The Organic Law detailing the functions of the *Defensor* was passed in 1981, and the first *Defensor* took office in 1983. In establishing the institution of *Defensor del Pueblo*, the constitutional drafters were influenced by the Scandinavian ombudsman. They followed this model to address poor administration, and they added human rights protection functions to help strengthen the new democracy.<sup>128</sup>

Title I of the Constitution contains civil and political rights, as well as economic, social, cultural, and some collective or "third generation" rights. Certain rights, mainly the civil and political ones, are binding on all public authorities and are protected by the *amparo*<sup>129</sup> appeal to the Constitutional Court, whereas the other rights are considered "guiding principles of economic and social policy" for legislators, judges, and public officials.<sup>130</sup> In addition to the usual powers to investigate, recommend and report on maladministration and human rights complaints against government, the *Defensor del Pueblo* of Spain was given stronger powers: to bring actions for civil liability against authorities, civil servant and government agents, and to launch unconstitutionality and *amparo* actions against laws before the Constitutional Court.<sup>131</sup>

Margarita Retuerto Buades, former Acting *Defensor del Pueblo*, surveyed cases examined by the *Defensor* during the 1990-1994 period and found that the most common complaints lodged by the office involved alleged breaches

127. SPAIN CONST. art. 54. In another translation, article 54 reads "who will supervise the functioning of public administration and will report to the General Cortes." See George E. Glos, *The New Spanish Constitution, Comments and Full Text*, 7 HASTINGS CONST. L.Q. 47, 61 (1979). Similar institutions have been established in the Spanish regions of: Andalusia, Canary Islands, Catalonia, Basque Region, Valencia, Aragon, Galicia, Castilla, and Leon.

128. See Margarita Retuerto Buades, *The Internationalization of Human Rights; Constitution and Ombudsman in Spain*, in OMBUDSMAN AND HUMAN RIGHTS: PROCEEDINGS OF A SYMPOSIUM 42 (The National Ombudsman of the Netherlands ed., 1995).

129. The *amparo* is "a citizen's action contesting the validity of any law or official disposition adversely affecting constitutionally guaranteed civil rights." Glos, *supra* note 127, at 75.

130. SPAIN CONST. ch. 3, arts. 53, 161.1 (b).

131. See Organic Act 3/81 Regarding the Ombudsman (1981) (Spain), §§ 26 and 29, reprinted in NATIONAL OMBUDSMEN: COLLECTION, *supra* note 104, 281, 290-91.

of the constitutional rights to equality, physical integrity, privacy, effective legal protection and conscientious objection.<sup>132</sup> Also, based on the Constitution, the *Defensor* has used the Universal Declaration of Human Rights and human rights treaties that Spain has ratified (including the European Convention, ICCPR, ICESCR, the Convention for the Elimination of Torture and Other Inhuman and Degrading Treatment, and the Convention for the Elimination of all Forms of Discrimination Against Women) during investigations and in the recommendations made.<sup>133</sup>

As a national human rights institution, the Spanish *Defensor del Pueblo* has contributed to building good governance through its ombudsman function and promoting and protecting human rights. In the latter sphere, the *Defensor* deals with individual human rights cases and plays a role in the implementation and interpretation of international and domestic human rights obligations of the state through its investigations and the constitutional actions it has instituted.<sup>134</sup> Perales has commented on the effect that the *Defensor del Pueblo* has had on the human rights situation in Spain after its first ten years of operation.<sup>135</sup> She has stated that the institution:

has had a very positive impact, not only in achieving resolution of complaints filed by individuals, but also in the analysis of greater problems . . . . It is precisely in this way that effective use of public powers can be achieved and improvement in constitutionally recognized human rights brought about.<sup>136</sup>

Spain is an example of a relatively young democracy that, nevertheless, has made a successful transition to a consolidated democracy where human rights are generally respected and enforced.<sup>137</sup> The *Defensor del Pueblo* has contributed to this transition and now operates as one element of a democratic governance structure. The legal framework supporting the *Defensor* is conducive to an effective institution, as seen in the independence, broad jurisdiction, and extensive powers given to the office. The *Defensor del Pueblo* has also benefited from the appointment of generally strong individuals to

132. See Retuerto Buades, *supra* note 128, at 43–45. Examples included local councils refusing to employ women, conduct of police and prison guards, conduct of health administration (especially the treatment of patients confined in psychiatric facilities), and undue delay of court proceedings. More recently, human rights complaints have focused on prison conditions, treatment of prisoners, detention of asylum-seekers and the administration of their claims, and the living conditions provided for Romani settlements. See U.S. DEPT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1998, at 1507 (1999) [hereinafter COUNTRY REPORT 1998].

133. See Retuerto Buades, *supra* note 128, at 46.

134. See *id.* at 48–49.

135. See Ascension E. Perales, *Implementing the Spanish Constitution*, in CONSTITUTIONAL POLICY AND CHANGE IN EUROPE 214, 220 (J.J. Hesse & Nevil Johnson eds., 1995).

136. *Id.*

137. See JUAN J. LINZ AND ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE 87–115 (1996). See also COUNTRY REPORT 1998, *supra* note 132, at 1507.

head the institution. The Spanish *Defensor del Pueblo* is an example of a successful hybrid human rights ombudsman. It has also been influential as a model for the design of many Latin American human rights institutions established since the late 1980s.

### B. Central and Eastern Europe

The end of the 1980s saw the collapse of the Soviet Union and the democratization of the former East bloc states and the new CIS states. In moving from totalitarian regimes to democratic governance, countries in Central and Eastern Europe have tried to redesign or build new government institutions. In all of these countries, the concerns have been the need to establish the rule of law, create new legislation, overhaul the practice of bureaucracies, improve the government's human rights record, and change the mind set of bureaucrats and the people. Thus, the last decade has seen a massive exercise of constitution drafting and democratic institution building, with the new governments looking to both western and socialist systems for inspiration or ideas—such as different approaches to distribution of powers, forms of legislatures, and the constitutional court concept.<sup>138</sup>

These countries are also making use of various types of national human rights institutions to address the problems of human rights protection and poor administration. The countries that have established an institution have created one institution whose predominant mandate expressly includes human rights protection, instead of creating separate ombudsman and human rights commission structures. In this respect, the use of the term "ombudsman" for the office can be misleading. Although fine distinctions may be difficult to make, it can be argued that some nations in the region have established offices more closely based on the human rights commission model, while others are more clearly hybrids. However, any distinction can often dissolve in practice.

National human rights institutions have been established in the following nations: Poland (Commissioner for Civil Rights Protection), Hungary (Parliamentary Commissioners for Civil Rights and for the Protection of National and Ethnic Minority Rights), Slovenia (Human Rights Ombudsman), Bosnia and Herzegovina (Human Rights Ombudsman), Federation of Bosnia and Herzegovina (Ombudsmen), Macedonia (Public Attorney), Croatia (National Ombudsman), Moldova (Parliamentary Advocates), Romania (Advocate of the People), Albania (People's Advocate), Russian Federation (Plenipotentiary for Human Rights), Latvia (Human Rights Office), Ukraine (Authorized Human Rights Representative), Georgia (Public Defender), Uzbekistan (Authorized Person for Human Rights), and Lithuania (its leg-

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138. See Rett R. Ludwikowski, *'Mixed' Constitutions-Products of an East-Central European Constitutional Melting Pot*, 16 B.U. INT'L L.J. 1 (1998). Some of the difficulties in reforming law and state in post-totalitarian and post-authoritarian regimes are described in LINZ & STEPAN, *supra* note 137, at 247-52.

islation creating the *Seimas* Ombudsmen is closer to the ombudsman model). In 1999, the Estonian legislature gave the task of Ombudsman to the Chancellor of Justice, a very questionable decision in light of the independence and effectiveness concerns this raises.

Many of the national human rights institutions in Central and Eastern Europe deal with human rights issues that cover the entire spectrum of political, civil, economic, social, and cultural rights. As can be seen from the following case studies, complaints concern the treatment of persons deprived of their liberty (e.g., detainees, prisoners, persons in psychiatric facilities), police conduct, property rights, social assistance rights, and unreasonable delays in obtaining court decisions and administrative proceedings feature prominently.

### 1. Poland

The first institution established in the region was Poland's Commissioner for Civil Rights Protection, an office created by legislation passed in 1987 during the decline of the communist government, in an attempt to retain some support from the population but without any genuine desire to create a viable institution.<sup>139</sup> The institution survived the collapse of communism. The office was included in the 1989 Constitution and strengthened in the 1997 Constitution.<sup>140</sup> Although the office was modelled on the classical ombudsman figure,<sup>141</sup> its human rights mandate is express and expansive. The 1997 Constitution emphasized the Commissioner's human rights protection role. Article 80 of the 1997 Constitution states that "everyone shall have the right to apply to the Commissioner for Civil Rights Protection for assistance in the protection of his freedoms or rights infringed by organs of public authority." Article 208(1) states further that the "Commissioner for Civil Rights Protection shall guard human and civic freedoms and rights specified in the Constitution and other legal acts."

The Commissioner is appointed by the legislative branch (by the *Sejm* on approval of Senate) for a five-year term, reporting only to the *Sejm*, with the mandate to "safeguard the rights and liberties of citizens as set forth in the Constitution of the Republic of Poland and in other regulations" and to investigate whether "the law and/or principle of community life and social

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139. The first Commissioner took office on Jan. 1, 1988. See Ewa Letowska, *The Commissioner for Citizens' Rights in Central and Eastern Europe: The Polish Experience*, 1996 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1 (1996). See also Agnieszka Klich, *Human Rights in Poland: The Role of the Constitutional Tribunal and the Commissioner for Citizens' Rights*, 1996 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 33 (1996); Howard Elcock, *The Polish Commissioner for Citizens' Rights Protection: Decaying Communism to Pluralist Democracy Through an Ombudsman's Eyes*, 75 PUB. ADMIN. 359 (1997); Ewa Letowska, *The Polish Ombudsman (The Commissioner for the Protection of Civil Rights)*, 39 INT'L & COMP. L.Q. 206 (1990); and Ewa Letowska, *The Ombudsman in 'New' Democracies: The Polish Perspective*, in 3 EUR. Y.B., *supra* note 101, at 271-72.

140. See Letowska, *The Commissioner for Citizens' Rights*, *supra* note 139; Law of 15 July 1987 (Pol.), reprinted in NATIONAL OMBUDSMEN: COLLECTION, *supra* note 104, at 211.

141. See Letowska, *The Commissioner for Citizens' Rights*, *supra* note 139, at 2.

justice have been breached" by the acts or omissions of public bodies in civil rights and liberties cases.<sup>142</sup> It has been argued that the Commissioner is similar to many ombudsmen in scrutinizing government administration both according to its legality (including violations of human rights laws) and against wider equitable standards including "social justice."<sup>143</sup>

Important for the human rights protection function, no area of administration is excluded from the jurisdiction of the office, with the Commissioner able to investigate the armed forces, the police, the prison system and security forces.<sup>144</sup> On finding a violation of rights and freedoms, the Commissioner can *inter alia* issue recommendations, demand that civil action be taken and participate in the action with the same powers as the public prosecutor, require that administrative proceedings or appeals be taken in the administrative court, and participate in the proceedings with the same powers as the public prosecutor, request that criminal proceedings be commenced, and launch extraordinary appeals in the Supreme Court against final decisions.<sup>145</sup> The Commissioner can also call on the government to make or change laws respecting rights and freedoms.<sup>146</sup> Furthermore, the 1989 Constitution permitted the Commissioner to make applications to the Constitutional Tribunal, and the 1997 Constitution made slight changes to this power, with the effect that the Commissioner is one of the government bodies that currently can apply to the Constitutional Tribunal to obtain a determination on, *inter alia*, the conformity of statutes and treaties with the Constitution and the conformity of statutes with ratified treaties.<sup>147</sup> The 1997 Constitution contains a range of civil, political, economic, social, cultural, and environmental rights.<sup>148</sup>

As a result, the human rights protection role is an important component of the work of the Polish Commissioner for Civil Rights Protection. This has been complemented with a human rights education component, important in a country emerging from a long repressive regime. During the first decade of activity, many cases covering the spectrum of human rights, especially those arising in a country moving from a socialist state to a demo-

142. POL. CONST. art. 208. The 1997 Polish Constitution also contains various guarantees of the independence of the office from other state bodies.

143. Letowska, *The Polish Ombudsman*, *supra* note 139, at 207. Social justice should, however, be used to soften the effect of law, not to invalidate legal norms altogether. *See* Klich, *supra* note 139, at 39.

144. *See* Letowska, *The Commissioner for Citizens' Rights*, *supra* note 139, at 3. The Commissioner launches investigations on receipt of complaints by citizens or on her own initiative.

145. *See* Law of 15 July 1987 art. 14 (Pol.), *reprinted in* NATIONAL OMBUDSMEN: COLLECTION, *supra* note 104, at 214.

146. *See* Law of 15 July 1987 art. 16 (Pol.), *reprinted in* NATIONAL OMBUDSMEN: COLLECTION, *supra* note 104, at 216.

147. The 1997 Constitution also introduced direct constitutional appeal by individuals to the Constitutional Tribunal. POL. CONST. arts. 79(1), 191, 188. The 1997 Constitution abolished the ability of the Commissioner and others to ask the Constitutional Tribunal to provide a binding interpretation of statutes in general. *See* Ludwikowski, *supra* note 138, at 56-57.

148. POL. CONST. arts. 30-76.



cratic, free market system, have been addressed by the Commissioner.<sup>149</sup> Cases have included equality rights and discrimination, treatment of prisoners, denial of passports, privacy rights, detention and treatment in mental health care facilities, improper arrest, minority rights, denial of pension benefits, rights of the child, rights associated with employment, housing rights, rights to education, and cultural rights.<sup>150</sup> In these cases and in applications before the Constitutional Tribunal, the Commissioner has been able to use provisions of human rights obligations, particularly those in the Universal Declaration of Human Rights, the ICCPR, the ICESCR and the European Convention, to interpret constitutional provisions and laws broadly.<sup>151</sup> Ewa Letowska, the first Commissioner, has stated:

The Polish Commissioner . . . took full advantage of the right to initiate an action before the Constitutional Tribunal or the Supreme Court. Most importantly, the Commissioner pushed for direct application by courts of the rules of international law, including the International Human Rights Covenants, and insisted upon the faithful observance of the rule of law.<sup>152</sup>

Certainly, the provisions in the 1997 Constitution will facilitate the use of international human rights treaties ratified by Poland in the cases that the Commissioner can bring before the Constitutional Tribunal. In 1998, the Commissioner launched the first six actions before the Constitutional Tribunal pursuant to the provisions of the 1997 Constitution.<sup>153</sup>

Although the human rights component of the Commissioner's work is extensive, the office also deals with the monitoring of administration in more diffuse areas. The 1998 reporting year illustrated that the greatest concentration of complaints submitted to the Commissioner included economic and social rights issues and some complaints mirror those seen in traditional ombudsman offices.<sup>154</sup>

149. See Klich, *supra* note 139. See also Tadeusz Zielinski, *The International Covenants on Human Rights in the Practice of the Polish Ombudsman*, 22 POLISH Y.B. INT'L L. 7 (1995-96); Ewa Letowska, *The Ombudsman and Basic Rights*, 4 E. EUR. CONST. REV. 63 (1995); Ewa Letowska, *The Polish Ombudsman*, *supra* note 139, at 210-17.

150. See Letowska, *The Polish Ombudsman*, *supra* note 139, at 210-17.

151. See *id.*

152. Letowska, *The Commissioner for Citizen's Rights*, *supra* note 139, at 9.

153. Poland: *The Commissioner for Civil Rights Protection, Annual Information*, 18 EUR. OMBUDSMEN NEWSL. 16, June 1990, at 17. But see Letowska, *The Ombudsman in 'New' Democracies*, *supra* note 139, at 279 (expressing the view that the introduction of direct individual appeals to the Constitutional Tribunal will likely result in a decrease of cases that the Commissioner will need to launch, so that the office can put less emphasis on systemic problems and more on individual complaints).

154. In the complaints submitted during 1998, the largest amount, 19.6%, related to social security and welfare assistance, 13.2% concerned taxation, customs duties, personal and property insurance, and consumer rights protection cases, 12.9% involved the activities of the courts, the police, and the public prosecutors' offices in criminal cases, and 12.1% involved housing issues. See Poland: *The Commissioner for Civil Rights Protection, Annual Information*, *supra* note 153.

Poland is a consolidating democracy, where human rights are respected overall, although there are some difficulties in areas such as prison conditions and the slow and ineffective judicial system.<sup>155</sup> The Commissioner for Civil Rights Protection is seen as a relatively effective institution, contributing to the democratization of Poland through its activities.<sup>156</sup> This can be attributed to strength in most of the factors that affect the institution, including the independence of the office, its wide jurisdiction and broad powers, the appointment of strong individuals to the position of Commissioner, the cooperative stance of the government, and the perception of the office in the eyes of the populace.<sup>157</sup> The problems encountered in the judicial system result in the Commissioner playing an even more important role in human rights protection than would be the case in an established democracy. The office also illustrates how a national human rights institution in Central and Eastern Europe can act as a non-judicial mechanism for the domestic implementation of international human rights obligations of the state, including the regional European human rights law. The Commissioner still has to face problems typical of a post-communist state, however, such as bureaucratic behavior that is slow to change, government officials that are poorly educated in human rights norms, and inadequacies in the law generally, all of which have an impact on the work of the office.<sup>158</sup>

## 2. Slovenia

On Slovenia's independence in 1991, a new Constitution was adopted, including Article 159, which provided for the establishment of the Office of the Ombudsman, described as "[a]n Ombudsman, responsible for the protection of human rights and fundamental freedoms in matters involving State bodies, local government bodies and statutory authorities . . . appointed pursuant to statute."<sup>159</sup> Slovenia's Parliament passed the *Human Rights Ombudsman Act* on December 28, 1993, and the first Ombudsman took office on January 1, 1995.<sup>160</sup>

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155. See COUNTRY REPORT 1998, *supra* note 132, at 1405–21. See also LINZ & STEPAN, *supra* note 137, at 255–92 (discussing Poland's democratic consolidation).

156. See COUNTRY REPORT 1998, *supra* note 132, at 1414. ("The Ombudsman's Office is an effective, independent body with broad authority to investigate alleged violations of civil rights and liberties. . . . The government cooperates with his office.")

157. See *id.* See also Elcock, *supra* note 139, at 376–77 (describing the first two Commissioners appointed); Klich, *supra* note 139. A public opinion poll covering 1990–1992 found that the Commissioner had the lowest disapproval rating among major government institutions. See LINZ & STEPAN, *supra* note 137, at 284.

158. See Klich, *supra* note 139, at 58–59.

159. SLON. CONST. art. 159, reprinted in NATIONAL OMBUDSMEN: COLLECTION, *supra* note 104, at 259. See also Bizjak, *The Role and Experience of an Ombudsman in a New Democracy*, *supra* note 68.

160. Human Rights Ombudsman Act (Slovn.), reprinted in NATIONAL OMBUDSMEN: COLLECTION, *supra* note 104, at 259.

The Ombudsman is elected by Parliament upon the nomination of the President for a six-year term and reports annually to Parliament.<sup>161</sup> In performing his function, the Ombudsman "shall act according to the provisions of the Constitution and international legal acts on human rights and fundamental freedoms. While intervening he may invoke the principles of equity and good administration."<sup>162</sup> The Human Rights Ombudsman has wide jurisdiction over public bodies, and even has limited powers over the courts, and is only able to interfere in court or other legal proceedings if there is "undue delay in the proceedings or evident abuse of authority."<sup>163</sup> On the conclusion of an investigation, if he finds a breach of human rights or some other maladministration, he can make recommendations, give opinions and propose that disciplinary measures be taken.<sup>164</sup> The Ombudsman is also empowered to examine more general issues relating to the human rights and legal security of Slovene citizens; for example, he can initiate systemic investigations and he can make submissions on proposed amendments to the law to Parliament and the government.<sup>165</sup> The Human Rights Ombudsman may also lodge constitutional appeals with the Slovenian Constitutional Court to determine the constitutionality of laws, and can make constitutional complaints to the Court with respect to individual cases he is handling.<sup>166</sup>

The Human Rights Ombudsman addresses complaints of poor administration in general, such as arbitrary decisions, delays, and mistakes. However, the human rights protection mandate is the core element of his work and the Ombudsman uses both constitutional law and international norms incorporated in domestic law. To this end, the Ombudsman has stated:

The work of the Human Rights Ombudsman is founded on constitutionally guaranteed human rights and freedoms. Under the provisions of our constitution, these rights are exercised directly pursuant to the constitution. Particularly important for my work is that the ratified international legal acts in Slovenia are incorporated into domestic law. Thus, the European Convention on Human Rights, for instance, can be applied directly. This provides the possibility of directly invoking the jurisprudence of the bodies established on the basis of this Convention. The same applies for other ratified conventions, such as the Council of Europe Conven-

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161. *See id.* arts. 2, 5, 12. Art. 4 underlines the autonomy and independence of the office.

162. *Id.* art. 3. *See also* art. 1.

163. *Id.* art. 24.

164. *See id.* arts. 7, 9, 26, 39. The Ombudsman can start an investigation on receipt of a complaint or on his own motion.

165. *See id.* arts. 9, 45. The current Human Rights Ombudsman considers that an important part of his work is to inform the government about laws that are "inappropriate and outdated." Bizjak, *The Role and Experience of an Ombudsman in a New Democracy*, *supra* note 68, at 59.

166. *See* Law on the Constitutional Court arts. 23, 50, 52 (Slovn.); Human Rights Ombudsman, Rules of Procedure arts. 37–38, *reprinted in* NATIONAL OMBUDSMEN: COLLECTION, *supra* note 104, at 271. The person whose human rights are at issue in the case must consent to the Ombudsman making the complaint.

tion on the Prevention of Torture or the United Nations Convention on the Rights of the Child.<sup>167</sup>

In his reports for 1995 and 1996, the Human Rights Ombudsman stated that the most serious human rights issues that his office had uncovered were the excessive duration and ineffectiveness of proceedings before state bodies, incomplete legislation in the human rights and administrative law fields, the inadequate and complex appeal routes from the actions of state bodies, the social difficulties encountered by many Slovenes, and problems arising out of Slovene independence.<sup>168</sup>

By 1998, the Human Rights Ombudsman was still noting that there were problems with the government's attempts to improve human rights, accessibility to information in the public interest and the unreasonable periods of time taken to reach decisions in court and administrative proceedings.<sup>169</sup> A review of the annual reports of the Human Rights Ombudsman over the past three years illustrates the variety of human rights issues addressed by the office, including the civil and political rights of detainees in remand centers and detained juveniles, rights of prisoners, rights of persons involuntarily confined in psychiatric facilities, social security, welfare and pension rights, the right to an effective judicial remedy within a reasonable period of time, civil rights arising out of police conduct, and refugee issues.<sup>170</sup> In 1998, the largest complaint sources were court, and police procedures (26.3%), administrative affairs (20.8%), and social security matters (12.1%), followed by labor relations (6.6%) and restrictions on personal freedom (6.4%).<sup>171</sup>

Slovenia is another example of a country consolidating its democratic structure, where the human rights situation is adequate, but where there are the usual problems experienced in the post-communist Central and Eastern European states—undue delay in judicial and administrative processes, outdated or nonexistent laws on matters affecting human rights and legislative slowness.<sup>172</sup> The effectiveness of the institution is affected by several factors. The independence of the Human Rights Ombudsman is not as strong as with a purely legislative appointment, since it is based on a nomination by the executive.<sup>173</sup> However, the institution is given broad jurisdiction and

167. Bizjak, *The Role and Experience of an Ombudsman in a New Democracy*, *supra* note 68, at 59.

168. See HUMAN RIGHTS OMBUDSMAN, REPUBLIC OF SLOVENIA, ANNUAL REPORT 1996, at 7 (1997).

169. See HUMAN RIGHTS OMBUDSMAN, REPUBLIC OF SLOVENIA, ANNUAL REPORT 1998, at 9–30 (1999) [hereinafter SLOVENIA ANNUAL REPORT 1998]; *Slovenia, Annual Report 1998*, 18 EUR. OMBUDSMEN NEWSL. 21, June 1999, at 23.

170. See SLOVENIA ANNUAL REPORT 1998, *supra* note 169, at 36–70.

171. In comparison, in 1996, the largest number of complaints fell in the areas of court and police procedures (30.3%), administrative affairs (20.7%), social security (12.0%), restriction of personal freedom (5.8%) and housing matters (5.6%). See *id.* at 84.

172. See COUNTRY REPORT 1998, *supra* note 132, at 1504–07.

173. The appointee is regarded as fair, although some have criticized his links to the government. See *id.* at 1506.

powers for human rights protection, including a limited mandate over court proceedings. Also, the Ombudsman himself has determined that there is a low level of response from both the executive and the legislative branches to the recommendations and reports of the Human Rights Ombudsman.<sup>174</sup>

### 3. Bosnia and Herzegovina

The national human rights institution situation in Bosnia is complex. In 1994, while the conflict in Bosnia was ongoing, the Bosniac and Croat governments agreed on a Constitution of the Federation of Bosnia and Herzegovina.<sup>175</sup> The Constitution contained human rights guarantees with an annex incorporating 21 human rights treaties and created three Federation Ombudsmen to uphold these rights.<sup>176</sup> Appointed by the Federation legislature, the Ombudsmen were given the responsibility to protect human dignity, rights, and liberties contained in the Federation Constitution (including the annexed treaties) and cantonal constitutions and, “[i]n particular, “they shall act to reverse the consequences of the violations of these rights and liberties and especially of ethnic cleansing.”<sup>177</sup> The Ombudsmen act individually and have jurisdiction over all Federation, cantonal and municipal institutions and “any institution or person by whom human dignity, rights, or liberties may be negated, including by accomplishing ethnic cleansing or preserving its effects.”<sup>178</sup> They have the power to investigate, report, and initiate and intervene in court proceedings, including in the Federation Human Rights Court.<sup>179</sup> Before the implementation of the Constitution, the first Federation Ombudsmen were appointed by the Organization on Security and Cooperation in Europe (OSCE) at the end of 1994, and commenced activities on January 20, 1995.<sup>180</sup> By 1996, the majority of human rights cases received concerned property rights (e.g., as a result of state authorities declaring apartments abandoned without proper legal process), freedom of movement, citizenship rights, the right to work, rights in the criminal trial process, the right to health care, and the right to life.<sup>181</sup> Despite their name, the Federation Ombudsmen focus on human rights, and currently are classified as an Entity institution.

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174. The Slovene legislature discussed the 1997 Ombudsman Annual Report in 1998, almost one year after it was submitted. See Slovenia Human Rights Ombudsman, *Human Rights Violated by Inadequate State Administration* (Press Release, Apr. 29, 1999); Željka Zagorac, *Slovenia's Ombudsman: Key, System-Related Problems Remain Unsolved*, SLOVENSKA TISKOVNA AGENCIJA ENGLISH SERVICE, Mar. 8, 1999.

175. See CONSTITUTION OF THE FEDERATION OF BOSNIA AND HERZEGOVINA, reprinted in 33 I.L.M. 740. [hereinafter BOSN. & HERZ. FED. CONST.].

176. BOSN. & HERZ. FED. CONST. art. II (Human Rights and Fundamental Freedoms), Annex. The three Ombudsmen are to be composed of one Bosniac, one Croat and one “Other.” *Id.* at art. II.B.1(1).

177. *Id.* art. II.B.2(1).

178. *Id.* art. II.B.5. See also *id.* art. II.B.3.

179. See *id.* arts. II.B.6–8.

180. See OMBUDSMAN OF THE FEDERATION OF BOSNIA AND HERZEGOVINA, ANNUAL REPORT 1 (1996).

181. See *id.* at 6–16.

The conflict in Bosnia was resolved with the signing of the Dayton/Paris General Framework Agreement for Peace in December 14, 1995 by the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia.<sup>182</sup> The Republic of Bosnia and Herzegovina (BH Republic) was divided into two Entities: the Federation of Bosnia and Herzegovina (BH Federation), comprising the Bosniac/Croat grouping, and the Republika Srpska (RS), the Serb entity. The Dayton Agreement contains twelve annexes, including Annex 4 (the Constitution of Bosnia and Herzegovina, itself containing some human rights provisions) and Annex 6 (Agreement on Human Rights). The Constitution of Bosnia and Herzegovina states that the country and both Entities "shall ensure the highest level of internationally recognized human rights and fundamental freedoms," that the European Convention on Human Rights and its Protocols "shall apply directly in Bosnia and Herzegovina" with priority over all other law, and that Bosnia and Herzegovina shall be a contracting party to the fifteen human rights treaties listed in Annex I to the Constitution.<sup>183</sup>

Mechanisms for the implementation of the international human rights referred to in the Constitution are created in the Constitution itself and in Annex 6 of the Dayton Framework Agreement. Annex 6 establishes the Commission on Human Rights, which is composed of two structures: the Office of the Human Rights Ombudsman and the Human Rights Chamber.<sup>184</sup> The Ombudsman and the Human Rights Chamber are to consider "alleged or apparent violations of human rights" found in the European Convention and its Protocols or cases of alleged discrimination on any ground arising in the enjoyment of the rights in the treaties listed in the Appendix to Annex 6 (the same as those in the Annex to the BH Constitution, with the addition of the European Convention) committed by a party (the BH Republic or the Entities).<sup>185</sup> In addition, the Human Rights Ombudsman is required to give "particular priority to allegations of especially

182. The General Framework Agreement for Peace in Bosnia and Herzegovina, 50th Sess., Agenda Item 28, U.N. Doc.S/1995/999 (Dec. 14, 1995), reprinted in 35 I.L.M. 89 [hereinafter *Framework Agreement*]. See generally Fionnuala N. Aolain, *The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis*, 19 MICH. J. INT'L L. 957 (1998); Elizabeth M. Cousens, *Making Peace in Bosnia Work*, 30 CORNELL INT'L L.J. 789 (1997); Paul C. Szasz, *The Dayton Accord: The Balkan Peace Agreement*, 30 CORNELL INT'L L.J. 759 (1997); Paul C. Szasz, *The Protection of Human Rights Through the Dayton/Paris Peace Agreement on Bosnia*, 90 AM. J. INT'L L. 301 (1996); James Sloan, *The Dayton Peace Agreement: Human Rights Guarantees and their Implementation*, 7 EUR. J. INT'L L. 207 (1996).

183. BOSN. & HERZ. CONST., arts. II(1), (2), (7). The 15 treaties in Annex I include the ICCPR, ICESCR, the Genocide Convention, the Convention Against Torture, the Convention on the Rights of the Child, and the Convention on the Elimination of all Forms of Discrimination Against Women.

184. See *Framework Agreement*, supra note 182, Annex 6 (Agreement on Human Rights) arts. II(1), IV-XII. The roots of the Ombudsman in the Dayton Accords can be found in the work of the International Conference on the Former Yugoslavia and in the Vance-Owen Plan. See Szasz, *The Protection of Human Rights Through the Dayton/Paris Peace Agreement on Bosnia*, supra note 182, at 309. This work was also used in the drafting of the Ombudsman provisions in the Federation Constitution.

185. See *Framework Agreement*, supra note 182, Annex 6 (Agreement on Human Rights) arts. II(2), V(2), VIII(1).

severe or systematic violations and those founded on alleged discrimination on prohibited grounds.”<sup>186</sup>

The first Human Rights Ombudsman could not be a national of the BH Republic or a neighboring state and was appointed by the Chairman-in-Office of the OSCE.<sup>187</sup> Although the first Human Rights Ombudsman (termed “Ombudsperson” by the appointee) is unique compared to other national human rights institutions because the appointee is selected by an international body and not by the domestic legislature or executive—and has been called an “internal international actor”<sup>188</sup>—the Human Rights Agreement envisages that five years after entry into force of the Agreement, the responsibility for the Commission shall be transferred to the institutions of the BH Republic unless the parties agree otherwise.<sup>189</sup>

The Human Rights Ombudsman is structured as an independent agency that acts as the first-stage investigatory mechanism of the Commission, either on the receipt of a complaint or on the Ombudsman’s own initiative.<sup>190</sup> If the Ombudsman finds that the complaint is admissible, an investigation will be conducted.<sup>191</sup> If the complaint is not settled informally, the Ombudsman proceeds with the investigation and has the power to issue a report on its conclusion, including her findings and conclusions on whether there has been a breach of the covered human rights obligations and, if so, her recommendations to the party or parties breaching the human rights law.<sup>192</sup> If the recipient does not comply with her recommendations within a specified period of time, the report will be forwarded to the OSCE High Representative and the Presidency of the relevant government for further action, unless the Ombudsman decides to take the case to the Human Rights Chamber.<sup>193</sup> In any event, the Ombudsman can refer a case to the Human Rights Chamber at any time in the proceedings if the matter falls within the Chamber’s jurisdiction, in addition to being able to take a case to the Chamber if the recipient does not comply with her recommendations.<sup>194</sup> Currently, the Ombudsman does not normally refer cases to the Chamber before she has adopted a report on the complaint.<sup>195</sup> Thus, the Human

186. *Id.* art. V(3).

187. *See id.* art. IV(2) and (4). The first Ombudsman is a Swiss national, Gret Haller.

188. Aolain, *supra* note 182, at 984, 987.

189. *See Framework Agreement, supra* note 182, Annex 6 (Agreement on Human Rights) art. XIV.

190. *See id.* art. V(1)–(3). Complaints can be made by a party, a person, an NGO or a group of individuals. The complainant also has the option of specifying that her complaint be heard directly by the Chamber, bypassing the Ombudsman. *See id.* art. V(1).

191. *See id.* art. V(3).

192. *See id.* art. V(4); BOSNIA AND HERZEGOVINA HUMAN RIGHTS OMBUDSMAN, RULES OF PROCEDURE, Rule 18, *reprinted in* 3 BOSNIA AND HERZEGOVINA HUMAN RIGHTS OMBUDSMAN, ANNUAL REPORT (1999) [hereinafter RULES OF PROCEDURE].

193. *See Framework Agreement, supra* note 182, Annex 6 (Agreement on Human Rights) art. V(4),(6), (7); *see also* RULES OF PROCEDURE, *supra* note 192, Rules 18(3) and 20(3).

194. *See Framework Agreement, supra* note 182, Annex 6 (Agreement on Human Rights) art. V(5), (7).

195. *See* 3 BOSNIA AND HERZEGOVINA HUMAN RIGHTS OMBUDSMAN, ANNUAL REPORT (1999) [hereinafter THIRD ANNUAL REPORT].

Rights Chamber hears human rights complaints, either referred from the Ombudsman or directly from a complainant, and renders decisions that the parties are bound to implement.<sup>196</sup> The Human Rights Ombudsman is entitled to intervene in any proceedings before the Chamber as a party if she has referred or taken the case to the Chamber or as an *amica curiae* in all other cases going to the Chamber.<sup>197</sup> Currently, the Ombudsman starts proceedings before the Chamber when its juridical opinion is needed on a new legal issue, and refers cases to it when no action can be taken because the violation has stopped and only monetary compensation can be pursued.<sup>198</sup>

Similar to the Federation Ombudsmen, the Bosnia and Herzegovina Human Rights Ombudsman has received many complaints concerning property rights, followed by non-enforcement of court judgments, discrimination in employment, human rights abuses by the police, and violations of the right to a fair trial.<sup>199</sup> There was a marked increase in case work during the third year of operations of the office.<sup>200</sup> The Ombudsman has indicated improvement in the responsiveness of the Entity governments towards cooperation with her institution.<sup>201</sup> Also, during its first three years, the institution has also been engaged in public human rights education and information campaigns on the European Convention system and the case law of the European Court of Human Rights.<sup>202</sup>

Given that the Ombudsman and Chamber deal mainly with breaches of the European Convention and the Ombudsman is structured as the first-stage complaint institution, the Commission has been likened to the Council of Europe human rights machinery prior to the abolition of the European Commission:

196. See *Framework Agreement*, *supra* note 182, Annex 6 (Agreement on Human Rights) arts. VIII–XI.

197. See *id.* art. V(7); RULES OF PROCEDURE, *supra* note 192, at Rule 23.

198. See *Introduction*, in THIRD ANNUAL REPORT, *supra* note 195.

199. Jessica Simor, *Tackling Human Rights Abuses in Bosnia and Herzegovina: The Convention Is up to It, Are Its Institutions?*, EUR. HUM. RTS. L. REV. 644, 653–61 (1997); *Bosnia and Herzegovina, Human Rights Ombudsperson*, 18 EUR. OMBUDSMEN NEWSL. 3, June 1999.

200. During the period from May 1998 to April 1999, investigations were opened in 51 cases, investigations were not opened in 180 cases (for admissibility reasons or withdrawal by the complainant), investigations were closed in 53 cases (amicable resolution, withdrawal), 1 case was referred to the Human Rights Chamber (right to respect for the home issue), there were final reports in 160 cases, and 1 special report was issued by the Ombudsman (right to a fair hearing in criminal proceedings and nondiscrimination in the enjoyment of this right). See *Case Study*, in THIRD ANNUAL REPORT, *supra* note 195. Overall, by the end of the third reporting period, 467 investigations were opened and 329 were not opened; investigations were closed in 83 cases, 64 cases were referred to the Chamber before adoption of the final report, final reports were issued in 327 cases, 50 cases were taken to the Chamber on the basis of a final report, 139 cases with final reports were referred to the High Representative and the government(s) for further action and the Ombudsman issued Special Reports on 14 issues. See *id.*

201. See *Co-operation with Authorities*, in THIRD ANNUAL REPORT, *supra* note 195. She has also indicated that her decisions and reports have been supported with legal analysis of the applicable international human rights law, in part to educate the government officials on their human rights obligations. See *Other Human Rights Activities of the Office*, in THIRD ANNUAL REPORT, *supra* note 195.

202. See *Introduction*, in THIRD ANNUAL REPORT, *supra* note 195.



The organisation of the Commission on Human Rights has several similarities to that of the Strasbourg mechanism, the Human Rights Ombudsman being equivalent to the European Commission of Human Rights and the Human Rights Chamber mirroring the European Court of Human Rights.<sup>203</sup>

The approach of the first Ombudsman, who has followed closely the European Commission approach and has used the same admissibility requirements in her Rules of Procedure as those expressly imposed only on the Chamber in the Dayton Agreement (especially exhaustion of domestic remedies), has been criticized as being too slow and overly formal.<sup>204</sup> Since both the Human Rights Ombudsman and the Chamber usually require exhaustion of domestic remedies, the result is an extremely lengthy, complex, and confusing process for individuals with human rights complaints, requiring many to wind their way through lower Entity courts before the Ombudsman will consider the case.<sup>205</sup> If the institution is to have some aspects of the ombudsman, exhaustion of domestic judicial remedies is typically not imposed as an admissibility requirement before an ombudsman can hear a complaint, although ombudsman offices often will not take a case until internal administrative appeals have been finished or if there is a judicial action of the complaint underway. In addition, there is the added difficulty of reconciling issues of jurisdiction over human rights cases between the Federation Ombudsmen and the Bosnia and Herzegovina Human Rights Ombudsman.<sup>206</sup>

The Human Rights Ombudsman has also raised concerns about the inaction of the Bosnia and Herzegovina government both in developing domestic legislation to transfer the institution in the future from an "internal international actor" to a fully domestic mechanism and in supporting the office financially.<sup>207</sup> On the request of the Ombudsman, in June 1999 the European Commission for Democracy Through Law (Venice Commission) completed a draft organic law on the State Ombudsman for Bosnia and Herzegovina that can be used as model legislation by the Republic of Bosnia

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203. European Commission for Democracy Through Law (CDL), *Opinion on the Constitutional Situation in Bosnia and Herzegovina with Particular Regard to Human Rights Protection Mechanisms*, 28 HUM. RTS. L. J. 297, 299 (1997). This is accompanied by the rather unusual situation that even though the provisions of the European Convention and its Protocols have been implemented into BH Republic Law by the Constitution, Bosnia and Herzegovina has not yet become a member of the Council of Europe with its consequent ability to accede to the European Convention. Accordingly, persons in Bosnia and Herzegovina cannot currently take cases to the European Court of Human Rights.

204. See Simor, *supra* note 199, at 650, 651; *Framework Agreement*, *supra* note 182, Annex 6 (Agreement on Human Rights) art. V(3) ("[t]he Ombudsman shall determine which allegations warrant investigation") and art. VIII(2) (listing admissibility criteria for the Chamber); RULES OF PROCEDURE, *supra* note 192, at Rule 9 (dictating that the Ombudsman can waive any of the admissibility criteria set out therein).

205. See European Commission for Democracy Through Law, *supra* note 203, at 305.

206. See Simor, *supra* note 199, at 648.

207. See *Preface*, in THIRD ANNUAL REPORT, *supra* note 195; see also *Conclusions*, in THIRD ANNUAL REPORT, *supra* note 195.

and Herzegovina to replace the ombudsman provisions in the Dayton Agreement scheduled to expire on December 15, 2000.<sup>208</sup>

Bosnia and Herzegovina is an unusual case. Although the United Nations Mission in Bosnia and Herzegovina (UNMIBH) and NATO's Stabilization Force (SFOR) have a continuing presence in the state, there continue to be human rights breaches in various areas, and the judiciary is not fully independent of government influence.<sup>209</sup> The Human Rights Ombudsman is an international actor in place for a transition period until the Bosnia and Herzegovina government establishes a fully domestic institution. As noted above, the Human Rights Ombudsman has been criticized for its bureaucratic practices, and the Ombudsperson has indicated that she has had uneven levels of cooperation with the local-level and Entity authorities, even though this situation is improving.<sup>210</sup> The office appears to be developing into a useful, albeit unique, institution that is contributing to the strengthening of a domestic human rights framework. However, the crucial issues for the future will be the receptiveness of the Republic of Bosnia and Herzegovina government to drafting strong legislation in a prompt manner to create a truly domestic national human rights institution, appointing a credible and respected individual to the office, cooperating positively with the institution, and funding the office at a level to enable it to exercise its functions effectively. Ongoing international financial and technical assistance for the national human rights institutions in Bosnia and Herzegovina will also be important for their longer term viability.<sup>211</sup>

### C. Latin America

Apart from the few Latin American nations that maintained democratic governments through the past decades, most countries in Latin America have adopted differing levels of democracy after shedding authoritarian regimes in the late 1970s.<sup>212</sup> In the past two decades, various attempts have been made in Latin American states to strengthen democratic institutions and improve the efficiency and fairness of public administration. In addition,

208. Human Rights Ombudsperson for Bosnia and Herzegovina, *The Ombudsman Institutions in Bosnia and Herzegovina*, 19 EUR. OMBUDSMEN NEWSL. (1999).

209. See COUNTRY REPORT 1998, *supra* note 132, at 1166-81; In June, 1999, the U.N. Security Council extended the mandates of SFOR and UNMIBH in 1999. See S.C.Res. 1247, U.N. SCOR, 54th Sess. 4014 mtg., U.N. DOC. S/RES/1247 (1999).

210. See *Co-operation With Authorities*, in THIRD ANNUAL REPORT, *supra* note 195; see also *Conclusions*, in THIRD ANNUAL REPORT, *supra* note 195.

211. The need for adequate domestic and international financial support for the Human Rights Ombudsman has been recognized by the Ombudsperson. See *Preface*, in THIRD ANNUAL REPORT, *supra* note 195; see also *Conclusion*, in THIRD ANNUAL REPORT, *supra* note 195.

212. JOHN A. PEELER, BUILDING DEMOCRACY IN LATIN AMERICA chs. 2-4 (1998) (explaining that countries such as Costa Rica, Venezuela, and, more arguably, Colombia maintained the democratic systems they obtained earlier in the century); see also LINZ & STEPAN, *supra* note 137, at 150-230; Diamond, *supra* note 83, at 31-49 (indicating how a number of Latin American democracies have degraded in the past few years).

many countries have had to confront a history of widespread state or state-sponsored human rights abuses and impunity. In response, a number of countries have established national human rights institutions in an attempt to improve the domestic protection of human rights. Given the importance of developing mechanisms to improve human rights protection, all of these institutions are either hybrid human rights ombudsmen or are closer to the human rights commission model. Usually there is only one institution at the national level of government, although some countries also have institutions at the sub-national level.

National human rights institutions have been established in Mexico (*Comisión Nacional de Derechos Humanos* and Human Rights Commissions at the state-level), Costa Rica (*Defensor de los Habitantes*), Guatemala (*Procurador de los Derechos Humanos*), El Salvador (*Procurador para la Defensa de los Derechos Humanos*), Honduras (*Comisión Nacional de Protección de los Derechos Humanos*), Panama (*Defensor del Pueblo*), Argentina (national *Defensor del Pueblo*, *Defensores* for some provinces and municipalities), Peru (*Defensor del Pueblo*), Ecuador (*Defensor del Pueblo*), Bolivia (*Defensor del Pueblo*), and Colombia (*Defensor del Pueblo*). Also, Nicaragua and Paraguay have passed constitutional amendments or laws for national institutions.<sup>213</sup>

### 1. Guatemala

The *Procurador de los Derechos Humanos* (PDH, Attorney or Counsel for Human Rights) was established in Guatemala in its Constitution in 1987, and was the first national human rights institution to be established in Latin America.<sup>214</sup> The Constitution structured the PDH as a Commissioner of Congress, elected by and responsible to the legislature, for the defense of human rights guaranteed by the Constitution and to supervise the administration.<sup>215</sup> The Constitution gives the PDH specific powers to promote the adequate function of government administration in human rights matters, investigate and denounce administrative behaviour detrimental to the interests of persons, and investigate human rights violation complaints.<sup>216</sup> The PDH has the power to investigate, make recommendations, issue public censures for unconstitutional acts, promote judicial or administrative actions

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213. Nicaragua recently appointed an ombudsman. Brazil has executive ombudsmen in the states of Parana and Ceará, the Federal District of Brasília and in a number of municipalities. Paraguay has not yet established a national institution. Paraguay has a city ombudsman in Asunción, and Venezuela has a Mérida state ombudsman. Chile is now considering the creation of a national institution. See also the ombudsman institutions in some Commonwealth Caribbean states, Puerto Rico and Haiti.

214. See GUAT. CONST. arts. 274–75; Ramiro de León Carpio, *The Ombudsman in Guatemala*, in *THE EXPERIENCE OF THE OMBUDSMAN TODAY—PROCEEDINGS 113* (Mexico Comisión Nacional de Derechos Humanos ed. 1992). A Human Rights Commission was also established to *inter alia* assist in the appointment of the *Procurador*, propose laws to Congress, and research human rights issues. The Commission did not have a human rights investigation power.

215. See GUAT. CONST. art. 274.

216. See *id.* art. 275.

or appeals, and report annually to the legislature.<sup>217</sup> The PDH has jurisdiction over human rights complaints against private persons and has a human rights education function.<sup>218</sup> In these respects, the institution is closer to the human rights commission model. The law governing the office states that the PDH is to defend the rights included in the Constitution, the Universal Declaration of Human Rights, and other treaties that Guatemala has ratified, and the Constitution holds that treaties ratified by Guatemala take precedence over domestic law.<sup>219</sup> Thus, the PDH can act both as a monitor of administrative behavior and as a mechanism for the domestic implementation of Guatemala's international human rights obligations.

The Guatemala PDH has been involved in various human rights investigations over the years, including investigations into violations of core human rights such as the right to life, freedom from torture, and the right to security of the person in cases involving forced disappearances, extra-judicial killings, torture, and the massacre of indigenous persons.<sup>220</sup>

Despite the poor human rights environment in Guatemala in the years leading up to 1996, caused in part by civil conflict, the PDH had a mildly positive influence on the human rights situation during this period:

The PDH has helped maintain a certain control over the government's conduct with respect to human rights. It has made room for the emergence of the human rights NGOs and has specifically denounced certain public bodies and officials as being responsible for violations. Its function is limited to monitoring, since it does not have the power to compel legal proceedings to be instituted; however, its investigative activity has, as yet, been limited.<sup>221</sup>

After increased United Nations involvement in peace negotiations between the Guatemalan government and rebel forces of the Guatemalan National Revolutionary Unity (URNG), a Peace Agreement was reached between the government and the URNG in December 1996.<sup>222</sup> The Comprehensive Agreement on Human Rights, reached between the parties in March 1994, was carried through into the 1996 Agreement.<sup>223</sup> The Human Rights Agreement contains commitments to strengthening existing institutions for the protection of human rights, including the PDH. With respect to the

217. See *id.* arts. 274, 275; see also Carpio, *supra* note 214, at 118.

218. See Carpio, *supra* note at 214, at 116-17.

219. See GUAT. CONST. art. 46.

220. See, e.g., International Commission of Jurists, *Guatemala: Massacre of Santiago Atitlán and Peace Talks*, 46 THE REVIEW 9 (1991); RAMIRO DE LEÓN CARPIO, HUMAN RIGHTS: A COMMITMENT TO JUSTICE AND PEACE—HUMAN RIGHTS OFFICER, FIRST CONSTITUTIONAL PERIOD 1987-1992 (1992); COUNTRY REPORT 1998, *supra* note 132, at 632-48.

221. TANIA PALENCIA PRADO & DAVID HOLIDAY, TOWARDS A NEW ROLE FOR CIVIL SOCIETY IN THE DEMOCRATIZATION OF GUATEMALA 76 (1996).

222. Agreement on a Firm and Lasting Peace and 10 Integral Agreements, *reprinted in* 36 I.L.M. 258 (1997).

223. See *id.* at 260 (introductory note, by C. Arnson).

PDH, the government agreed to support and strengthen the office, support his actions, promote law reform to enable the PDH to improve the exercise of the functions of the office, and support action to improve the technical and material resources of the institution.<sup>224</sup>

The PDH was also given additional roles under the Comprehensive Agreement on Human Rights. To assist in the realization of the rights to freedoms of association and movement, the PDH is required to determine whether members of the volunteer civil defense committees have been forced to join these committees against their will and whether their human rights have been violated.<sup>225</sup> If the PDH determines that there have been such violations, he is empowered to take whatever decisions thought necessary and is required to start judicial or administrative action to punish the human rights violations.<sup>226</sup> Further, the PDH has been asked to include information on the scope and contents of the Comprehensive Agreement on Human Rights in the work of the institution.<sup>227</sup>

The 1996 Peace Agreement also continued the UN mission to verify human rights and compliance with the commitments of the agreement as part of a larger UN international verification mission (United Nations Verification Mission in Guatemala or MINUGUA).<sup>228</sup> MINUGUA started operations in November 1994 with human rights monitors and the provision of assistance to government bodies involved in human rights protection, including the PDH.<sup>229</sup> The verification elements of the Comprehensive Agreement on Human Rights recognized the importance of national institutions for human rights protection, especially the PDH, and called on MINUGUA *inter alia* to establish that national institutions were carrying out their investigations independently, effectively, and in accordance with the Constitution and international human rights norms; cooperate with national institutions and provide technical cooperation and institution-building programs; offer its support to help strengthen these institutions; and promote international technical and financial support to strengthen the capacity of the PDH and other institutions.<sup>230</sup> When MINUGUA completes its mission in Guatemala at the end of 2000, the PDH will assume MINUGUA's human rights verification role.<sup>231</sup>

Guatemala is attempting to implement the Peace Accords and strengthen its democratic institutions. Although the human rights situation in Guatemala is improving, there are still ongoing human rights abuses such as some

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224. See *id.* at 276.

225. See *id.* at 276–77.

226. See *id.* at 276.

227. See *id.* at 277.

228. See *id.* at 273 (establishing MINUGUA in 1994 agreement for UN to verify human rights in period before ceasefire).

229. See *id.* at 260.

230. See *id.* at 277–78.

231. See COUNTRY REPORT 1998, *supra* note 132, at 653–54.

cases of extra-judicial killings, disappearances, torture, illegal detention, mistreatment by police, poor prison conditions, and discrimination.<sup>232</sup> Further, although independent, the judiciary is subject to inefficiency and corruption.<sup>233</sup> Thus, the PDH of Guatemala operates in a relatively difficult political and legal environment, although its human rights activities may be considered to be of even greater potential utility in Guatemala given the state of the judicial branch. The PDH is given considerable guarantees of independence from government and has broad jurisdiction and powers. The legislature has not shied away from appointing strong individuals to the office, although the executive branch is not always receptive to the institution.<sup>234</sup> A major issue affecting the effectiveness of the institution, however, is the failure of the government to provide sufficient funding to enable the office to exercise its investigative function properly.<sup>235</sup> This factor will become even more important to the effectiveness of the office after MINUGUA exits Guatemala. Thus, the Guatemala office exemplifies a national human rights institution that has been given a good legal and constitutional structure, but the ultimate effectiveness of which is influenced by larger political and economic factors that lie within the control of the government and not the institution itself.

## 2. El Salvador

The *Procurador para la Defensa de los Derechos Humanos* (PDDH, Counsel or Attorney for the Defense of Human Rights) was established in El Salvador as part of the peace and rebuilding process following the termination of the civil war that had lasted for twelve years.<sup>236</sup> Starting in 1990, a number of agreements were reached between the government of El Salvador and the FMLN, including the 1991 Mexico Agreement, which had a provision on the creation of a National Counsel for the Defence of Human Rights to be elected by the Legislature "whose primary function shall be to promote and ensure respect for human rights."<sup>237</sup> The institution of the PDDH was in-

232. See *id.* at 649-56.

233. See *id.* at 651-52.

234. The first *Procurador*, León de Carpio, was well-respected during his tenure and was the popular choice for President after the 1993 *autogolpe*, although he came under some criticism later for his actions as President. The current *Procurador*, Arango Escobar, has taken some strong positions, including issuing a criticism of the President for trying to restrict freedom of the press (although the President successfully applied to the Supreme Court for a stay of the resolution on the grounds that the *Procurador* had not followed his governing law with respect to obtaining the testimony of the President, in a decision upheld by the Constitutional Court). See *id.* at 653-54.

235. See *id.*

236. See generally E. TORRES-RIVAS & M. GONZÁLEZ-SUÁREZ, OBSTACLES AND HOPES: PERSPECTIVES FOR DEMOCRATIC DEVELOPMENT IN EL SALVADOR (1994); IAN JOHNSTONE, RIGHTS AND RECONCILIATION: UN STRATEGIES IN EL SALVADOR (1995); Alvaro de Soto & Graciana del Castillo, *Implementation of Comprehensive Peace Agreements: Staying the Course in El Salvador*, 1 GLOBAL GOVERNANCE 189 (1995); Reed Brody, *The United Nations and Human Rights in El Salvador's "Negotiated Revolution"*, 8 HARV. HUM. RTS. J. 153 (1995).

237. Letter dated 8 Oct. 1991 from El Salvador transmitting the text of the Mexico Agreement and

cluded in the final 1992 Chapultepec Peace Accords, negotiated under the auspices of the United Nations.<sup>238</sup> The Chapultepec Peace Agreement stated that the National Counsel for the Defence of Human Rights was to be appointed within ninety days after the entry into force of the constitutional reforms resulting from the Mexico Agreement, that COPAZ (National Commission for the Consolidation of Peace) was to be entrusted with preparing the legislation creating the institution, and that the preliminary bill should contain means to eradicate specific human rights abuses.<sup>239</sup>

The United Nations Observer Mission in El Salvador (ONUSAL), Division of Human Rights, was given the responsibility to verify the protection of human rights during the period between the cease fire and the final signature of the Peace Accords in January 1992, and continued to assist the PDDH for several years before ONUSAL disbanded in 1995.

The Constitution of El Salvador was amended to include a provision on the PDDH<sup>240</sup> and the Law establishing the PDDH was drafted and then entered into force in March 1992.<sup>241</sup> The first *Procurador* was appointed in February 1992 and operations began in July 1992.<sup>242</sup>

The PDDH can be categorized as a hybrid human rights ombudsman. Although the major role of the PDDH is in the protection and promotion of human rights, the office is also given the general power to supervise the conduct of public administration.<sup>243</sup> The human rights mandate given to the PDDH is extensive: to ensure the respect and the guarantee of human rights, investigate—on receipt of complaints or on own-motion—cases of violations of human rights, assist alleged victims of these violations, commence judicial or administrative actions for the protection of human rights, monitor the situation of persons deprived of their liberty, propose reforms to state organs for the progress of human rights, issue opinions on proposed

annexes signed on Apr. 27, 1991 by the Government of El Salvador and the FMLN, A/46/553-S/23130 (Oct. 9, 1991), reprinted in United Nations Blue Book Series, 4 THE UNITED NATIONS AND EL SALVADOR, 1990–1995, at 167, 168 (1995).

238. Peace Agreement between the Government of El Salvador and the FMLN, signed at Chapultepec castle, Mexico City, on Jan. 16, 1992. See *id.* at 193, 205–06.

239. The preliminary bill:

shall establish appropriate means for putting into effect the firm commitment assumed by the Parties in the course of the negotiations to identify and eradicate any groups which engage in a systematic practice of human rights violations, in particular, arbitrary arrests, abductions and summary executions, as well as other attempts on the liberty, integrity and security of persons. This includes the commitment to identify and, where appropriate, abolish and dismantle any clandestine jail or place of detention. In any event, the Parties agree to give top priority to the investigation of such cases, under ONUSAL verification.

*Id.* at 205–06. See also §§ A–B of the Peace Agreement. COPAZ was created in the Peace Agreement as a mechanism to supervise the implementation of the Agreements. ONUSAL started operations in July 1991.

240. See EL SAL. CONST. art. 194.

241. Ley de la Procuraduría para la Defensa de los Derechos Humanos, Decree No. 163 (Feb. 20, 1992) (El. Sal.) [hereinafter *Ley*].

242. See JOHNSTONE, *supra* note 236, at 66.

243. See EL SAL. CONST. art. 194(7); *Ley*, *supra* note 241, at art. 11(7).

laws that affect human rights, propose measures to prevent violations of human rights, formulate conclusions and recommendations, issue reports, and develop human rights education programs.<sup>244</sup> The PDDH Law defines human rights as the civil, political, economic, social, cultural, and third generation rights contemplated in the Constitution, valid laws and treaties, and also those rights contained in declarations and principles approved by the UN or the OAS.<sup>245</sup> The PDDH has powers to investigate, recommend, report, issue public criticism if his recommendations are not implemented by the government, and initiate judicial or administrative proceedings.<sup>246</sup>

Initially, the PDDH was very weak in terms of its activities and its financial and human resources.<sup>247</sup> While ONUSAL was still in operation, its Human Rights Division initially received more complaints than the PDDH.<sup>248</sup> However, ONUSAL provided considerable technical and advisory assistance to strengthen the PDDH and for a period, in late 1994 to 1995, ONUSAL transferred the complaints it received to the PDDH, engaging in joint investigations with the PDDH.<sup>249</sup> As an example of the full range of civil, political, economic, and social rights examined by the PDDH during the period from 1996 to 1998, there were diverse investigations including those addressing the rights to liberty, personal integrity, work, health and property, and concerning judicial and administrative procedures.<sup>250</sup> In 1997 and 1998, most complaints involving breaches of the right to personal integrity, covering complaints of torture, inhuman or degrading treatment, improper use of force and mistreatment of detainees, were made against the Civilian National Police (PNC) and there were relatively large numbers of complaints against the PNC in all human rights areas.<sup>251</sup> The 1997 to 1998 period also saw a decrease in the number of complaints relating to arbitrary arrest or detention.<sup>252</sup> The PDDH has also been involved with other government institutions and NGOs on initiatives to reduce violence against women and improve the rights of children.<sup>253</sup>

244. See EL. SAL. CONST. art. 194; Ley, *supra* note 241, art. 11.

245. See Ley, *supra* note 241, at art. 2.

246. See *id.*, arts. 30, 32, 33, 37.

247. See JOHNSTONE, *supra* note 236, at 66; Brody, *supra* note 236, at 172.

248. See JOHNSTONE, *supra* note 236, at 67.

249. See Brody, *supra* note 236, at 172; JOHNSTONE, *supra* note 236, at 66–67. The ONUSAL mission ended in Apr., 1995.

250. See Procuraduría para la Defensa de los Derechos Humanos de El Salvador, *Informe de Labores 117* (June 1996 to May 1997); COUNTRY REPORT 1998, *supra* note 132, at 615–29.

251. See COUNTRY REPORT 1998, *supra* note 132, at 617. There were 849 complaints on violation of the right to personal integrity in 1998 and 1,199 complaints in 1997. In the Jan. to June 1998 period, the PDDH was receiving an average of 142 complaints per month against the PNC, compared to 190 complaints per month in the June 1997 to May 1998 reporting year.

252. See *id.* at 619–20. In 1998, the PDDH received 287 complaints involving breaches of personal liberty, compared to 724 complaints in 1997.

253. See *id.* at 623–26. The PDDH has developed human rights training for police units that encounter children and youths.



El Salvador is another example of a democratizing state that is attempting to implement the terms of a peace accord, where the human rights situation is improving to a certain degree but subject to continuing violations in areas such as police conduct, prison conditions, violence against women, the rights of children, and impunity for certain sectors of society.<sup>254</sup> Although the judicial system is independent and is being reformed, it is still slow and affected by corruption,<sup>255</sup> thus placing additional pressures on the PDDH in the human rights protection field. Similar to the Guatemala institution, the PDDH has good constitutional and legislative provisions on independence, jurisdiction, and powers, but it also is subject to unfavorable political and legal pressures. These environmental factors can, and currently are, negatively affecting the effectiveness of the PDDH. For example, the institution is receiving insufficient funding, preventing it from conducting its investigations effectively.<sup>256</sup> Also, there have been mixed results in terms of the individuals appointed as *Procurador*, with the current appointee subject to strong criticism by NGOs.<sup>257</sup>

### 3. Argentina

Governmental support for the establishment of a national human rights institution in Argentina developed during the 1980s and coalesced in 1993-1994. In August 1993, the President of Argentina passed an executive decree to create a national *Defensor del Pueblo*, which was repealed after Congress passed a law to establish the *Defensor del Pueblo* on December 1, 1993.<sup>258</sup> Support for the institution spread quickly, with the result that the *Defensor del Pueblo* was enshrined in the new 1994 Constitution of Argentina as:

an independent organ created within the realm of the National Congress, which operates with full functional autonomy, without taking instructions from any authority. Its mission is to defend and to protect human rights and other rights, guarantees and interests guarded by this Constitution and by laws regarding deeds, acts,

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254. *See id.* at 616-20, 623-26.

255. *See id.* at 620-21.

256. *See id.* at 622-23. This situation has occurred, despite a small budget increase, because the PDDH is attempting to expand its activities and there have been increases in public use of the office.

257. The former *Procurador*, Victoria Velásquez de Avilés, was considered effective. The current *Procurador*, appointed in 1998, is criticized on account of his lack of qualifications in human rights and his administration of the PDDH.

258. Decree 1.786 (repealed Dec. 2, 1993) (Arg.); Law No. 24.284 (Dec. 1, 1993) (Arg.). *Defensores del Pueblo* have also been established at the provincial level in Córdoba, Formosa, Río Negro, San Luis, San Juan, Santa Fe, Santiago del Estero and Tucumán. There are municipal *Defensores* in the cities of Buenos Aires, Posadas, Río Cuarto, La Banda, Chilecito, La Plata, Corrientes, Florencio Varela, Quilmes, Vicente López, and Santiago del Estero.

and omissions of the Administration; and control over the exercise of public administrative functions.<sup>259</sup>

The *Defensor* is appointed by the National Congress and can only be dismissed by the same body pursuant to a special vote in each Chamber.<sup>260</sup> The first *Defensor* was appointed by Congress in June 1994 and served from 1994 to 1999.

The Constitution of Argentina also gives the *Defensor* the power to launch *amparo* actions<sup>261</sup> to protect the constitutional rights of individuals "against any form of discrimination and in regard to anything relative to the rights that protect the environment, competition, users and consumers, as well as collective incidental rights in general."<sup>262</sup> The 1994 Constitution incorporates nine human rights treaties and two declarations on human rights, giving them constitutional status.<sup>263</sup> Also, human rights guarantees, some that are carried over from the past constitution and others that are new, are found in Part I of the Constitution.<sup>264</sup> As a result, the human rights included in the Argentine Constitution that are within the mandate of the *Defensor* cover civil, political, economic, social, and cultural rights. In addition, the *Defensor* protects the new "third-generation" rights contained in the 1994 Constitution, i.e., environmental rights and consumer rights.<sup>265</sup> The structure of the

259. ARG. CONST. art. 86. See generally Nestor Pedro Sagüés, *An Introduction And Commentary To The Reform Of The Argentine National Constitution*, 28 U. MIAMI INTER-AM. L. REV. 41 (1996); Jorge L. Maiorano, *The Defensor del Pueblo in Argentina: A Constitutional Institution of Control and Protection*, in THE INTERNATIONAL OMBUDSMAN ANTHOLOGY, *supra* note 21, at 359; J.L. MAIORANO, EL OMBUDSMAN: DEFENSOR DEL PUEBLO Y DE LAS INSTITUCIONES REPUBLICANAS, TOMOS I-IV (1999).

260. ARG. CONST. art. 86.

261. For a definition of what constitutes an *amparo* action see *supra* note 129.

262. ARG. CONST. art. 43. The affected individual and registered associations also have the same right.

263. See *id.* art. 75(22). The treaties are the American Convention on Human Rights; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; Optional Protocol to the International Covenant on Civil and Political Rights; Convention on the Prevention and Punishment of the Crime of Genocide; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women; Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment of Punishment; and the Convention on the Rights of the Child. The declarations are the American Declaration of the Rights and Duties of Man; and the Universal Declaration of Human Rights. Also, all the treaties ratified by Argentina are given a status superior to that of domestic law. See *id.* See also Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSNAT'L L. 281 (1999).

264. See ARG. CONST. arts. 14-35 (deriving mainly from past constitutions) and arts. 36-43 (adding new, mainly third-generation rights). But ARG. CONST. art. 75(22) also states that the treaties incorporated in the Constitution "do not derogate from any article of the First Part of this Constitution and ought to be understood as complementing the rights and guarantees recognized therein." See also Koven Levit, *supra* note 263, at 310-12 (criticizing the Ch. 1 rights for their weakness compared to the substance of modern international human rights norms).

265. Maiorano, *supra* note 259, at 364; ARG. CONST. art. 41 (granting all inhabitants the right to a healthy and balanced environment fit for human development and for productive activities to satisfy present needs without compromising those of future generations); ARG. CONST. art. 42 (giving consumers and users of goods and services the right, in relation to consumption, to the protection of health, security, and economic interests, to adequate and truthful information, to freedom of choice and condi-

office is clearly reminiscent of the Spanish *Defensor del Pueblo*. The *Defensor del Pueblo* of Argentina is a hybrid institution, with powers both to protect human rights contained in the constitution and monitor public administration. In addition, it has the power to investigate complaints with respect to protection of the environment and rights of consumers.

In the implementation of his mandate, the *Defensor* can investigate conduct of the national public administration and its agents that indicates that there has been illegitimate, faulty, irregular, abusive, arbitrary, discriminatory, negligent, seriously inconvenient, or inadequate behavior, including that affecting collective interests.<sup>266</sup> The *Defensor* has jurisdiction over the national public administration, including ministries, wholly or partly owned government companies, nongovernmental public entities exercising public privileges, and private entities rendering public services, but cannot investigate the judiciary, the legislature and the defence and security entities.<sup>267</sup> Pursuant to these legal provisions, the *Defensor* has been able to investigate complaints against privatized public utility companies. On the conclusion of an investigation, the *Defensor* can make recommendations, including calls for amendments of law and policy, and warnings.<sup>268</sup> However, like the Spanish *Defensor*, although the *Defensor del Pueblo* of Argentina can launch an *amparo* action in the courts in respect of the constitutional rights of an individual or collectivity, the *Defensor* cannot make his own recommendations legally binding.

The *Defensor del Pueblo* receives a high number of annual complaints, steadily increasing in number from the first year of operations.<sup>269</sup> In the past several years of operation of the *Defensor*, the largest number of complaints have fallen in the area of economic administration, especially concerning the conduct of private companies that provide public services such as water and electricity, and national financial institutions.<sup>270</sup> Also, material numbers of complaints involve employment and social security matters, followed by human rights and administration of justice, health and social action, and protection of the environment, culture and education issues.<sup>271</sup> Core civil

tions of equitable treatment and dignity).

266. See Law 24.284 (Dec. 1, 1993) § 14 (Arg.). The *Defensor* takes complaints from members of the public, can start own-motion investigations and must pay special attention to behaviour that evidences general and systematic faults in the public administration. See *id.*, §§ 14–15.

267. See *id.* at §§ 16–17. The Municipality of Buenos Aires is also excluded, but there is a *Defensor del Pueblo* for Buenos Aires.

268. See *id.* at §§ 27–28.

269. In 1998, the office started 30,434 proceedings, compared to 25,496 in 1997, 22,697 in 1996 and 7,256 in 1995. See DEFENSOR DEL PUEBLO DE LA NACION, REPUBLICA ARGENTINA ANN. REP. 2 (1998).

270. In 1998, 44.5% of total complaints fell in the area of economic administration; in 1997, 40.4% of complaints fell in this area. See *id.* at 4–5. In 1996, 31.6% of total complaints concerned economic administration, following complaints about employment and social security matters, which constituted 43% of the total. See DEFENSOR DEL PUEBLO DE LA NACION, REPUBLICA ARGENTINA ANN. REP. 4 (1997).

271. In 1998, 44.5% of total complaints concerned economic administration, 23.1% addressed em-

and political human rights complaints arise in relatively lower percentages of the total number of complaints, however, covering issues such as discrimination, the rights of minors held in police detention, the rights of prisoners, the rights of persons in mental health care facilities, and delay in rendering judicial decisions.<sup>272</sup> Thus, the major concerns of complainants over the past several years, due in part to the neoliberal policies of the government with the associated privatization of services, have fallen in the realm of economic and social rights.

Middle-income Argentina is a state continuing to struggle with democratic development.<sup>273</sup> In this connection, the judiciary has been subjected to political influence from time to time and is slow.<sup>274</sup> Although human rights in Argentina are respected overall, there are still some violations occurring in areas such as police conduct, prison conditions, discrimination, and violence against women.<sup>275</sup> As the complaints to the *Defensor* indicate, social and economic rights are also problem areas. The *Defensor del Pueblo* is another example of a Latin American institution with strong constitutional and legal guarantees of independence, jurisdiction, and powers. However, unlike the Central American institutions examined above, the *Defensor del Pueblo* operates in a wealthier country with different human rights concerns. It is an example of an institution in Latin America that has a more balanced intake of complaints in the fields of administrative conduct and human rights issues. In its first five years of operation, the institution has been provided with good levels of financial support and there was a strong appointee as *Defensor* during this period. With a new government in Argentina, the next few years will be important in determining the longer term effectiveness of the *Defensor*, as much will depend on the quality of appointment of the new *Defensor*, maintaining future levels of financial support and improving the

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ployment and social security matters, complaints about human rights and justice administration constituted 13%, health and social action complaints amounted to 10.4%, and complaints about the environment, culture and education administration constituted 8%. See DEFENSOR DEL PUEBLO DE LA NACION, REPUBLICA ARGENTINA, ANN. REP. 3 (1998). In 1997, 40.4% of total complaints fell in the economic administration area, 28.8% of complaints addressed employment and social security concerns, human rights and justice administration complaints constituted 12.8% of the total, complaints on the environment, culture, and education administration amounted to 9.4%, and complaints concerning health administration and social action amounted to 8.4%. See DEFENSOR DEL PUEBLO DE LA NACION, REPUBLICA ARGENTINA ANNUAL REPORT 4 (1997).

272. See DEFENSOR DEL PUEBLO DE LA NACION, REPUBLICA ARGENTINA ANN. REP. 6-7, 10 (1998); DEFENSOR DEL PUEBLO DE LA NACION, REPUBLICA ARGENTINA ANN. REP. 8-9, 13, 22 (1997); DEFENSOR DEL PUEBLO DE LA NACION, REPUBLICA ARGENTINA ANNUAL REPORT 9-10 (1996).

273. LINZ & STEPAN, *supra* note 137, at 190-204.

274. See COUNTRY REPORT 1998, *supra* note 132, at 483. The *Defensor* has taken complaints concerning the slowness in judicial decision making by the Supreme Court in a series of actions concerning pension benefits and, when his recommendations were not followed, he submitted an application to the Inter-American Commission on Human Rights arguing that Argentina had violated art. 25(1) of the American Convention on Human Rights. The Supreme Court issued its judgments before the admissibility of the complaint was determined. See generally Reif, *Ombudsman and Human Rights Protection and Promotion in the Caribbean*, *supra* note 66.

275. See COUNTRY REPORT 1998, *supra* note 132, at 483.

responsiveness of the executive branch to the institution. The high levels of complaints to the *Defensor* in its first five years of operation indicates that there is a clear need for a non-judicial complaints institution in Argentina.

#### D. Africa

Although a few ombudsman offices were established in Africa starting in the mid-1960s and 1970s, the popularity of national human rights institutions has increased in Africa in the past ten to twenty years as more countries in the region have turned to democratic governance structures or, sometimes, non-democratic regimes have tried to use institutions as evidence of domestic change.<sup>276</sup> Also, corruption in government is a problem for many African states and, accordingly, some of the institutions being established have been given a corruption-fighting mandate.

Increasingly, the ombudsman institution is being established in Africa, either alone or occasionally accompanied by a separate human rights commission. In a few countries, a hybrid human rights ombudsman has been established. The earlier ombudsman offices were generally more restricted in their powers, whereas some of the new offices, both ombudsman and hybrid models, are being given broader jurisdiction and stronger powers. Ombudsman and hybrid human rights ombudsman are now present in Botswana (Ombudsman), Burkina Faso (*Médiateur*), Djibouti (*Médiateur*), Gabon (*Médiateur*), Ghana (hybrid, Commissioner for Human Rights and Administrative Justice), Lesotho (Ombudsman), Madagascar (*Défenseur du Peuple*), Malawi (Ombudsman), Mauritania (*Médiateur*), Mauritius (Ombudsman), Namibia (hybrid, Ombudsman), Nigeria (Public Complaints Commission), Senegal (*Médiateur*), the Seychelles (hybrid, Ombudsman), South Africa (Public Protector), Swaziland (Ombudsman), Tanzania (Permanent Commission of Enquiry), Tunisia (*Médiateur*), Uganda (Inspector General of Government), Zambia (Investigator-General), and Zimbabwe (Ombudsman). Algeria, Benin, Cameroon, Central African Republic, Chad, Malawi, Mali, Morocco, Nigeria, Senegal, South Africa, Togo, Tunisia, and Uganda have human rights commissions or councils. Ethiopia is currently drafting legislation to create a separate ombudsman and human rights commission.

A number of the human rights institutions in Africa are executive branch appointments. There is some question about the ability of these offices to operate with independence and impartiality given that investigations are taken against the appointing body. However, some argue that an executive-appointed institution can work effectively depending on the political-legal structure of government and the framework of the institution itself.<sup>277</sup>

276. For a history of the development of the ombudsman in Africa, see Victor O. Ayeni, *Evolution of and Prospects For the Ombudsman in Southern Africa*, 63 INT'L REV. ADMIN. SCI. 543, 547-55 (1997).

277. In the ombudsman context, see Roy Gregory, *supra* note 84, at 134-36, for both sides of the debate, and Mjemmas G.J. Kimweri, *The Effectiveness of an Executive Ombudsman*, in THE INTERNATIONAL OMBUDSMAN ANTHOLOGY, *supra* note 21, at 379. There are some ombudsman offices in Southern Africa

## 1. Namibia

Namibia's national human rights institution is an example of a newer office with an expanded mandate and powers. The current Namibia Ombudsman office was established in 1990 in the new Constitution, after Namibia gained its independence from South Africa.<sup>278</sup> Despite its title, the Namibian Ombudsman is a hybrid human rights ombudsman with extra powers—in addition to the examination of administrative government conduct by an official of any government organ, the Ombudsman has the mandate to investigate: complaints of human rights infringements by both government officials and private persons or entities; complaints against administrative organs, the defense force, the police force, and the prison service relating to the failure to achieve a balanced structuring of the service; equal access in recruitment matters or fair administration; government corruption; and harm to the environment (over-utilization of living natural resources, irrational exploitation of non-renewable resources, degradation and destruction of ecosystems, and failure to protect the beauty and character of Namibia).<sup>279</sup> The human rights and fundamental freedoms that can be the subject of an investigation are defined in the Constitution, and include a wide variety of civil, political, economic, social, and cultural rights.<sup>280</sup> Further, the Constitution also considers treaties and general rules of international law binding Namibia to be part of Namibian law unless they conflict with the Constitution or Act of Parliament.<sup>281</sup>

The Ombudsman is appointed by the President on the recommendation of the Judicial Service Commission, and is given guarantees of independence under the Constitution.<sup>282</sup> In addition to the usual ombudsman powers to

that are legislative appointments. See Ayeni, *supra* note 276, at 555.

278. See NAMIB. CONST. arts. 89–94. See generally Jill Cottrell, *The Constitution of Namibia: An Overview*, 35 J. AFR. LAW 56 (1991); John Hatchard & Peter Slinn, *Namibia: The Constitutional Path to Freedom*, 17 COMMW. L. BULL. 644 (1991); Gino J. Naldi, *Some Reflections on the Namibian Bill of Rights*, 6 REVUE AFRICAINE DE DROIT INTERNATIONAL ET COMPARÉ 45 (1994). There was an Ombudsman created in 1986 legislation under the South African-controlled regime. See M. Maree, *The Institution of Ombudsman in the Republic of Namibia*, in 3 INT'L OMBUDSMAN Y.B. 141 (1999). The first Ombudsman took office in 1992.

279. See NAMIB. CONST. art. 91. The Ombudsman Act No. 7 of 1990 replicates and enlarges the powers of the Ombudsman. See The Ombudsman Act No. 7 of 1990 (Namib.), reprinted in GOV'T GAZETTE REPUBLIC NAMIBIA, June 14, 1990, R0.50, No. 32. The Ombudsman does not have the power to investigate the judicial branch. See NAMIB. CONST. art. 93. The government is considering the establishment of a separate Anti-Corruption Unit. With respect to the ability of the Ombudsman to investigate breach of fundamental rights against private persons, it has been stated that the mining, industry, commerce, and farming sectors, in addition to social clubs, should form the majority of private entities against which complaints are filed. See N. Steytler, *The Judicialization of Namibian Politics*, 9 SOUTH AFRICA J. ON HUM. RTS. 477, at 490 (1993).

280. NAMIB. CONST. ch. 3.

281. NAMIB. CONST. art. 144.

282. See *id.* arts. 90, 89(3). The Judicial Service Commission is composed of the Chief Justice, a Judge appointed by the President, the Attorney-General and two members of the legal profession appointed by the law society. However, the Ombudsman is linked to the Ministry of Justice for its budget and other institutional arrangements, which situation the Namibian legislature is trying to change. See Maree, *supra* note 278, at 148.

investigate, recommend and report, the Namibian Ombudsman has been given stronger remedial powers—to refer matters to the Prosecutor-General and the Auditor-General, to bring court proceedings to halt or alter offending action, to determine whether laws predating Namibian independence violate the Constitution and, if so, to make recommendations to government thereon.<sup>283</sup> In addition, the Constitution gives the Ombudsman the discretionary power to provide legal assistance and advice to persons who exercise their constitutional right to go to court to enforce the human rights and freedoms guaranteed by the Constitution.<sup>284</sup> This unusual feature is a recognition that, especially in a developing country, many individuals do not have easy access to justice because of factors such as lack of legal aid and shortages of trained lawyers.<sup>285</sup>

In 1998, the Namibian Ombudsman received 1,111 complaints: approximately 66% of complaints were against the public sector and the remaining 34% of complaints were lodged against persons and entities in the private sector.<sup>286</sup> The Namibian police was the target of the greatest number of complaints, followed by the Ministry of Prisons and the Ministry of Justice.<sup>287</sup> The largest percentage of cases related to unfair dismissals (21%), followed by complaints about remuneration/salaries (13%), unfair or irregular court proceedings and decisions (12%), and pension refunds (10%).<sup>288</sup> Thus, the recent period indicates that the largest number of complaints relate to employment issues and the state of administration of justice in the country. A review of the complaints submitted to the Namibia Ombudsman between 1994 and 1998 indicates that the complaints fall primarily in the areas of administrative unfairness or illegality with some human rights complaints (especially against the police and the prison service), and small numbers of complaints concern the environment and corruption.

Namibia is a new democracy, with a legacy of racial discrimination to overcome with connected problems of poverty and serious human rights problems in a few areas, such as incidents of extra-judicial killings, poor prison conditions, violence against women and children, racial discrimination, discrimination against indigenous peoples, and nonfulfillment of social and economic rights.<sup>289</sup> The Namibian judiciary is independent, although there are delays in some cases.<sup>290</sup> The Namibian Ombudsman has been given an extremely broad and heavy mandate, especially compared to earlier Afri-

283. See NAMIB. CONST. art. 91(e); Ombudsman Act, *supra* note 279, §§ 4–5.

284. See NAMIB. CONST. art. 25(2).

285. See John Hatchard, *Developing Governmental Accountability: The Role of the Ombudsman*, 215 THIRD WORLD LEGAL STUD. 222 (1992).

286. REPUBLIC OF NAMIBIA, OFFICE OF THE OMBUDSMAN, ANNUAL REPORT 14–15 (1998). This was an increase over the 779 complaints received in 1997.

287. See *id.* at 14. Complaints against the police service came from both the public and police officers.

288. See *id.* at 17. Disputes between private entities constituted seven percent of total complaints. There was a similar breakdown in complaints for the 1997 reporting year.

289. See COUNTRY REPORT 1998, *supra* note 132, at 298–315.

290. See *id.*

can domestic institutions, and enforcement powers that go considerably beyond the norm for traditional ombudsman offices and even for hybrid institutions. This is a welcome development for an African national human rights institution, but it highlights the crucial importance of giving sufficient funding to the institution to enable it to exercise its multiple functions effectively. Also, the independence of the office from the executive can be strengthened further—the Ombudsman is a quasi-executive appointment, although there is some community involvement, and the office is still too dependent on the executive for its budget and other institutional matters. The Namibia Ombudsman, although it has a strong human rights mandate, is receiving a material number of complaints falling into the traditional ombudsman sphere or relating to economic issues—perhaps not so surprising given the economic and social development issues facing the country.

## 2. South Africa

During the apartheid regime in South Africa, the government established a national ombudsman and puppet ombudsman offices in the homelands, which were abolished when the apartheid regime collapsed.<sup>291</sup> In the transition to a democratic South Africa, a number of separate national human rights institutions were established in the South African Interim Constitution of 1993 and the Final Constitution of 1996.<sup>292</sup> The new institutions appearing or maintained in the 1996 Constitution are the Public Protector (Ombudsman), the Human Rights Commission, the Commission for Gender Equality and the Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities. Chapter 2 of the South African Constitution is the “Bill of Rights,” containing civil, political, economic, social, cultural and environmental rights.<sup>293</sup> The Constitution also states that courts, tribunals or forums, *inter alia*, “must consider international law” when interpreting the Bill of Rights.<sup>294</sup>

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291. See Ayeni, *supra* note 276, at 550–51.

292. See S. AFR. CONST. art. 181. Article 181 also includes other state institutions and provides all of the institutions with guarantees of independence. See, e.g., Hon. Abdullah Omar, Transformation of the South African System of Justice, Edward A. Smith Visiting Lecture, Human Rights Program, Harvard Law School (1998) (on file with Harvard Law School Library); Jeremy Sarkin, *The Drafting Of South Africa's Final Constitution from a Human Rights Perspective*, 47 AM. J. COMP. L. 67 (1999); John Dugard, *The Influence of International Human Rights Law on the South African Constitution*, 49 CURRENT LEGAL PROBS. 305 (1996); Makau wa Mutua, *Hope And Despair For A New South Africa: The Limits Of Rights Discourse*, 10 HARV. HUM. RTS. J. 63 (1997).

293. S. AFR. CONST. ch. 2.

294. *Id.* art. 39(1)(c). Also, art. 39(2) requires that “every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights” when interpreting legislation and when developing common law or customary law. Yet, by the end of 1999, South Africa was a contracting party to the International Covenant on Civil and Political Rights, but had only signed and not ratified the International Covenant on Economic, Social and Cultural Rights.



This Section will focus on the roles of the Public Protector and the Human Rights Commission in building good governance and protecting human rights in South Africa. The Public Protector and members of the Human Rights Commission are appointed by the President on the recommendation of the National Assembly.<sup>295</sup> Thus, although they are nominally executive appointments, the legislature plays the major role in the choice of appointees and is the only body able to remove them from office.

The office of the Public Protector (Ombudsman) was included in both the 1993 Interim Constitution and the Final Constitution, starting operations on October 1, 1995.<sup>296</sup> The Public Protector follows the classical ombudsman model in investigating "any conduct in state affairs, or in the public administration" in any sphere of government that may be improper or result in any impropriety or prejudice.<sup>297</sup> The office has wide jurisdiction covering all levels of government and including the police but, following the traditional model, it cannot investigate the judicial functions of courts and does not investigate the private sector.<sup>298</sup> The Public Protector investigates maladministration in connection with the affairs of government at any level; abuse or unjustifiable exercise of power; unfair, capricious, discourteous, or other improper conduct or undue delay by a public official; improper or dishonest conduct or corruption with respect to public money; improper or unlawful enrichment or receipt of improper advantage by a person as a result of the conduct of public administration; and conduct of a public servant that results in unlawful or improper prejudice to another person.<sup>299</sup> In the course of an investigation, the Public Protector can engage in mediation, conciliation or negotiation, make recommendations as warranted and, if he is of the opinion that an offense has been committed, notify the prosecutorial authorities.<sup>300</sup> In addition to annual reports to the legislature, the Public Protector can also submit special reports to the National Assembly on particular investigations if the Protector deems it to be necessary or in the public interest.<sup>301</sup>

295. See *id.* arts. 193(4)–(6), 194. The Constitution also strictly limits grounds for removal from office by the National Assembly.

296. See *id.* arts. 182–83; Public Protector Act, Act No. 23, Vol. 353, No. 16107 GOV'T GAZETTE (1994) (S. Afr.); Public Protector Amendment Act, Act No. 113, Vol. 401, No. 19524 GOV'T GAZETTE (1998) (S. Afr.); S.A.M. Baqwa, *The Role of the Public Protector Vis-à-vis Other Institutions That Redress Grievances in South Africa*, in 3 INT'L OMBUDSMAN Y.B. 129 (1999); Jeremy Sarkin, *The Development of a Human Rights Culture in South Africa*, 20 HUM. RTS. Q. 628 (1998). Although the Interim Constitution included offices of provincial Public Protectors, the constitutional negotiators decided to include only a national Public Protector in the Final Constitution, which can have regional offices. See *id.* at 653.

297. See S. AFR. CONST. art. 182(1)(a); see also Public Protector Act, *supra* note 296, Preamble.

298. See S. AFR. CONST. art. 182(1)–(3).

299. See Public Protector Act, *supra* note 296, § 6(4)(a). The Public Protector can start investigations on receipt of a complaint or on his own motion.

300. See *id.* § 6(4)(b)–(c).

301. See *id.* § 8(2). The Public Protector has issued 12 special reports to date, on topics ranging from nepotism in government to irregularities in the granting of degrees at a university. See *The Public Protector* (visited Feb. 22, 2000) <<http://www.polity.org.za/govt/pubprot/>>.

Thus, the Public Protector's mandate is primarily that of the ombudsman, building good governance through investigations into poor administration and allegations of corruption. However, despite the fact that the Public Protector has no express human rights mandate, the institution considers the violation of a human right by government to fall within the concept of "improper prejudice" suffered by a person and it does undertake investigations with a human rights component.<sup>302</sup> The office deals with numerous complaints against the police and, pursuant to understandings with the Human Rights Commission and the Commission for Gender Equality, the Public Protector investigates individual cases of human rights complaints brought against the public sector.<sup>303</sup> Thus, the human rights in the Constitution are relevant for the work of the Public Protector, both in maladministration complaints and investigations that raise more direct human rights issues.<sup>304</sup>

The Human Rights Commission was also established in the 1993 Interim Constitution and carried through into the 1996 Constitution, with the supporting legislation passed and the Commissioners appointed in September 1995.<sup>305</sup> The broad function of the Human Rights Commission is to protect and promote the human rights of South Africans contained in the Constitution's Bill of Rights. The Commission has the mandate to promote respect for human rights and a culture of human rights; promote the protection, development, and attainment of human rights; and monitor and assess the observance of human rights in South Africa.<sup>306</sup> The Commission also has the power to investigate and report on human rights observance, take steps to secure redress when human rights have been violated, and research and educate on human rights.<sup>307</sup> The Commission will try to resolve the human rights complaint through negotiation, mediation, a public hearing, or litigation; the Commission has the power to bring court actions in its own name or on behalf of persons, groups, or classes of persons whose rights have been infringed.<sup>308</sup> The Commission has jurisdiction over human rights matters in both the public and private sectors. Also, the Constitution recognizes that

302. See *The Public Protector* (visited Feb. 22, 2000) <<http://www.polity.org.za/govt/pubprot/pubprot.html>>.

303. Baqwa, *supra* note 296, at 136. Also, an Independent Complaints Directorate was set up in 1997 to investigate police brutality and action resulting in death.

304. Included in the Bill of Rights is article 33, which states:

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons . . . .

S. AFR. CONST. ch. 2, art. 33. See also REPUBLIC OF SOUTH AFRICA, PUBLIC PROTECTOR, INVESTIGATION CONCERNING THE SARAFINA II DONOR (1996) (applying art. 13 (right to privacy) and art. 23 (access to information) of the Constitution.)

305. See S. AFR. CONST. art. 184; The Human Rights Commission Act, Act 54 of 1994 (S. Afr.), (visited Feb. 22, 2000) <<http://www.polity.org.za/govdocs/legislation/1994/act94-054.html>>.

306. See S. AFR. CONST. art. 184(1).

307. See *id.* art. 184(2).

308. See SOUTH AFRICA HUMAN RIGHTS COMMISSION, COMPLAINTS PROCEDURE; Human Rights Commission Act, 1994, *supra* note 305, at §§ 7(1)(e), 8, 9.

many South Africans suffer from socio-economic disadvantages given the history of racial discrimination and, as a result, gives an additional role to the Human Rights Commission to monitor state action taken to implement the economic, social and environmental constitutional rights.<sup>309</sup>

In 1998, the Human Rights Commission finalized a National Action Plan for the Protection and Promotion of Human Rights.<sup>310</sup> The National Action Plan is designed to implement a recommendation that states consider drafting such plans identifying steps by which the state will improve the protection and promotion of human rights, which was made in the Vienna Declaration and Programme of Action adopted at the 1993 United Nations World Conference on Human Rights.<sup>311</sup> The South African National Action Plan analyzes the current human rights situation in South Africa, identifies areas for improvement, and lists specific measures for the improvement of human rights protection to be taken over a five-year period. The Human Rights Commission is included as one of the domestic institutions that has the role of monitoring and implementing the international, regional, and domestic constitutional human rights obligations of South Africa. The Public Protector is also mentioned as one of the domestic institutions that is invited to monitor and implement a number of the covered civil, political, economic, and social rights.<sup>312</sup>

As a new multiracial democracy, South Africa is attempting to consolidate its democracy through constitutional, legal, and institutional reform, and has to address the major issues of poverty and socio-economic disparities in the country. Human rights problems continue, ranging from the conduct of the security forces, poor prison conditions, violence against women, and discrimination to weaknesses in the fulfilment of social and economic rights that are some of the legacies of the past *apartheid* regime.<sup>313</sup> The judicial system in South Africa is independent, although sometimes slow,<sup>314</sup> and will play its own role in protecting human rights. In establishing its national human rights institutions, South Africa chose separate institutions for administrative oversight and human rights breaches. Nonetheless, the om-

309. See S. AFR. CONST. art. 184(3):

Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

But see *supra* note 294 on the International Covenant on Economic, Social and Cultural Rights.

310. REPUBLIC OF SOUTH AFRICA, NATIONAL ACTION PLAN FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS (1998) reprinted in *The South African Human Rights Commission* (visited Feb. 22, 2000) <<http://www.sahrc.org.za>>.

311. See Vienna Declaration and Programme of Action, *supra* note 5, para. 71.

312. These include the right to privacy, political rights, access to justice rights, the right to just administrative action, the rights of aliens, the right to freedom of expression, the rights of arrested, detained, accused and convicted persons, health rights, food rights, social security rights, and the right to development. See NATIONAL ACTION PLAN, *supra* note 310.

313. See COUNTRY REPORT 1998, *supra* note 132, at 379–92.

314. See *id.* at 383.

budsman receives some human rights related complaints, so that both institutions can act as mechanisms for the implementation of national and international human rights norms. The appointment provisions for the Public Protector and Human Rights Commission have been criticized as not being independent enough from the executive branch, with the result that appointments can be subject to politics.<sup>315</sup> The jurisdiction and powers of each institution are reasonably strong and they have the potential to be effective national human rights institutions. However, the ability of the institutions to carry out their mandate has been hampered by insufficient funding provided by the government.<sup>316</sup> Again, the longer term effectiveness of the South African national human rights institutions will depend on surrounding political and economic factors.

### CONCLUSION

National human rights institutions have roles to play in both democratizing states and established democracies. They have the potential for building good governance in a state through improving administration and/or protecting human rights. In this respect, increasing numbers of national human rights institutions have the capacity to implement international human rights obligations of the state. The effectiveness of a national human rights institution at any point in time depends, however, on legal, political, financial and social factors, many of which fall within the power of the executive and legislative branches of government. Thus, ultimately, it is the action of these two branches of government which is crucial in determining the strength or weakness of a national human rights institution.

A final question must be asked: should human rights protection and administrative oversight be in the hands of institutions that are mainly only cooperative control mechanisms? In my view, in the ideal situation, national human rights institutions should not be relied on as the sole or central means of implementing and protecting human rights or promoting good governance in public administration. National human rights institutions should be considered to be only one of a variety of democratic government institutions and non-state mechanisms that are needed in a country to promote good governance and human rights protection. The early national human rights institutions—both the ombudsman and human rights commissions—were not designed to be stand-alone mechanisms but rather were intended to act as complements to other government organs such as the legislature, the courts and administrative tribunals. In established democracies, this is the usual institutional configuration, and national human rights institutions fulfill a valuable function alongside other democratic government institutions and non-state actors.

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315. See Sarkin, *supra* note 292, at 84–85; Dugard, *supra* note 292, at 312.

316. See COUNTRY REPORT 1998, *supra* note 132, at 386–87.

However, in states that are in the transition to democracy or are trying to strengthen and consolidate their democratic structure, national human rights institutions will often have a more important place in the protection of human rights and in administrative oversight. This may occur because the judicial branch is weak or politicized, complainants cannot afford litigation or some matters are just not justiciable. In states with developing democracies, in addition to establishing or strengthening national human rights institutions, continuing efforts should be placed on building an independent and highly trained judiciary and improving access to the courts for human rights and administrative cases.

States must work towards establishing, strengthening and diversifying a network of state and civil society institutions, the particular design of which will depend on a country's makeup. In the realm of human rights protection, an independent and trained judiciary, reduction of barriers to human rights litigation, human rights training of police and armed forces, fostering a free press, and strengthening human rights NGOs are some of the other institutions and processes that should be developed at the same time that national human rights institutions are established.