Linda C. Reif

The Ombudsman, Good Governance and the International Human Rights System

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THE OMBUDSMAN, GOOD GOVERNANCE AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM

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by

LINDA C. REIF

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To Carl Ley, M.D.

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My interest in the intersections between the ombudsman and human rights protection dates back to 1990 when, during a secondment as lawyer to the Office of the Ombudsman of Alberta, I discovered that human rights issues arose in the work of a classical ombudsman. The explosion in the number of human rights ombudsman institutions since that time added another dimension to the theme. As a result, my research and writing interests increasingly addressed issues relating to the ombudsman and human rights protection, culminating in this book.

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Linda C. Reif

CHAPTER ONE

Introduction

The Role of the Ombudsman

Over the course of the past century, government administration has expanded greatly and complaints about bureaucratic conduct have grown in parallel. In response, the ombudsman institution has been established by the state in many countries around the world.[1] Although the ombudsman in its contemporary form dates back to the Swedish ombudsman of 1809, the institution only began to spread outside Scandinavia starting in the 1960s.[2]

The ombudsman is a public sector institution, preferably established by the legislative branch of government, to supervise the administrative activities of the executive

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[1] See generally K. Hossain et al., eds., *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (The Hague: Kluwer Law International, 2001) [hereinafter *Human Rights Commissions and Ombudsman Offices*]; L.C. Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection" (2000) 13 Harvard H.R.J. 1; V. Ayeni, L. Reif and H. Thomas, eds., *Strengthening Ombudsman and Human Rights Institutions in Commonwealth Small and Island States – The Caribbean Experience* (London: Commonwealth Secretariat, 2000); R. Gregory and P. Giddings, eds., *Righting Wrongs: The Ombudsman in Six Continents* (Amsterdam: IOS Press, 2000) [hereinafter *Righting Wrongs*]; L.C. Reif, ed., *The International Ombudsman Anthology: Selected Writings From The International Ombudsman Institute* (The Hague: Kluwer Law International, 1999) [hereinafter *International Ombudsman Anthology*]; J.L. Maiorano, *El Ombudsman: Defensor del Pueblo y de las Instituciones Republicanas*, 2d ed., 4 vols. (Buenos Aires: Ediciones Macchi, 1999); L.C. Reif, ed., *The Ombudsman Concept* (Edmonton, International Ombudsman Institute, 1995); M.A. Marshall and L.C. Reif, "The Ombudsman: Maladministration and Alternative Dispute Resolution" (1995) 34 Alberta Law Rev. 215; F. Matscher, ed., *Ombudsman in Europe – The Institution* (Kehl: N.P. Engel, 1994); L. Reif, M. Marshall and C. Ferris, eds., *The Ombudsman: Diversity and Development* (Edmonton: International Ombudsman Institute, 1992); D.C. Rowat, *The Ombudsman Plan: The Worldwide Spread of an Idea*, 2d rev. ed. (Lanham, Md.: University Press of America, 1985); G.E. Caiden, ed., *International Handbook of the Ombudsman: Evolution and Present Function* and *International Handbook of the Ombudsman: Country Surveys*, 2 vols. (Westport: Greenwood Press, 1983). Parts of this Chapter are developed from Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection", *ibid.* at 5-9, 11-13, 23-30.

[2] The word "ombudsman" is used as the generic term and when it is the title of a specific institution. "Ombudsman" is considered to be gender neutral in contemporary Swedish. While *ombudsmän* is the plural form in Swedish, this book uses "ombudsmen". As both women and men hold the office of ombudsman the pronouns in this book are used to reflect this fact.

branch. The ombudsman receives and investigates impartially complaints from the public concerning the conduct of government administration. The traditional ombudsman model that has proved most popular is based on the offices established in the western Scandinavian countries of Denmark and Norway, which do not have the power to investigate the judiciary or prosecute officials.[3] The general objectives of the ombudsman are the improvement of the performance of the public administration and the enhancement of government accountability to the public. The Supreme Court of Canada has stated that "[t]he powers granted to the Ombudsman allow him to address administrative problems that the courts, the legislature and the executive cannot effectively resolve."[4]

Most ombudsman offices have been established in states with democratic forms of government. In such a government the ombudsman operates as another check on the power of the executive/administrative branch, in addition to the controls exercised by the legislature, the courts and other public sector institutions. Functioning as a complement or supplement to courts and administrative tribunals, some advantages of the ombudsman relative to other public sector dispute resolution mechanisms are its informality, speed and accessibility. One element of its accessibility is that use of the institution is free of charge to complainants.

The ombudsman is a mechanism which enhances transparency in government and democratic accountability, with the result that it assists in building good governance in a state. Also, some ombudsman institutions are hybrids. One variation is the human rights ombudsman which has both administrative oversight and human rights protection functions. With other variations, ombudsmen may be given mandates including anti-corruption, leadership code enforcement and/or environmental protection functions. Further, even the classical ombudsman can and does resolve some complaints with human rights aspects. Thus, both classical and human rights ombudsman institutions play roles in domestic human rights protection and promotion. The human rights norms involved may be derived from the international human rights obligations of the state concerned, with the result that the ombudsman acts as a domestic non-judicial institution for the implementation of international human rights law.

The Classical Ombudsman

The classical ombudsman model, a public sector office appointed by but separate from the legislature, is given the authority to supervise the general administrative conduct of the executive branch through investigation and assessment of that conduct.[5] A definition that is often given of the classical ombudsman is, as follows:

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[3] In contrast, the first two ombudsman institutions, in Sweden and Finland, have jurisdiction over the judiciary and can prosecute officials. See *infra* text accompanying notes 56 to 68 for discussion on the issue of ombudsman jurisdiction over the courts.

[4] *B.C. Development Corp.* v. *Friedmann*, [1985] 1 W.W.R. 193 (S.C.C.) at 206.

[5] See M. Oosting, "Roles for the Ombudsmen: Past, Present and Future" in I. Rautio, ed., *Parliamentary Ombudsman of Finland 80 Years* (Helsinki: Parliamentary Ombudsman of Finland, Feb. 7, 2000) 17 at 19.

> an office provided for by the constitution or by action of the legislature or parliament and headed by an independent, high-level public official who is responsible to the legislature or parliament, who receives complaints from aggrieved persons against government agencies, officials, and employees or who acts on his own motion, and who has the power to investigate, recommend corrective action, and issue reports.[6]

The ombudsman has the power to investigate complaints from members of the public that the administration of government is being conducted in an illegal or, more broadly, an unfair or improper manner. Members of the public have the right to make complaints to the ombudsman. Many ombudsmen are also given the power to launch own-motion investigations and, in a number of jurisdictions, legislators or government ministers may refer matters to the ombudsman for investigation.[7] Classical ombudsmen typically only take complaints directed against the government and usually do not have the jurisdiction to investigate complaints between private entities.[8] However, some hybrid human rights ombudsmen do have the jurisdiction to take complaints involving both public and private sector conduct.[9]

The ombudsman is given investigative jurisdiction over a wide variety of government departments, agencies, state corporations and their administrative officials.[10] The legislature is invariably excluded from ombudsman jurisdiction.[11] Also, most ombudsman institutions do not have jurisdiction over the judicial activities of the courts, as discussed further below. Many ombudsmen have jurisdiction to investigate the administration of prisons and other detention centers, and customs and immigration administrations often fall within the mandate of national ombudsmen. While a number of classical ombudsmen do not have jurisdiction over the police and military forces, some ombudsmen have been given jurisdiction over these sensitive areas.[12] Some states have established

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[6] Ombudsman Committee, International Bar Association Resolution (Vancouver: International Bar Association, 1974).

[7] E.g. Alberta's Ombudsman, *Ombudsman Act*, R.S.A. 2000, c. O-7, as am., s. 12(2) (on complaint, own-motion), (4) (any committee of the legislature), (5) (any Minister).

[8] But see the extension of jurisdiction in a few cases, e.g. to universities and colleges, self-governing professional bodies, specific private sector conduct, e.g. K. Del Villar, "Who Guards the Guardians? Recent Developments Concerning the Jurisdiction and Accountability of Ombudsmen in Australia" (2002) 6 Int'l Omb. Yrbk. 3. For the jurisdiction of the New South Wales Ombudsman over sexual abuse cases in the private sector see *infra* Chapter 9.

[9] E.g. *Provedor de Justiça* (Provider of Justice) of Portugal (relations between private persons which involve a special relationship of dominion in the protection of rights), *Defensor del Pueblo* (Defender of the People) of Argentina (public utilities that have been privatized), Ombudsman of Namibia (human rights infringements by private persons), Commission on Human Rights and Administrative Justice of Ghana (human rights breaches by private persons); Ombudsman Commission of Papua New Guinea (discriminatory practices in public and private sectors).

[10] Government ministers and executive heads of government may be excluded from the jurisdiction of the ombudsman.

[11] But see the supranational European Ombudsman of the European Union, who does have jurisdiction over the law-making or "legislative" organs of the Community – the Council, the Commission and the European Parliament. See *infra* Chapter 11 for a detailed discussion of the European Ombudsman.

[12] E.g. National Ombudsman of the Netherlands (jurisdiction over the police, security forces),

separate defence force or police ombudsmen – which may be legislative or executive appointments – in addition to or in the absence of a general ombudsman office.[13]

The ombudsman is given strong powers of investigation. These powers include compelling the production of documents and the attendance and testimony of witnesses, through *subpoena* powers if necessary. Although they are important backstops for ombudsman investigations, in practice these strong powers do not have to be used often. Numerous ombudsmen, including many in Europe, have the power to undertake inspections of government institutions where individuals are forcibly confined, such as prisons and mental health care facilities.[14]

After an impartial and objective investigation, the ombudsman makes a determination whether there has been improper conduct. The ombudsman may determine that the government entity or bureaucrat has acted appropriately, i.e. within the law and in a fair manner. However, if misconduct is uncovered by the investigation, the ombudsman has the power to make recommendations for changes to administrative practice and policy to terminate the administrative problem. Many ombudsmen also have the power to make recommendations for changes in laws.[15] Also, the ombudsman has reporting duties. In specific investigations, the ombudsman reports to the complainant, the government and, if recommendations are not implemented by the administration, the ombudsman can report on the matter to the legislature. Further, the ombudsman has the duty to make an annual report to the legislature on the activities of the office, and some ombudsmen can issue special reports based on particular, usually more serious, investigations.

A Brief History of the Ombudsman

THE SWEDISH JUSTITIEOMBUDSMAN

Officials with duties similar to that of the modern ombudsman have been seen in different cultures throughout history.[16] However, the modern roots of the ombudsman are

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Australia's Commonwealth and Defence Forces Ombudsman (jurisdiction over defence forces and the federal police), Sweden's Ombudsmen (jurisdiction over certain commissioned officers in the armed forces, police), Finland's Ombudsman (jurisdiction over police, military), Norway's Ombudsman (jurisdiction over police, defence forces), Belgium's Federal Ombudsmen (jurisdiction over military forces, police, civil and military information services).

[13] E.g. Israel (defence forces), Norway (armed forces), Northern Ireland (police), Canada (federal defence forces and R.C.M.P.).

[14] E.g. Ombudsmen of Sweden, the Netherlands, Denmark and Lesotho; the Human Rights Ombudsman of Slovenia. A 1991 survey of ombudsmen at national and sub-national levels of government with 76 responses found that 66 offices (86.8%) had inspection power, U. Kempf and M. Mille, "The Role and Function of the Ombudsman: Personalized Parliamentary Control in Forty-Eight Different States" (1993) 11 Omb. J. 37 at 54, rep. in *International Ombudsman Anthology*, *supra* note 1, 195 at 213 [further references to *Anthology*].

[15] In the 1991 survey, 68 out of 76 ombudsmen (89.5%) had the power to recommend changes to laws, *ibid.* at 205.

[16] Parallels have been found in the Roman, Chinese, Islamic and Spanish (Aragon) systems, see J.M.

found in the Swedish *justitieombudsman* (ombudsman for justice) established in 1809.[17]

After a military defeat by Russia in 1709, the Swedish king, Charles XII, fled to Turkey for some years. As a result of the long absence of the monarch, the administration in Sweden deteriorated. In 1713 the king appointed a representative to monitor the conduct of the Swedish administration and judiciary, and named the official *Justitiekanslern* (Chancellor of Justice) in 1719.[18] If a violation of the law or other misconduct was discovered, the *Justitiekanslern* was empowered to commence legal proceedings against the recalcitrant official. This was and still is an executive appointment, as the Chancellor of Justice continues to exist as "the government's ombudsman".[19] However, between 1766 and 1772, the Estates (*Riksdag* or parliament) took over the function of electing the Chancellor of Justice, with the monarch regaining this power in 1772.[20] After the King was deposed in 1809, a new Constitution was adopted which divided power between the crown and the parliament, giving the latter the ability to place some checks on the exercise of executive power.[21] The Constitution of 1809 included a novel institution – the *justitieombudsman* – appointed by parliament with the powers to supervise the public administration and judiciary and to prosecute those who failed to fulfil their official duties.[22] As the institution evolved, it changed from being a purely legislative monitor to a public complaints driven process.[23]

Why did the Swedish *Riksdag* create a new institution, that of the legislative ombudsman? Wieslander states that the memorandum of the Constitutional Committee indicates that the members felt that an ombudsman appointed by the legislature would promote "genuine civic feeling" and that the ombudsman "was intended primarily to establish a system of supervising the discharge of public office which was independent of the Government."[24] Also, Wieslander states that the debates of the Estates over the

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Mas i Solench, *El Síndic de Greuges de Catalunya* (Barcelona: Síndic de Greuges de Catalunya, 1995) at 166-167; V. Pickl, "Islamic Roots of Ombudsman Systems" (1987) 6 Omb. J. 101; U. Lundvik, "A Brief Survey of the History of the Ombudsman" (1982) 2 Omb. J. 85.

17 See C. Ekhlundh, "The Swedish Parliamentary Ombudsman System" in *Human Rights Commissions and Ombudsman Offices, supra* note 1 at 423; B. Wieslander, *The Parliamentary Ombudsman in Sweden* (Bank of Sweden Tercentenary Foundation, 1994); U. Lundvik, "Sweden" in *International Handbook of the Ombudsman: Country Surveys, supra* note 1 at 179; W. Gellhorn, "The Swedish Justitieombudsman" (1965) 75 Yale Law J. 1.

18 Wieslander, *ibid.* at 13; Gellhorn, *ibid.* at 1. The idea for the position of Chancellor of Justice may have come from the Turkish office of *Qadi al Qudat* (Chief Justice) which had a similar function, I. al-Wahab, *The Swedish Institution of Ombudsman: An Instrument of Human Rights* (Stockholm: LiberFörlag, 1979) at 24.

19 See <www.jo.se>, "History".

20 Wieslander, *supra* note 17 at 14. The Estates were composed of the aristocracy, the clergy, farmers and citizens.

21 al-Wahab, *supra* note 18 at 23.

22 Wieslander, *supra* note 17 at 11-14. The first Ombudsman was appointed in 1810. Under Sweden's legal system, administrative authorities have considerable independence of action from the executive branch of government and government ministers are not responsible for the conduct of government departments or officials, Eklundh, *supra* note 17 at 423-424. In the contemporary period, the power to prosecute is not exercised often.

23 See *B.C. Development Corp.* v. *Friedmann, supra* note 4 at 204.

24 Wieslander, *supra* note 17 at 14-15.

constitutional proposals of the Committee show that the legislature considered that the supervision of administration by the Chancellor of Justice was insufficient to protect the rights of the public given that the Chancellor was answerable only to the executive branch of government.[25]

Sweden today is governed by its 1974 Constitution and has four Parliamentary Ombudsmen (*Riksdagens ombudsmän*), one of whom is designated Chief Parliamentary Ombudsman.[26] The Parliamentary Ombudsmen have a dual mandate: supervising the rule of law in the public administration and the judiciary, and ensuring "that the fundamental rights and freedoms of citizens are not encroached upon in public administration."[27] The Ombudsmen are instructed to examine the observance of the human rights provisions in the Swedish Constitution by the administration.[28] Thus, the Swedish ombudsman institution is actually a form of human rights ombudsman.

THE POPULARITY OF THE OMBUDSMAN

The ombudsman idea did not spread beyond Sweden until the early twentieth century when newly independent Finland adopted the office in its 1919 Constitution.[29] Two more Scandinavian countries established the office considerably later – Denmark in its 1953 Constitution (ombudsman appointed in 1955) and Norway in 1962 (ombudsman appointed in 1963). The popularity of the public sector ombudsman accelerated in the 1960s and, as noted, it was the Danish and Norwegian version office which was adopted in other nations.

Over the past forty years, the model has been adopted by a majority of the Commonwealth's members. New Zealand was the first Commonwealth country to create an ombudsman in 1962. Beginning in the mid-1960s, numerous other Commonwealth nations in the Americas, Africa, Asia and the Pacific region have established classical or hybrid ombudsmen.[30]

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[25] *Ibid.* at 15; Eklundh, *supra* note 17 at 424.

[26] The number of ombudsmen increased over the course of the twentieth century. Each has a separate sphere of responsibility and each is individually responsible to the *Riksdag*, <www.jo.se>.

[27] *Act with Instructions for the Parliamentary Ombudsmen* (Nov. 13, 1986, consolidated April 1, 1999), s. 3; Eklundh, *supra* note 17 at 425; <www.jo.se>.

[28] Eklundh, *ibid.* A Swedish statute, however, can limit these constitutional rights, *ibid.* See I. Cameron, "The Swedish Experience of the European Convention on Human Rights Since Incorporation" (1999) 48 Int'l & Comp. Law Q. 20 at 29.

[29] The Ombudsman was appointed in 1920. Finland was under Russian rule until it declared its independence in Dec. 1917. See e.g. *Aaland Islands' Case* (1920) L.N.O.J. Special Supp. (No. 3) 3 (Finland did not become a state with a government in control of its territory until after the civil conflict ended in May 1918); T. Modeen, "The Finnish Ombudsman: The First Case of Foreign Reception of the Swedish Justitieombudsman Office" (1981) 1 Omb. J. 41.

[30] Tanzania (Permanent Commission of Enquiry, 1966, replaced by Commission for Human Rights and Good Governance, 2001, in operation 2002), Guyana (Ombudsman, 1966, in operation 1967), United Kingdom (Parliamentary Commissioner for Administration, 1967), Mauritius (Ombudsman, 1967-1968, commenced activities in 1970), some state-level offices in India (*Lok Ayukta*, commencing in 1971, in operation 1972), Australia (starting at the state level in 1972, Commonwealth Ombudsman in 1976, commenced operations in 1977), Fiji (Ombudsman, 1970, appointed 1972),

The ombudsman was also increasingly established and adapted in other countries, starting in the same time period, and continuing to the present as the institution became more widely recognized. The states which have created an ombudsman have ranged from established democracies reforming their governance structures to states in various stages of democratization. For example, ombudsmen (or *médiateurs*) have been established in: five states and two dependencies in the U.S.A. (commencing in 1969),[31] France (1973), Italy (in most regions and provinces starting in Tuscany, 1974), Austria (1977), the Netherlands (1981, in operation 1982), Ireland (1980, commenced operations 1984), Iceland (1988), Greenland (1994, in operation 1995), South Korea (1994), Belgium (federal office in 1995, also Flemish Community and Walloon Community offices), various Francophonie nations in Africa (office of *Médiateur*) and Morocco (2002). Hybrid ombudsmen have been established in many more states.

Hybrid Ombudsman Institutions

The United Nations and other international organizations consider "national human rights institutions" to encompass various domestic institutions, other than the courts, that have functions in protecting and promoting human rights.[32] Human rights commissions,

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Zambia (Commission for Investigations, 1974), Papua New Guinea (Ombudsman Commission, 1975), Nigeria (Public Complaints Commission, 1975, also at the state level), Trinidad and Tobago (Ombudsman, 1976), Jamaica (Parliamentary Ombudsman, 1978, replaced by Public Defender, 2000), St. Lucia (Parliamentary Commissioner, 1978, started operations in 1981), Ghana (Ombudsman, 1980, replaced by Commissioner on Human Rights and Administrative Justice, 1992, in operation 1993), Solomon Islands (Ombudsman, 1980), Zimbabwe (Ombudsman, 1982), Barbados (Ombudsman, 1980, commenced activities in 1987), Sri Lanka (Parliamentary Commissioner for Administration, 1981), Pakistan (*Wafaqi Mohtasib*, 1983), Uganda (Inspectorate of Government, 1985, commenced activities in 1986), Cook Islands (Ombudsman, 1985), Samoa (*Komesina O Sulfufaiga*, 1988, in operation 1990), Namibia (Ombudsman, 1990), Cyprus (Commissioner for Administration, commenced activities in 1991), Seychelles (Ombudsman, 1993, commenced activities, 1994), Lesotho (Ombudsman, 1993), Malawi (Ombudsman, 1994, commenced activities 1995), Botswana (Ombudsman, 1995, in operation December 1997), Antigua and Barbuda (Ombudsman, 1981, commenced activities in 1995), South Africa (Public Protector, 1995), Malta (Ombudsman, 1995), Vanuatu (Ombudsman, 1995), Belize (Ombudsman, 1994, commenced activities in 1999), The Gambia (Ombudsman, 1999), Sierra Leone (Ombudsman, 1991 Constitution, 1997 law, in operation 2002). An Ombudsman operated in Swaziland 1983-1987. An Ombudsman for the Overseas British Territory of Gibraltar was appointed in 1999 and a Bermuda Ombudsman was included in 2003 constitutional amendments. In Bangladesh, legislation was considered in 2003 for an ombudsman. In 2003, the Kenya draft constitution provided for an ombudsman. See e.g. J. Hatchard, *National Human Rights Institutions in the Commonwealth: Directory*, 3d ed. (London: Commonwealth Secretariat, 1998); J. Hatchard, "Some Reflections on the Role of the Commonwealth in the Development of National Institutions" (Spring 1999) 25 Commonwealth Law Bull. 64 at Appendix I; International Ombudsman Institute, *Directory 2003* (Edmonton: International Ombudsman Institute, 2003).

[31] Hawaii (1967, in operation 1969), Nebraska (1969, in operation 1971), Iowa (1970 executive, 1972 legislative ombudsman), Alaska (1975), Arizona (1996), Puerto Rico (1977) and Guam (1978, in operation 1979).

[32] See e.g. 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 (UN Doc. HR/P/PT/4, 1995) [hereinafter

ombudsmen, hybrid human rights ombudsmen and specialized institutions (e.g. ombudsmen for children) are types of national human rights institutions. Other forms of hybrid ombudsmen have also been created, with some given multiple mandates.

THE HUMAN RIGHTS OMBUDSMAN

The hybrid human rights ombudsman combines both the ombudsman and human rights commission roles. Human rights ombudsman institutions stand on a spectrum, with some being closer to the classical ombudsman at one end and others being much more akin to pure human rights commissions at the other end of the spectrum.[33]

The human rights ombudsman dates back to the "third wave" democratization movement in Southern Europe and the creation of hybrid institutions in Portugal and Spain in the 1970s.[34] The *Provedor de Justiça* (Provider of Justice) of Portugal, established in 1975 on the country's return to democracy, was given the power to defend and promote rights and freedoms in addition to monitoring public administration.[35] The Spanish transition to democracy included a new constitution in 1978 that provided for a *Defensor del Pueblo* (Defender of the People) to supervise the protection of human rights in the new constitution and government administration.[36] Political and economic developments were catalysts for a new wave of hybrid institutions commencing in the last half of the 1980s and continuing to the present time. One trend was the transition of a number of governments from military rule to democratic governance, especially in Latin America. Another development was the end of the Cold War and the breakup of the Soviet Union which permitted the movement to democratic governance in countries in Central and East Europe. Yet another aspect was the influence of international organizations and donor governments on developing nations and the pressure to build good governance by, *inter alia*, reforming governance structures and public administration as conditions for the receipt of financial and technical assistance.[37]

In response, countries in Latin America, the Caribbean, Central and Eastern Europe, Africa, Asia and the Pacific region have moved to establish democratic governance structures. A variety of public sector mechanisms have been introduced by these nations and, in particular, the hybrid human rights ombudsman has become popular. The establishment of the ombudsman can be seen as one concrete manifestation of a country's attempts to develop democratic accountability and build good governance. Since many

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National Human Rights Institutions: A Handbook]; *Protecting Human Rights: The Role of National Human Rights Institutions*, Commonwealth Conference of National Human Rights Institutions, Cambridge Conference Communiqué, July 4-6, 2000 (London: Commonwealth Secretariat, 2000). For a detailed discussion of national human rights institutions see *infra* Chapter 4.

33 For further details on national human rights institutions, and the human rights protection role of human rights ombudsmen and classical ombudsmen, see *infra* Chapters 4-9.

34 See S.P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991).

35 For further details see *infra* Chapter 5.

36 *Ibid.*

37 For a detailed discussion of good governance and the role of the ombudsman see *infra* Chapter 3.

of these countries have a history of human rights abuses committed by public authorities, the ombudsman model has often been adapted to include an additional human rights protection and promotion mandate. Also, in recent years some states have changed their classical ombudsman to a hybrid human rights ombudsman, in particular Finland, Jamaica, Ghana and Tanzania.

Human rights ombudsmen with different mandates and titles are located primarily in the following countries: (1) in Europe: in Spain, Portugal, Finland, Sweden, Cyprus, Greece and most countries in Central and East Europe; (2) in Latin America: in Guatemala, Costa Rica, El Salvador, Honduras, Nicaragua, Panama, Colombia, Peru, Bolivia, Ecuador, Argentina and Paraguay (while Mexico has human rights commissions at the federal and state levels); (3) in the Caribbean: in Jamaica, the Dominican Republic (not in operation by mid-2003), Belize and Guyana (discrimination); (4) in Africa: in Ethiopia (not in operation by mid-2003), Ghana, Lesotho, Malawi, Namibia, the Seychelles, Tanzania and Zimbabwe; and (5) in Asia and the Pacific region: in some Central Asian states, Sri Lanka, Thailand, East Timor (not in operation by mid-2003), Papua New Guinea (discrimination) and Fiji.[38]

Ombudsmen With Anti-Corruption, Leadership Code Enforcement, Environmental Protection and/or Other Mandates

Growing numbers of classical ombudsmen in developed and developing states are being given additional or secondary duties such as overseeing freedom of information, privacy and/or whistleblower protection laws in places such as Ireland, some Australian states, and some Canadian provinces.[39]

Hybrid institutions have been created when ombudsman offices have been given a corruption fighting mandate. While there are several types of horizontal accountability bodies that are established to combat corruption, including the courts and anti-corruption commissions, some countries have not created a specific institution for the purpose and, instead, have endowed their ombudsman with an additional anti-corruption mandate. Also, some organizations consider that all ombudsman offices have a role in anti-corruption efforts as a complement to other dedicated institutions.[40] However, only a

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[38] While some classical ombudsmen have jurisdiction over discriminatory conduct/law in brief terms, in contrast e.g. the Guyana Ombudsman has more detailed jurisdiction over discrimination and the Papua New Guinea Ombudsman has jurisdiction over discrimination in both the public and private sectors. The Uganda Inspectorate of Government originally was a human rights ombudsman, but lost its human rights role when the Uganda Human Rights Commission was established. The South Korean Ombudsman protects the rights of the public, but does not appear to focus on human rights in practice. See also the Palestinian Independent Commission for Citizens' Rights, F.S. Azzam, "Update: The Palestinian Independent Commissioner for Citizens' Rights" (1998) 20 H.R.Q. 338.

[39] On Australian developments see Del Villar, *supra* note 8; <www.ombudsman.mb.ca> (Manitoba, freedom of information and privacy); <www.ombudsman.yk.ca> (Yukon, freedom of information and privacy); <www.ombudsman.gov.ie> (Ireland, freedom of information). See also the Nebraska Public Counsel/Ombudsman with whistleblower protection duties.

[40] E.g. World Bank, "Fostering institutions to contain corruption", *PREMnotes* No. 24 (June 1999); Transparency International reports.

relatively small number of ombudsmen have been granted an express anti-corruption mandate Some ombudsmen have been given mandates to enforce the leadership codes of conduct that are binding on elected and senior public officials covering matters such as misuse of government funds, conflicts of interest and nepotism. The ombudsman institutions which have been given one or both of these functions are found principally in the African, Asian, Pacific and Caribbean regions where government corruption is perceived to be problematic. Examples of these offices are those in Papua New Guinea, Vanuatu, Philippines, Indonesia, Macao (China), Taiwan, some states in India, South Africa, Uganda, Namibia, Mauritius, Ghana, Lesotho, the Seychelles, Rwanda, Belize, Trinidad and Tobago, Saint Lucia and possibly East Timor.[41] However, the anti-corruption ombudsman has not been adopted in Latin American states – a region where government corruption is also a major concern. There are additional developments in other parts of the world. The Israeli Ombudsman also has a state auditor function, and in 2001 the Welsh Commissioner for Local Administration was given jurisdiction to investigate complaints that members of local authorities in Wales are not in compliance with the statutory code of conduct issued by the Welsh legislature.[42]

The anti-corruption and leadership code ombudsmen have differing powers in the fight against corruption. For example, the Uganda Inspectorate of Government can prosecute wrongdoers, the Public Protector of South Africa has classical ombudsman powers, and the ombudsmen in Saint Lucia and Trinidad and Tobago can only investigate general conditions surrounding corruption.[43] It can be argued that the nature of anti-corruption work demands that it be backed up by coercive power with enforceable sanctions. In this respect, the United Nations Development Programme has been critical of ombudsman institutions which have been given corruption-fighting mandates, stating that "they are seldom a way to uncover large-scale systemic corruption, and most have no authority to initiate lawsuits."[44] Following this line of argument, the ombudsman should only be considered as a supplement to an anti-corruption commission.[45] However, as noted above, a few of the anti-corruption ombudsmen do have coercive power to back up their investigations, such as those in the Philippines, Uganda, Ghana and Namibia.[46] For some of the anti-corruption ombudsmen, their concern is the manner in which their corruption fighting role may "overshadow" their other functions of investigating poor administration and human rights complaints.[47]

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41 In practice the Hong Kong (China) Ombudsman undertakes some work in this area, see *infra* Chapter 7.

42 See *infra* note 110; E. Moseley, "The New Law Governing the Conduct of Local Authority Members in Wales" (2002) 6 Int'l Omb. Yrbk. 46.

43 For further details on South Africa's Public Protector see *infra* Chapter 7 and *infra* Chapter 6 on ombudsmen in the Caribbean.

44 United Nations Development Programme, *Corruption and Good Governance*, MDGD Discussion Paper 3 (July 1997) at 85.

45 "Fostering institutions to contain corruption", *supra* note 40 at 2.

46 For further details on the institutions in Namibia, Ghana and Uganda see *infra* Chapter 7. See also the prosecution of former President Estrada on corruption and plunder charges by the Ombudsman of the Philippines.

47 V.O. Ayeni, "The Ombudsman in the Achievement of Administrative Justice and Human Rights in the New Millennium" (2001) 5 Int'l Omb. Yrbk. 32 at 43.

Most ombudsmen have the jurisdiction to deal with environmental issues indirectly when administrative conduct is involved. Some human rights ombudsmen can also investigate matters involving human rights to the environment if environmental rights are contained in the constitution or other domestic law of the state in which they operate. In addition, two human rights ombudsman institutions in Africa with multiple mandates – Namibia and Lesotho – have been given specific environmental protection functions.[48] Another development, seen in a few countries, is a special-sector commissioner for the environment.[49]

Current Status of Classical and Hybrid Ombudsman Institutions

By mid-2003, there were about 110 countries with national classical and hybrid ombudsman institutions, located throughout the world, and a few more were in the process of considering an ombudsman.[50] Approximately fifty percent of these institutions can be categorized as human rights ombudsmen, and there are additional ombudsmen with other hybrid mandates. There are many more classical and hybrid ombudsmen at the sub-national level of government (regional, provincial, state or municipal) and in dependent or semi-autonomous territories.

Some countries with a national ombudsman also have ombudsmen in some or all of the state or provincial levels of government, e.g. Argentina, Australia, Austria, Belgium and Spain.[51] Other countries have ombudsmen only at the regional, provincial or state level of government, and to differing degrees, e.g. Canada, India, Italy, Switzerland, the U.S.A. and Brazil. Some national ombudsmen have jurisdiction over many or all municipal governments, while in other countries there may be either discrete municipal ombudsman offices in one or more cities or no local ombudsman coverage at all.[52]

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48 See *infra* Chapter 7.

49 E.g. the New Zealand Parliamentary Commissioner for the Environment, <www.pce.govt.nz>, T. Bührs, "Barking Up Which Trees? The Role of New Zealand's Environmental Watchdog" (1996) 48 Political Science 1; Canada's Commissioner or Environment and Sustainable Development, part of the Auditor-General of Canada, <www.oag-bvg.gc.ca>; and the Environmental Commissioner of Ontario, <www.eco.on>.

50 The Middle East and Northern Africa have the smallest number of institutions, with the Israeli ombudsman, the Palestinian Independent Commission for Citizen's Rights, Tunisia's *Médiateur*, the new Moroccan ombudsman and Jordan's recent establishment of a National Centre for Human Rights with a Commissioner General for Human Rights.

51 E.g. Argentina and Spain have state or regional ombudsmen in a number of their provinces and regions. Australia has ombudsmen at both the federal and state levels. In Austria, most of the states (*länder*) have, pursuant to the federal Constitution, elected the federal Ombudsman as the applicable ombudsman institution for their state, while Tyrol and Vorarlberg have created their own state ombudsman offices, N. Schwäzler, "The Ombudsman Institution in Austria" in *Human Rights Commissions and Ombudsman Offices, supra* note 1, 247 at 247-248. In Belgium, there are ombudsmen at the federal level and in two of the five sub-national areas (Walloon Region and Flemish Community), P.-Y. Monette, "The Parliamentary Ombudsman in Belgium: Strengthening Democracy" in *Human Rights Commissions and Ombudsman Offices, supra* note 1, 269 at 270.

52 For further discussion of national ombudsmen with jurisdiction over municipal governments and municipal government ombudsmen see *infra* Chapter 2.

With the evolution of self-government by indigenous peoples, another development is an ombudsman for the territory in question, and this concept is becoming a reality in Canada with the jurisdiction of the Yukon Ombudsman and the current initiative to establish a Métis Settlement Ombudsman in Alberta.[53]

The Ombudsman and Other Titles

The word "ombudsman" is of Swedish origin and means "representative".[54] The title "Ombudsman" was used by legislators in a number of Commonwealth countries and has also been adopted in a number of other countries.[55] However, as the ombudsman model has been established by governments around the world, the name used to represent the office has changed, often to a title more immediately expressive of the characteristics of the institution. For example: Parliamentary Commissioner for Administration (e.g. United Kingdom, Sri Lanka), Public Protector (South Africa), *Protecteur du Citoyen* (Protector of the Citizen, Quebec), *Médiateur de la République* (Mediator of the Republic, in Francophonie countries such as France, Senegal, Burkina Faso, Gabon and Mauritania), *Difensore Civico* (Civic Defender, at the regional and provincial level in Italy) and Citizens' Aide (several U.S. states).

The names of human rights ombudsmen often reflect their mandate. For example, there is the *Defensor del Pueblo* (Defender of the People), found in countries such as Spain, Argentina, Peru, Bolivia, Ecuador and Colombia, the *Provedor de Justiça* (Provider of Justice) of Portugal, the Commissioner for Civil Rights Protection of Poland, the Parliamentary Commissioner for Human Rights of Hungary, the Public Defender of Jamaica, the *Procurador para la Defensa de los Derechos Humanos* (Attorney for the Defence of Human Rights) of El Salvador and the *Procurador de los Derechos Humanos* (Human Rights Attorney) of Guatemala. Occasionally, however, even an office called "Ombudsman" may have an express human rights protection role, such as the Ombudsman of Namibia and the Parliamentary Ombudsman of Finland.

Although most ombudsmen and human rights ombudsmen are single-individual appointments, some countries have created multi-member offices, e.g. New Zealand's National Ombudsman (three), Sweden's Parliamentary Ombudsman (four), Austria's federal-level *Volksanwaltschaft* (three), Belgium's Federal Ombudsman (two), Ghana's Commission on Human Rights and Administrative Justice (three), Tanzania's Commission for Human Rights and Good Governance (six), South Korea's Ombudsman (ten) and Papua New Guinea's Ombudsman Commission (three).

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[53] The Yukon Ombudsman can investigate First Nations governments in the territory if the latter request such action. See also the Nebraska Public Counsel/Ombudsman, with the power to arbitrate disputes between Native Americans and the Nebraska State Historical Society over the repatriation process for human remains and artifacts held in museums, Nebraska Public Counsel, *2001 Annual Report* at 8.

[54] Lundvik, *supra* note 17 at 179.

[55] E.g. ombudsman offices in most Canadian provinces/territories, the ombudsman offices at the federal level and most state level offices in Australia, Antigua and Barbuda, Barbados, Cook Islands, Ireland, Malta, Mauritius, the Netherlands, New Zealand, Norway, Vanuatu. See also the European Ombudsman (EU).

Ombudsman Jurisdiction Over the Judicial Branch

Although most ombudsmen do not have jurisdiction over the judicial branch of government, there are some exceptions and qualifications to the general rule.[56]

As noted earlier, the first two ombudsman institutions – in Sweden and Finland – are notable exceptions as they were given full jurisdiction over all activities of the judiciary, including review of the substance of judgments.[57] The particular constitutional, governmental and legal structures that exist in these two nations permit ombudsman scrutiny of the judicial branch. In Sweden, supervision of the courts in practice does not usually involve intervention in the substantive law making function of the judiciary, and ombudsman scrutiny is generally limited to the administrative aspects of court procedures and cases of unreasonable delay in rendering judgments.[58] However, where a judgment is "manifestly wrong", the Swedish Ombudsman will intervene.[59] In Finland, the Ombudsman does not get involved in a case that is before the courts or is under appeal.[60] However, the Ombudsman of Finland has investigated and criticized judicial branch conduct, including:

> the instructions that the courts have given to attorneys in respect of the exchange of briefs, insufficient or erroneous instructions for appeal, defects in the reasoning given for judgments, delays, unnecessary postponements, clerical errors, [and] the refusal of a court to accede to a request for summons. . . .[61]

When other ombudsmen were established following those in Sweden and Finland, the ombudsmen were not granted jurisdiction to supervise the judiciary. This change in structure was due to a number of factors in these other countries such as: the absence of a history of judicial supervision by state officials (as found in Sweden and Finland), the presence of other judicial complaints/supervisory mechanisms in the country in question, and the legal and political norms which militated against the creation of a legislative mechanism with supervisory powers over the judicial branch of government.[62] In many countries, constitutional law norms and socio-political realities may make it legally or practically impossible for an ombudsman to be given jurisdiction over the judiciary.[63] Also, resistance coming from the judiciary may slow any initiative to create

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56 See Comisión Nacional de Derechos Humanos, *Judicial Ombudsman: International Outlooks* (Mexico: Comisión Nacional de Derechos Humanos, 1996).

57 See P. Koskinen, "Investigating the Judiciary" in *The Ombudsman Concept, supra* note 1 at 121, rep. in *International Ombudsman Anthology, supra* note 1 at 519 [further references to *Anthology*].

58 Eklundh, *supra* note 17 at 425-426.

59 *Ibid.* The example given for such an intervention is the situation where a judge hands down a prison sentence that is longer than the maximum provided for in law.

60 Koskinen, *supra* note 57 at 522.

61 *Ibid.* at 523. See e.g. Parliamentary Ombudsman of Finland, *Annual Report 2001*, English Summary (Helsinki, 2002) at 26 (Case 829/400, "Time Required to Deal With a Case in the Insurance Court").

62 Rowat, *supra* note 1 at 29. Other mechanisms to review judicial conduct include self-monitoring, such as the Judicial Council (e.g. Canada), and state institutions such as the Judicial Council, found in Spain, Italy and Latin America. See M. Ungar, *Elusive Reform: Democracy and the Rule of Law in Latin America* (Boulder: Lynne Rienner Publishers, Inc., 2002) at 170-186.

63 E.g., for the situation in Canada see T.J. Christian, "Why No Ombudsman to Supervise the Courts in Canada?" in *The Ombudsman Concept, supra* note 1 at 139, rep. in *International Ombudsman Anthology, supra* note 1 at 539.

an ombudsman mechanism, such as in Israel in 2002, although legislation to create an ombudsman to take complaints against the Israeli judiciary eventually passed.[64]

In contrast, some of the recently established hybrid ombudsmen have more limited jurisdiction over the courts. Slovenia's Human Rights Ombudsman has been given jurisdiction over the judiciary in cases of undue delay or evident abuse of authority.[65] The People's Advocate of Albania has jurisdiction over human rights violations in the administration of the judicial branch and judicial procedures, which stems from the corruption and poor training of judges during the Communist period.[66] Costa Rica's *Defensor de los Habitantes* has jurisdiction over the administrative aspects of the judiciary that violate individual rights.[67] Uganda's Inspectorate of Government is an anti-corruption and leadership code enforcing ombudsman, with jurisdiction over the judiciary with respect to matters of administration and corruption.[68]

Furthermore, for the vast majority of ombudsmen – where jurisdiction does not extend to cover the judiciary itself – the statutory language governing the scope of the institution may still enable an ombudsman to investigate complaints relating to the administrative aspects of the court system.

The Executive Ombudsman

Some public sector ombudsmen are both appointed by and responsible to the executive power. They are called an "executive ombudsman" or "quasi-ombudsman". These executive ombudsman institutions can be found at national, sub-national and municipal levels of government. Others are appointed by the executive branch but have some links with the legislative body. It may make a large difference whether an executive ombudsman operates in a one-party state or a vibrant democracy. For example, the ombudsmen of the United Kingdom and France are appointed by the executive in one sense or another, but are independent in law and practice.[69] Most classical, human rights and other hybrid ombudsmen in Africa and Asia are executive appointments.[70]

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64 G. Alon, "Lapid wants Strasberg-Cohen as first court watchdog", *Ha'aretz* (May 14, 2003), in operation January 2004.

65 See *infra* Chapter 5 for a discussion of Slovenia's Human Rights Ombudsman.

66 Constitution of the Republic of Albania (1998), art. 60; *Law No. 8454* (1999), art. 25, "The People's Advocate Institution and its Relations with the Judiciary in the Republic of Albania" in (April 2002) 26 European Omb. News. 2.

67 R.A. Carazo, "The Ombudsman of Costa Rica" in *Human Rights Commissions and Ombudsman Offices, supra* note 1, 299 at 302.

68 See *infra* Chapter 7 for a discussion of the Inspectorate of Government.

69 The *Médiateur* of France is appointed by decree of the Council of Ministers for one six-year term only and reports to the President and Parliament, *Law Establishing a Mediator of the French Republic*, Law No. 73-6 (Jan. 3, 1973) as am., ss. 2, 14. The UK Parliamentary Commissioner for Administration is appointed by the Crown, in practice on the recommendation of the Prime Minister after consultation with the Leader of the Opposition and the Chair of the legislative committee on public administration, R. Gregory and P. Giddings, "The United Kingdom Parliamentary Ombudsman Scheme" in *Righting Wrongs, supra* note 1, 21 at 23.

70 See *infra* Chapter 7.

There is continuing debate over whether executive ombudsmen meet the definition of a classical ombudsman as it can be argued that their ability to act with independence is brought into question by reason of the fact that they have the task of investigating the administrative arm of the government body which has appointed them.[71] The opposing viewpoint is that "while impartiality is important, formal independence underpinned by the legislative connection is neither a necessary nor a sufficient condition of impartiality and effectiveness."[72]

The Ombudsman, the Judicial Process and Alternative Dispute Resolution (ADR)

There are various barriers to court proceedings – such as the financial expense, long time periods before decisions are handed down and the problem of the non-justiciability of certain disputes – that make judicial settlement an unrealistic option for many individuals. As Stephen Owen, former British Columbia Ombudsman, recognized:

> [c]ourt proceedings are inappropriate for the resolution of the high proportion of concerns that arise from simple misunderstandings and errors that invite quick resolution by an independent party acting informally but with authority. Further, there is often no legal remedy for the unfair impact of the legitimate exercise of discretion by public administrators.[73]

Accordingly, classical and hybrid ombudsmen provide a valuable alternative for situations where judicial proceedings are unavailable or unrealistic. Further, in some countries there are more serious problems with the judiciary, such as insufficient funding, politicization and corruption. In these states, the ombudsman may be even more important as a venue for complaints against the public administration.

The issue of a possible conflict of jurisdiction between the ombudsman and the courts may arise. Ombudsman statutes deal with issues of precedence differently. An ombudsman statute may give the ombudsman the discretion to decide to investigate a complaint if she is of the opinion that it would be unreasonable for the complainant to pursue available court or tribunal processes, while in other jurisdictions the ombudsman may be more circumscribed.[74] A complainant whose complaint is unsuccessful after an ombudsman investigation can still bring a court action on the same set of facts as long as the issue is justiciable, a limitation period has not expired and there are no other

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71 E.g. R. Gregory, "Building an Ombudsman Scheme: Statutory Provisions and Operating Practices" (1994) 12 Omb. J. 83, rep. in *International Ombudsman Anthology*, *supra* note 1, 129 at 134-136 [further references to *Anthology*].

72 *Ibid.* at 134.

73 S. Owen, "The Ombudsman: Essential Elements and Common Challenges" in *The Ombudsman: Diversity and Development*, *supra* note 1, 1 at 4, rep. in *International Ombudsman Anthology*, *supra* note 1, 51 at 55 [further references to *Anthology*].

74 See D. Pearce, "The Ombudsman: Review and Preview – The Importance of Being Different" (1993) 11 Omb. J. 13 at 19, rep. in *International Ombudsman Anthology*, *ibid.*, 73 at 79-80.

admissibility bars.[75] However, ombudsman legislation typically prevents the ombudsman from investigating a complaint in which litigation is pending or where a court judgment on the same facts has already been issued.[76]

After a complaint has been made, an impartial investigation takes place and the ombudsman does not take a position – either to uphold a complaint or find it without merit – until after the investigation process has been completed. Keeping these *caveats* in mind, the ombudsman process can be broadly classified as a form of alternative dispute resolution (ADR) for conflicts between the government administration and members of the public.[77] As a non-judicial mechanism, the ombudsman process is voluntary for the individual complainant and mandatory for the administration.[78] However, it should be understood that the ombudsman has a broader mandate and stronger powers than those of simple ADR providers.[79]

Roy Gregory argues that the role for ADR in ombudsman work comes at different points in the process:

> the specially distinctive ADR technique employed by the ombudsman is not only "investigation" but a unique combination of investigation, judgement and recommendation, coupled sometimes with a certain amount of mediation and negotiation as regards remedy.[80]

After the conclusion of an investigation, if the ombudsman has taken the position that improper administration has occurred and has made recommendations for changes in law or practice to the government, some ombudsmen may enter into informal negotiations or mediation with the government department concerned to try to persuade the government to accept and implement her recommendations.[81]

It is also more common today to see ombudsmen use informal means of dispute resolution instead of a formal investigation for minor or simple complaints, which go by terms such as "the intervention method" (the Netherlands) or "friendly solutions" (European Union).[82] This process has been developed to deal with heavy complaint loads and to avoid or reduce back logs and delays in complaint processing. A few ombudsmen are authorized to engage in ADR during an investigation, for example the Saskatchewan Ombudsman, South Africa Public Protector and Vanuatu Ombudsman.[83] A number of

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75 See e.g. E.F. Short, "Remedies: The Relationship Between National Human Rights Institutions and Other Statutory Institutions/Mechanisms, With Special Reference to Racial Discrimination" in *The Sixth International Conference for National Human Rights Institutions, Proceedings*, Copenhagen and Lund, April 10-13, 2002 (Copenhagen: Danish Centre for Human Rights) 123 at 126.

76 *Ibid.* at 126-127.

77 See e.g. Marshall and Reif, *supra* note 1 at 216-217; J. Robertson, "The Ombudsman – World Trends" in *The Ombudsman Concept, supra* note 1, 2 at 8; Owen, *supra* note 73 at 54-56.

78 Owen, *ibid.* at 54.

79 See R. Gregory, "The Ombudsman: 'An Excellent Form of Dispute Resolution'?" (2001) 5 Int'l Omb. Yrbk. 98 at 120-121.

80 *Ibid.* at 120.

81 *Ibid.* at 108.

82 *Ibid.* at 111-115; M. Oosting, "The Ombudsman: A Profession" (1997) 1 Int'l Omb. Yrbk. 5 at 9; Owen, *supra* note 73 at 55.

83 *The Ombudsman and Children's Advocate Act*, R.S.S. 1978, c. O-4, as am., s. 12(5) (Ombudsman

human rights ombudsmen, for example in Latin America and Europe, also have mediation functions.[84]

A number of classical and hybrid ombudsmen can initiate investigations on their own motion. For example, through information gleaned from investigations of numerous complaints all alleging the same administrative problem, the ombudsman may see a pattern of government conduct indicating that there is a broader systemic malfunction in government administration. In response, the ombudsman may launch an own-motion systemic investigation.[85] At the end of an investigation, if a systemic breakdown or weakness is found, recommendations to terminate the wider dysfunction are made. If these recommendations are implemented, numerous future individual complaints about the dysfunction are avoided. Thus, systemic investigations are a form of preventive medicine for the public administrative system and are of collective benefit for many users of the system.[86] Indeed, some proactive government administrations may even ask the ombudsman to participate in the development of administrative policies or examine existing policies to ensure that they are fair.[87]

Horizontal and Vertical Accountability: The Ombudsman as a Control Mechanism

The legislative ombudsman can serve as a mechanism of horizontal accountability for government in a democratic state because it is an entity which is part of the state governance structure but external to the executive/administrative arm and independent of all branches of government.[88] The ombudsman also serves as a vertical accountability mechanism between the populace and the government, allowing members of the public to complain about government administration and have their concerns investigated, assessed

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can use negotiation, conciliation, mediation or other ADR to try to resolve any problem raised in a complaint); E.R. Hill, "The Ombudsman as Mediator – Challenges, Limitations and Opportunities in Vanuatu" (2001) 5 Int'l Omb. Yrbk. 146 at 150-151, 157 (Ombudsman can mediate instead of, or during, an investigation, mediation can be requested by persons affected by the inquiry, including the complainant and the government agency, and mediation can occur after an investigation has been completed and a report issued). On South Africa's Public Protector (mediation, conciliation or negotiation) see *infra* Chapter 7.

84 See *infra* Chapter 6 for a listing of Latin American human rights ombudsmen and their functions. See *infra* Chapter 5 for ombudsmen in Europe, e.g. Bulgaria and some Spanish community ombudsmen with mediation functions.

85 See Owen, *supra* note 73 at 57-58; H. Johnson, "Systemic Reviews" in *The Ombudsman Concept, supra* note 1 at 187; C. Ferris, "Special Ombudsman Investigations" in *The Ombudsman: Diversity and Development, supra* note 1 at 187, rep. in *International Ombudsman Anthology, supra* note 1 at 595.

86 D. Jacoby, "The Future of the Ombudsman" in *The Ombudsman Concept, supra* note 1, 211 at 221-222, rep. in *International Ombudsman Anthology, supra* note 1, 15 at 27-28 [further references to *Anthology*].

87 Owen, *supra* note 73 at 58.

88 See *infra* Chapter 3 for further discussion of the ombudsman as a horizontal and vertical accountability mechanism.

and presented to the government as critical feedback.[89] From another perspective, the ombudsman acts as a protector of people against the government.[90]

A hallmark of the ombudsman is that the office does not have the power to make decisions that are legally binding on the administration – the executive/administrative branch is free to implement, in whole or in part, or ignore the ombudsman's recommendations. A common criticism of the ombudsman is that the institution lacks the power to make legally binding decisions. However, a response to this position is that if the ombudsman was given such power, the institution would become just another type of court or tribunal – institutions which the state already has in place.[91] As Marten Oosting has noted, beyond the importance of the legal and institutional aspects of the office, it is the authority of the ombudsman which is essential to the strength of the institution.[92] In this respect, Oosting considers that the quality of the work of the ombudsman, the political support for the institution, public access to its work through the media, and the character and expertise of the office-holder are the main building blocks of the authority of the ombudsman.[93] These elements also reappear later in Chapter 12 as some of the factors necessary for ombudsman effectiveness.

The soft, non-coercive powers of recommendation and reporting given to the ombudsman are considered to be optimal in the context of its working environment. As Stephen Owen has stated:

> It may be that this inability to force change represents the central strength of the office and not its weakness. It requires that recommendations must be based on a thorough investigation of all facts, scrupulous consideration of all perspectives and vigorous analysis of all issues. Through this application of reason, the results are infinitely more powerful than through the application of coercion. While a coercive process may cause reluctant change in a single decision or action, by definition it creates a loser who will be unlikely to embrace the recommendations in future actions. By contrast, where change results from a reasoning process, it changes a way of thinking and the result endures to the benefit of potential complainants in the future. If genuine change is to take place as a result of ombudsman action, the office must earn and maintain the respect of government through its reasonableness. Without this, it will be at best ignored and, at worst, ridiculed.[94]

The different styles of legal control that can be applied to obtain compliance with the law or achieve desired behaviour highlight the advantages of the soft powers of the ombudsman. Marc Hertogh has categorized control types in administrative law into

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89 On the critical feedback concept see M. Oosting, "Roles for the Ombudsmen: Past, Present and Future", *supra* note 5 at 21.

90 *Ibid.* at 20.

91 M. Oosting, "The Ombudsman and His Environment: A Global View" (1995) 13 Int'l Omb. J. 1 at 10, rep. in *International Ombudsman Anthology, supra* note 1, 1 at 10 [further references to *Anthology*].

92 *Ibid.* at 10-11.

93 *Ibid.* at 12-13.

94 Owen, *supra* note 73 at 52.

repressive control and reflexive control variations.[95] Repressive control is reactive, coercive and imposed unilaterally.[96] Reflexive control is cooperative, facilitative, proactive and persuasive where actors negotiate in an attempt to change behaviour to achieve the desired result.[97] The judiciary is a repressive control type. The ombudsman generally uses reflexive control in reports and negotiations to try to persuade the administration to implement the institution's recommendations. Hertogh found that Dutch administrative court decisions only had a limited effect on the policies and conduct of administrative agencies, while the recommendations and reports of the Ombudsman were relatively successful in influencing agency behaviour over a longer period.[98]

However, some ombudsmen have been given stronger powers that endow them with some elements of repressive control. For example, the first two ombudsmen – in Sweden and Finland – were given the power to prosecute public officials, and the *Médiateur* of France can commence disciplinary proceedings against public officials.[99] Also, the Austrian federal Ombudsmen (*Volksanwaltschaft*) and the Ombudsmen in the Austrian state (*länd*) of Vorarlberg have the power to apply to Austria's Constitutional Court for a review of the legality of a federal (or state) law and to determine differences of opinion between the respective government and ombudsman on the interpretation of legal provisions.[100] A number of the recent human rights and other hybrid ombudsmen have been given additional powers beyond those of recommendation and reporting, such as the ability to prosecute officials (such as on the grounds of corruption) or the power to take constitutional issues to court for a judicial determination.[101] The Ghana Commission for Human Rights and Administrative Justice and Tanzania's Commission for Human Rights and Good Governance stand at the far end of the spectrum of human rights ombudsman powers – they have the power to go to court to enforce their recommendations if government bodies do not comply with them.[102]

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95 M. Hertogh, "The Policy Impact of the Ombudsman and Administrative Courts: A Heuristic Model" (1998) 2 Int'l Omb. Yrbk. 63; M. Hertogh and M. Oosting, "Introduction: The Ombudsman and the Quality of Government" in J.J. Hesse and T.A.J. Toonen, eds., (1996) 3 European Yrbk. Comp. Gov't & Public Admin. 259.

96 Hertogh, "The Policy Impact of the Ombudsman", *ibid.* at 69.

97 *Ibid.*

98 *Ibid.* at 67. See *infra* Chapter 5 for a detailed discussion of the Netherlands National Ombudsman.

99 Sweden, *Act with Instructions for the Parliamentary Ombudsmen* (1986), s. 6 (an Ombudsman can launch criminal proceedings); France, *Law No. 73-6* (1973, am. in 1976, 1989, 1992), s. 10 (failing action by the competent authority the *Médiateur* can initiate disciplinary proceedings against a responsible official or refer the matter to the criminal court), rep. in *National Ombudsmen: Collection of legislation from 27 countries* (Warsaw: Commissioner for Civil Rights Protection of Poland, 1998). For further details on Finland's Parliamentary Ombudsman see *infra* Chapter 5.

100 Austrian Federal Constitution, art. 148(e)-(f); *Law on the Constitution of Land (State) Vorarlberg*, Land Vorarlberg Law Gazette (May 31, 1984), art. 58(2)-(3), rep. in Schwäzler, *supra* note 51 at 254, 259-264.

101 See e.g. some institutions discussed *infra* in Chapters 5-8.

102 *The Commission on Human Rights and Administrative Justice Act, 1993*, Act 456, s. 18(2) (Ghana); *The Commission for Human Rights and Good Governance Act, 2001*, Act Supp. No. 7, s. 28(3) (Tanzania); E.F. Short, "The Development and Future of the Ombudsman Concept in Africa" (2001) 5 Int'l Omb. Yrbk. 56 at 66-67. For further details see *infra* Chapter 7.

Other Accountability Institutions: the Advocate, the Inspector General or State Auditor, the Petitions Committee and the Truth Commission

There are a number of government accountability institutions that are sometimes confused with the ombudsman concept. Most of these other institutions are horizontal accountability mechanisms and some of them are also complaint-handling institutions. These other institutions may overlap with the classical or hybrid ombudsman functions in some instances. Examples include the advocate, the inspector general or state auditor, the petitions committee and the truth commission.

THE ADVOCATE

As discussed earlier in this Chapter, an ombudsman is not an advocate for the complainant and must act impartially during the investigation of a complaint. In addition to the general-service ombudsman, many countries have single-sector ombudsmen dealing with one issue, such as children's rights, defence forces, health services, ethnic minorities, gender equality, etc.[103] In addition, some governments have established advocate institutions in special sectors, such as the children's advocate and the patient advocate. Some children's advocates are discussed in Chapter 9.

While there are some similarities between an advocate and a general-service ombudsman, there are a number of differences. An advocate may be established by legislative or executive action. An advocate typically does not have the same approach and powers compared to a general-service ombudsman. Although advocates may have investigatory powers, they may not have the same strong statutory powers to support their investigations and they may not have an obligation to conduct an impartial investigation prior to making a determination or recommendations. As the name implies, an advocate typically works to protect her client from the outset and may have other roles, such as representing or assisting the client when major decisions or adjudicative procedures affecting the client are being made. The distinction can become blurred, however, when some single-sector ombudsmen are compared with advocates. For example, some children's advocates have functions and powers that are very similar to those of some ombudsmen for children, such as promoting children's interests, having additional protective functions and having powers of investigation to differing degrees. In both Australia and Canada, some institutions have both investigatory and advocacy functions, such as the Queensland Commissioner for Children and Young People and some Canadian provincial children's advocates.[104]

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[103] See *infra* Chapter 2 for further discussion of single-sector ombudsmen and Chapter 9 on children's ombudsmen.

[104] For further details see *infra* Chapter 9.

The Inspector General or State Auditor

Inspectors general and state auditors, like the ombudsman, are types of horizontal accountability mechanisms. An ombudsman has different functions compared to an inspector general or state auditor although, in a few cases, their jurisdiction may overlap. The ombudsman deals with poor government administration, but is usually not mandated to investigate matters relating to financial management. This latter function is typically exercised by the state auditor, inspector general or equivalent institution.

The office of inspector general is found at the federal level in the U.S.A., as an office established pursuant to congressional legislation set up in government departments and agencies to investigate fraud, financial mismanagement, abuse and waste.[105] The inspectors general have audit, inspection, investigation and program evaluation duties.[106]

A public sector institution that exists in a number of other countries is the office of the state auditor.[107] State auditor models are typically based on: 1) the Napoleonic model, based on *cours des comptes*, found in France, some other European states and some countries in Latin America and Africa; 2) the Westminster model comprising the legislative office of the Auditor General, found in the United Kingdom and Commonwealth countries such as Canada; or 3) the Board model, which is similar to the Auditor General concept, which is found in a number of Asian countries.[108] The inspector general or state auditor offices have also been adapted for use at the international level in some international organizations. Also, the European Union has its financial control body in the Court of Auditors of the European Community.[109]

Some overlap between the ombudsman and these financial accountability institutions exist. For example, in Israel and Taiwan one institution provides both the ombudsman and the state auditor functions.[110] Also, ombudsmen with an anti-corruption mandate have a role closer to that of an inspector general in monitoring financial management by the public administration, but the jurisdiction and role of these ombudsmen encompass more than financial matters.

The Petitions Committee

The petitions committee is another type of horizontal accountability mechanism. A petitions committee is a committee of the legislature, i.e. a political sub-body, composed of members of the legislature, which receives requests and complaints from members of

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105 See e.g. M.R. Bromwich, "Running Special Investigations: The Inspector General Model" (1998) 86 Georgetown Law J. 2027 (Inspector General offices in U.S. federal government departments).

106 *Ibid.* at 2028, 2030.

107 See K.M. Dye and R. Stapenhurst, *Pillars of Integrity: The Importance of Supreme Audit Institutions in Curbing Corruption* (Washington, D.C.: The Economic Development Institute of the World Bank, 1998).

108 *Ibid.* at 5-6.

109 For further details see *infra* Chapter 11.

110 See the Israeli Office of the State Comptroller and Ombudsman, *Basic Law: The State Comptroller, State Comptroller Law*, 5719-1958, as am., and Taiwan's *Control Yuan, infra* Chapter 7.

the public.[111] In addition to individual petitions, mass petitions may also be permitted. Petitions committees tend to have a more general subject-matter jurisdiction than an ombudsman – covering political issues as well as complaints concerning administrative conduct. A Petitions Committee can ask for information and comments from relevant government departments or entities and can hear relevant parties. Although a Petitions Committee does not have decision making powers, it refers well-founded petitions that have not been amicably resolved to the government, requesting it to act on the matter, and the most serious matters may be debated in the legislature. A petitions committee will refer appropriate complaints to an ombudsman if the latter exists in the jurisdiction. However, in contrast to a legislative ombudsman, a petitions committee may be "too inaccessible, cumbersome and slow for minor complaints, and potential complainants may suspect it of being partisan."[112] Other commentators have critiqued petitions committees as being anonymous, with a membership that changes often and having other political duties which prevent full-time attention to petitions.[113]

There are petitions committees in a number of European countries, such as Germany (at the federal and *länd* levels), Luxembourg, the Netherlands, Portugal, Scotland, Spain, Slovenia and the Czech Republic (only Germany and Luxembourg do not have national ombudsmen as well).[114] In Germany, for example, the right of petition was included in the 1949 *Basic Law*, giving everyone the right individually or jointly to make requests or complain to the appropriate legislatures and agencies, and providing for a petitions committee.[115] Thereafter, the *Bundestag* quickly established its Petitions

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[111] See Petitions Committee of the German Bundestag, "Cooperation of the Petitions Committee of the German Bundestag With Other Petitions Committees and Ombudsmen", *I.O.I. Occasional Paper No. 51* (Edmonton: International Ombudsman Institute, Nov. 1994); Petitions Committee of the German Bundestag, "Organization, Responsibilities and Procedure of the Petitions Committee of the German Bundestag", *I.O.I. Occasional Paper No. 50* (Edmonton: International Ombudsman Institute, Nov. 1994); G. Pfennig, "Contribution" in Ombudsman Spain, *Ombudsman Conference: Documents and Conclusions* (Madrid: May 28-30, 1992) 29; J.A. Frowein, "Administrative Structures for the Protection of Human Rights" (1990) 53 J. of Contemp. Roman-Dutch Law 250 at 254.

[112] Rowat, *supra* note 1 at 51.

[113] Kempf and Mille, *supra* note 14 at 198; U. Kempf, "Complaint-Handling Systems in Germany" in *Righting Wrongs, supra* note 1, 189 at 191 (German Petitions Committee has fast turnover of membership).

[114] On the Public Petitions Committee of the Scottish Parliament, see <www.scottish.parliament.uk>. The Czech Republic Senate has its Committee on Education, Science, Culture, Human Rights and Petitions. For the Spanish Committees on Petitions see J. Vintró Castells, "The Ombudsman and the Parliamentary Committees on Human Rights in Spain" in *Human Rights Commissions and Ombudsman Offices, supra* note 1, 393 at 413.

[115] *Basic Law* (May 23, 1949), arts. 17, 45(c)(1), Kempf, "Complaint-Handling Systems in Germany" *supra* note 113 at 189-194; Pfennig, *supra* note 111 at 29. Requests usually pertain to legislative proposals while complaints usually relate to administrative conduct, *ibid.* There are also petitions committees at the *länd* level in Germany. In 2001, legislation was introduced to reform the petitions legislation and amend art. 45c of the Basic Law, *Report of the Petitions Committee, Requests and Complaints Addressed to the German Bundestag, The Work of the Petitions Committee of the German Bundestag in the Year 2001*, German Bundestag Printed Paper 14/9146. A number of European countries have the right of petition in their constitutions, see European Ombudsman, *The Constitutional Status of Ombudsmen and the Right to Petition in Europe* (2003).

Committee.[116] Also, at the supranational level, the European Parliament of the European Union has a Petitions Committee.[117]

The Truth Commission

Over the past twenty-five years, there have been numerous truth commissions established in countries around the world after they have moved from authoritarian or military governments to democratic regimes.[118]

Truth commissions are "official bodies set up to investigate and report on a pattern of past human rights abuses."[119] The foundational objective of a truth commission is to discover the truth of what happened during the previous regime – often in terms of clarifying the number and identities of the victims, the manner of their deaths and, sometimes, the identities of the perpetrators – to help with healing, reconciliation and the transitional justice process. Although each truth commission has a slightly different mandate, they all have the following features: (1) they examine abuses committed in the past; (2) they examine a variety of abuses committed over a defined period; (3) they are established for relatively brief periods of time (e.g. from six months to two years) and after their final report is submitted the commission is disbanded; and (4) they are established and supported by the domestic government (and occasionally also supported by rebel groups if a peace agreement is involved), although the initiative for their creation may be found in an international instrument of some type.[120] Truth commission members may be domestic experts, international personalities or a mix of both. Each truth commission has slightly different powers in addition to investigation and truth-telling, e.g. documentation, naming names and/or making recommendations for reform and redress.

A truth commission is established for a temporary period of time to investigate past abuses. In contrast, an ombudsman is designed as a permanent institution, taking complaints as they arise, often with a limitation period that circumscribes the age of an admissible complaint. However, a human rights ombudsman may be empowered to receive and investigate complaints about human rights abuses committed under a prior abusive regime in its foundational laws.[121] In this limited respect, a human rights ombudsman can perform a function similar to that of a truth commission.

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116 Pfennig, *ibid.*

117 See *infra* Chapter 11.

118 See P.B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001); A.R. Chapman and P. Ball, "The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala" (2001) 23 H.R.Q. 1; J.M. Pasqualucci, "The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity, and the Inter American Human Rights System" (1994) 12 Boston U. Int'l Law J. 321; T. Buergenthal, "The United Nations Truth Commission for El Salvador" (1994) 27 Vanderbilt J. Transnat'l Law 497. For a selected list see Hayner, *ibid.*, Appendix; United Nations Development Programme, *Human Development Report 2000* (New York: Oxford University Press, 2000) at 73.

119 Hayner, *ibid.* at 5.

120 *Ibid.* at 14.

121 Ghana's Commission on Human Rights and Administrative Justice has the constitutional power to

Book Structure

The following chapters of this book address the variations on the ombudsman model that exist, focussing primarily on the classical ombudsman, the human rights ombudsman, the single-sector ombudsman addressing particular aspects of human rights protection and the ombudsman concept at the international level of governance.

Chapter 2 surveys the variations on the ombudsman concept at the domestic level in both the public and private sectors, and at the international and supranational levels of governance. In Chapter 3, this book will explore how the public sector ombudsman – as a domestic mechanism which is part of the state institutional structure yet given considerable independence of action – can promote democratic development and good governance. The methods by which the institution can serve as a vehicle to apply international and domestic human rights obligations of the state will be mined in Chapter 4. As such, the ombudsman can play a valuable role as a national human rights institution, and this is particularly true when the office is given an express human rights protection mandate. However, this book will illustrate how even classical ombudsmen and single-sector ombudsmen can implement international and domestic human rights norms and policies in the domestic sphere. In this respect, examples of classical, human rights and other hybrid ombudsmen in Europe, Latin America, the Caribbean, Africa, Asia and the Pacific region will be provided in Chapters 5 to 8. Also, the relationship of ombudsmen with international and regional human rights systems and norms will be explored. The creation of human rights ombudsmen in some post-conflict peace-building initiatives, often under international organization auspices, will be discussed in Chapter 8. One type of single-sector human rights ombudsman, the ombudsman for children, will be examined in all its variations in Chapter 9. Chapter 10 turns to the international level, looking at the workplace ombudsman found in a number of international organizations, and other international mechanisms that perform ombudsman-like functions or cooperate with national ombudsmen. Chapter 11 will discuss the European Ombudsman found in the supranational European Union (EU) – the only true ombudsman institution on the international plane – and explore its role in monitoring administrative conduct and human rights protection in EU institutions and bodies. In conclusion, Chapter 12 will look at ombudsman effectiveness factors and comment on the contemporary role of the ombudsman.

This book attempts to illustrate the variety of classical and hybrid ombudsmen playing roles in good governance and human rights protection. While an attempt has been made to include as many examples of the multitude of classical and hybrid ombudsman institutions as possible, it must be noted that, given the large number of institutions in operation, the selected case studies provide only a partial view of the activities and effectiveness of classical and hybrid ombudsmen in building good governance and promoting and protecting international and domestic human rights. The case studies found in this book were chosen based on the availability of sufficient primary and secondary sources on particular ombudsman institutions in an accessible language.

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take cases on forced taking of property by the former military government, see International Council on Human Rights Policy, *Performance & legitimacy: national human rights institutions* (Versoix: International Council on Human Rights Policy, 2000) at 61.

CHAPTER TWO

Variations on the Ombudsman Concept

Introduction

As described in Chapter 1, there have been various adaptations of the legislative ombudsman around the world at the national and sub-national levels of government. Over the past few decades, the ombudsman concept has been expanded into other areas, in both the public and private sectors, and even into the international or supranational level of governance. In all large public and private organizations, large bureaucracies operate, often to the detriment of their employees, clients or customers. As many grievances have arisen out of organizational interactions with individuals, the ombudsman has been adopted and adapted by these organizations as a pragmatic dispute settlement mechanism to improve employee, customer and public relations. This adaptation of the ombudsman concept has been based on the need for alternative complaint processes to the courts, given the disadvantages of judicial action for many persons in both developed and developing states, because of the financial expenses involved in litigation, the delays in rendering judgment and the limited judicial remedies available given the wide variety of consumer, client and employee complaints. Public and private sector institutions have seen the ombudsman mechanism – which is free of charge, accessible, informal and relatively fast compared to the courts – as a way of resolving disputes effectively and efficiently. The ombudsman is also seen as an means to offset the inequalities of size and bargaining power between large organizations and individuals with complaints. In this respect, the many uses of the ombudsman mechanism are forms of alternative dispute resolution (ADR).

Classical and hybrid ombudsmen are discussed in more detail in Chapters 1 and 3 to 8. This chapter will provide a description of other adaptations of the ombudsman that have evolved in the public and private sectors, focussing on the municipal ombudsman, the single-sector ombudsman, government department ombudsmen, hybrid public/private ombudsmen and various types of private sector ombuds mechanisms. The ombudsman for children, an important type of single-sector ombudsman, will be explored in Chapter 9. The ombudsman at the international level of governance will be examined in Chapters 10 and 11.

Variations on the Ombudsman Theme

In the broadest sense, the ombudsman mechanism in both the public and private sectors is designed to resolve disputes between a provider of goods or services (government, institution, industry, company, etc.) and a recipient of those goods/services (member of the public, client, customer, etc.) or an employee of the provider.[1] Although each adaptation of the public sector legislative ombudsman alters aspects of the institution, each variant is an attempt by government, an industry, an institution or a company to resolve the legal and administrative problems encountered by members of the public, employees or customers in their encounters with government or private sector bureaucracies.

The many variations of the public sector ombudsman and private sector "ombuds" mechanisms can be categorized, as follows:

1) *Public Sector Legislative Ombudsman*

a) established by national, sub-national or municipal government;
b) appointed by and reporting to the legislative branch of government;
c) established by constitutional provision and/or legislation;
d) jurisdiction over legality and fairness of government administration in many departments, agencies and state corporations.

2) *Public Sector Executive Ombudsman*

a) established by national, sub-national or municipal government;
b) appointed by the executive branch of government and reporting to the executive and/or legislative branch;
c) established by constitutional provision, legislation or executive act;
d) jurisdiction over legality and fairness of government administration in many departments, agencies and state corporations.

3) *Public Sector Hybrid Ombudsman: Human Rights, Anti-Corruption, Leadership Code Enforcement etc.*

a) established by national, sub-national or municipal government;
b) appointed by and reporting to the legislative or executive branch of government;
c) established by constitutional provision, legislation or executive act;
d) express mandate to look at human rights, corruption, leadership code etc. complaints against government administration in addition to monitoring the general legality and fairness of administration;
e) jurisdiction over many departments, agencies and state corporations;
f) a few human rights ombudsmen can also take human rights complaints arising in the private sector.

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[1] This section is developed from M.A. Marshall and L.C. Reif, "The Ombudsman: Maladministration and Alternative Dispute Resolution" (1995) 34 Alberta Law Rev. 215 at 225-238.

4) *Public Sector Legislative or Executive Ombudsman With Limited Subject-Matter Jurisdiction (the "Single-Sector", "Single-Purpose" or "Specialty" Ombudsman)*

a) established by national, sub-national or municipal government;
b) appointed by and reporting to the legislative and/or executive branch of government;
c) established by constitutional provision, legislation or executive act;
d) has jurisdiction over one area only that may be related to human rights, e.g. rights of children, prevention of discrimination (e.g. gender, ethnic minorities, disabilities), official languages, privacy, freedom of information, police, defence forces.

5) *Executive Organizational Ombudsman Created by Government Departments, Agencies or State Corporations to Handle Internal and/or External Complaints*

a) established by one government department, agency or state corporation at the national or sub-national level of government;
b) appointed by and reporting to the minister, head of department or senior bureaucrat;
c) established usually by an internal instrument of the government department and occasionally by legislation;
d) complaint mechanism is (i) external: for the members of the public who have come into contact with the department and/or (ii) internal: for employees of the department or agency (the "workplace" ombudsman).

6) *Hybrid Public/Private Sector Ombudsman for an Entire Industry or Service Sector Created by Legislation to Resolve Complaints Made by Customers/Clients*

a) established by national or sub-national government;
b) appointed by and reporting to legislative or executive branch of government, or to separate juridical entity;
c) established by legislation;
d) jurisdiction over one industry or service sector only, e.g. banks, financial institutions, legal services.

7) *Self-Regulatory Ombudsman for an Industry or Service Sector Created by the Industry/Service Sector to Resolve Complaints Made by Customers/Clients*

a) ombudsman for an industry or service sector established by the industry or service sector acting collectively (e.g. banks, insurance companies);
b) established by industry agreement, often through the creation of an umbrella juridical entity (e.g. not-for-profit corporation, foundation, commission) and funded by the industry;
c) should be appointed by and reporting to a body in the umbrella organization that contains a number, preferably a majority, of non-industry members (e.g. board of directors of corporation or foundation);
d) takes complaints from customers of members of the industry/service sector participating in the scheme.

8) *Organizational Ombudsman Created by Private Sector Institutions and Corporations*

a) established by the institution or company, e.g. university, college, newspaper or corporation providing goods/services;
b) appointed by and reporting to the executive or administration of the institution/company (e.g. audit committee, board of directors, chief executive officer, chief editor or publisher);
c) established by internal institution/company legal instrument or policy;
d) jurisdiction over internal workplace complaints and/or external complaints made by students, customers, etc. against the institution or company.

9) *The International Organization Workplace Ombudsman*

a) established by an international organization;
a) established pursuant to internal instrument of the international organization;
b) appointed by and reporting to the international organization's head of secretariat (e.g. Secretary-General) or Deputy;
c) in-house complaints mechanism which takes complaints from employees of the international organization concerning employment-related matters.

10) *Creation of the Classical Ombudsman at the International or Supranational Level of Governance*

a) established by an international or supranational organization;
b) appointed by and reporting to the "legislative" branch of the international organization or body;
c) established by the constituent treaty and/or formal internal legal instrument of the international organization or body;
d) takes complaints from persons who are external to the organization who have been affected by the activities of the organization (and may also take complaints from the organization's employees);
e) only example to date is the European Ombudsman of the European Union (EU).

The Municipal Ombudsman

Overview

Municipal government bureaucracy plays a role in the lives of many urban residents. Given increased levels of urbanization worldwide, municipal government bureaucracy is a reality for millions. The concept of the municipal ombudsman has become increasingly popular over the past few decades to give city residents a vehicle for submitting complaints about municipal maladministration, and having their concerns investigated fairly and supported when justified.[2]

[2] See M. Mills, "Municipal Government Ombudsman" in L.C. Reif, ed., *The Ombudsman Concept*

THREE TYPES OF OMBUDSMAN JURISDICTION OVER MUNICIPAL ADMINISTRATION

There are three mechanisms by which urban residents can be granted access to an ombudsman to hear their complaints against municipal government. The first two mechanisms involve national or provincial/state ombudsman oversight over the municipalities in the territory in question. The third mechanism is the municipal ombudsman.

The first mechanism is found where a national or a state/provincial ombudsman is given jurisdiction over all or some of the municipal governments in the territory, in addition to their jurisdiction over national or state/provincial administration. For example, the national ombudsmen in Sweden, Norway, Ireland, Greece, Portugal, Hungary, Slovenia, Albania, Peru, Panama, Saint Lucia, Trinidad and Tobago, Belize, Sri Lanka and Thailand have jurisdiction over municipal government in their countries.[3] In Canada, ombudsman offices in British Columbia, Manitoba, New Brunswick, Nova Scotia and the Yukon have jurisdiction over municipalities in their provinces.[4] In the U.S.A., the state ombudsmen in Alaska and Iowa have jurisdiction in varying degrees over municipal government administration.[5]

The second mechanism is used in the United Kingdom. England and Wales have Commissioners for Local Administration who handle complaints against local government in their respective jurisdictions.[6] However, the amalgamated Scottish Public Services Ombudsman now handles, *inter alia*, complaints against local administration and the Northern Ireland Ombudsman handles local administration matters.[7]

Third, a number of cities in various countries have established municipal ombudsmen. In Europe, for example, there are ombudsmen in: many municipalities in the Netherlands;[8] Bern, Winterthur and Zurich in Switzerland; Paris (*Médiateur*) in France; Antwerp, Bruges, Ghent, Leuven and a number of other municipalities in Belgium;

(Edmonton, International Ombudsman Institute, 1995) at 111, rep. in L.C. Reif, ed., *The International Ombudsman Anthology: Selected Writings From the International Ombudsman Institute* (The Hague: Kluwer Law International, 1999) at 423 [hereinafter *International Ombudsman Anthology*] [further references to *Anthology*]; M.D. Farrell-Donaldson, "Will the Real Ombudsman Come Forward?" in L. Reif, M. Marshall and C. Ferris, eds., *The Ombudsman: Diversity and Development* (Edmonton: International Ombudsman Institute, 1993) 65, rep. in *International Ombudsman Anthology, ibid.* at 411.

3 See *supra* Chapter 1 and *infra* Chapter 5.

4 The Yukon Ombudsman has jurisdiction only if a municipality requests an investigation. Due to government funding cutbacks, the British Columbia Ombudsman stopped investigating complaints against municipalities in 2003. The Winnipeg (Manitoba) ombudsman was abolished at the start of 2003, and supervision of the city's administration was transferred to the Ombudsman of Manitoba. See also Ombudsman Ontario, *Municipal Ombudsman and the Right of Complaint: An Overview* (Jan. 1997) at 5.

5 The Alaska Ombudsman only has jurisdiction over municipalities which contract with the Ombudsman for services and the Iowa Citizen's Aide/Ombudsman has jurisdiction over all municipalities.

6 See M. Seneviratne, *Ombudsmen: Public Services and Administrative Justice* (Butterworths LexisNexis, 2002) at 197-237; 270-274; England: <www.lgo.org.uk>; Wales: <www.ombudsman-wales.org>; *Municipal Ombudsman and the Right of Complaint: An Overview, supra* note 4 at 6.

7 See Seneviratne, *ibid.* at 239-274; <www.scottishombudsman.org.uk>.

8 See *infra* note 15.

Berlin, Bremen and Hamburg in Germany; various municipalities in Spain;[9] and Sofia in Bulgaria.[10] Israel has a number of city ombudsman offices.[11] In the U.S. and Canada, there are ombudsmen in municipalities such as Anchorage, Boise, Dayton, Detroit, Flint, Portland and Montreal.[12] New York City has an elected Public Advocate – established when the position of City Council President was abolished – who has a mélange of functions including complaint-handling.[13] In Latin America, the City of Buenos Aires and a number of other Argentinian municipalities have *Defensores del Pueblo*, Brazil has some city ombudsmen and there is an ombudsman in Asunción, Paraguay.[14] In a combination of the first and third mechanisms, the Dutch national government permits municipalities to choose between supervision by the National Ombudsman of the Netherlands or forming their own city ombudsman.[15] To date, municipal ombudsman offices have been established primarily in Europe, North America and Latin America. However, cities in other regions have begun to establish ombudsmen, such as in Australia, Indonesia and Japan.[16]

MUNICIPAL OMBUDSMAN LEGAL FRAMEWORK AND POWERS

A municipal ombudsman takes complaints from persons affected by the city administration – who are typically city residents – that the municipal bureaucracy has acted

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[9] *Municipal Ombudsman and the Right of Complaint: An Overview, supra* note 4 at 6; R. Andersen et al., "The Ombudsman in Belgium" in R. Gregory and P. Giddings, eds., *Righting Wrongs: The Ombudsman in Six Continents* (Amsterdam: IOS Press, 2000) 107; E.R. Bartlett i Castellá, "Los Defensores Sectoriales y Otras Técnicas Específicas Utilizadas por los Comisionados Parlamentarios Para la Defensa de los Derechos Constitucionales" in Defensor del Pueblo Andaluz, ed., *Jornadas Sobre el Defensor del Pueblo Andaluz*, Baeza, April 18-20 (Seville: Defensor del Pueblo Andaluz) 87 at 94; International Ombudsman Institute, *Directory 2003* (Edmonton: International Ombudsman Institute, 2003).

[10] The Sofia Local Civic Mediator was created by the municipal council on May 23, 2001 (operational March 2002).

[11] Haifa, Herzliya, Jerusalem, Nathaniya, Tel Aviv; *Directory 2003, supra* note 9.

[12] The Anchorage Ombudsman is a legislative ombudsman, established in 1975, appointed by and reporting to the Municipal Assembly, see Mills, *supra* note 2 at 425-426. For further details on the Portland and Boise Ombudsmen see *infra* this Chapter. See also the King County Office of Citizen Complaints in Washington State which has jurisdiction over county administrative agencies, <www.metrokc.gov/ombudsman>.

[13] M. Green and L.W. Eisner, "The Public Advocate of New York City: An Analysis of the Country's Only Elected Ombudsman" (1998) 42 N.Y. Law School Law Rev. 1093. However, in late 2002, the city government took the role of Presiding Officer of City Council away from the Public Advocate's mandate.

[14] See *infra* Chapter 6. The Federal District of Mexico City has a human rights commission.

[15] The National Ombudsman of the Netherlands, *Annual Report 2001: summary* (The Hague: National Ombudsman of the Netherlands, 2002) at 10. By 2002, the National Ombudsman had jurisdiction over almost 200 municipalities, with another 165 municipalities having established their own city ombudsman offices, *ibid.* The cities with ombudsmen include Amsterdam, Groningen, Rotterdam and Vlaardingen, The Hague, Utrecht and Houten.

[16] Perth, Australia has a part-time ombudsman, Bandung, Indonesia established an ombudsman commission and Japan's include those Kawasaki City, Joetsu City and Kokubunji City, plus a few municipal human rights ombudsman institutions, see *infra* notes 18-19.

illegally or improperly. Like ombudsman institutions at the national or sub-national levels, city ombudsmen may be legislative ombudsmen or executive appointees. A legislative municipal ombudsman is supported by municipal legislation and is appointed by and reports to the city's legislative body. Executive city ombudsmen lack a legislative framework, are appointed by and report to the mayor, and may be housed in the mayor's office.

While Michael Mills, currently municipal Ombudsman of Portland, is of the opinion that an executive municipal ombudsman can be an effective institution in addressing complaints and uncovering systemic problems, he cautions that:

> [t]he executive ombudsman, being accountable to the government's chief executive officer, is not in fact independent of the government. While the individual can operate in an impartial manner, they may not be considered by the public as being so when they serve at the pleasure of one elected executive. The degree to which the individual imparts impartiality to the citizens they serve is largely dependent upon the values of the elected official to whom they are accountable.[17]

The lack of a legislative foundation for the institution also renders an executive municipal ombudsman office susceptible to abolition after there is a change in the city's executive government.

Some municipal ombudsman institutions have a specialized human rights or human-rights related mandate. For example, the Boise Community Ombudsman, as discussed further below, has jurisdiction only over complaints of misconduct against the city police and law enforcement officers. Japan has a few municipal human rights ombudsman offices.[18] These include a municipal children's human rights ombudsman.[19] Further, in those countries where the human rights ombudsman is present at the national level, the municipal ombudsman may also take the format of a human rights ombudsman with jurisdiction over both poor administration and human rights infringements. This is the case, for example, with the *Defensor del Pueblo* of Buenos Aires and other city *Defensores* in Argentina.

CASE STUDIES OF MUNICIPAL OMBUDSMAN OFFICES

This section looks in more detail at two municipal ombudsman institutions in the U.S.A.: the Portland (Oregon) Ombudsman, a "classical" city ombudsman, and the Boise (Idaho) Community Ombudsman, a single-sector municipal ombudsman focussing on police conduct.

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[17] Mills, *supra* note 2 at 426.

[18] E.g. Kawasaki City Human Rights Ombudsperson, Takefu City Human Rights Ombudspersons with jurisdiction also covering gender discrimination, T. Takemura, "Spousal abuse laws change faster than public attitudes", *The Daily Yomiuri* (Sept. 1, 2002).

[19] Kawanishi City Children's Human Rights Ombudsperson. See also the Community of Madrid's *Defensor del Menor, infra* Chapter 9.

Portland Ombudsman

The Portland Ombudsman office started life in 1993 as an executive ombudsman without a legislative foundation given that the Mayor initially wished to evaluate the utility of the institution prior to considering a longer-term basis for the office.[20] Also, Portland city government operates as a commission, with the result that the Council members, including the Mayor, act in both legislative and executive roles, making it impossible to create a purely legislative city ombudsman.[21] In 2000, the City Auditor, an elected official, argued for a more independent ombudsman.[22] In 2001, the institution gained this independence with the passage of a City Council Ordinance Code that relocated the Ombudsman from the Mayor's Office to the Office of the City Auditor and specified the functions and powers of the Ombudsman.[23]

The Ordinance gives the Portland Ombudsman the powers to, *inter alia*: investigate, on the basis of a complaint or on his own motion, any administrative act of a city agency "if he or she reasonably believes that it is an appropriate subject for review"[24] and undertake, participate in or cooperate in general studies, conferences, inquiries, meetings or studies "which might improve the functioning of agencies or lessen the risks that objectionable administrative acts will occur".[25] The latter function gives the Portland Ombudsman a more proactive mandate than is the norm, enabling the Ombudsman to engage in systemic reviews. Like the classical ombudsman, the Portland Ombudsman can only make recommendations for change and issue reports, but the Ordinance does permit the office-holder to seek Council authorization "for legal recourse if necessary to carry out the duties of the Ombudsman Office".[26] The Ombudsman does not have jurisdiction over complaints against elected city officials and complaints which are in litigation.[27]

Pursuant to the Ordinance, the Portland Ombudsman is given relatively strong powers of investigation, namely to: enter and inspect the premises of any agency without notice; obtain access to, examine and copy agency records (except certain legally privileged documents); and request any person or agency to give sworn testimony or produce documentary evidence.[28] However, the Ordinance does not give the Ombudsman *subpoena* power to compel the giving of documents or testimony.

Over the second half of 2001 and through 2002, the largest number of complaints and cases handled by the Portland Ombudsman concerned two agencies: the Bureau of Development Services and the Office of Transportation.[29] Most issues with the Bureau

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[20] Mills, *supra* note 2 at 423-424.

[21] *Ibid.* at 424.

[22] City of Portland, Auditor's Office, *2001 Ombudsman Report* at 1.

[23] Portland, *Ordinance 175568*, ch. 3.77 (May 9, 2001), <www.ci.portland.or.us/auditor/ombudsman>. The Ombudsman commenced operations on July 1, 2001.

[24] *Ordinance 175568, ibid.*, s. 3.77.110(A).

[25] *Ibid.*, s. 3.77.110(B).

[26] *Ibid.*, s. 3.77.110(G).

[27] *2001 Ombudsman Report, supra* note 22 at 2.

[28] *Ordinance 175568, supra* note 23, s. 3.77.110(C)-(E).

[29] *2001 Ombudsman Report, supra* note 22 at 3; City of Portland, Auditor's Office, *2002 Ombudsman Report* at 1.

of Development Services involved building code enforcement matters, while towing vehicles and sidewalk concerns were the largest source of complaints against the Transportation Office.[30] Illustrative of a North American classical city ombudsman, housing, transportation and street life issues were the major issues for city inhabitants in Portland.[31]

Boise Community Ombudsman

Police conduct has also been of concern to urban dwellers in North American cities. Against a backdrop of public criticism over the conduct of its police force, Boise City Council established the Boise Community Ombudsman in 1999.[32] The Community Ombudsman is appointed by the Mayor, confirmed by City Council, and reports to both the Mayor and City Council.[33] The City Code stipulates that the Ombudsman and staff shall at all times be totally independent.[34] Thus, with its legislative base, and the appointment and reporting provisions, the Boise Community Ombudsman can be considered an executive-legislative blend.

The Boise Community Ombudsman is a single-sector ombudsman at the municipal level, with the mandate to investigate public complaints of wrongdoing made against any Boise law enforcement or police employee.[35] The Community Ombudsman has the discretion to decide who conducts the investigation – whether it be his Office, the Boise City Police Department or any other competent investigative agency.[36] Based on the results of the investigation, the Ombudsman must reach an independent finding as to the facts, assess the conduct complained against on the basis of the facts, law, departmental policies and training, and make recommendations for personnel action to be taken.[37] The Community Ombudsman also reviews internal police investigations, and any person can appeal the findings of an internal investigation to the Ombudsman.[38] The Community Ombudsman has also been given more proactive duties: to make recommendations on policies, practices, etc. of Boise city police and law enforcement personnel to improve safety, professionalism, effectiveness and accountability, and to engage in community outreach.[39] Whenever there is a critical incident involving city

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30 *2001 Ombudsman Report, ibid.*

31 *Ibid.; 2002 Ombudsman Report, supra* note 29. For the City of Detroit Ombudsman, abandoned cars lead complaint rankings.

32 *Boise Municipal Code*, ch. 2-22, adding Ordinance 5930 (July 20, 1999) as am. by Ordinance 6093 (Oct. 9, 2001). See <www.boiseombudsman.org>.

33 *Boise Municipal Code, ibid.*, ss. 2-22-02, 2-22-04(G).

34 *Ibid.*, s. 2-22-08.

35 *Ibid.*, s. 2-22-04(A). The airport police, parking enforcement and City Code enforcement personnel are included.

36 *Ibid.*, s. 2-22-04(A)(1). The Ombudsman is also required to develop an ADR process for resolving complaints which may be more appropriately resolved in this more informal manner, *ibid.*, s. 2-22-04(D).

37 *Ibid.*, s. 2-22-04(A)(iii).

38 *Ibid.*, s. 2-22-04(B) and (C). On an appeal, the Ombudsman can order a follow-up investigation.

39 *Ibid.*, s. 2-22-04(E) and (F).

police and death or bodily injury occurs, the Ombudsman is required to act as an observer to any departmental investigation, and the Ombudsman may also conduct his own independent investigation, making recommendations thereafter.[40]

The Boise Community Ombudsman is given complete access to all information, files, evidence and other materials deemed necessary to perform his duties, and all city employees are required as a condition of their employment to cooperate fully and truthfully with the Ombudsman.[41] The Boise Community Ombudsman does not have *subpoena* powers. The Ombudsman has to comply with all federal and state laws requiring confidentiality of records and information, and must respect the privacy of all individuals involved.[42]

In 2001, 1,114 contacts with the public resulted in 304 formal cases alleging police misconduct.[43] In a positive spin on the office, the Ombudsman opens a formal case when a police officer's conduct is praised and makes a commendation.[44] Some major reports issued by the Community Ombudsman have covered complaints about police conduct during street protests and the manner in which the police conducted an investigation into a shooting death involving minors.[45]

The Public Sector Ombudsman With Limited Subject-Matter Jurisdiction

OVERVIEW

In the public sector, there are ombudsmen with competence over one sector only, such as the police, correctional facilities, defence forces, the prevention of discrimination and equal opportunities, children, the protection of minorities, health services, information, privacy, consumer matters and official languages. These are called "specialty", "single-sector" or "single-purpose" ombudsmen. A specialty ombudsman may be a legislative or an executive appointment. For example, even in Sweden with its long tradition of the parliamentary ombudsman, the Swedish specialty ombudsmen are executive appointments with differing legal powers.[46]

Some specialized ombudsmen do not have powers of investigation, while others do have such powers and a few may even make binding decisions or impose sanctions.[47]

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[40] *Ibid.*, s. 2-22-04(H).

[41] *Ibid.*, ss. 2-22-06(B), 2-22-07.

[42] *Ibid.*, s. 2-22-05.

[43] *Boise Community Ombudsman Annual Report 2001* at 2.

[44] *Ibid.* at 6.

[45] Boise Community Ombudsman, *Street Protest and Police Use of Force* (Sept. 26, 2000); Boise Community Ombudsman, *Ombudsman Report* OMB02/0072 (Aug. 26, 2002).

[46] P. Nobel, "The Swedish Ombudsman Against Ethnic Discrimination" in F. Matscher, ed., *Ombudsman in Europe – The Institution* (Kehl: N.P. Engel, 1994) at 47. See also Sweden's competition ombudsman, consumer ombudsman, gender equality ombudsman, disability ombudsman, ombudsman against discrimination on the grounds of sexual orientation and children's ombudsman, e.g. A. Bohlin, "The Office of the Competition Ombudsman and the Local Authorities" (1987) Scand. Studies in Law 31.

[47] J. Robertson, "The Ombudsman – World Trends" in *The Ombudsman Concept, supra* note 2, 3 at

Single-purpose ombudsmen often have other functions, such as education and advocating for law reform. If a general ombudsman operates in the same territory with a specialty ombudsman, the former may have jurisdiction to investigate the conduct of the latter.[48] Single-purpose ombudsmen, by reason of their subject-specific focus, may deal with only one or two government departments and, as a result, "[t]hey have to be continually vigilant to avoid organizational capture arising from their close association with the special public and the organization subject to jurisdiction."[49]

A single-sector ombudsman must be distinguished from the situation where a full-service ombudsman is directed by statute, or unilaterally decides, to appoint a deputy ombudsman inside the institution who is responsible for complaints emanating from a single sector. For example, the regional *Defensor del Pueblo* of Andalusia, Spain is instructed by the regional statute for the protection of children and youth to appoint a deputy *Defensor del Menor* (Defender of Minors) who is responsible for handling complaints about minors.[50] In contrast, a specialty ombudsman has its own legal framework which sets out the powers of the ombudsman and establishes the institution as a free-standing entity.

There are arguments for and against the establishment of single-sector ombudsmen in addition to a full-service national (or provincial, etc.) ombudsman. The establishment of single-sector ombudsman institutions indicates that the government is serious about improving the protection of persons falling within that sector. Establishing a single-sector ombudsman also means that specialized expertise and attention is brought to bear on the area in question. Single-sector ombudsmen may have a broader range of functions than a general ombudsman, especially if the specialty ombudsman deals with an aspect of human rights protection. However, some full-service ombudsmen have argued against the establishment of single-sector ombudsmen in their jurisdictions, arguing that this might weaken their own institution or cause confusion on the part of the populace.[51] Also, ombudsmen have argued that:

> in a period of transition and financial insecurity, it would be more rational to concentrate all available resources on the office of the existing national ombudsman and, where appropriate, appoint deputies to deal with specific issues. . . .[52]

Yet, single-sector ombudsman institutions are proliferating, especially in developed states with the financial resources to establish more than one ombudsman. In contrast, growing numbers of states in Latin America, Europe and Africa are establishing hybrid human rights ombudsman offices which are more amenable to the creation of deputies and departments focussing on specialized human rights issues.

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5. See e.g. the Swedish Ombudsman Against Ethnic Discrimination, discussed further *infra*, who can impose fines on recalcitrant employers.

48 *Ibid.*

49 *Ibid.*

50 For further information on the Andalusian *Defensor del Menor* (Defender of Minors) see *infra* Chapter 9.

51 See e.g. Council of Europe, Office of the Commissioner for Human Rights, "Conclusions of the Meeting Between the Ombudsmen of Central and East Europe and Mr. Alvaro Gil-Robles, Commissioner for Human Rights" (Budapest, June 23-24, 2000), para. 2.

52 *Ibid.*

THE SINGLE-SECTOR OMBUDSMAN AND HUMAN RIGHTS

In the area of human rights protection, there are single-sector ombudsmen with jurisdiction over discrimination (e.g. on the basis of gender, disabilities, sexual orientation, etc.),[53] the protection of minorities and the rights and needs of children. Other single-sector ombudsman institutions can also play a role in human rights protection, as human rights issues may arise in conjunction with the complaints raised, such as ombudsmen for the military, police, health services, freedom of information and privacy. Although single-sector ombudsmen working in human rights are often found at the national level, there are also examples at the sub-national and municipal levels of governance.[54]

Case Studies of Ombudsmen for the Protection of Ethnic Minorities: Hungary, Sweden and Finland

In Europe, the abuse of human rights of minorities has been a problem for centuries, and the issue was brought to the surface yet again during the 1990s, especially in Central and Eastern European nations after the collapse of the Communist regimes. International law for the protection of minority rights lagged behind in the evolution of the international human rights law system, although there have been developments commencing in the 1990s.[55] There have also been some remedial devices created for the protection of minority groups at the national and international levels.

On the international level, the UN High Commissioner for Human Rights monitors the protection of minorities within the office's wider mandate.[56] On a regional basis, the Organization for Security and Cooperation in Europe (OSCE) established a High Commissioner on National Minorities in 1992, the Council of Europe created a Commissioner for Human Rights in 1999 whose responsibilities includes minority rights in member states, and until late 2003 there was a Commissioner of the Baltic Sea States on Democratic Development with a mandate encompassing minority rights protection.[57]

At the domestic level, in addition to the courts, general purpose classical and human rights ombudsmen may investigate and report on situations involving minorities in their nation (which may have to be addressed on an individual basis).[58] Some European states, however, have gone one step further and have established single-sector ombuds-

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[53] For further information on the single-sector ombudsman for gender issues and work on women's rights inside human rights ombudsman offices see *infra* Chapter 4.

[54] See e.g. the Boise Community Ombudsman who deals with complaints against the city police, discussed *supra* notes 32 to 45, and the Community of Madrid's Human Rights Ombudsman for Minors (*Defensor del Menor*), discussed *infra* in Chapter 9.

[55] See e.g. P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991); G. Alfredsson and E. Ferrer, *Minority Rights: A Guide to United Nations Procedures and Institutions* (London: Minority Rights Group International, 1998).

[56] For further information on the UN High Commissioner see *infra* Chapter 10, <www.unhchr.ch>.

[57] For further details on these institutions see *infra* Chapter 10.

[58] E.g. in Europe and Latin America. See *infra* Chapter 6, note 135, for a list of Latin American human rights ombudsmen with internal departments or programs for ethnic minorities.

men for the protection of minorities. These ombudsmen usually coexist with a general ombudsman.

Hungary established a specialized human rights ombudsman, the Parliamentary Commissioner for the Protection of National and Ethnic Minority Rights, together with a general human rights ombudsman and a privacy and information ombudsman in 1990 amendments to its Constitution.[59] Article 32B(2) of Hungary's Constitution states that mandate of the Parliamentary Commissioner for the Protection of National and Ethnic Minority Rights is to investigate any abuse of national or ethnic minority rights that comes to his attention and initiate general or particular measures for redress.[60] The Parliamentary Commissioner is a legislative appointment, giving the institution independence from the executive/administrative branch of government. The Parliamentary Commissioner has the power to investigate complaints that a citizen's or community's minority rights have been violated, or there is an imminent threat of violation, made against public ministries and agencies, police and military forces, county, settlement or minority self-governments, mayoral offices, public utilities or publicly-owned media.[61] Many of the issues and cases addressed by the Commissioner involve discrimination against and mistreatment of Roma.[62]

Sweden has an Ombudsman Against Ethnic Discrimination.[63] The Ombudsman was created in 1986 as an executive appointment, with the mandate to strive to ensure that ethnic discrimination does not occur in the workplace, universities and other institutions of higher education, and in other areas of social life.[64] The legislation defines ethnic discrimination very broadly as unfair treatment of a person or a group of persons, or other unfair or offensive treatment because of race, colour, national or ethnic origin or religion.[65] The Ombudsman Against Ethnic Discrimination has four main roles, to: (1) provide support and/or advice to individuals and groups who consider they have been the targets of ethnic discrimination; (2) take general measures to prevent ethnic discrimination; (3) make proposals to the government and any other body for new laws, the amendment of existing laws and other measures; and (4) increase knowledge and influence public opinion on matters relating to ethnic discrimination.[66] General measures

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[59] Constitution of the Republic of Hungary, 1990, Ch. V, art. 32B, rep. in Commissioner for Civil Rights of Poland, *National Ombudsmen: Collection of legislation from 27 countries* (Warsaw: Bureau of the Commissioner for Civil Rights Protection, 1998) at 103. For further details on the Parliamentary Commissioner for Civil Rights see *infra* Chapter 5.

[60] Constitution of Hungary, art. 32B, *ibid.*

[61] <www.obh.hu>; *Act LXXVII of 1993 on the Rights of National and Ethnic Minorities, ibid.*

[62] E.g. Parliamentary Commissioner for the Protection of National and Ethnic Minority Rights, *2001 Annual Report* and *2000 Annual Report*, <www.obh.hu>.

[63] Nobel, *supra* note 46; M. Wadstein, "Education Against Racial Discrimination" in *The Sixth International Conference for National Human Rights Institutions, Proceedings*, Copenhagen and Lund, April 10-13, 2002 (Copehagen: Danish Centre for Human Rights) at 141; <www.do.se>.

[64] See *The Law on the Ombudsman Against Ethnic Discrimination* (1999:131), s. 2; *The Law on Measures Against Ethnic Discrimination in Working Life* (1999:130); *Equal Treatment of Students at Universities Act* (2001:1286); <www.do.se>.

[65] *The Law on the Ombudsman Against Ethnic Discrimination, ibid.*, s. 1. See Convention on the Elimination of All Forms of Racial Discrimination, art. 1, defining racial discrimination as discrimination on the basis of race, colour, descent, or national or ethnic origin.

[66] Nobel, *supra* note 46 at 48-49; Wadstein, *supra* note 63 at 141.

undertaken by the Ombudsman have included maintaining a public profile in the media, involvement in public discussions, and educational and training programs.[67] The Ombudsman Against Ethnic Discrimination has the powers to: launch investigations, require employers etc. to provide information, involve them in negotiations and mediation, impose fines on those who refuse to cooperate, and take court action on behalf of employees and students if discrimination is alleged.[68]

Although Finland has a relatively high level of human rights protection, some problems remain such as the protection of national minorities and treatment of immigrants.[69] Finland's government created an Ombudsman for Minorities in 2001.[70] This executive appointment is established under the Ministry of Labour and has the duties to: try to prevent discrimination on the basis of ethnicity, investigate, report on and make recommendations on ethnic discrimination and the rights of foreigners in Finland, and intervene in asylum and expulsion cases.[71]

Defining the Organizational Ombudsman

The organizational ombudsman is found at the domestic level in the public and private sectors in some: (1) government departments; (2) universities and colleges; and (3) corporations, including newspapers.[72] The organizational ombudsman is also found at the international level of governance inside some international organizations. Mary P. Rowe describes the status of the organizational ombudsman as follows:

> The organizational ombudsperson is a designated neutral within an organization and usually reports at or near the top of that organization, outside ordinary management channels. An *outside* organizational ombudsperson works on contract as an ombuds service provider and may report to the chief executive officer or to the head of the division that is contracting with the practitioner.[73]

An organizational ombudsman may be authorized to handle internal, external, or both internal and external complaints.[74]

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[67] Nobel, *ibid.* at 51.

[68] *Ibid.* at 48, 50-51; *The Law on Measures Against Ethnic Discrimination in Working Life, supra* note 64, ss. 24-38, 43; *Equal Treatment of Students at Universities Act, supra* note 64, ss. 16, 18.

[69] Council of Europe Commissioner for Human Rights, *2nd Annual Report April 2001 to December 2001*, CommDH(2002)2 (Strasbourg, May 15, 2002) at 75; Amnesty International, *Amnesty International: Report 2002* (New York: Amnesty International Publications, 2002) at 101.

[70] The office incorporates the mandate of the 1991 Ombudsman for Foreigners.

[71] S. Reinboth, "New Minority Ombudsman says flexibility required for greater tolerance", *Helsingin Sanomat* (Jan. 15, 2002); <www.europa.eu.int/comm.employment_social/fundamental_rights/pdf/legisln/fi_ombuds_en.pdf>. Minority groups covered include the Roma and Sami. Swedish-speaking Finns are treated as a second national group and not as a minority, Council of Europe Commissioner for Human Rights, *2nd Annual Report, supra* note 69 at 69.

[72] See e.g. M.P. Rowe, "Options, Functions, and Skills: What an Organizational Ombudsman Might Want to Know" (April 1995) Neg. J. 103.

[73] *Ibid.*

[74] *Ibid.* at 104.

An ombudsman authorized to take internal complaints can process complaints only from the employees of the organization (e.g., employees of a government department, corporation, international organization). The internal ombudsman is sometimes called the "workplace" ombudsman. Complaints cannot be taken from external sources, e.g. members of the public or customers of the organization. The internal ombudsman handles employment-related issues inside the organization. The disputes may be between employer and employee, or between employees. An internal ombudsman can be described as:

> a neutral or impartial manager within an organization, who may provide informal and confidential assistance to managers and employees in resolving work-related concerns; who may serve as a counsellor, informal go-between and facilitator, formal mediator, informal fact-finder, upward-feedback mechanism, consultant, problem prevention device and change agent; and whose office is located outside ordinary line management structures.[75]

In contrast, an ombudsman with the mandate to handle external complaints takes complaints only from the customers or clients of the organization who are unhappy with the service and/or conduct of the organization, e.g. users of the government department's services, corporate customers and newspaper readers.[76] Some organizational ombudsmen are authorized to take both internal and external complaints.

All general-service public sector ombudsmen, plus some specialty ombudsmen, undertake formal investigations into individual complaints and follow up as necessary with recommendations and reports. However, with organizational ombudsmen, "[m]ost ombudspeople who deal with internal staff, and may of those who deal with students, do no formal investigations and write no case reports."[77] Rather, organizational ombuds perform functions that encompass: listening impartially to problems, providing and receiving information relevant to the problem, reframing issues, developing options for action for the complainant, making referrals to persons and entities able to assist the complainant, acting as an informal mediator to try to help resolve the dispute and providing advice for solutions to systemic problems.[78] Some organizational ombudsmen do examine problems in more detail and write reports, although "this function is typically at the request of someone in the organization other than the employer, and is typically not for disciplinary purposes."[79] Organizational ombudsmen may also issue annual reports containing basic statistics on the activities of the office.

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[75] M.P. Rowe, "The Ombudsman's Role in a Dispute Resolution System" (Oct. 1991) 7 Neg. J. 353 at 353.

[76] Rowe, "Options, Functions, and Skills: What an Organizational Ombudsman Might Want to Know", *supra* note 72 at 104.

[77] *Ibid.* at 105.

[78] *Ibid.* at 106-111.

[79] *Ibid.* at 108.

The Executive Organizational Ombudsman Created by Government Departments, Agencies or State Corporations to Handle Internal and/or External Complaints

OVERVIEW

Most government department ombudsmen do not have a statutory foundation and are internal appointments. Individual government departments or agencies in some countries have created executive organizational ombuds mechanisms to resolve external and/or internal disputes involving the government body. External ombuds mechanisms address disputes between the department and its public clients, and internal ombuds are used for employment-related disputes between the government body and its employees (the workplace ombudsman).

Government department external ombudsmen assist their department in refining their administrative policies and practices, thereby improving public relations.[80] As Daniel Jacoby, former *Protecteur du citoyen* of Quebec, has stated, government ministry ombudsmen who handle external complaints "have sometimes been created by officialdom in the hope of minimising its contacts with the official Ombudsman, who is viewed as 'a stranger in the house'."[81] External government department ombudsmen can be confused with the specialty ombudsman. Specialty ombudsmen are created by constitution, legislation or executive act. Typically, their discrete foundation in law gives them independence and powers beyond those of a government department ombudsman. In contrast, government department ombudsmen are not independent of their home ministry. It is argued that it is unlikely that these types of ombuds mechanisms can resolve complaints without being influenced to some degree by the policies and practices of the government authority in question.[82]

Unlike legislative ombudsmen with statutory protections, government department ombudsmen may be unable to keep their records confidential if demands for their disclosure are made, for example, by the courts, government bodies or by operation of law.[83] These departmental ombudsman offices often do not have the strong investigatory powers that are given to the classical ombudsman, such as broad access to government documents backed up with *subpoena* powers. Where a government department falls within the jurisdiction of a general legislative ombudsman, its departmental ombudsman will also fall within the legislative ombudsman's jurisdiction.[84]

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[80] D. Jacoby, "The Future of the Ombudsman" in *The Ombudsman Concept, supra* note 2, 211 at 212, rep. in *International Ombudsman Anthology, supra* note 2, 15 at 16 [further references to *Anthology*].

[81] *Ibid.*

[82] Robertson, *supra* note 47 at 7.

[83] See H.J. Krent, "Federal Agency Ombuds: The Costs, Benefits, and Countenance of Confidentiality" (2000) 52 Admin. Law Rev. 17.

[84] See Robertson, *supra* note 47 at 7.

CASE STUDIES OF GOVERNMENT DEPARTMENT OMBUDSMEN

The U.S. and Canadian federal governments provide interesting examples of government department ombudsmen.

U.S.A. – Federal Level

The United States federal government has made frequent use of the internal organizational ombudsman mechanism. For example, by 2001 there were over twenty federal workplace ombudsmen in the U.S. government.[85] The U.S. government also has some external ombudsman schemes.[86] The Federal Deposit Insurance Corporation (FDIC) Ombudsman is an example of an internal/external ombuds mechanism, with jurisdiction over public companies, banks and FDIC employees.[87]

The U.S. Environmental Protection Agency (EPA) Hazardous Waste Ombudsman has had a contentious life. The EPA Ombudsman, an external organizational ombudsman who received and investigated public complaints on EPA-administered hazardous waste cleanup issues, was initially regulated and given independence by Congressional legislation from 1984 to 1988.[88] Subsequently, it continued to function within the EPA (Office of Solid Waste and Emergency Response) as an executive government department ombudsman, but even the U.S. General Accounting Office criticized its lack of independence.[89] In 2001, the EPA Administrator collapsed the Ombudsman into the Office of Inspector General – a move that was also criticized.[90] From 2001 onwards, members of the U.S. Senate have tried unsuccessfully to pass legislation to revive the EPA Ombudsman and strengthen its independence and powers.[91]

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[85] See U.S. General Accounting Office, *Human Capital: The Role of Ombudsmen in Dispute Resolution* (GAO-01-466, April 2001), Appendix II of the GAO Report lists federal workplace ombudsmen as of Jan.16, 2001; D.L. Meltzer, "The Federal Workplace Ombuds" (1998) 13 Ohio State J. Dispute Res. 549. E.g. Smithsonian Institution, Secret Service (Treasury Department), Central Intelligence Agency, Department of State, Department of Energy, Department of Justice.

[86] E.g. Internal Revenue Service, Food and Drug Administration. The new Department of Homeland Security appointed a Citizenship and Immigration Ombudsman in July 2003 to take complaints from immigrants and the public.

[87] See B. Male, "Assessing Ombudsman Performance" (2000) 4 Int'l Omb. Yrbk. 59 at 63.

[88] See U.S. General Accounting Office, *Hazardous Waste EPA's National and Regional Ombudsmen Do Not Have Sufficient Independence* (GAO-01-813, July 2001) at 5 (amendments to *Resource Conservation and Recovery Act*).

[89] *Ibid.*

[90] E.g. U.S. General Accounting Office, *Environmental Protection: Issues Raised by the Reorganization of the EPA's Ombudsman Function* (GAO-03-92, Oct. 2002) (EPA Ombudsman lacks sufficient independence and should not be housed in Office of Inspector General).

[91] See T.N. Ballard, "Bill to liberate EPA ombudsman languishes", GovExec.com (Nov. 26, 2002); "Senate Environment and Public Works Committee passes environmental legislation", *Capital Reports* (April 15, 2003).

Canada – Federal Level

Some Canadian federal government departments have created internal workplace ombuds mechanisms.[92] The Canada Post Ombudsman is an external ombudsman. It was formed in 1997, and takes complaints from customers after all Canada Post internal dispute resolution procedures have been exhausted.[93] The Canada Post Ombudsman acts as a mediator and can make recommendations. In the wake of the merger of Canada's two major national airlines, the Canadian Air Travel Complaints Commissioner was created in 2000 in amendments to federal transportation legislation.[94] Appointed by the Minister of Transport and operating under the Canadian Transportation Agency, the Commissioner is an external ombudsman, taking complaints from persons about the air service provided by licensed carriers if the dispute cannot be satisfactorily resolved by the airline.[95] The Commissioner investigates, can obtain documents, mediates disputes (or appoints a mediator), reports to the parties and reports to Cabinet through the Minister semi-annually.[96]

In some countries there are single-sector military ombudsmen, obtaining their powers through statute.[97] In Canada, however, the national military ombudsman is an executive government department ombudsman, appointed in 1998 by the Minister of Defence with a mandate and powers contained in Ministerial Directives.[98] The National Defence and Canadian Forces Ombudsman handles complaints from present or former Department employees and members of the military, plus their immediate family members.[99] On the Minister's behalf, the Ombudsman acts as "a neutral and objective sounding board, mediator, investigator and reporter on matters related to the DND [Department of National Defence] and CF [Canadian Forces]."[100] The Ombudsman is independent of the DND and CF, and reports directly to and is accountable to the Minister.[101] The Ombudsman investigates (on receipt of a complaint, on his own motion or if directed by the Minister), makes recommendations and reports to the relevant authorities, annu-

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92 E.g. Canadian International Development Agency (CIDA), Department of Indian and Northern Affairs.

93 See <www.ombudsman.poste-canada-post.com>; Canada Post Ombudsman, *In All Fairness*.

94 *Canada Transportation Act*, S.C. 1996, c. 10, as am. by S.C. 1999-2000, c. 15, s. 85.1; M. McKinnon, "Ottawa creating airline ombudsman", *The Globe and Mail* (May 10, 2000) at B1. There are also special-sector federal commissioners for freedom of information, privacy, official languages, corrections, and the R.C.M.P.

95 *Canada Transportation Act, ibid.*, s. 85.1(1)-(2). The provisions are lacking in some respects, e.g. length of tenure.

96 *Ibid.*, s. 85.1(3)-(6).

97 German *Bundestag* Defence Commissioner, Israeli Defence Force Soldiers' Complaints Commissioner and Norway's Defence Ombudsman. Australia's Commonwealth Ombudsman is also Defence Force Ombudsman. A number of classical and human rights ombudsmen also have jurisdiction over defence forces, e.g. Sweden, Spain, Greece, Hungary, Lithuania, Bosnia and Herzegovina, Peru, Ghana.

98 <www.ombudsman.forces.gc.ca> (*Ministerial Directives*, 1999, 2001 rev.).

99 *Ministerial Directives, ibid.*, s. 12.

100 *Ibid.*, s. 3(1)(a).

101 *Ibid.*, s. 3(2).

ally to the Minister and in special cases.[102] Although the Directives provide the Ombudsman with investigatory powers, there are a number of limitations, such as in the provision of information.[103] In the 2001 to 2002 reporting period, the Ombudsman received 1,489 cases and, over the past few years, has issued special reports on matters such as the treatment of CF members with post traumatic stress disorder and the treatment of sexual assault complainants in the military.[104]

The Hybrid Public/Private Sector Ombudsman for an Entire Industry or Service Sector Created by Legislation to Resolve Complaints Made by Consumers

OVERVIEW

Some governments have created ombudsmen by legislation to cover an entire industry or service sector and receive the complaints made by customers against individual service providers who belong to that industry or service sector. Various countries have established these hybrids, typically in core service areas such as financial services, pensions, insurance, telecommunications, public utilities and legal services.[105] These entities are hybrid ombudsmen because they are public bodies regulated by statute that monitor those areas of the private sector which are often sites of public policy concern.

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[102] *Ibid.*, ss. 4, 17, 34-38. Certain matters are outside the office's jurisdiction, e.g. judicial matters, military police disciplinary matters, *ibid.*, s. 14.

[103] *Ibid.*, ss. 24-33. An Advisory Committee with broad based representation from the DND and CF provides the Ombudsman with advice and concerns relating to his activities, *ibid.*, s. 39.

[104] National Defence and Canadian Forces Ombudsman, *2001-2002 Annual Report* at 7, 70. The largest numbers of cases concerned benefits, release issues, requests for information, harassment and postings. For special reports see <www.ombudsman.forces.gc.ca>.

[105] See various Australian hybrids (e.g. Victoria's Legal Ombudsman, Tasmania's Energy Regulator and Australia's Telecommunications Industry Ombudsman and Private Health Insurance Ombudsman), K. Del Villar, "Who Guards the Guardians? Recent Developments Concerning the Jurisdiction and Accountability of Ombudsmen in Australia" (2002) 6 Int'l Omb. Yrbk. 3, notes 6-7. See also Ireland's new Pensions Ombudsman, created in the *Pensions (Amendment) Act 2002*, s. 5 (in operation 2003), and the UK Pensions Ombudsman, appointed under pension plan legislation to take complaints concerning maladministration by, and disputes about facts or law with, the employers, trustees, administrators and managers of occupational and personal pension plans, *Pensions Schemes Act 1993*, ss. 145-146; as am. by *Pensions Act 1995*, <www.pensions-ombudsman.org.uk>, *Pensions Schemes Act 1993*, ss. 145-146; as am. by *Pensions Act 1995*, <www.pensions-ombudsman.org.uk>, e.g. *Moore's (Wallisdowne) Ltd.* v. *Pensions Ombudsman*, [2002] 1 All E.R. 737 (Ch.D.); *Royal Masonic Hospital* v. *Pensions Ombudsman*, [2001] 3 All E.R. 408 (Ch.D.); *Legal & General Assurance Society Ltd.* v. *Pensions Ombudsman*, [2000] 2 All E.R. 577 (Ch.D., Q.B.); *Edge et al.* v. *Pensions Ombudsman*, [1999] 4 All E.R. 546 (C.A.); *Department of Health* v. *Pensions Ombudsman*, [1998] 4 All E.R. 508 (C.A.); *Hillsdown Holdings plc* v. *Pensions Ombudsman*, [1997] 1 All E.R. 862 (Q.B.); *Law Debenture Trust Corp. plc* v. *Pensions Ombudsman*, [1997] 3 All E.R. 233 (Ch.D.); *Seifert* v. *Pensions Ombudsman*, [1997] 4 All E.R. 947 (C.A.).

CASE STUDIES OF LEGISLATIVE INDUSTRY/SERVICE SECTOR OMBUDSMEN

Financial Services

Statutory ombudsmen to monitor customer complaints arising out of the financial services sector have become increasingly popular. Spain,[106] South Africa[107] and the United Kingdom are three examples.

In the United Kingdom, financial services legislation in force on December 1, 2001 replaced six self-regulatory industry ombudsmen with one new Financial Ombudsman Service (FOS) under the Financial Services Authority (FSA) to take complaints from customers of FSA-regulated companies.[108] The legislation states that the ombudsman scheme is to be independent, and it requires that the FOS be administered by a corporate entity with a Board.[109] The FOS reports annually to the FSA.[110] It is funded by the institutions covered by the FOS, through annual levies and individual case fees.[111] The FOS takes complaints from the public against banks, building societies, stockbrokers, financial advisers, insurance companies, pension providers, and unit trust and investment trust managers. The FOS also has an additional voluntary jurisdiction that can cover firms such as mortgage and insurance brokers, and certain kinds of complaints not otherwise within the FSA's jurisdiction.[112] The FOS has jurisdiction only after an individual or small business complainant has exhausted the financial institution's internal complaints mechanism.[113] The FOS investigates complaints and tries to reach a mediated settle-

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[106] In 2002, the Spanish government introduced new legislation to regulate financial services, including the establishment of three ombudsmen to take complaints from customers in the banking, investment, insurance and pension fund areas. The law will require financial service companies to create an internal complaint mechanism for customers, following which complainants can lodge their complaints with the relevant ombudsman, "Spain tightens financial law in wake of Enron case", *Reuters Limited* (March 1, 2002).

[107] South Africa has some private sector ombuds (e.g. Long-Term Insurance Ombudsman, Short-Term Insurance Ombudsman, Banking Adjudicator). In 2002, the South African government tabled legislation recognizing industry ombuds systems if they satisfy listed criteria and creating a statutory financial services ombudsman to take complaints against financial institutions not participating in one of the voluntary systems, "Bill tabled on voluntary financial ombudsman", *South African Press Association* (March 20, 2002); J.H. Steyn, "Alternative Dispute Resolution: The Role of the Private Sector Ombudsman" (2001) 5 Int'l Omb. Yrbk. 134.

[108] *Financial Services and Markets Act 2000*, c.8, Part XVI, Schedule 17; <www.financial-ombudsman.org.uk>. The FOS replaced the Banking Ombudsman, Building Societies Ombudsman, Insurance Ombudsman, Investment Ombudsman, Personal Investment Authority Ombudsman and Securities and Futures Authority Complaints Bureau. Also, the different compensation services were amalgamated into one Financial Services Compensation Scheme. The FSA has appointed its own Complaints Commissioner to take complaints against the FSA made by companies, consumers and other persons.

[109] *Financial Services and Markets Act 2000, ibid.*, s. 225, Schedule 17.

[110] *Ibid.*

[111] Financial Ombudsman Service, *the financial ombudsman service: an introduction for firms* (London: Financial Ombudsman Service, Feb. 2002) at 7.

[112] *Financial Services and Markets Act 2000, supra* note 108, s. 227, Schedule 17, Part IV; Financial Ombudsman Service, (April 2003) 27 Omb. News at 3.

[113] Financial Ombudsman Service, *a guide for complaints handlers* (London: Financial Ombudsman Service, Feb. 2002) at 1-4.

ment.[114] If unsuccessful, the FOS makes recommendations, and if either of the parties wants a further review the FOS makes final written decisions and can order covered institutions to pay monetary compensation to the complainant.[115] If the complainant accepts the decision within the time limit specified, both parties are bound by the decision; if not, neither party is bound and the complainant can commence a court action against the firm.[116]

Legal Services

The Legal Services Ombudsman (England/Wales) and the Scottish Legal Services Ombudsman are other examples of the hybrid public/private ombudsman.[117] Established by legislation, these Legal Services Ombudsmen investigate complaints about how their respective law societies (and other relevant professional bodies) have handled complaints made by clients against solicitors, barristers and other law professionals.[118] The services of lawyers cannot be the subject of a complaint to the Legal Services Ombudsmen. If a client is dissatisfied with the performance of a lawyer, the client must first complain to the appropriate law society and, if dissatisfied with the handling of the complaint by the law society, the client can then make a complaint to the Legal Services Ombudsman about the law society's conduct.

In contrast, in Australia, the State of Victoria's Legal Ombudsman investigates complaints about the professional conduct of lawyers in the state.[119]

The Self-Regulatory Industry or Service Sector Ombudsman

OVERVIEW

Some entire industries or service sectors, through their representative body, have created an ombudsman to take complaints from customers of companies which comprise the sector or which participate in the scheme. These ombudsmen are often formed in

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[114] *Ibid.* at 8-10.

[115] *Ibid.; Financial Services and Markets Act 2000, supra* note 108, ss. 228-229, Schedule 17.

[116] *Ibid.* at 10; *Financial Services and Markets Act 2000, ibid.*, s. 228(5)-(6).

[117] See R. James and M. Seneviratne, "The Legal Services Ombudsman: Form versus Function?" (1995) 58 Modern Law Rev. 187.

[118] Established in the *Courts and Legal Services Act 1990*, and appointed by the Lord Chancellor, the Legal Services Ombudsman (England/Wales) investigates the handling of complaints against solicitors, barristers, licensed conveyancers, legal executives and patent agents by the relevant professional bodies, <www.olso.org>. Created by the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1990*, as am. 1997, s. 34, and appointed by Scottish Ministers, the Scottish Legal Services Ombudsman investigates the handling of complaints about legal practitioners by the Law Society of Scotland, the Faculty of Advocates and the Scottish Conveyancing and Executry Services Board, <www.slso.org.uk>.

[119] *Legal Practice Act 1996* (Vic.); <www.legalombudsman.vic.gov.au>. Complaints include dishonesty, negligence, poor behaviour and delays.

sensitive areas such as insurance, banking and public utilities, where individuals have to deal with powerful and bureaucratic companies.[120] The self-regulatory scheme can sometimes be confused with the hybrid public sector/private industry ombudsman described above.

With the self-regulatory ombudsman, industry members come together and draft rules governing the powers and functions of the ombudsman that are mutually agreed upon. A legal device such as a not-for-profit corporation, a commission or a foundation is set up as the umbrella organization for the ombudsman which gives the ombudsman independence from the industry members. The board of the corporation (or equivalent) may be partly composed of non-industry members. The board handles matter such as appointment of the ombudsman, the budget and the receipt of annual reports. The independence and impartiality of the ombudsman are protected further through provisions in the governing rules that the ombudsman shall act independently, objectively and without taking instruction from any body concerning the exercise of his or her functions.

CASE STUDIES OF SELF-REGULATORY INDUSTRY OR SERVICE SECTOR OMBUDSMEN

Banking and Financial Services

Self-regulatory banking ombudsman systems are found, for example, in New Zealand,[121] Australia,[122] Switzerland[123] and Canada.

In Canada, initially most of the big banks established their own corporate ombuds mechanisms. This was complemented in 1996 with the establishment of the Canadian Banking Ombudsman (CBO), a self-regulatory ombudsman covering the federally-regulated banking sector.[124] Although funded by the banking sector, the CBO was given independence by the establishment of the CBO as a not-for-profit corporation and hav-

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[120] See also the UK Estate Agents Ombudsman, <www.oea.co.uk>, and the Telecommunications Ombudsman (Otelo), <www.otelo.org.uk>.

[121] On New Zealand see <www.bankombudsman.org.nz>; N. Tollemache, "Taking the Ombudsman Concept into the Private Sector: Notes on the Banking Ombudsman Scheme in New Zealand" (1996) 26 V.U.W. Law Rev. 233.

[122] On Australia's Banking Industry Ombudsman see <www.abio.org.au>.

[123] The Swiss Banking Ombudsman was founded in 1993 by the Swiss Bankers Association. The Swiss Banking Ombudsman Foundation is the umbrella entity, with a board comprising some independent members. In the late 1990s, the Swiss Banking Ombudsman took complaints from Holocaust victims and their heirs that dormant accounts held in Swiss banks were owned by victims, reviewed thousands of claims, and worked with Swiss banks to try to find lost assets and return them to their owners,"Weak markets leave bank customers jittery", *Swissinfo* (July 13, 2002); "Swiss banks set new steps to find dormant accounts", *Reuters* (Feb. 3, 2000); "100 Million Swiss Francs Deposited In An Escrow Account", *PRNewswire* (Feb. 5, 1997); "Jewish congress assails Swiss findings", *The Globe and Mail* (Nov. 13, 1996) at A7; M. Drohan, "Swiss take a hard look into past", *The Globe and Mail* (Nov. 12, 1996) at A12.

[124] See Terms of Reference of Canadian Banking Ombudsman, adopted by Ombudsman's Board of Directors (The Canadian Banking Ombudsman Inc.); Canadian Banking Ombudsman Inc., *Canadian Banking Ombudsman Annual Report 2001*. In 2002, the jurisdiction of the office was extended to non-bank investment dealers and mutual fund companies.

ing the Ombudsman interact with the Board of Directors.[125] The CBO took complaints from individual and small business customers that banks had not been able to resolve through their company ombuds offices.[126]

In 2002, convergence in the Canadian financial services sector resulted in the formation of three self-regulatory industry ombuds mechanisms, covering banking and investments, life insurance and general insurance.[127] The CBO was replaced by the new Ombudsman for Banking Services and Investments (OBSI) who, in addition to complaints against banks and other deposit-taking institutions, has jurisdiction over investment dealers, mutual fund dealers and mutual fund companies who are members of their respective Canadian associations.[128] The same not-for-profit company model is used, with the Board of Directors having a majority of members unaffiliated with the financial services sector.[129] The Ombudsman is appointed by the Board and, although the OBSI is "responsible" to the Board, he neither reports to the Board nor are his determinations influenced by the Board.[130] The process and powers of the OBSI remain almost identical to those of the CBO. Individual and small business customers first have to take their complaints to their individual bank/company ombudsman and only if the complaint is not resolved internally can the customer complain to the OBSI.[131] The OBSI is empowered to: investigate, try to settle the dispute amicably or make recommendations with reasons for resolving the matter (including for financial compensation), on a quarterly basis report publicly the names of the banks against which recommendations have been made and the number of cases where the banks have complied with the recommendations, and report annually to the Board.[132] The recommendations of the OBSI are not binding on either the complainant or the institution.[133] If the institution does not comply, or the complainant is otherwise dissatisfied, the latter will have to resort to the courts.

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125 *Canadian Banking Ombudsman Annual Report 2001, ibid.* at 1, 8. The company was incorporated under the *Canada Corporations Act*, R.S.C. 1970, c. C-32, as am., Part II.

126 Terms of Reference of Canadian Banking Ombudsman *supra* note 124, s. 10. In 2001, the largest percentage of complaints concerned accounts and transactions, *Canadian Banking Ombudsman Annual Report 2001, ibid.* at 6.

127 The Centre for the Financial Services OmbudsNetwork is the overall organization and provides a central referral service, <www.cfson-crcsf.ca>. See also *Financial Consumer Agency of Canada Act*, S.C. 2001, c. 9.

128 <www.obsi.ca>. In addition to participating banks, the OBSI covers member firms of the Investment Dealers Association of Canada, the Mutual Funds Dealers Association of Canada and the Investment Funds Institute of Canada. See also Canadian Life and Health Insurance Ombudservice, <www.clhia.ca>, and General Insurance Ombudservice, <www.gio-scad.org>.

129 <www.obsi.ca> "Governance Structure".

130 *Ibid.*

131 OBSI Terms of Reference, <www.obsi.ca>, s. 10.

132 *Ibid.*, ss. 3, 20-24, 28.

133 *Ibid.*, s. 22.

Insurance

Ombudsman schemes set up by the insurance industries are found in a number of countries including New Zealand,[134] Canada,[135] South Africa and Ireland.

Among South Africa's industry ombudsmen is the Ombudsman for Long-Term Insurance. The Ombudsman is established and funded by the insurance industry, and takes complaints from policyholders over "the marketing, coming into existence and performance execution of life assurance contracts marketed or effected in the Republic of South Africa" which involves a subscribing insurance company member.[136] The Ombudsman's powers and functions are set out in rules agreed upon by the industry members who have subscribed to the ombudsman plan.[137] Subscribing company members are bound by the rulings of the Ombudsman and have waived their rights to go to court over the dispute although, in some instances, they have the right to challenge the advice of the Ombudsman before a panel of adjudicators.[138] Complainant policyholders, however, always retain their rights to go to court over the matter, even if they have complained unsuccessfully to the Ombudsman.[139] The Ombudsman for Long-Term Insurance attempts to resolve insurance policy disputes mainly by mediation or conciliation, but if these forms of ADR are unsuccessful, the insurance company member involved has agreed to accept the advice, recommendations, and/or monetary award made by the Ombudsman.[140]

The Insurance Ombudsman of Ireland was established in 1992 by the Irish Insurance Federation to provide policyholders with an independent and impartial dispute resolution process.[141] A Board (composed of nominees from member companies) and a Council (composed of a majority of non-industry nominees) were created.[142] The Council appoints the Ombudsman, subject to the approval of the Board, and works to ensure the independence and adequate financing of the Ombudsman Office.[143] The scheme provides Terms of Reference for the Ombudsman.[144] When a complaint between a customer and a member company cannot be resolved, it is sent to the Insurance Ombudsman. Complaints can be settled by mediation, conciliation or early intervention by the Ombudsman, and written adjudications can be issued by the Ombudsman in complaints

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134 S. Rogers, "The New Zealand Insurance and Savings Ombudsman Scheme" (1996) 26 V.U.W. Law Rev. 791.

135 See *supra* note 128.

136 South Africa Ombudsman for Long-Term Insurance, *Rules*, nos. 2.1-2.2, rep. in Steyn, *supra* note 107 at 142; *ibid.* at 137.

137 *Rules, ibid.*

138 Steyn, *supra* note 107 at 137; *Rules, ibid.*, nos. 3.4-3.5. A panel is appointed occasionally by the ombudsman in consultation with the industry. The panel's decision is binding on the insurance company.

139 Steyn, *ibid.*

140 *Ibid.; Rules, supra* note 136, nos. 3.1-3.4.

141 Insurance Ombudsman of Ireland, *5 Years of Dispute Resolution 1992-1997* at 1; <www.ombudsman-insurance.ie>.

142 *5 Years of Dispute Resolution 1992-1997, ibid.* at 2.

143 *Ibid.*

144 See <www.ombudsman-insurance.ie>.

that cannot be informally resolved.[145] Member companies have agreed to be bound by the Ombudsman's written adjudications, whereas complainants can reject the Ombudsman's determination and proceed to litigation.[146]

Organizational Ombudsmen Created by Private Sector Institutions and Corporations

There are hundreds of ombudsman mechanisms in the private sector established by individual institutions or companies – such as universities, colleges, newspapers and companies providing goods and services. These ombuds mechanisms may be internal ombudsmen, handling workplace complaints (by employees), external ombudsmen, taking complaints from external bodies (clients, customers, readers, etc.) against the entity having established the ombudsman, or ombudsmen with the power to take both internal and external complaints.[147] An individual corporation or institution will establish an ombudsman pursuant to internal terms of reference, the ombudsman will be subject to the governing procedure of the company and will ultimately report to and be responsible to a senior executive.

The University or College Ombudsman

The first college or university ombuds mechanism was established at Eastern Montana College in 1966 and the Michigan State University Ombudsman, initiated in 1967, was the first to appear in a major academic institution.[148] It is estimated that there are now over two hundred universities and colleges in the U.S. and Canada with ombuds offices.[149] Spain has at least twenty-eight universities with university ombudsman offices (*Defensores Universitarios*).[150] Some university ombudsmen handle only complaints from students or faculty/staff, while others take complaints from students, faculty and staff.[151] In a variation on the theme, in 2002, the representative body for Scotland's universities and colleges established an ombudsman to take complaints from students enrolled in all its institutions.[152]

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145 *5 Years of Dispute Resolution 1992-1997, supra* note 141 at 2.

146 *Ibid.*

147 See *supra*, text accompanying notes 72 to 79.

148 C. Stieber, "Variation on a Classical Theme: The Academic Ombudsman in the United States", *I.O.I. Occasional Paper No. 38* (Edmonton: International Ombudsman Institute, March 1987) at 2; S.A. Wiegand, "A Just and Lasting Peace: Supplanting Mediation with the Ombuds Model" (1996) 12 Ohio State J. Dispute Res. 95 at 113, note 98.

149 See University and College Ombudsman Association, <www.colorado.edu/Ombuds/UCOA/history.htm>.

150 I. Jiménez Soto, "Los Defensores Sectoriales: La Especial Configuración de los Defensores Universarios" in *Jornadas Sobre El Defensor del Pueblo Andaluz, supra* note 9 at 137.

151 See Wiegand, *supra* note 148 at 115-118.

152 "Watchdog for students' complaints", *Evening News* (Dec. 16, 2002).

THE NEWSPAPER OMBUDSMAN

The phenomenon of the newspaper or press ombudsman is well-known. Approximately forty newspapers in the U.S.A, plus newspapers in other countries, have created company ombudsmen to take complaints from readers, although this represents a small minority of total newspaper enterprises.[153] The growing bureaucracy of newspaper organizations, the concentration of newspaper ownership among smaller numbers of companies and newspaper credibility problems led to the establishment of press ombuds mechanisms.[154] Press ombudsmen are:

> designated persons on daily newspapers who accept complaints, investigate those worthy of attention, and then take steps to remedy the problems. This may involve intercession, conciliation, or, in extremis, publicizing professional misconduct in order to force improvement.[155]

The main objectives of a press ombudsman are "correcting inaccuracies, unfairness or insensitivity" in reporting.[156] Complaints cover matters such as inaccurate reporting, overly graphic or mislabeled photographs, sexism in reporting, failure to identify commentary or editorials and failure to report certain news.[157] The press ombudsman takes complaints from readers, investigates informally, responds informally within the newsroom as an "internal critic" with memoranda and some also write a regular newspaper column.[158] In many instances, the ombudsman is hired from within (e.g., a former senior editor) and reports to the chief editor or publisher.[159] Another approach is to hire the ombudsman as an independent contractor for a non-renewable and defined contractual term, who cannot be fired but who cannot seek subsequent employment with the newspaper.[160] This latter approach gives the ombudsman more independence from influence by newspaper management.

THE CORPORATE OMBUDSMAN

The concept of the corporate ombudsman was initiated in the U.S.A. during the 1960s, and substantially increased in popularity during the 1980s and 1990s, with many large

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153 See e.g. K. Campbell, "This is a job for . . . Ombudsman, writer of wrongs!", *The Christian Science Monitor* (July 6, 2000); L. Moses, "Is There a Doctor in the House?", *Editor & Publisher* (Jan. 10, 2000). The percentage of newspaper ombudsmen in the U.S. is still small as there are approximately 1,550 U.S. dailies, Campbell, *ibid.* The first newspaper ombudsman arguably was the committee set up by Japan's Asahi Shimbun in 1922 and the first U.S. newspaper ombudsman was created in 1967 at The Louisville Times, Moses, *ibid.* Other media organizations may have an ombudsman, e.g. the Canadian Broadcasting Corporation (CBC).

154 S. Zagoria, "Press Ombudsmen", *I.O.I. Occasional Paper No. 34* (Edmonton: International Ombudsman Institute, Feb. 1986) at 1; Moses, *ibid.*; Campbell, *ibid.*

155 Zagoria, *ibid.*

156 *Ibid.* at 2.

157 *Ibid.* at 5; Moses, *supra* note 153.

158 Zagoria, *ibid.* at 2.

159 Moses, *supra* note 153.

160 Zagoria, *supra* note 154 at 3-4 (see Washington Post); Moses, *ibid.*

corporations in North America, Europe and Asia creating company ombuds positions.[161] Corporate ombudsmen are expected to be neutral problem solvers and are located outside line management, although they are hired and paid by the company, and report to the chief executive officer, another senior executive or the board of directors. As with other organizational ombudsmen, corporate ombudsman can have internal or external oversight, or both.

Internal Corporate Ombudsmen

Internal corporate ombudsmen are sometimes called workplace or intra-corporate ombudsmen. Many company ombudsmen are internal ombudsmen, addressing work-related complaints made by employees. Mary Rowe has defined an intra-corporate ombudsman as:

> a neutral or impartial manager within a corporation, who may provide confidential and informal assistance to managers and employees in resolving work-related concerns, who may serve as a counsellor, go-between, mediator, fact-finder or upward feedback mechanism, and whose office is located outside ordinary line management structures.[162]

Sometimes "their role is connected with the existence in a given company of a code of conduct aimed at promoting integrity by clearly spelling out which standards are expected of the employees, including their obligation to report any apparent code violation."[163] These corporate codes of conduct cover a variety of matters such as sexual harassment, human rights, bribery, competition rules, conflicts of interest and environmental standards.[164]

The duties of an internal corporate ombudsman include: discussing matters; giving and receiving information; counselling and problem solving to give the individual help with options for action; taking complaints or information from employees on breaches of the company rules, policies or code of conduct; mediating disputes; conducting an objective investigation into a matter and, if appropriate, making recommendations for change and monitoring their implementation; alerting company lawyers about situations with legal implications; and providing feedback to management on issues such as outdated rules and systemic problems.[165]

In the U.S., internal corporate ombudsmen have experienced problems in keeping their records confidential when their disclosure is demanded in litigation proceedings.[166]

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[161] See V. Futter, "An Answer To The Public Perception Of Corporations: A Corporate Ombudsperson?" (1990) 46 Bus. Lawyer 29; M.P. Rowe, "The Corporate Ombudsman: An Overview and Analysis" (1987) 3 Neg. J. 127; U. Draetta, "Towards a New Model: Ombudsman for Multinational Companies" in E.A. Marias, ed., *The European Ombudsman* (Maastricht: European Institute of Public Administration, 1994) 17 at 17, 21.

[162] Rowe, *ibid.* at 127.

[163] Draetta, *supra* note 161 at 17-18.

[164] *Ibid.* at 18.

[165] *Ibid.*; Rowe, "The Corporate Ombudsman: An Overview and Analysis", *supra* note 161 at 130-131.

[166] See *Carman* v. *McDonnell Douglas Corp.*, 114 F. 3d 790 (Ct. Appeals, 8th Cir., 1997) (confidential

External Corporate Ombudsmen

Other corporations have external ombudsmen to take complaints from dissatisfied customers about the service and activities of the company. For example, various financial service institutions in North America have created external ombudsmen. In Canada, most of the big banks have established ombudsman mechanisms. One is the Scotiabank Ombudsman, created in 1995 to take complaints from small business and retail customers.[167] Only if a dispute cannot be settled by a bank branch or by the Office of the Bank's President can a customer complain to the Scotiabank Ombudsman.[168] After an investigation, the Ombudsman provides a written response.[169] If a dispute cannot be resolved amicably by a Canadian internal bank ombudsman, the customer can take the complaint to the self-regulatory industry ombudsman: the Ombudsman for Banking Services and Investment (OBSI), discussed earlier in this Chapter. Another example comes from the U.S. where, in the wake of investment bank scandals involving inaccurate stock analysis provided to certain customers, Citigroup, J.P. Morgan and Lehman Brothers each agreed to appoint an ombudsman to ensure that investors are given independent stock analysis in addition to that provided by the firms themselves.[170]

Other examples of external company ombudsmen come from IBM, Air Canada and Nestle. IBM has a Procurement Ombudsman who takes complaints from disgruntled suppliers.[171] The Air Canada Ombudsman was established in 2000 when customer complaints about service increased after Air Canada took over its closest rival, resulting in a near monopoly in the national-service Canadian airline industry.[172] The Swiss-based company Nestlé maintains ombudsmen in each country where it markets its products, who examine any complaints that the company has breached the World Health Organization (WHO) guidelines on marketing breast-milk substitutes.[173]

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information given by employee to internal company ombudsman not privileged from disclosure in civil litigation). The McDonnell Douglas company ombudsman position was eliminated in 1995. See also *Miller* v. *Regents of the Univ. of Colorado*, 188 F. 3d 518, 1999 WL 506520 (Ct. Appeals, 10th Cir., July 19, 1999) (unreported, no privilege, university ombudsman). Some lower court decisions have recognized confidential communications made to a corporate ombudsman as privileged, *Kientzy* v. *McDonnell Douglas Corp.*, 133 F.R.D. 570 (E.D. Mo. 1991), remanded 990 F. 2d 1051, rehearing denied; *Roy* v. *United Technologies Corp.*, Civil No. H-89-680 (J.A.C.) (D. Conn., May 29, 1990). But see where public sector ombudsman privilege found when created by statute, e.g. *Shabazz* v. *Scurr*, 662 F. Supp. 90 (S.D. Iowa, 1987) (former prison ombudsman, statute establishing it and Iowa Citizens' Aide/Ombudsman). See M.E. McGarry, "The Ombudsman Privilege: Keeping Harassment Complaints Confidential" (Nov. 30, 1995) 214:104 N.Y. Law J. 1; B.V. Thompson, "Corporate Ombudsmen and Privileged Communications: Should Employee Communications to Corporate Ombudsmen be Entitled to Privilege?" (1992) U. Cincinnati Law Rev. 653.

167 Scotiabank Ombudsman, *Annual Report* (2002), <www.scotiabank.com>.

168 *Ibid.* at 2.

169 *Ibid.* at 1.

170 D. Dunaief, "Bias bills coming due in Feb. on Wall St.", *New York Daily News* (Jan. 15, 2003).

171 See <www.ibm.com>.

172 C. Grandmont, "Air Canada Appoints Ombudsman to Handle Complaints", *Reuters* (July 31, 2000). See also the federal Air Travel Complaints Commissioner discussed *supra*, notes 94 to 96.

173 M. McKinney, "Baby Formula Violates International Policy: Study", *Reuters Health* (Jan. 17, 2003), reporting on a study alleging that Nestle and other companies were breaching the guidelines in West Africa.

Internal/External Corporate Ombudsmen

Some corporate ombudsmen can take complaints from employees and dissatisfied customers. The Royal Bank of Canada (RBC) Financial Group Ombudsman, for example, was established in 1995.[174] It is available as a voluntary mechanism for the settlement of disputes between the bank and its customers/clients and between the bank and its employees. As a recent example, in 2003 Tyco International Ltd. – attempting to salvage its reputation after senior executives were charged with serious offences – made changes in its corporate governance, including the establishment of an ombudsman.[175] The new ombudsman will report directly to the company's audit committee and can take complaints about Tyco's operations and management lodged by employees, customers, suppliers, and financial and regulatory bodies.[176]

Overuse of the "Ombudsman" Title?

As the word "ombudsman" has been used in areas beyond that of the full-service public sector ombudsman, and especially when used in the private sector, there has been some criticism of the use of the term for dispute settlement mechanisms that are quite different from that of the legislative ombudsman. It is argued that there is a risk of public confusion over the differences in independence and functions between the public sector ombudsmen and the other mechanisms that use the name "ombudsman". All public sector classical and human rights ombudsmen are external complaint-handling mechanisms with strong powers of investigation and most have considerable independence from the government branch they report to. Moving away from the full-service public sector ombudsman, even some specialty public sector ombudsmen do not have the same powers of investigation and independence, although they may have a variety of other roles. Government department or private sector "ombuds" mechanisms are dispute resolution processes where the independence and powers of the office may not be at an optimum level *de jure* and sometimes *de facto*. However, it must be recognized that some public sector executive ombudsmen attract questions concerning their independence and, in contrast, many legislated and self-regulatory industry ombudsmen have relatively strong powers and independence. In an attempt to limit confusion over new complaint handling mechanisms, New Zealand amended its ombudsman legislation in 1991 to prohibit the title "Ombudsman" being used by others in connection with any business, trade, occupation or service unless statute permits or with prior written consent of the Chief Ombudsman.[177]

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[174] See <www.rbc.com/ombudsman>.

[175] "Tyco announces two corporate governance jobs", *Associated Press* (March 4, 2003).

[176] *Ibid.*; N. Lipschutz, "Audit Committee: New Power Center", *Dow Jones News* (March 5, 2003).

[177] *Ombudsmen Act 1975*, no. 9, as am., s. 28A(1); J.F. Robertson, "Protection of the Name 'Ombudsman' ", *I.O.I. Occasional Paper No. 48* (Edmonton: International Ombudsman Institute, Feb. 1993). See also the British and Irish Ombudsman Association, composed of public and private sector ombudsmen, which *inter alia* safeguards the role of ombudsman in both sectors by making membership

Despite limited attempts to control use of the "ombudsman" title, it is now commonly used for many types of dispute settlement models throughout the public and private sectors in a number of countries. However, as Stephen Owen has remarked, "what we can all celebrate is the proliferation of the principle of administrative fairness to individual citizens."[178] Rather than making blanket distinctions between public and private sector ombudsmen and so on, each office should be examined individually for its compliance with important ombudsman effectiveness factors, such as independence, scope of jurisdiction, powers of investigation and level of resources.[179]

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conditional on satisfying criteria of independence, fairness, effectiveness and public accountability, <www.bioa.org.uk>.

[178] S. Owen, "The Ombudsman: Essential Elements and Common Challenges" in *The Ombudsman: Diversity and Development, supra* note 2, 1 at 2, rep. in *International Ombudsman Anthology, supra* note 2, 51 at 52.

[179] See *infra* Chapter 12 for a listing of effectiveness factors for public sector classical and human rights ombudsmen.

CHAPTER THREE

The Ombudsman: Democratic Accountability and Good Governance

Introduction

Classical and hybrid ombudsman institutions can act as mechanisms of democratic accountability, thereby promoting democratic development in a state. Accountability can be conceptualized as having horizontal and vertical aspects. This Chapter will explore the place of the ombudsman in a democratic state, the concepts of horizontal and vertical accountability and the manner in which an ombudsman can improve the operation of the administrative branch of government by serving as both a horizontal and a vertical accountability mechanism.

Beginning in the early 1990s, the concept of good governance has been adopted by international organizations (most, but not all of them providing development assistance) and donor states as a standard to be met by the states receiving the assistance. This Chapter will survey the characteristics of good governance, the critique of the concept by scholars, the definition and use of good governance by international organizations and states particularly in the context of public administration and human rights protection, and how classical and hybrid ombudsman institutions can assist in building good governance in a state.[1]

The Ombudsman and Hybrid Institutions as Mechanisms of Democratic Accountability

Democratic Governance and the Ombudsman

New concepts have been evolving in international law and policy in response to the increasing numbers of states that have adopted democratic forms of government in the past twenty-five years.

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[1] This Chapter is an elaboration of L.C. Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection" (2000) 13 Harvard H.R.J. 1 at 16-19 and 28-30.

Historically, international law generally did not concern itself with the complexion of the government of a state. However, more recently it is argued that there is an emerging right to democratic governance under international law.[2] The arguments supporting the emergence of this legal norm rest on foundational principles of the right to self-determination and human rights to participation in government, and the increasing insertion of guarantees of representative democracy in the treaty law and other instruments of regional organizations.[3] The development of the right to democratic governance is further supported by the evidence of the number of states that have made the transition to democracy over the past two decades.[4] Another development is the considerable increase in the activities of the United Nations and other regional international organizations in the provision of electoral and related assistance to states engaged in transitions to democracy.[5] However, these international law developments do not explore the range and characteristics of domestic government institutions, civil society actors and associated legal, economic and social reforms that may be needed to strengthen and consolidate democratic governance in states that have made the transition.

More broadly, social science scholars have explored themes of democratic transition and consolidation in considerable detail. The phrase "the third wave of democratization" has been used to refer to the transitions to democracy occurring in a number of states, commencing in the 1970s in Southern Europe in Greece, Portugal and Spain.[6] During the 1980s and early 1990s, military regimes in Latin America were brought to an end and democratic forms of government replaced them. Beginning at the end of the 1980s, internal changes in East Bloc states and the collapse of the Soviet Union led to the formation of democratic governments in Central and Eastern Europe into the 1990s. In addition, the past several decades have seen other countries in Africa and the Asia-Pacific region establish democratic forms of government.

These transitions to democratic forms of governance vary in strength, depth and viability. Social science scholars have been engaged in examining the differences between states in the process of democracy building and democratic consolidation, and the var-

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[2] E.g. G.H. Fox and B.R. Roth, eds., *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000); T.M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995) at 83-139; C.M. Cerna, "Universal Democracy: An International Legal Right or the Pipe Dream of the West?" (1995) 27 N.Y.U. J. Int'l Law & Pol'y 289; J. Crawford, "Democracy and International Law" (1993) 64 British Yrbk. Int'l Law 113; T.M. Franck, "The Emerging Right to Democratic Governance" (1992) 86 American J. Int'l Law 46.

[3] See e.g. Franck, *Fairness in International Law and Institutions, ibid.* at 91-117.

[4] Freedom House statistics, which examine democracy levels and civil/political rights protection, state that of a total of 192 independent states, 121 were electoral democracies. Of the total, 89 states were classified as "free", 56 as "partly free" and 47 as "not free", *Freedom in the World 2002: Liberty's Expansion in a Turbulent World* (2003 combined average ratings), <www.freedomhouse.org>. In contrast, in 1972, 43 states were considered free, 38 partly free and 69 not free, *ibid.* at 1.

[5] See Y. Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy* (Dordrecht: Martinus Nijhoff Pub., 1994).

[6] S.P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991) at 3.

ious factors that may account for the relative successes or failures.[7] Each nation making the transition to democratic governance is unique in its preexisting domestic political environment, the form of democracy that it has adopted, the approaches that it takes in the democratic consolidation period, the domestic democratic culture and the influence of international actors. However, some regional similarities and trends are evident both in the underlying environment of a state located in a particular region and in the regional frameworks used to support democratic governance (e.g. Europe, Latin America).

One of the many issues for analysis is the qualitative aspect of democracy in a particular state. A very limited definition of democracy confines itself to the examination whether a state conducts periodic free and fair elections. However, there are many additional aspects of democratic governance which are important elements of a well-developed democratic state, including the following: a government composed of separate legislative, executive/administrative and judicial branches with relatively well-balanced spheres of power;[8] an independent judiciary; other state institutions that provide horizontal accountability; the comprehensive application of the rule of law; the protection of a wide array of human rights; freedom of the press and other media; and the development of a strong civil society.[9]

States can be classified as liberal democracies, non-liberal electoral democracies, pseudo-democracies and non-democratic authoritarian regimes.[10] Liberal democracies are those states which enjoy a wide range of these additional components of democratic governance, whereas non-liberal electoral democracies are those states that do not provide many of these additional democratic institutions and guarantees.[11] Such a qualitative differentiation between democracies is valuable. Changes in the quality of democracy in a

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[7] See generally S.H. Barnes, "The Contribution of Democracy to Rebuilding Postconflict Societies" (2001) 95 American J. Int'l Law 86; L. Diamond, *Developing Democracy: Toward Consolidation* (Baltimore: The Johns Hopkins University Press, 1999); L. Diamond et al., eds., *Consolidating the Third Wave Democracies: Regional Challenges* (Baltimore: The Johns Hopkins University Press, 1997); L. Diamond et al., eds., *Consolidating the Third Wave Democracies: Themes and Perspectives* (Baltimore: John Hopkins University Press, 1997); J.L. Linz and A. Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore: The Johns Hopkins University Press, 1996); L. Diamond and M.F. Plattner, eds., *The Global Resurgency of Democracy*, 2d ed. (Baltimore: The Johns Hopkins University Press, 1996); L. Whitehead, ed., *The International Dimensions of Democratization: Europe and the Americas* (Oxford: Oxford University Press, 1996); J. Higley and R. Gunther, eds., *Elites and Democratic Consolidation in Latin America and Southern Europe* (Cambridge: Cambridge University Press, 1992).

[8] There is some interface between the legislative and executive branches depending on the form of government. Particular forms of democratic governance differ from state to state, based on factors such as historical antecedents and regional influences. New or established democracies may use parliamentary or presidential systems, or a hybrid model.

[9] See e.g. United Nations Development Programme, *Human Development Report 2002: Deepening democracy in a fragmented world* (N.Y., Oxford: Oxford University Press, 2002).

[10] Diamond, *Developing Democracy: Toward Consolidation*, *supra* note 7 at 8-13, 279-280. See also the Freedom House classification system using degrees of freedom.

[11] Diamond, *ibid.* at 8-13.

state can also be more clearly detected, either in the positive or negative direction. While there are examples of states with improved levels of democracy and human rights protection in the past decade, a number of new democracies have failed to improve or have regressed – to shallower forms of democratic governance or back to pseudo-democracies or authoritarian regimes.[12]

A number of countries have had a history of the executive branch of government wielding too much power in contrast to the weaker legislative and judicial branches. In these states the latter two areas of government need to be strengthened. In addition, in the formation or reconstruction of democratic forms of government, various states have focussed on reform of the executive/administrative branch of government. Many of these nations have to deal with the legacies of past authoritarian or military governments, attendant human rights infringements and the paucity of a democratic culture. In particular, new democracies have attempted to reduce or eliminate administrative inefficiencies or unfairness, and eliminate government corruption and human rights abuses committed by government officials. Some of these states may be recovering from conflict and engaged in peace-building initiatives. One of the responses has been to establish a classical or hybrid ombudsman to investigate complaints concerning these forms of government conduct. A well-functioning classical or human rights ombudsman is one of the various public sector mechanisms that can contribute to the strengthening of democratic governance.

However, as discussed further in Chapter 12, it is very difficult for an ombudsman to operate with any success in a state that does not have some form of democratic governance. It is a factor which affects whether an ombudsman will be established in the state. For example, if the Freedom House country rankings of freedom are used as a guide, about twenty percent of countries classified as "not free" have established a classical or hybrid ombudsman, whereas approximately seventy percent of "free" and "partly free" states have done so.[13] If the state is a functioning democracy, its qualitative aspects will influence the ability of the ombudsman to exercise its functions effectively. Regression in a state's level of democracy may be reflected in the operations of an ombudsman or human rights ombudsman in the state as one or more of the factors affecting the effectiveness of the institution may be weakened.[14]

In a democratic state classical and hybrid ombudsmen can also serve as mechanisms

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[12] See *Freedom in the World 2002, supra* note 4 at 10 (partly free electoral democracies that have stagnated are Georgia, Guatemala, Moldova, Mozambique, Paraguay, Russia, Sri Lanka and Ukraine); T. Carothers, "The End of the Transition Paradigm" (2002) 13:1 J. Democracy 5 (arguing that the majority of transitional states have not developed or even made progress in achieving well-functioning democracies).

[13] *Freedom in the World 2002, ibid.* E.g., of the 47 states considered "not free", 9 states have an operative classical or hybrid ombudsman: Kazakhstan, Kyrgyzstan, Uzbekistan, Haiti, Pakistan, Rwanda, Sudan, Tunisia and Zimbabwe. Côte d'Ivoire's ombudsman has not been activated. Of the 89 free states, 25 have no ombudsman at all at the national and/or sub-national levels and of 56 partly free states, 17 have no ombudsman at all. Most of the states without an ombudsman are small and/or developing nations, and a few of them are considering establishing the institution. Human rights commissions are not included in this scenario.

[14] See *infra* Chapter 12 for various effectiveness factors.

to improve the accountability of the administrative branch of government to members of the public. The ombudsman can be characterized as both a horizontal and a vertical accountability mechanism.

THE OMBUDSMAN AS A HORIZONTAL ACCOUNTABILITY MECHANISM

In examining the administrative aspects of governance, public accountability is identified as one of the indicators of its legitimacy.[15] Stephen Owen defines public accountability in the context of administrative governance, as follows:

> Government officials must be accountable to the public for the fair, honest and open exercise of statutory discretion. This requires due process in administrative decision-making which provides the interested public with access to information, protection of privacy, notice of decisions that will significantly affect them, opportunities for hearings and reasoned decisions from public officials. Public accountability for the protection of these rights is provided through ombudsman offices, human rights commissions, freedom of information and privacy commissioners, anti-corruption and conflict of interest commissioners.[16]

Owen states that an effective democratic state relies on legislative, administrative and judicial governance institutions which incorporate substantial public participation.[17] He states that "[t]he legitimacy of any particular governance function will be measured by its effectiveness in engaging, representing, serving and protecting the public in a meaningful and effective way."[18] A well-functioning classical or human rights ombudsman can serve as one important element of administrative governance, enhancing the accountability of the government. Accountability and public participation are also elements of good governance, discussed later in this Chapter.

Another perspective on government accountability comes from the field of political science where government oversight institutions which control the actions of other government bodies are analyzed.[19] These state institutions provide forms of "horizontal accountability", in contrast to the vertical accountability imposed on governments by voters through periodic free and fair elections. Horizontal accountability can be defined as "the capacity of state institutions to check abuses by other public agencies and branches of government."[20] These oversight institutions (or "watchdog agencies") include courts of all kinds, electoral commissions, state auditors, anti-corruption agencies, conflict of interest

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[15] S. Owen, "Good Governance" in A. Grzybowski and S. Owen, *Good Governance and Conflict Management: A framework for conflict analysis and resolution* (Victoria: Institute for Dispute Resolution, University of Victoria, 2001) at 3-4.

[16] *Ibid.* at 4.

[17] *Ibid.* at 6.

[18] *Ibid.*

[19] See A. Schedler, L. Diamond and M.F. Plattner, eds., *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder: Lynne Rienner Publishers, 1999) [hereinafter *The Self-Restraining State*].

[20] L. Diamond, M.F. Plattner and A. Schedler, "Introduction" in *The Self-Restraining State, ibid.* at 3.

commissioners, privacy commissioners, classical and hybrid ombudsmen, human rights commissions, children's ombudsmen and other specialized ombudsman institutions.[21]

Schedler describes how horizontal accountability mechanisms can provide different forms of accountability, as follows:

> [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.[22]

Classical and hybrid ombudsman offices, with the latter having additional human rights protection, corruption fighting and/or leadership code mandates, can be considered to be institutions of horizontal accountability in democratic governments. The ombudsman and human rights ombudsman improve legal, constitutional and administrative horizontal accountability of government by impartially investigating the conduct of public administration; recommending changes to law, policy or practice when illegal or improper administration is uncovered; reporting to the legislature and the public; and, in some institutions, exercising stronger powers such as court action. Ombudsmen with anti-corruption and/or leadership code mandates can supply legal, administrative and financial horizontal accountability with their focus on misuse of public funds, fraud, conflicts of interest, etc. Different offices will have different foci: classical ombudsmen receive complaints that raise primarily issues of administrative and legal accountability, while others – such as those with an express human rights protection function – will work extensively in areas of constitutional and legal accountability.

The ombudsman institution can be examined from the perspective of the level of accountability provided by self-regulatory state institutions. Schedler states that the concept of political accountability is composed of "answerability" and "enforcement" elements.[23] 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 were based, whereas the enforcement element of accountability is composed of punishment or other negative sanctions for inappropriate behaviour.[24] Schedler concludes that state institutions can still offer some level of accountability even if they only exercise the answerability form of accountability. Schedler states 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" expressions do not share a common core but lack one or more elements that characterize the prototypical "primary" category.[25]

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[21] See e.g., *The Self-Restraining State, ibid.*; K.M. Dye and R. Stapenhurst, *Pillars of Integrity: The Importance of Supreme Audit Institutions in Curbing Corruption* (Washington, D.C.: The Economic Development Institute of the World Bank, 1998).

[22] A. Schedler, "Conceptualizing Accountability" in *The Self-Restraining State, ibid.*, 13 at 22.

[23] *Ibid.* at 14-17.

[24] *Ibid.*

[25] *Ibid.* at 18.

Based on Schedler's classification, most classical and hybrid ombudsman institutions have to be classified as horizontal accountability state mechanisms which have only the answerability element of accountability. If the enforcement aspect of accountability is considered to be present only when the institution is given the power to impose punishment, then most ombudsmen will be considered to lack this element unless "soft" types of sanctions are included, such as the making of recommendations to correct poor administration and negative publicity in ombudsman reports.

Schedler's categorization does not take into account the powers of the ombudsman, and forms of alternative dispute resolution undertaken by ombudsmen. Ombudsman powers – investigating a complaint thoroughly and impartially, analysing the case according to law and fairness, making recommendations to government for changes in law and policy, and public reporting – go beyond the concept of answerability accountability. It is more accurate to classify classical and many hybrid ombudsmen as providing a third, intermediate form of accountability that lies between answerability and enforcement accountability.

In addition, some hybrid ombudsmen have additional, stronger powers, such as the ability to take cases to constitutional and other courts for judicial determination of constitutional or legal issues, the power to prosecute state officials and, in a small number of cases, the power to enforce their recommendations in court.[26] Ombudsmen with these types of powers engage in or contribute to enforcement accountability.

However, regardless of the type and level of accountability provided, in order to act as an effective horizontal accountability mechanism, one crucial requirement of the ombudsman structure is that it must be independent from the executive/administrative branch of government, and there are other factors that also determine the effectiveness of the institution as discussed further in Chapter 12.

THE OMBUDSMAN AS A VERTICAL ACCOUNTABILITY MECHANISM

Classical and hybrid ombudsmen can also improve the vertical accountability of the government to the populace. The concept of vertical accountability is typically seen as being implemented through the holding of periodic free and fair elections allowing the citizenry to select their leaders and eject them from office.[27] However, classical ombudsmen, hybrid ombudsmen and other national human rights institutions with a complaints investigation function also give the populace a mechanism to indicate their displeasure with the manner in which government is being administered. It has been stated that:

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[26] E.g., the Ombudsmen of Finland and Sweden and the Inspectorate of Government in Uganda can prosecute public officials; many human rights ombudsmen (e.g., Spain, Portugal, many in Latin America and Central/East Europe, the Seychelles) can take cases involving constitutional and other legal matters before judicial tribunals; and the human rights ombudsmen in Tanzania and Ghana can enforce their recommendations in the courts. For further details see *supra* Chapter 1, *infra* Chapters 4-8.

[27] See generally G. O'Donnell, "Horizontal Accountability in New Democracies" in *The Self-Restraining State*, *supra* note 19 at 29.

> [t]oday's ombudsman is a profoundly democratic institution. With the right to complain, the individual citizen is given a means of directly influencing the administration more specifically and, in its own time and place, more powerfully, than by casting his vote as one of many in an election. This element of direct democracy may account for some of the appeal of the ombudsman idea.[28]

Ombudsman institutions permit members of the public to lodge complaints that the government has not acted legally or fairly, with the result that the government is subjected to an impartial investigation of its conduct and may be faced with criticism of its actions or, depending on the ombudsman institution, stronger consequences.

The role of ombudsmen in democratic governance, including their conceptualization as mechanisms to strengthen vertical and horizontal accountability, also interfaces with the concept of good governance, discussed in detail below.

Good Governance, Public Administration and the Ombudsman

WHAT IS GOOD GOVERNANCE?

A growing number of international organizations, donor governments and policymakers have adopted the concept of good governance as a standard for domestic governance. The calls for good governance are usually either directed at those developing states which need to obtain development and technical assistance or are applied to states in a post-conflict peace-building phase. The concept of good governance can be applied to the national and sub-national levels of government within states. Most of the international developments to date have been directed at governance at the state level. However, good governance can also be used as a standard of conduct for governance by international organizations.[29]

While good governance is used as a standard for development and development assistance, there is insufficient evidence of state practice to support its conceptualization as a right to good governance under international law.[30] Similarly, there is insufficient evidence to argue that states have a duty under international law to exercise good governance. Instead, good governance has been described as "a notion embodying a number of general principles of government."[31] However, the normative aspects of democratic

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[28] I.E. Nebenzahl, "The Direct and Indirect Impact of the Ombudsman" in G.E. Caiden, ed., *International Handbook of the Ombudsman: Evolution and Present Function* (Westport: Greenwood Press, 1983) 59 at 64. See also J.E. Méndez and I. Aguilar, "La relación entre el Ombudsman y el Derecho Internacional de los Derechos Humanos" in (1998) 1 Debate Defensorial: Revista de la Defensor del Pueblo de Perú 55 at 56-58.

[29] N. Woods, "Good Governance in International Organizations" (1999) 5 Global Governance 39. For further discussion on good governance in international organizations see *infra* Chapter 10.

[30] T. van Boven, "Is There an Emerging Right to Good Governance?" in L.E. Green, ed., *Proceedings of the Netherlands-Canada/1995 Distinguished Lecture Series* (The Hague: The Netherlands-Canada Committee, 1996) 50 at 57.

[31] *Ibid.*

governance and human rights protection – elements often incorporated in the broader basket of good governance policies – must be considered separately. International law rights and obligations are clearly attached to human rights protection and, as noted earlier in this Chapter, there is an evolving normative structure under international law surrounding democratic governance.

In international development circles, the notion of good governance grew out of the economic growth limitations of structural adjustment programs, the need to reform post-Communist state systems and the success of interventionist East Asian states in fuelling economic growth.[32] The concept of "governance" was adopted by the World Bank in 1989 to connote "the exercise of political power to manage a nation's affairs" and "good governance" was considered to comprise "a public service that is efficient, a judicial system that is reliable and an administration that is accountable to its public."[33] In 1992, the World Bank defined governance as "the manner in which power is exercised in the management of a country's economic and social resources for development" and good governance was considered to be "synonymous with sound development management."[34]

There is no one internationally accepted definition of good governance. Dias and Gillies have broadly conceptualized good governance as:

> the responsible use of political authority to manage a nation's affairs. It requires a professionally competent, honest and merit-based civil service, sound fiscal management and public financial accountability, effective state institutions to formulate and implement national development policies, and a just and predictable legal framework. The challenge of good governance is to build an efficient, democratic culture within the machinery of government; one which respects human rights and is accountable to the civic culture in society at large.[35]

Rumu Sarkar has stated that "'[g]ood governance' involves measures to address corruption, transparency in the political process, accountability of public officials and standards of public sector management."[36] The Dias and Gillies definition takes the concept of good governance beyond the institutional and administrative framework of government to include the functioning of the legal system. Broader conceptions of good

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[32] M. Kjœr and K. Kinnerup, "Good Governance: How Does It Relate to Human Rights?" in H.O. Sano and G. Alfredsson, eds., *Human Rights and Good Governance: Building Bridges* (The Hague: Kluwer Law International, 2002) 1 at 2-3 [hereinafter *Human Rights and Good Governance*].

[33] World Bank, *Sub-Saharan Africa – From Crisis to Sustainable Growth. A Long Term Perspective Study* (Washington, D.C.: World Bank, 1989) at 60, xii. See A. Seidman, R.B. Seidman and T. Wälde, "Building Sound National Legal Frameworks for Development and Social Change" in A. Seidman, R.B. Seidman and T. Wälde, eds., *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* (London: Kluwer Law International, 1999) at 1, note 1; R. Sarkar, *Development Law and International Finance* (London: Kluwer Law International, 1999) at 36; D. Gillies, *Human Rights, Democracy, and "Good Governance": Stretching the World Bank's Policy Frontiers* (Montreal: International Centre for Human Rights and Democratic Development, 1993) at 18.

[34] World Bank, *Governance and Development* (Washington, D.C.: World Bank, 1992) at 1.

[35] C.J. Dias and D. Gillies, *Human Rights, Democracy and Development* (Montreal: International Centre for Human Rights and Democratic Development, 1993) at 10-11.

[36] Sarkar, *supra* note 33 at 37.

governance also include civil society and the private sector, and their interrelationship with the public sector.[37]

Good governance can be broken down into political and economic components. The political aspects focus on issues such as government architecture, democratization and human rights protection, while the economic dimension comprises matters such as the role of the state in the economy and liberalization of trade and the monetary system.[38] A focus on economic governance is a narrow reading of good governance, whereas a broader definition includes political governance.[39] It has been argued that good governance does not necessarily influence the size of government but, rather, relates to its qualitative aspects and its procedural mechanisms for public participation and accountability.[40] However, a purely economic focus on good governance with its notions of curtailing government involvement in the markets and the rationalization of government services does in fact put pressure on governments to downsize.

There is a clear interconnection between democracy and good governance, with democratic governance being a prerequisite for the exercise of good governance. However, if a state does have a democratic government, good governance does not automatically follow.[41] The protection of human rights is often included within the concept of good governance.[42] However, human rights in the context of good governance are often treated in a vague and instrumentalist manner, as one more vehicle for strengthening development.[43] From legal and moral perspectives, human rights protection must be considered as an autonomous and essential matter for every state regardless of its development situation.

International organizations generally treat the concept of good governance as an expandable container of many practices, including a professional civil service, a transparent and accountable administration, elimination of corruption in government, strengthening and upholding the rule of law, protection of human rights, civilian police training, development of a fair free market system, devolution and decentralization of

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37 The United Nations Development Programme includes the state, civil society and private sector spheres in its conception of good governance, United Nations Development Programme, *Governance for sustainable human development: A UNDP policy document* (New York, UNDP, Jan. 1997).

38 B. Simma, J.B. Aschenbrenner and C. Schulte, "Human Rights Considerations in the Development Co-operation Activities of the EC" in P. Alston, ed., *The EU and Human Rights* (Oxford: Oxford University Press, 1999) 571 at 577.

39 S. Baden, "Gender, Governance and the Feminisation of Poverty" in United Nations Development Programme, *Women's Political Participation and Good Governance: 21st Century Challenges* (New York: United Nations Development Programme, 2000) at 29.

40 See P. McAuslan, "Law, governance and the development of the market: practical problems and possible solutions" in J. Faundez, ed., *Good Government and Law: Legal and Institutional Reform in Developing Countries* (MacMillan Press Ltd., 1997) 25 at 34.

41 An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping, Report of the Secretary-General pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 Jan., 1992, UN Doc. A/47/277-S/24111 (1992) in B. Boutros-Ghali, *An Agenda for Peace* (New York: United Nations, 1992) at 17; B. Boutros-Ghali, *An Agenda for Development*, UN Doc. A/48/935 (1995) at 22-25.

42 E.g. the UN Secretary-General has stated that "[i]ncreasingly in recent years, human rights have also come to be seen as an integral element of good governance." Annual Report of the Secretary-General on the Work of the Organization (1997), UN Doc. A/52/1 (1997), para. 27.

43 van Boven, *supra* note 30 at 57; H.O. Sano, "Good Governance, Accountability and Human Rights" in *Human Rights and Good Governance, supra* note 32, 123 at 142.

government and reasonable levels of military expenditure. Organizations with mandates that are tied to the economic sphere may tend to highlight aspects of good governance that relate to market and financial issues but, even here, the boundary between the economic and the political have blurred and these organizations have increasingly looked to political dimensions of good governance when the latter has effects on economic development.[44]

There is scholarly critique of good governance. One criticism is that when good governance is given an economic focus, the result is a neo-liberal application with its circumscribed role for the state.[45] As Kjœr and Kinnerup point out, some successful good governance programs "can co-exist with a recipient government that regularly violates human rights."[46] In this vein, James Thuo Gathii argues that the new international good governance standards – which promote a public law of democracy and human rights protection together with a private law movement promoting macroeconomic reform – are contradictory and serve the agendas of the major multilateral and bilateral donors.[47] He argues that the main emphasis of the good governance movement is on political and procedural rights, and that economic and social human rights and structural economic inequality are ignored, because "neo-liberal economic reform actually undermines the promotion of democracy through its stringent requirement on governments to cut back on social expenditures in areas such as health, education, worker benefits and rights among others."[48] Kjœr and Kinnerup argue that a "legal perspective" on human rights should be taken where good governance policies must comply with human rights norms regardless of their impact on economic development, and methods for making good governance and human rights protection mutually reinforcing must be sought.[49] Further, good governance programs must include elements that promote and protect economic, social and cultural rights as well as civil and political rights.

A second criticism focuses on the Western liberal roots of the concept and its application to non-Western states – a critique which parallels that made about the heritage of the international human rights system. Makau wa Mutua has recognized that the World Bank's call for good governance is not altruistic, and is advocacy for liberal democracy in the target states.[50] Nira Wickmarasinghe has critiqued the good governance polices

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[44] I.F.I. Shihata, "The World Bank and "Governance" Issues in its Borrowing Members" in I.F.I. Shihata, *The World Bank in a Changing World: Selected Essays* (Dordrecht: Martinus Nijhoff Pub., 1991) 53 at 75-77.

[45] Kjœr and Kinnerup, *supra* note 32 at 10.

[46] *Ibid.* at 15. See also Sano, *supra* note 43 at 128.

[47] J.T. Gathii, "The Limits of the *New* International Rule of Law on Good Governance" in E.K. Quashigah and O.C. Okafor, eds., *Legitimate Governance in Africa: International and Domestic Legal Perspectives* (The Hague: Kluwer Law International, 1999) 207 at 209, 215. See also J.T. Gathii, "Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law" (1999) 5 Buffalo H.R. Law Rev. 107.

[48] Gathii, "The Limits of the *New* International Rule of Law on Good Governance", *ibid.* at 213. See also Kjœr and Kinnerup, *supra* note 32 at 9-10.

[49] Kjœr and Kinnerup, *ibid.* at 16-18.

[50] M. wa Mutua, "Politics and Human Rights: An Essential Symbiosis" in M. Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000) 149 at 172.

of the World Bank from two perspectives.[51] Wickmarasinghe argues that, first, the relationship between democracy and development is too complex to be successfully captured in the notion of good governance and, second, the concept of good governance is an essentialist and totalizing ideology, based on Western ideology.[52] Following on from this latter point, van Boven has noted that the standard of good governance is typically unilaterally imposed by international agency and developed state donors on developing nations.[53] He argues that the concept will only gain in credibility if it is reciprocally applied by donors to their own governance structures as a demonstration of mutual commitment.[54]

A third critique is that good governance formulations generally lack a gender perspective. State programs to reform and strengthen state institutions, the constitution, the legal system and other aspects of governance can ignore or marginalize women. It has been noted that "governance policies rarely concentrate on 'getting institutions right for women in development' ".[55] The use of a gender perspective in good governance, the greater involvement of women in good governance planning and implementation, and gender mainstreaming in good governance programs are all needed.[56]

GOOD GOVERNANCE AS A STANDARD USED BY THE INTERNATIONAL COMMUNITY

As will be surveyed in more detail below, a variety of international organizations and donor states have implemented the standard of good governance in a growing number of international instruments. It is still the case that the majority of international organizations which use the good governance standard apply it in the context of development assistance to developing states and to those states – also typically developing nations – that are in post-conflict peace-building phases. However, a few international organizations which are now applying the concept of good governance to their members are composed entirely or primarily of South nations, e.g. the Caribbean Community (CARICOM), Commonwealth and African Union.

Most of the international instruments referring to good governance are not legally binding treaties, but rather are soft law documents, such as international organization programs, policies and resolutions. More recently, however, treaties containing good

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[51] N. Wickramarasinghe, "From Human Rights to Good Governance: The Aid Regime in the 1990s" in M. Sellers, ed., *The New World Order: Sovereignty, Human Rights and the Self-Determination of Peoples* (Berg, 1996) 305.

[52] *Ibid.* at 318-321.

[53] van Boven, *supra* note 30 at 54-55, 57; N. Schrijver, "Reciprocity in International Development Cooperation: The Case of the Netherlands and the 'BBC-Countries'" in F. Weiss, E. Denters and P. de Waart, eds., *International Economic Law with a Human Face* (The Hague: Kluwer Law International, 1998) 387 at 396-7.

[54] van Boven, *ibid.* at 57.

[55] Baden, *supra* note 39, 27 at 30 (quoting A.M. Goetz, "Institutionalising women's interests and gender-sensitive accountability in development", Editorial in "Getting institutions right for women in development" (July 1995) 26:3 *IDS Bulletin*).

[56] See C. Chinkin, *Gender Mainstreaming in Legal and Constitutional Affairs: A Reference Manual for Governments and Other Stakeholders* (London: Commonwealth Secretariat, 2001).

governance elements are beginning to appear via the African Union and the European Union, discussed further below.

Most of the international organizations surveyed use a broader definition of good governance, including human rights protection and other "political" aspects. Notable exceptions are the World Bank and International Monetary Fund (IMF) which emphasize economic aspects of good governance, although the World Bank does include some political elements such as reform of the judiciary, public administration and the legal system.

The United Nations System

a) UN Programs and Post-Conflict Peace-Building

The United Nations (UN) has adopted good governance as an important element of its programs in various sectors, especially in its peace-building, development and human rights activities. Kofi Annan, UN Secretary-General, has defined good governance, stating:

> [B]roadly speaking, and making due allowance for cultural differences, good governance comprises the rule of law, effective state institutions, transparency and accountability in the management of public affairs, respect for human rights, and the meaningful participation of all citizens in the political processes of their countries and in decisions affecting their lives.[57]

The Secretary-General also has recognized the importance of good governance in UN activities:

> UN 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 post-conflict settings, good governance can promote reconciliation and offer a path for consolidating peace.[58]

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[57] Annual Report of the Secretary-General on the Work of the Organization (1997), *supra* note 42, para. 22. Also see Annual Report of the Secretary-General on the Work of the Organization (1998), UN Doc. A/53/1 (1998), para. 114, "By good governance is meant creating well-functioning and accountable institutions – political, judicial and administrative – that citizens regard as legitimate, through which they participate in decisions that affect their lives, and by which they are empowered. Good governance also entails a respect for human rights and the rule of law generally."

[58] K. Annan, "The Quiet Revolution" (1998) 4 Global Governance 123 at 123. See also the good governance provisions in United Nations, The causes of conflict and the promotion of durable peace and sustainable development in Africa, Report of the Secretary-General (1998), UN Doc. A/52/871-S/1998/318/1998, (1998) 37 Int'l Legal Mat. 913 (good governance in categories of respect for human rights and the rule of law, transparency and accountability in public administration, the enhancement of administrative capacity, and the strengthening of democratic governance), endorsed in S.C. Res. 1170, UN Doc. S/RES/1170/1998 (May 28, 1998), (1998) 37 Int'l Legal Mat. 936 (Preamble stresses "the importance of promoting good governance, the rule of law and sustainable development as essential factors in the prevention of conflicts in Africa").

b) UN General Assembly Resolutions

In a number of resolutions, the UN General Assembly has connected good governance to the strengthening of democracy, development, globalization and human rights.[59] The 2000 Millennium Declaration included "human rights, democracy and good governance" as one of its key objectives, and in another objective – that of development and poverty eradication – it was recognized that good governance at both the domestic and international levels is a factor in achieving the latter.[60] The General Assembly has also begun to emphasize the importance of efficient, accountable, effective and transparent public administration.[61]

c) UN Conferences

The 1995 UN World Summit for Social Development produced the Copenhagen Declaration on Social Development and a Programme of Action of the World Summit.[62] Among the principles and goals of the Copenhagen Declaration on Social Development, the state participants underlined "the importance of transparent and accountable governance and administration in all public and private national and international institutions".[63] The participating states also made a number of commitments in the Copenhagen Declaration, including that of creating an environment to enable people to achieve social development, which at the national level would require states to provide a legal framework that includes, *inter alia*, "full respect for all human rights and fundamental freedoms and the rule of law, access to justice, the elimination of all forms of discrimination, transparent and accountable governance and administration and the encouragement of partnership with free and representative organizations of civil society."[64]

With respect to governance matters, the Programme of Action of the World Summit for Social Development indicated that ensuring the rule of law and democracy, and maintaining rules and procedures for transparency, accountability and the prevention of corruption in public institutions are essential.[65] The Programme of Action recognized

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[59] U.N.G.A. Res. 55/96 (Dec. 4, 2001), UN Doc. A/RES/55/96 (Feb. 28, 2001), Preamble, art. 1(f) (calls on states to promote and consolidate democracy *inter alia* through good governance such an increasing both transparency of public institutions and accountability of public officials); U.N.G.A. Res. 55/43 (Nov. 27, 2000), UN Doc. A/RES/55/43 (Jan. 18, 2001), para. 7 (support states' efforts to achieve good governance and democratization); United Nations Millennium Declaration, U.N.G.A. Res. 55/2 (Sept. 8, 2000), UN Doc. A/RES/55/2 (Sept. 18, 2000) Part V; U.N.G.A. Res. 56/150 (Dec. 19, 2001), UN Doc. A/RES/56/150 (Feb. 8, 2002) arts. 11, 21(c) (good governance at the international level); U.N.G.A. Res. 56/165 (Dec. 19, 2001), UN Doc. A/RES/56/165 (Feb. 26, 2002) art. 3 (good governance within states and at the international level).

[60] Millennium Declaration, *ibid.*, III, para. 13, V.

[61] U.N.G.A. Res. 57/277 (Dec. 20, 2002), UN Doc. A/RES/57/277 (March 7, 2003), para. 2; U.N.G.A. Res. 56/213 (Dec. 21, 2001), UN Doc. A/RES/56/213 (Feb. 28, 2002), Preamble.

[62] World Summit for Social Development, *The Copenhagen Declaration and Programme of Action* (New York: United Nations Department of Public Information, 1995).

[63] Copenhagen Declaration on Social Development, *ibid.*, art. 26(f), (n).

[64] *Ibid.*, Commitment 1(a).

[65] Copenhagen Programme of Action, *supra* note 62, art. 14(b). See also arts. 15(a), (b), (d), 17(e) for actions on human rights protection and implementation, and the strengthening of democracy.

both the need to improve governance practices and develop links between the administrative branch of government and the public in order to increase democratic participation. The Programme of Action, in Article 71, stated that governments "should make public institutions more responsive to people's needs" by:

> d. Opening channels and promoting full confidence between citizens and government agencies, and developing affordable recourse procedures accessible to all people, especially those who have no access to channels and agencies of communication to seek redress of grievances; . . . [and]
>
> f. Requiring accountability for the honest, just and equitable delivery of public services to the people from all public officials; . . .[66]

In March 2002, an International Conference on Financing for Development was held in Monterrey, Mexico under UN auspices. Designed to improve the various financial aspects of development such as official development assistance (ODA), international trade and foreign investment, the Conference was attended by representatives of governments, the business sector, civil society, and international organizations such as the World Bank, IMF and World Trade Organization (WTO). Conference participants adopted the Monterrey Consensus by acclamation on March 22, 2002.[67] Notably, all subscribing governments, both developed and developing, committed themselves to "good governance at all levels and the rule of law."[68] They agreed that "[g]ood governance is essential for sustainable development",[69] good governance at all levels is necessary to ensure the effectiveness of ODA,[70] and "[g]ood governance at all levels is also essential for sustained economic growth, poverty eradication and sustainable development worldwide."[71]

d) United Nations Development Programme

The United Nations Development Programme (UNDP) includes good governance as an important element of their initiative to achieve sustainable human development.[72] The UNDP has also recognized that human development and the enjoyment of human rights are mutually reinforcing.[73] The UNDP's definition of governance is "the exercise of economic, political, and administrative authority to manage a country's affairs at all levels,

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66 *Ibid.*, art. 71(d), (f), (g).

67 International Conference on Financing for Development, Final Outcome of the International Conference on Financing for Development (Monterrey Consensus), UN Doc. A/CONF/198/3 (March 22, 2002).

68 *Ibid.*, para. 4.

69 *Ibid.*, para. 11.

70 *Ibid.*, para. 40.

71 *Ibid.*, para. 61.

72 *Governance for sustainable human development, supra* note 37; United Nations Development Programme, *Reconceptualizing Governance*, Discussion Paper 2 (New York: UNDP, Jan. 1997); United Nations Development Programme, *UNDP and Governance: Experience and Lessons Learned*, Management Development and Governance Division, Lessons Learned Series No. 1 (Oct. 1998).

73 United Nations Development Programme, *Human Development Report 2000* (New York: Oxford University Press, 2000).

comprising the mechanisms, processes, and institutions through which that authority is directed."[74] For the UNDP, good governance is:

> participatory, transparent, accountable, and efficient. It promotes the rule of law and equal justice under the law. It also recognises that governance is exercised by the private sector and civil society, as well as the state. . . .[75]

In proposing ideas for strengthening good governance, the UNDP has suggested the establishment of ombudsman and human rights oversight bodies.[76]

e) UN Human Rights Bodies

The UN Commission on Human Rights also addressed the concept of good governance in the promotion of human rights in a resolution passed in April 2000.[77] The Commission stated that:

> transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people, is the foundation on which good governance rests, and that such a foundation is a sine qua non for the promotion of human rights.[78]

The Commission also expressly recognized that good governance practices will differ from country to country, and that the responsibility for deciding on the form of good governance in practice and the mode of its implementation rests with each state.[79]

Also under the umbrella of the UN human rights system, the Committee on Economic, Social and Cultural Rights (CESCR) is the treaty body under the International Covenant on Economic, Social and Cultural Rights (ICESCR) which makes General Comments on the interpretation of ICESCR provisions, and examines and comments upon periodic state reports concerning implementation of their treaty obligations.[80] Recent General Comments of the CESCR have made references to good governance and to the work of national ombudsman institutions. CESCR General Comment No. 12, on the right to adequate food contained in ICESCR Article 11, states that "[g]ood governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all."[81] CESCR General Comment No.

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[74] *UNDP and Governance: Experience and Lessons Learned, supra* note 72 at 2. See also *Governance for sustainable human development, supra* note 37 at 2-3; *Reconceptualizing Governance, supra* note 72 at 9; *Women's Political Participation and Good Governance: 21st Century Challenges, supra* note 39 at 29.

[75] *UNDP and Governance: Experience and Lessons Learned, ibid.*

[76] *Ibid.* at 15.

[77] "The role of good governance in the promotion of human rights", U.N.C.H.R. Res. 2000/64, UN Doc. E/CN.4/RES/2000/64 (2000).

[78] *Ibid.*, para. 1.

[79] *Ibid.*, Preamble.

[80] International Covenant on Economic, Social and Cultural Rights, Annex to G.A. Res. 2200A, 21 U.N. G.A.O.R., Supp. (No. 16) 49 (1966).

[81] Committee on Economic, Social and Cultural Rights, General Comment No. 12, UN Doc. E/C.12/1999/5 (May 12, 1999), para. 23.

14, on the right to the highest attainable standard of health in ICESCR Article 12, states that national health plans and strategies:

> should . . . be based on the principles of accountability, transparency and independence of the judiciary, since good governance is essential to the effective implementation of all human rights, including the realization of the right to health.[82]

General Comment No. 15 on the right to water, read into ICESCR Articles 11 and 12, contains the same good governance language with respect to national water plans and strategies.[83] All of these General Comments also state that national ombudsmen and human rights commissions should be permitted to address violations of the rights discussed.[84]

World Bank and International Monetary Fund

As noted above, the World Bank took the lead in advocating the strengthening of "governance" in developing states, including public sector reform.[85] The World Bank has considered governance matters in connection with the Bank's economic development mandate, taking the position that good governance supports equitable development and that "it is an essential complement to strong economic policies".[86] As David Gillies has stated, "[w]hile the good governance agenda makes no presumption about the political form of government, there is an assumption that the success or failure in achieving sustainable economic development is contingent on the quality of governance."[87] From this perspective, the World Bank has looked at four elements of governance: public sector management, accountability, the legal framework for development, and transparency and information.[88] The Bank has promoted good governance reforms in its support of economic liberalization, education programs, and legal, judicial and civil service

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[82] Committee on Economic, Social and Cultural Rights, General Comment No. 14, UN Doc. E/C.12/2000/4 (July 4, 2000), para. 55.

[83] Committee on Economic, Social and Cultural Rights, General Comment No. 15, UN Doc. E/C.12/2002/11 (Jan. 20, 2003), para. 49.

[84] General Comment No. 12, *supra* note 81, para. 32; General Comment No. 14, *supra* note 82, para. 59; General Comment No. 15, *ibid.*, para. 55.

[85] See e.g. World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth, supra* note 33; World Bank, *Governance and Development, supra* note 34; World Bank, *Governance: The World Bank's Experience* (Washington, D.C., The World Bank, 1994); World Bank, *The State in a Changing World*, World Development Report (Oxford: Oxford University Press, 1997).

[86] World Bank, *Governance and Development, ibid.* at 1. See Shihata, "The World Bank and "Governance" Issues in its Borrowing Members", *supra* note 44; Gillies, *Human Rights, Democracy, and "Good Governance": Stretching the World Bank's Policy Frontiers, supra* note 33; J. Cahn, "Challenging the New Imperial Authority: The World Bank and the Democratization of Development" (1993) 6 Harvard H.R.J. 159 at 163-164.

[87] Gillies, *ibid.* at 18.

[88] E.g. World Bank, *Governance and Development, supra* note 34 at 2; *Governance: The World Bank's Experience, supra* note 85 at xiii, 1-36.

reform.[89] The Bank has also supported corruption-fighting initiatives, another facet of good governance.[90]

Likewise, the IMF has implemented a policy of promoting aspects of good governance related to economic performance with respect to member states.[91] The IMF focuses on matters such as transparency in public sector financial transactions, the reform of public administration and the elimination of corruption and fraud in government.[92]

Organization for Economic Cooperation and Development

The Organization for Economic Cooperation and Development (OECD) has also included the concepts of good governance and democratization in its development assistance policies.[93] The OECD has stated that:

> It has become increasingly apparent that there is a vital connection between open, democratic and accountable systems of governance and respect for human rights, and the ability to achieve sustained economic and social development. . . . This connection is so fundamental that participatory development and good governance must be central concerns in the allocation and design of development assistance.[94]

In examining the components of good governance, the OECD has considered the following to be important: the rule of law, public sector management, controlling corruption and reducing excessive military expenditures.[95] According to the OECD, public sector management includes systems of accountability and information so that government is transparent, well managed and has feedback processes to control its actions.[96]

European Union

Over the course of the 1990s, the European Union has attached standards of democracy, human rights protection and good governance to its external development assistance programs.[97] For example, in its 1998 Common Position on human rights,

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89 I.F.I. Shihata, "Democracy and Development" (1997) 46 Int'l & Comp. Law Q. 635 at 641.

90 See e.g. Dye and Stapenhurst, *supra* note 21.

91 International Monetary Fund, *Good Governance: The IMF's Role* (Washington, D.C.: IMF, 1997).

92 IMF Guidance Note on the Role of the IMF in Governance Issues (adopted July 25, 1997), rep. in *Good Governance: The IMF's Role, ibid.*

93 E.g. Organisation for Cooperation and Development, *Participatory Development and Good Governance* (Paris: OECD, 1995); Organisation for Economic Cooperation and Development, Development Assistance Committee, *Final Report of the Ad Hoc Working Group on Participatory Development and Good Governance* (Paris: OECD, 1997).

94 *Participatory Development and Good Governance, ibid.* at 5.

95 *Ibid.* at 14; *Final Report of the Ad Hoc Working Group on Participatory Development and Good Governance, supra* note 93 at 6.

96 *Participatory Development and Good Governance, ibid.* at 16.

97 E.g. European Union, "Resolution of the Council and representative meeting in the Council on

democratic principles, the rule of law and good governance in Africa, the Council of the European Union stated that the Union was committed to support the democratization process in Africa on the basis of respect for various principles, including that of good governance – defined as "including the transparent and accountable management of all a country's resources for the purposes of equitable and sustainable development."[98]

The development relationship between the European Union and seventy-seven African, Caribbean and Pacific (ACP) states is now governed by the Cotonou Agreement, in force April 1, 2003, which replaces the Lomé Agreement regime.[99] The Cotonou Agreement framework supports good governance, human rights, democratic principles and the rule of law as part of long term development.[100] The Agreement requires regular political dialogue between the parties including "a regular assessment of the developments concerning the respect for human rights, democratic principles, the rule of law and good governance."[101] Further, Article 9(3) of the Cotonou Agreement states that:

> good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption.
>
> Good governance, which underpins the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute a fundamental element of this Agreement. . . .[102]

Accordingly, the Cotonou Agreement's development cooperation strategies include the promotion of good governance as a core element of the current relationship between the EU and the ACP states.[103]

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human rights, democracy and development" (Nov. 28, 1991), Bull. EC 11/1991 at 122-123; "Common Position concerning human rights, democratic principles, the rule of law and good governance in Africa", May 25, 1998, O.J. C L. 158/1 (June 2, 1998). See E. Stein, "Reflections on Democracy in the European Union" in M.C.E.J. Bronckers and R. Quick, eds., *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (The Hague: Kluwer Law International, 2000) at 3; Simma, Aschenbrenner and Schulte, *supra* note 38; T. King, "Human Rights in the Development Policy of the European Community: Towards a European World Order?" (1997), 28 Netherlands Yrbk. Int'l Law 51.

98 Common Position concerning human rights, democratic principles, the rule of law and good governance in Africa", *ibid.*, art. 2(d).

99 Cotonou Agreement, <http://www.europa.eu.int/comm/development/cotonou> (signed June 23, 2000, in force April 1, 2003). The Agreement has a twenty year term, open to revisions every five years.

100 Cotonou Agreement, *ibid.*, Preamble.

101 *Ibid.*, art. 8(4).

102 *Ibid.*, art. 9(3).

103 *Ibid.*, art. 20(d).

The Commonwealth

As a voluntary association of fifty-three states, the Commonwealth has also addressed the importance of good governance in its participating states and, in some aspects, this has recently been connected to anti-corruption initiatives.[104]

In the 1991 Harare Commonwealth Declaration, the Heads of Government pledged to protect and promote the fundamental political values of the Commonwealth, including "democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, [and] just and honest government . . .".[105] Whereas the Harare Declaration did not expressly mention good governance, given its origins at the start of the 1990s, the concept of "just and honest government" represented the essence of contemporary conceptions of good governance. In the 1999 Durban Communiqué, however, the terminology had evolved and the Commonwealth Heads of Government renewed their "commitment to the Commonwealth's fundamental political values of democracy, human rights, the rule of law, independence of the judiciary and good governance."[106] In March 2002, the Commonwealth meeting of state leaders resulted in the Coolum Declaration which reaffirmed this commitment.[107]

Organization of American States (OAS) and the Summits of the Americas

The Organization of American States (OAS) is the regional international organization representing the nations of North, Central and South America and the Caribbean.[108] The functions of the OAS range from international peace and security to human rights. In September 2001 the OAS adopted the Inter-American Democratic Charter.[109] The Charter includes references to transparency in government activities, responsible administration and respect for human rights as essential components of democracy.[110] In addition, OAS programs are to be targeted at promoting good governance, sound administration and other aspects of a strong democratic culture.[111] In June 2003, the OAS General Assembly approved by acclamation the Declaration of Santiago on Democracy and Public Trust: A New Commitment to Good Governance for the Americas.[112] It

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104 E.g. *Harare Commonwealth Declaration*, annexed to *Harare Communiqué* (1991); Commonwealth Heads of Government, *The Durban Communiqué*, Commonwealth Press release 99/68, para. 41 (Nov. 15, 1999) (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*). Zimbabwe withdrew from the Commonwealth in December 2003.

105 *Harare Commonwealth Declaration, ibid.* See generally A. Duxbury, "Reinventing the Commonwealth – the Human Rights Remedy" (1997) 46 Int'l & Comp. Law Q. 344.

106 *The Durban Communiqué, supra* note 104, para. 10.

107 *The Coolum Declaration* (March 5, 2002), <www.thecommonwealth.org> ("Declarations").

108 OAS Charter (1948), as am., (1994) 33 Int'l Legal Mat. 981.

109 Inter-American Democratic Charter (adopted Sept. 11, 2001 by OAS General Assembly), (2001) 40 Int'l Legal Mat. 1289.

110 *Ibid.*, arts. 3-4.

111 *Ibid.*, arts. 26-27.

112 Declaration of Santiago on Democracy and Public Trust: A New Commitment to Good Governance for the Americas, OAS Doc. AG/DEC.31 (XXXIII-O/03) (adopted June 10, 2003).

declares the "need to define an agenda for good governance for the Hemisphere that addresses political, economic, and social challenges and fosters credibility and public trust in democratic institutions."[113]

The states of the Americas (excluding Cuba) have also met informally in periodic summits since the first Miami Summit of the Americas held in December 1994. The Summits of the Americas have dealt with a wide range of subject matter, including human rights and democracy promotion. The Third Summit of the Americas, held in Quebec City in April 2001, placed the strengthening of democracy in the Americas on its agenda. The resulting Plan of Action included transparency and good governance as elements in improving democracy, "[r]ecognizing that good governance requires effective, representative, transparent and accountable government institutions at all levels, public participation, effective checks and balances, and the separation of powers. . . .".[114]

CARICOM

In the Caribbean region, CARICOM (Caribbean Community), composed of fifteen member states, has issued a Charter of Civil Society for the Caribbean Community which has been endorsed by all of its state members.[115] The Charter of Civil Society includes provisions on human rights and good governance. Article XVII of the Charter defines good governance in terms of the rule of law, the justice system, the conduct of public officials, the public administration and the participation of the people in the democratic process. Art. XVII states that members: shall adopt and implement all appropriate measures to ensure just, open and accountable good governance; recognize and affirm that the rule of law, the effective administration of justice and the maintenance of the independence and impartiality of the judiciary are essential to good governance; and undertake to ensure that all persons are treated fairly, humanely and equally by public authorities."[116]

African Union

The Constitutive Act of the African Union (AU) was adopted on July 11, 2000 by fifty-three African states, it entered into force in 2001 and, in 2002, the AU was officially inaugurated.[117] It will replace the Organization of African Unity (OAU) after a transition period.[118]

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113 *Ibid.*

114 III Summit of the Americas, Plan of Action (April 2001), <www.summit-americas.org>.

115 Caribbean Community Secretariat, *Charter of Civil Society for the Caribbean Community* (Georgetown, Guyana: CARICOM Secretariat, 1997).

116 *Ibid.*, art. XVII(1), (2),(5).

117 See <www.africa-union.org>; Constitutive Act of the African Union (adopted July 11, 2000); (2000) 8 African Yrbk. Int'l Law 479; Durban Declaration (July 10, 2002) (2002) 41 Int'l Legal Mat. 1029; K.D. Magliveras and G.J. Naldi, "The African Union – A New Dawn for Africa?" (2002) 51 Int'l & Comp. Law Q. 415. For further details on Africa's human rights system see *infra* Chapters 4 and 7.

118 Constitutive Act of the African Union, *ibid.*, art. 33(1).

In July 2001, the OAU adopted a plan called the New Partnership for Africa's Development (NEPAD), which has been incorporated as an AU program.[119] The development strategy in NEPAD includes a democracy and political governance initiative which considers that "development is impossible in the absence of true democracy, respect for human rights, peace and good governance."[120] This initiative includes commitments by the participating states to meet basic standards of good governance, strengthening domestic institutions such as the public administration and legislative oversight mechanisms, and creating and strengthening national, sub-regional and continental structures that support good governance.[121]

The Constitutive Act of the African Union contains a number of references to good governance. It is mentioned in its Preamble, the objectives of the AU include the promotion of "democratic principles and institutions, popular participation and governance", plus the principles of the Union include "[r]espect for democratic principles, human rights, the rule of law and good governance".[122]

Individual Donor States

Individual donor states, such as Canada, the United Kingdom, the Netherlands, France, the Nordic states, Japan and the U.S., have development assistance policies that include programs for the strengthening of good governance.[123] Donor states emphasize different aspects of the good governance concept, with Japan focussing on economic aspects and the Nordic countries and the Netherlands emphasizing human rights.[124] Most include government accountability and transparency as elements of good governance.[125] For example, Canadian official development assistance is focussed on core program areas which include human rights, democracy and good governance.[126] Similarly, the Canadian International Development Agency (CIDA) has defined good governance as "the exercise of power by various levels of government that is effective, honest, equitable, transparent and accountable."[127]

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[119] New Partnership for Africa's Development (NEPAD), <www.uneca.org>; *Durban Declaration, supra* note 117, art. 15.

[120] New Partnership for Africa's Development, *ibid.*, para. 79.

[121] *Ibid.*, paras. 81-84.

[122] Constitutive Act of the African Union, *supra* note 117, Preamble, arts. 3(g), 4(m). See also the Durban Declaration, *supra* note 117, art. 11.

[123] See Canadian International Development Agency, *Government of Canada Policy for CIDA on Human Rights, Democratization and Good Governance* (1996) at 21-22; Gillies, *Human Rights, Democracy, and "Good Governance": Stretching the World Bank's Policy Frontiers, supra* note 33 at 10; Kjœr and Kinnerup, *supra* note 32 at 7-8; Sano, *supra* note 43 at 129-131.

[124] Kjœr and Kinnerup, *ibid.* at 8, 12.

[125] See Sano, *supra* note 43.

[126] Government of Canada, *Canada in the World* (1995) at 42. The Canadian government is undergoing a foreign policy review in 2003.

[127] *Government of Canada Policy for CIDA on Human Rights, Democratization and Good Governance, supra* note 123 at 21.

Shared Elements of Good Governance

The international organizations and donor states promoting good governance have their own perspectives on the definition and contents of good governance. However, there are shared elements found in all the formulations of good governance. The consensus is that good governance is based on respect for democracy, the rule of law, democratic institutions and public participation. As one element of good governance, public administration should be transparent and accountable. Further, human rights must be protected and corruption in government should be eliminated. Ombudsman and other national human rights institutions are referred to by the UNDP and UN human rights bodies as mechanisms that contribute to building good governance in a state. Many organizations and some donor states support the establishment of the ombudsman as part of their good governance and human rights programs.

The Ombudsman and Good Governance in Domestic Law

The role of the ombudsman in building good governance is now being expressly recognized at the domestic level in a few states in the constitutional and statute law governing hybrid ombudsmen.

In Bosnia and Herzegovina, the new legislation for the national human rights ombudsman includes the promotion of good governance as one of the objectives of the institution.[128] In Uganda, the 1995 Constitution and the *Inspectorate of Government Act, 2002* reconfigures the Inspectorate as an ombudsman with anti-corruption and leadership code of conduct enforcement functions.[129] Section 225(1)(c) of Uganda's Constitution states that one of the functions of the Inspectorate is "to promote fair, efficient and good governance in public offices" and this is reiterated in its governing statute.[130] Tanzania replaced its ombudsman with a hybrid Commission for Human Rights and Good Governance that began operations in March 2002. In addition to giving the Commission functions to investigate and follow up on human rights violations and injustice committed by the public administration, the legislation confers a research function on the Commission which includes good governance issues, and it also empowers the Commission to propose changes to legislation to ensure compliance with human rights norms and the principles of good governance.[131] Ethiopian legislation to establish an ombudsman states that the objective of the institution is to bring about good governance that is of high quality, efficient, transparent and based on the rule of law.[132]

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[128] *Law on the Human Rights Ombudsman of Bosnia and Herzegovina*, BaH Official Gazette 32/00 and 19/02, art. 1(1), discussed in more detail *infra* Chapter 8.

[129] Constitution of Uganda (1995), ch. 13; *Inspectorate of Government Act, 2002*, <www.igg.go.ug>.

[130] Constitution of Uganda, *ibid.*, s. 225(1)(c); *Inspectorate of Government Act, 2002, ibid.*, s. 8(1)(c).

[131] *The Commission for Human Rights and Good Governance Act, 2001*, No. 7, s. 6(1)(d), (k); *infra* Chapter 7.

[132] *A Proclamation to Provide for the Establishment of the Institution of the Ombudsman*, Proclamation No. 211/2000, s. 5, rep. in K. Hossain et al., eds., *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (The Hague: Kluwer Law International, 2000) at 849.

The Contribution of the Ombudsman to Good Governance

Classical, hybrid and specialized ombudsmen in a state can promote good governance. As Bience Gawanas, former Ombudswoman of Namibia, has stated, "the role of the ombudsman assumes a wider dimension in that he or she is expected to defend the people's right to good governance and to be the defender of the human rights of the citizen."[133]

The establishment, strengthening and activities of classical and human rights ombudsmen fall within the political component of good governance, given their roles in democratization, administrative and legal accountability, and human rights protection. In addition, ombudsmen with corruption-fighting and leadership code mandates and the work of ombudsman offices generally in making recommendations directed at improving the efficiency of administrative conduct may also fall within the economic dimensions of good governance.

Focussing on the core elements of good governance, the UNDP has stated that "[g]ood governance is, among other things, participatory, transparent and accountable. It is also effective and equitable."[134] Similarly, Ngaire Woods has argued that the three core elements of good governance are: participation, accountability and fairness.[135] Stephen Owen states that "[g]ood governance is most likely to occur when it involves high levels of public participation."[136] Victor Ayeni has stated that "[a]n administrative system that is perceived by all to be just is inevitably one of the most important prerequisites of good governance."[137] Thus, in the context of public administration, public participation, transparency, accountability to the public and justice or fairness are essential components of good governance. Some of these components are interconnected.

Classical and hybrid ombudsmen help build good governance in public administration by working to improve all of its core elements: public participation in governance, transparency of public administration, the accountability of public authorities to the people and fairness in administration.

Public participation involves asking the public for input and views on proposed government action and for feedback on government action already taken. Effective participation in governance requires, *inter alia*, access to information, the courts and government institutions, and the existence of agencies where members of the public can submit complaints about government and have them addressed.[138] Ombudsman institutions are mechanisms which enable members of the public to participate in the regula-

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133 B. Gawanas, "What Alternatives Exist for Holding Governments Accountable?", Comprehensive Legal and Judicial Development: Towards an Agenda for a Just and Equitable Society in the 21st Century (Washington, D.C.: World Bank, Oct. 5-7, 2000) at 3.

134 *Governance for sustainable human development, supra* note 37 at 3.

135 Woods, *supra* note 29 at 41, 43-46.

136 Owen, *supra* note 15 at 1.

137 V.O. Ayeni, "The Ombudsman in the Achievement of Administrative Justice and Human Rights in the New Millennium" (2001) 5 Int'l Omb. Yrbk. 32 at 34.

138 P. Ocheje, "Exploring the Legal Dimensions of Political Legitimacy: A 'Rights' Approach to Governance in Africa" in *Legitimate Governance in Africa: International and Domestic Legal Perspectives, supra* note 47, 165 at 193.

tion of the conduct of public administration by lodging complaints that lead to impartial investigations of faulty administration and possibly also allegations of human rights breaches and/or financial impropriety.

Transparency in the context of public administration includes: transparency and understandability of the processes in which public bodies make decisions, provision of reasons for these decisions, and public availability of the information on which these decisions are based, to the extent possible.[139] A transparent government and its administration provides optimal public information about its actions through means such as publications, access to information laws and procedural mechanisms to review government conduct that include judicial review and various horizontal accountability mechanisms. Transparency of government conduct can be heightened through formal, objective scrutiny via inspection, investigation and public reporting on complaints by the ombudsman. The ombudsman can also investigate, on the basis of a complaint or own-motion, complaints of lack of transparency in public administration (e.g. administrative process is secretive, lack of reasons for decisions, deficiencies in access to information) and, if justified, can make recommendations for changes in law and practice to increase transparency.[140]

Accountability can be defined as "answerability for the performance of an office, a charge, or a duty. It is not an entirely legal concept. It refers to standards of conduct of ethical, institutional, and also legal nature."[141] 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 due process or procedural fairness such as notice of proceedings, holding hearings, and communicating decisions and the reasons on which they are based to the recipients.[142] Accountability also includes government provision of review mechanisms described above. Accountability of the administration is improved through ombudsman activities. Lines of accountability are drawn between the complaining public, the ombudsman and the administrative branch of government. Government administration has to comply with ombudsman investigations, have its behaviour scrutinized according to standards of law and equity and respond to recommendations for correction or change made by the ombudsman. Some hybrid ombudsmen have stronger powers to enforce government accountability.

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139 J. Söderman, European Ombudsman, "Transparency as a Fundamental Principle of the European Union", Speech at Walter Hallstein Institute, Humboldt University, Berlin (June 19, 2001), <www.euro-ombudsman.eu.int/speeches/> at 2.

140 See e.g. numerous complaints to the European Union's European Ombudsman on lack of transparency in Community institutions, *ibid.*

141 S. Schlemmer-Schulte, "The World Bank, its Operations and its Inspection Panel" (1999) R.I.W. 175 at 180.

142 Woods, *supra* note 29 at 44; Owen, *supra* note 15 at 4; *An Agenda for Development, supra* note 41, para. 126 (improving governance "means accountability for actions and transparency in decision-making"); K. Ginther, "Sustainable Development and Good Governance: Development and Evolution of Constitutional Orders" in K. Ginther et al., eds., *Sustainable Development and Good Governance* (Dordrecht: Martinus Nijhoff Pub., 1995), 150 at 157 (good governance means "promoting limited government through strengthening public accountability").

Fairness is composed of substantive and procedural elements. Substantive fairness requires fairness of results and procedural fairness requires that "the processes of representation, decision making, and enforcement in an institution . . . be clearly specified, nondiscretionary, and internally consistent".[143] Fairness of government in both its procedural and substantive aspects is enhanced by the ombudsman. An ombudsman is expressly mandated to investigate broad areas of administrative legality and injustice to improve procedural fairness in administration. The ombudsman can also be considered as a mechanism to improve procedural human rights by providing an avenue for members of the public to complain about illegality and unfairness in public administration. Ombudsmen can build both procedural and substantive fairness by making recommendations for changes to law and policy.[144] All ombudsmen with a human rights protection role attempt to reduce human rights breaches by the administration, thereby improving substantive fairness. A growing number of human rights ombudsmen have jurisdiction over economic, social and cultural rights as well as civil and political rights. Anti-corruption and leadership code ombudsmen improve substantive fairness through controlling the behaviour of public officials and monitoring financial management.

[143] Woods, *ibid.* at 46.

[144] *An Agenda for Development, supra* note 41, para. 127 ("[i]mproved governance means that bureaucratic procedures help ensure fairness rather than enrich officials").

CHAPTER FOUR

The Ombudsman: Domestic Protection and Promotion of International Human Rights

Introduction

Both the classical and human rights ombudsman can be categorized as national human rights institutions, along with the human rights commission and specialized institutions. This Chapter will define national human rights institutions and examine the attention paid by major international organizations to the ombudsman and other national human rights institutions. In particular, the work of the UN and its Paris Principles will be explored. This Chapter will also describe how both classical and human rights ombudsmen can act as non-judicial domestic mechanisms for the protection and promotion of human rights, and how they can assist in the domestic application of the international human rights law obligations of the state. The role and approach of an institution will differ depending on whether it is a classical ombudsman or a hybrid office with both human rights complaint and ombudsman functions. The ability of each type of institution to implement or promote international human rights norms is dependent on a number of factors. Each ombudsman institution is unique in the extent of its human rights activities, based on the particular legal environment of the state in which the ombudsman office is located.[1]

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[1] This chapter is based on L.C. Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection" (2000) 13 Harvard H.R.J. 1 at 3-7, 9-13, 19-23. See also L.C. Reif, "Ombudsman and Human Rights Protection and Promotion in the Caribbean: Issues and Strategies" in V. Ayeni, L. Reif and H. Thomas, eds., *Strengthening Ombudsman and Human Rights Institutions in Commonwealth Small and Island States: The Caribbean Experience* (London: Commonwealth Secretariat, 2000) at 160 [hereinafter *The Caribbean Experience*]; L.C. Reif, "The Promotion of International Human Rights Law by the Office of the Ombudsman" in L. Reif, M. Marshall & C. Ferris, eds., *The Ombudsman: Diversity and Development* (Edmonton: International Ombudsman Institute, 1993) at 87, rep. in L.C. Reif, *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute* (The Hague: Kluwer Law International, 1999) at 271 [hereinafter *International Ombudsman Anthology*]; L.C. Reif, "International Human Rights Law and the Ombudsman Office" in L.C. Reif, ed., *The Ombudsman Concept* (Edmonton: International Ombudsman Institute, 1995) at 175.

Classical and Human Rights Ombudsmen as National Human Rights Institutions

OVERVIEW

Measures for the protection of human rights are found at both the international and national levels of governance. There is a connection between the two levels as international human rights law obligations of states must be made effective inside domestic legal systems and, more broadly, developments in international human rights law can influence domestic law and vice versa. In recent years, the international community has placed greater emphasis on improving human rights protection at the national level and the implementation of international human rights norms in the domestic sphere.

Effective protection of human rights inside a state requires a web of norms and institutions. For example, states must become bound by the major international and regional treaties on human rights, international human rights obligations must be implemented or otherwise made part of the domestic legal systems of states, states must provide effective substantive and procedural laws for human rights protection, there must be independent courts with appropriate levels of resources, the NGO community and the media must be given freedom to operate fully and independently, and effective national human rights institutions must be established and maintained. National human rights institutions can assist in the domestic implementation of international human rights norms and help governments in complying with their international obligations. National human rights institutions can accomplish this in a manner which "accommodates national peculiarities and which respects cultural, religious and ethnic diversity, and in a more informed and sensitive manner than any international body."[2]

NATIONAL HUMAN RIGHTS INSTITUTIONS DEFINED

A national human rights institution has been defined by the United Nations as "a body which is established by a Government under the constitution, or by law or decree, the functions of which are specifically designed in terms of the promotion and protection of human rights."[3] Similarly, a national human rights institution can be defined as "a

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[2] A. Gallagher, "Making Human Rights Treaty Obligations a Reality: Working With New Actors and Partners" in P. Alston and J. Crawford, eds., *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000) 201 at 203.

[3] 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, UN Doc. HR/P/PT 4 (1995) at 6 [hereinafter *National Human Rights Institutions: A Handbook*]. See also B. Burdekin and A. Gallagher, "The United Nations and National Human Rights Institutions" in G. Alfredsson et al., eds., *International Human Rights Monitoring Mechanisms* (The Hague: Kluwer Law International, 2001) at 815. For an international relations perspective see S. Cardenas, "Emerging Global Actors: The United Nations and National Human Rights Institutions" (2003) 9 Global Governance 23.

quasi-governmental or statutory institution with human rights in its mandate."[4] The courts, other tribunals and government departments dealing with human rights are not included in the definition.[5] The United Nations considers that both ombudsmen and human rights commissions broadly defined fall within the definition and form the majority of national human rights institutions.[6] This inclusion of the ombudsman as a national human rights institution has occurred even though the classical office does not have an express human rights protection function although, in practice, a number of classical ombudsmen do address human rights issues in some of their investigations. The newer hybrid human rights ombudsmen also fall within the definition of a national human rights institution. There are also specialized national human rights institutions such as the equality rights commission, the ombudsman or commissioner for children and youth, and the ombudsman for national minorities.

THE HUMAN RIGHTS COMMISSION

Human rights commissions have been established within the past forty or so years, and their numbers have exploded since the beginning of the 1990s.[7] Human rights commissions began appearing in Commonwealth nations in the early 1960s, and have spread to a growing number of members in the intervening period, especially during the 1990s.[8]

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[4] International Council on Human Rights Policy, *Performance & legitimacy: national human rights institutions* (Versoix: International Council on Human Rights Policy, 2000) at 3 [hereinafter *Performance & legitimacy*].

[5] *National Human Rights Institutions: A Handbook, supra* note 3 at 6; *Performance & legitimacy, ibid.* at 3.

[6] *National Human Rights Institutions: A Handbook, ibid.* at 6. See J. Hatchard, "Developing Appropriate Institutions to Meet the Challenges of the New Millennium" (2000) 8 Asia Pacific Law Rev. 7.

[7] See e.g. J. Hucker, "Bringing Rights Home: The Role of National Human Rights Institutions" in F. Butler, ed., *Human Rights Protection: Methods and Effectiveness* (The Hague: Kluwer Law International, 2002) at 29. The first human rights commission to be established appears to be the Ontario (Canada) provincial human rights commission.

[8] E.g. Australia's Human Rights and Equal Opportunity Commission (1986); Canadian Human Rights Commission (1977), and provincial/territorial human rights commissions and councils, starting with Ontario (1961); New Zealand Human Rights Commission (1971); Northern Ireland Human Rights Commission (1998); Bermuda Human Rights Commission (1982); Cameroon National Commission for Human Rights and Freedoms (1992); India's National Commission for Human Rights (1993), some Indian state-level commissions; South African Human Rights Commission (1995); Malawi Human Rights Commission (1996); Uganda Human Rights Commission (1996, in operation 1997); Sri Lanka Human Rights Commission (1996, in operation 1997); Nigeria Human Rights Commission (1996); Zambia Human Rights Commission (1997); Fiji Human Rights Commission (1999); Malaysia Human Rights Commission (2000); Mauritius National Human Rights Commission (1998, in operation 2001). Some members have specialized commissions. See K. Hossain et al., eds., *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (The Hague: Kluwer Law International, 2000) [hereinafter *Human Rights Commissions and Ombudsman Offices*]; Human Rights Unit, Commonwealth Secretariat, *National Human Rights Institutions in the Commonwealth: Directory* (London: Commonwealth Secretariat, J. Hatchard, ed., 1992). In 2002, the province of British Columbia (Canada) abolished its Human Rights Commission in favour of a Human Rights Tribunal for all matters. See also Ghana's hybrid Commission on Human Rights and Administrative Justice, *infra* Chapter 7.

Human rights commissions in Commonwealth members have differing jurisdictions and a range of functions.[9] An array of human rights commissions with very different degrees of independence and powers have also been established in other countries around the world, mainly in developing nations.[10] The number of human rights commissions overall has increased markedly over the past fifteen years as growing numbers of states are attempting to improve their domestic human rights situation and the international community has promoted the establishment of national human rights institutions.[11]

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[9] E.g. *Human Rights Commissions and Ombudsman Offices, ibid.*; M. Mulgan, "Implementing International Human Rights Norms in the Domestic Context: The Role of a National Institution" (1993) 5 Canterbury Law Rev. 235 (New Zealand); J. Hucker, "Antidiscrimination Laws in Canada: Human Rights Commissions and the Search for Equality" (1997) 19 H.R.Q. 547; M. Gomez, "Sri Lanka's New Human Rights Commission" (1998) 20 H.R.Q. 281; J. Hatchard, "A new breed of institution: the development of human rights commissions in Commonwealth Africa with particular reference to the Uganda Human Rights Commission" (1999) 32 Comp. & Int'l Law J. Southern Africa 28; S. Livingstone, "The Northern Ireland Human Rights Commission" (1999) 22 Fordham Int'l Law J. 1465; V. Sripati, "India's National Human Rights Commission: A Shackled Commission?" (2000) 18 Boston U. Int'l Law J. 1; V. Sripati, "A Critical Look at the Evolving Role of India's National Human Rights Commission in Promoting International Human Rights Law" (2001) 5 Int'l Omb. Yrbk. 163; A.H. Monjurul Kabir, "Establishing National Human Rights Commissions in South Asia: A Critical Analysis of the Processes and the Prospects" (2001) 2 Asia-Pacific J.H.R. & Law 1; R.B. Howe and D. Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 2000); O.C. Okafor and S.C. Agbakwa, "On Legalism, Popular Agency and 'Voices of Suffering': The Nigerian National Human Rights Commission in Context" (2002) 24 H.R.Q. 662; A. Whiting, "Situating Suhakam: Human Rights Debates and Malaysia's National Human Rights Commission" (2003) 39 Stanford J. Int'l Law 59.

[10] E.g. Algeria National Consultative Commission for Protection and Promotion of Human Rights; Armenia Human Rights and Democracy Centre; Afghanistan Human Rights Commission; Bahrain Committee for Human Rights; Benin Human Rights Commission; Brazil Human Rights Commission and some state-level commissions; Burkina Faso National Commission on Human Rights; Cape Verde Human Rights Commission; Chad National Human Rights Commission; Czech Republic Council for Human Rights; Denmark Centre for Human Rights; Djibouti Human Rights Committee; Equatorial Guinea National Commission on Human Rights; France National Consultative Commission for Human Rights; Gabon National Human Rights Commission; German Institute of Human Rights; Greece National Commission for Human Rights; Indonesia National Commission for Human Rights; Iran Islamic Human Rights Commission; Irish Commission on Human Rights; Latvia National Human Rights Office; Liberia Human Rights Commission; Lithuania Human Rights Centre; Luxembourg Advisory Commission on Human Rights; Madagascar National Human Rights Commission; Mauritania Human Rights Commission; Mexico National Commission for Human Rights, and state-level Commissions; Mongolia National Human Rights Commission; Morocco Human Rights Consultative Council; Nepal Human Rights Commission; Netherlands Equal Treatment Commission; Niger National Human Rights Commission; Philippines Human Rights Commission; Qatar National Human Rights Committee; Romania Institute for Human Rights; Russian Federation Presidential Commission on Human Rights; Rwanda National Commission for Human Rights; Senegal Human Rights Committee; South Korea National Human Rights Commission; Sudan Advisory Council for Human Rights; Thailand National Human Rights Commission; Togo National Commission on Human Rights; Tunisia Higher Committee on Human Rights and Fundamental Freedoms; Venezuela National Human Rights Commission, Yemen Human Rights Committee. There are legislative bases in place for human rights commissions in Ethiopia, Central African Republic, Côte d'Ivoire, Republic of Congo and Mali. Taiwan is considering a human rights commission. See the Palestinian Independent Commission for Human Rights and Jordan's National Centre for Human Rights with its Commissioner General for Human Rights which have hybrid qualities, and Tanzania's hybrid Commission for Human Rights and Good Governance, *infra* Chapter 7.

[11] The quality and effectiveness of some of these human rights commissions have been criticized by

A human rights commission is designed to protect and promote human rights in the nation or federal sub-unit. It is composed of a number of members who should have human rights expertise or experience.[12] The commission may be established by the constitution, legislation or executive decree and the members may be appointed by the legislature or executive branches. Some commissions have international human rights laws placed in their legislative framework as the express foundation for their activities, e.g. Australia's National Human Rights and Equal Opportunity Commission.[13] A human rights commission is given some or all of the functions of: providing advice to government on signing and implementing human rights treaties, creating and strengthening domestic human rights laws; human rights research; human rights education; inspection of prisons and other places where persons are involuntarily confined; and the investigation of complaints that human rights have been violated.[14] Advisory commissions, which have no power of investigation, are found in a number of countries, ranging from France to Morocco.[15] Where human rights commissions can investigate complaints, many commissions use conciliation to settle an investigation in a friendly manner, and after an investigation commissions usually only make recommendations although some can refer a dispute to binding settlement by human rights tribunals or the courts.[16] Some commissions can conduct public inquiries, a few have the power to appear as *amicus curiae* (friends of the court) in court cases involving human rights and some can obtain declaratory judgments on human rights statutes.[17] In the rare case, a human rights commission may be able to enforce its own decisions.[18]

Some commissions only have jurisdiction over discrimination while others have more extensive jurisdiction over civil and political rights, and even economic, social and cultural rights. Human rights commissions may have jurisdiction over both the public and private sector, while others may be confined to promoting and protecting human rights in one sector only.

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the NGO sector. See Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa* (New York: Human Rights Watch, 2001); *Performance & legitimacy, supra* note 4; *Amnesty International's Recommendations on Effective Protection and Promotion of Human Rights*, IOR 40/007/2001 (Oct. 2001).

12 United Nations, *National Institutions for the Promotion and Protection of Human Rights*, Fact Sheet No. 19 (Geneva: United Nations, 1993) at 6.

13 B. Burdekin, "Human Rights Commissions" in K. Hossain et al., eds., *Human Rights Commissions and Ombudsman Offices*, *supra* note 8, 801 at 802, 806; Mulgan, *supra* note 9 at 237-238.

14 *National Human Rights Institutions: A Handbook, supra* note 3 at 7.

15 *Performance & legitimacy, supra* note 4 at 4.

16 *National Human Rights Institutions: A Handbook, supra* note 3 at 7-8.

17 Mulgan, *supra* note 9 at 243-244; W. Jonas, "Procedures and Remedies for Dealing With Complaints of Racial Discrimination and Vilification" in *The Sixth International Conference for National Human Rights Institutions, Proceedings*, Copenhagen and Lund, April 10-13, 2002 (Copenhagen: The Danish Centre for Human Rights) 84 at 90 [hereinafter *Sixth International Conference Proceedings*]; K. Buck, "Report by the General Rapporteur", *ibid.* 41 at 42-51.

18 See the Uganda Human Rights Commission, Hatchard, "A new breed of institution", *supra* note 9 at 42-43. The human rights ombudsmen in Ghana and Tanzania can apply for judicial enforcement of their determinations, see *infra* Chapter 7.

THE CLASSICAL OMBUDSMAN

The history, functions and powers of the classical ombudsman are discussed in Chapter 1. Some may consider the ombudsman institution to be a mechanism that is dedicated solely to the resolution of complaints of improper administration and the improvement of administrative justice. Certainly, classical ombudsmen do not have express human rights protection and promotion mandates, although some ombudsman statutes give the ombudsman jurisdiction over discriminatory administrative action and laws.[19]

However, there has always been some recognition of the human rights protection aspects of the classical ombudsman in practice. In 1976, Bernard Frank noted that "[i]n recent years, there has been a widespread growth in democratic countries of an institution – the Ombudsman – which has as its basic purpose the protection of the human rights of the citizen with respect to complaints against government."[20] Other commentators have also recognized the human rights protection component of the classical ombudsman.[21] In 2001, Western European ombudsmen concluded that, although national laws might not expressly mention the human rights functions of ombudsmen, ombudsmen in practice did interpret their mandate to include human rights issues.[22] In 2003, the Council of Europe Commissioner for Human Rights stated that:

> all Ombudsmen have an important role to play in the defence of human rights. Whilst explicit reference to human rights protection may be absent from the mandates of certain Ombudsmen, it is clear that human rights violations by state authorities constitute, at the same time, serious cases of maladministration, and, as such, fall within the concerns of even the most narrowly defined institutions.[23]

Various classical ombudsmen point to the human rights aspects of some of their complaints and the use of international human rights norms in their resolution. Some examples are the ombudsmen in Norway,[24] Denmark,[25] Iceland,[26] the Netherlands,[27] France,[28]

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19 E.g. ombudsmen in Canadian provinces, Antigua and Barbuda, Hong Kong (China), Fiji, Papua New Guinea.

20 B. Frank, "The Ombudsman and Human Rights – Revisited" (1976) 6 Israel Yrbk. H.R. 122 at 123.

21 E.g. G. Caiden, N. MacDermot and A. Sandler, "The Institution of Ombudsman" in G. Caiden, ed., *International Handbook of the Ombudsman: Evolution and Present Function* (Westport: Greenwood Press, 1983) 3 at 5; D. Pearce, "The Ombudsman: Review and Preview – The Importance of Being Different" (1993) 11 Omb. J. 13 at 28, rep. in *International Ombudsman Anthology*, *supra* note 1, 73 at 89-90; Mulgan, *supra* note 9 at 236.

22 Council of Europe, Office of the Commissioner for Human Rights, Conclusions of the Meeting Between the Western European Ombudsman and Mr. Alvaro Gil-Robles, Commissioner for Human Rights, CommDH(2000)5 (Dec. 1, 2000), para. 4.

23 Council of Europe Commissioner for Human Rights, *3rd Annual Report January to December 2002*, CommDH(2003)7 (Strasbourg, June 19, 2003) at 14-15 [hereinafter *3rd Annual Report*].

24 Norwegian Parliamentary Ombudsman, *Annual Report 1990*, English Summary at 22-23; Norwegian Parliamentary Ombudsman, *Annual Report 2001*, English Summary at 19-21. See *infra* this Chapter, text accompanying notes 120 to 126.

25 J. Møller, "The Danish Ombudsman and the Protection of Human Rights" in F. Matscher, ed., *Ombudsman in Europe – The Institution* (Kehl: N.P. Engel, 1994) at 37; H. Gammeltoft-Hansen, "Human Rights and the National Ombudsman" in L.A. Rehof and C. Gulmann, eds., *Human Rights in Domestic Law and Development Assistance Policies of the Nordic Countries* (Dordrecht: Martinus Nijhoff Pub., 1989) 187 at 188-89.

New Zealand[29] the Canadian provinces of British Columbia, Quebec and Saskatchewan[30] and Hong Kong (China), with South Africa's hybrid Public Protector addressing human rights without an express mandate to do so.[31]

THE HUMAN RIGHTS OMBUDSMAN

Hybrid adaptations of the ombudsman that have developed within the past few decades include the human rights ombudsman.[32] As discussed in Chapter 1, human rights ombudsmen have been established in countries in Europe, Latin America, the Caribbean, Africa and Asia since the mid-1970s and exhibit features of both the classical ombudsman and the human rights commission.

A human rights ombudsman can be described as an institution established by a government which has been given two roles, to: (1) protect and promote human rights of persons, usually against the state and (2) monitor government administration for legality and fairness. This definition does not include those classical ombudsmen which from time to time deal with human rights matters within their mandate to promote administrative justice. A human rights ombudsman has structural similarities to the ombudsman model because usually only one individual is appointed as the office-holder, and most hybrid ombudsmen do not have the power to examine complaints about private sector conduct.[33] Other facets of the hybrid institution are closer to the human rights commission concept, such as the functions of undertaking human rights education, research and law reform initiatives. Also, the human rights ombudsman often has powers which were

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26 G. Gauksdóttir, "Iceland" in R. Blackburn and J. Polakiewicz, eds., *Fundamental Rights In Europe: The European Convention and its Member States, 1950-2000* (Oxford: Oxford University Press, 2001) 399 at 406-407.

27 M. Oosting, " The National Ombudsman of the Netherlands and Human Rights" (1994) 12 Omb. J. 1; for further details see *infra* Chapter 5.

28 M. Pauti, "The Ombudsman in France" in R. Gregory and P. Giddings, eds., *Righting Wrongs: The Ombudsman in Six Continents* (Amsterdam: IOS Press, 2000) 175 at 183 [hereinafter *Righting Wrongs*]; *Médiateur* of the Republic of France, *1998 Report to the President of the French Republic and Parliament*, abr. English version, at 17, 51 (cases using European Convention and Protocols). The *Médiateur* is also a member of France's National Consultative Commission for Human Rights.

29 A. Satyanand, "The Ombudsman Concept and Human Rights Protection", *I.O.I. Occasional Paper No. 68* (Edmonton: International Ombudsman Institute, Jan. 1999) (on the human rights aspects of several New Zealand ombudsman investigations).

30 British Columbia: use of the UN Convention on the Rights of the Child, discussed *infra* Chapter 9; Quebec: D. Jacoby, "The Future of the Ombudsman" in *The Ombudsman Concept, supra* note 1 at 211, rep. in *International Ombudsman Anthology, supra* note 1 at 32 [further references to *Anthology*] (Quebec *Protecteur* recommended changes to laws contravening fundamental rights); Saskatchewan: Saskatchewan Ombudsman, *Locked Out: A Review of Inmate Services and Conditions of Custody in Saskatchewan Correctional Centres* (Nov. 2002).

31 See *infra* Chapter 7.

32 Ombudsmen with corruption fighting and/or leadership code mandates are discussed *supra* in Chapters 1 and 3.

33 Although usually only one ombudsman is appointed in a jurisdiction, there are some multi-member institutions, *supra* note 1. There are a few human rights ombudsmen with jurisdiction over both public and private sector human rights complaints, e.g. Namibia, Ghana, Tanzania.

not usually granted to earlier institutions such as the power to bring constitutional cases to court. A human rights ombudsman may have the power to request abstract constitutionality review, i.e. it can bring an action to determine the constitutionality of a law without any connection to an individual complaint (e.g. Spain, Portugal) and/or the power to request a constitutionality review when the law in question is connected to the determination of an individual complaint under investigation (e.g. Spain, Slovenia). Several human rights ombudsmen can even go to court to enforce their own recommendations, as in Ghana and Tanzania.

Each human rights ombudsman is different from the next in its functions and powers, although similarities can be seen regionally and sub-regionally. If a spectrum is constructed, some institutions will fall nearer the ombudsman concept in terms of their functions and complaints while others are much closer to the human rights commission model. As a result, it is sometimes difficult to classify a national human rights institution into one of the discrete categories discussed above. More confusion is produced by the terminology used for some institutions, elements of the legal framework of the institution or the actual practice of the office. For example, some offices are called "Ombudsman" when in fact they are essentially human rights complaint institutions, for example the Bosnia-Herzegovina Human Rights Ombudsman under the Dayton Peace Agreement (whereas the subsequent domestic legislation turned the Human Rights Ombudsman into a hybrid model). Other institutions are essentially human rights commissions, although they have small elements of the ombudsman concept such as in the nature of the complaints considered.

Indeed, the United Nations has preferred to take a functional approach to defining national human rights institutions, recognizing that:

> precise classification of a particular institution is complicated by the fact that functions implied in these designations are not always reflected in the work of institutions so categorized. An "ombudsman", for example, may be engaged in a broad range of promotional and protective activities generally recognized as characteristic of a commission. An entity identified as a "human rights commission" may be operating exclusively within the sphere of public administration – a domain traditionally associated with the office of the ombudsman.[34]

The reasons for establishing hybrid institutions are also diverse. One factor is that fewer financial and human resources are needed to operate one office rather than two separate institutions. Another factor is that instances of human rights violations and administrative injustice sometimes overlap, so that a hybrid institution avoids both duplication of operations and public confusion over which institution to complain to.[35] In addition, professional expertise is located in one institution.[36] Further, "focusing attention on a single body can raise its public profile and better counter executive attempts to weaken or

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[34] *National Human Rights Institutions: A Handbook, supra* note 3 at 7.

[35] E.F. Short, "The Development and Future of the Ombudsman Concept in Africa" (2001) 5 Int'l Omb. Yrbk. 56 at 65.

[36] Hatchard, "A new breed of institution", *supra* note 9 at 37.

undermine its operation."[37] Developing states and small states which have limited financial and human resources may be more likely to establish one hybrid institution rather than a separate ombudsman and human rights commission.

Other factors are historical political ties or a shared cultural or legal heritage which makes a particular model persuasive for states reforming or constructing their government institutions. For example, most Latin American states have looked to the Spanish human rights ombudsman model. However, while many Commonwealth nations with national human rights institutions have established separate human rights commissions and ombudsman offices, some have established hybrid institutions.[38]

In a few cases, established classical ombudsmen have recently been given an express human rights protection function in addition to their existing responsibilities (e.g. Finland, Jamaica) or classical ombudsmen have been replaced by new hybrid human rights ombudsman institutions (e.g. Ghana, Tanzania). Moreover, this adaptation or hybridization of the ombudsman model has produced a greater awareness of the human rights protection work undertaken by some of the classical legislative ombudsmen.

Recognition of the Human Rights Protection Aspects of the Ombudsman and Other National Human Rights Institutions by the International Community

Global and regional international organizations whose functions include human rights protection have increasingly recognized the human rights role of the ombudsman. More recently, classical and human rights ombudsmen have been included along with human rights commissions as national human rights institutions. This section surveys the attention paid to ombudsman and other national human rights institutions by the Council of Europe, the Organization for Security and Cooperation in Europe (OSCE), the Organization of American States (OAS) and the Summits of the Americas, the African Union (replacing the Organization of African Unity), the Commonwealth and the UN system.

COUNCIL OF EUROPE

The Council of Europe was created in 1949 with the objectives of strengthening regional unity, democracy, human rights and the rule of law, and cooperating in other areas including cultural heritage and social issues.[39] By mid-2003 the Council of Europe had forty-five member states representing all regions of Europe. The Council of Europe undertakes a broad range of activities, but its most prominent achievements are in the

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[37] *Ibid.*

[38] E.g. Cyprus, Jamaica, Ghana, Lesotho, Malawi, Namibia, the Seychelles and Tanzania have human rights ombudsmen, and some ombudsmen have anti-corruption and/or leadership code enforcement roles.

[39] Statute of Council of Europe, E.T.S. 1 (May 5, 1949); <www.coe.fr>; A.H. Robertson, *The Council of Europe* (London: Stevens & Sons Ltd., 1956) at 1-17.

development of the European human rights law system which revolves around the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.[40]

The Council of Europe started to call for the establishment of ombudsmen at the domestic level starting in the 1970s.[41] In 1975, after several years of internal discussions, the Parliamentary Assembly of the Council of Europe adopted Recommendation 757 which stated that there was a need for a guarantee beyond existing judicial remedies which should be simpler, cheaper, quicker and more flexible, and that this guarantee could be provided by an ombudsman.[42] In addition, the Assembly recommended that the Committee of Ministers invite member states which had not yet established the institution to consider doing so at the national, regional and/or local levels.[43] The Recommendation did not expressly focus on the human rights protection possibilities of the ombudsman, although it did note that the extension of public authority into the private life of the individual could threaten human rights.[44]

In the 1980s, the Council of Europe began to recognize the role of the ombudsman in human rights protection, in acting as mechanisms for the domestic application of the European Convention rights and other Council of Europe human rights norms. The Committee of Ministers of the Council of Europe adopted Recommendation R(85)13 in 1985, recommending that member state governments were:

> a) to consider the possibility of appointing an *Ombudsman* at national, regional or local level or for specific areas of public administration;
> b) to consider empowering the *Ombudsman*, where this is not already the case, to give particular consideration, within his general competence, to the human rights matters under his scrutiny and, if not incompatible with national legislation, to initiate investigations and to give opinions when questions of human rights are involved;
> c) to consider extending and strengthening the powers of the *Ombudsman* in other ways so as to encourage the effective observance of human rights and fundamental freedoms in the functioning of the administration.[45]

In effect, the Council of Europe advocated the establishment of hybrid human rights ombudsmen. On the same date, the Committee of Ministers initiated a process of regular meetings of Council of Europe representatives and ombudsmen of member states

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[40] For a description of the European human rights treaties, the European Court of Human Rights and its jurisprudence in relation to the ombudsman institution see *infra* Chapter 5.

[41] See e.g. W. Hummer, *The Position and Duties of the Ombudsman of the European Parliament* (Innsbruck: European Ombudsman Institute, 1995) at s. 3.

[42] Council of Europe, Parliamentary Assembly, Rec. 757 (1975) on the conclusions of the meeting of the Assembly's Legal Affairs Committee with the Ombudsmen and Parliamentary Commissioners in Council of Europe Member States (adopted Jan. 29, 1975), paras. 6-7, (1975) 18 Yrbk. European Conv. H.R. 60. The Parliamentary Assembly reflects the political elements of member states, composed of representatives from national legislatures.

[43] *Ibid.*, para. 10.

[44] *Ibid.*, para. 4.

[45] Council of Europe, Committee of Ministers, Rec. No. R(85)13 of the Committee of Ministers to Member States on the Institution of the *Ombudsman* (adopted Sept. 23, 1985), (1985) 28 Yrbk. European Conv. H.R. 234. The Committee of Ministers is the decision making organ.

to discuss issues and exchange experiences "on the protection of human rights in relation to acts of the administrative authorities" in order to stimulate further the human rights function of the ombudsman.[46]

More recently, the broader conceptualization of "national human rights institutions" incorporating the ombudsman has been adopted by the Council of Europe. In 1997, the Council of Europe Committee of Ministers adopted Recommendation R (97)14 which stated that:

> Convinced, in the light of experience, that it is desirable to promote the establishment of national human rights institutions in the member states where comparable institutions do not exist,
>
> Recommends that the governments of member states:
>
> a. consider . . . the possibility of establishing effective national human rights institutions, in particular human rights commissions which are pluralist in their membership, ombudsmen or comparable institutions . . .[47]

On this date, the Committee of Ministers also instituted regular meetings with the national human rights institutions of member states.[48]

In May 1999, a new office was created to enhance human rights – the Council of Europe Commissioner for Human Rights – with a mandate that includes the duties to "facilitate the activities of national ombudsmen or similar institutions in the field of human rights" and cooperate with human rights structures in the Council of Europe member states.[49]

ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE (OSCE)

The Organization on Security and Cooperation in Europe (OSCE) began life as the Conference on Security and Cooperation in Europe (CSCE) in the early 1970s.[50] As an

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[46] Council of Europe, Committee of Ministers, Res. (85)8 on co-operation between the *Ombudsmen* of Member States and between them and the Council of Europe (adopted Sept. 23, 1985), (1985) 28 Yrbk. European Conv. H.R. 239. In 2002, the Council of Europe Commissioner for Human Rights took over the work of organizing the meetings, *3rd Annual Report, supra* note 23 at 7.

[47] Council of Europe, Committee of Ministers, Rec. No. R (97)14 on the establishment of independent national institutions for the promotion and protection of human rights (adopted Sept. 30, 1997), (1997) 40:2 Yrbk. European Conv. H.R. 612.

[48] Council of Europe, Committee of Ministers, Res. (97)11 on co-operation between states' national institutions for the promotion and protection of human rights, and between them and the Council of Europe (adopted Sept. 30, 1997), (1997) 40:2 Yrbk. European Conv. H.R. 614. In 2002, the Council of Europe Commissioner for Human Rights took over the work of organizing these meetings, *3rd Annual Report, supra* note 23 at 7.

[49] Council of Europe, Committee of Ministers, Res. (99)50 (adopted May 7, 1999), arts. 3(c)-(d), 5. See Chapter 10 for a more detailed discussion of the Council of Europe Commissioner for Human Rights.

[50] See e.g. R. Brett, "Human Rights and the OSCE" (1996) 18 H.R.Q. 668; A. Bloed, "Monitoring the CSCE Human Dimension: In Search of its Effectiveness" in A. Bloed et al., eds., *Monitoring Human Rights in Europe – Comparing International Procedures and Mechanisms* (Dordrecht, Martinus Nijhoff Pub., 1993) 45; T. Buergenthal, "The CSCE Rights System" (1991) 25 George Wash. J. Int'l Law & Econ. 333.

informal forum for the discussion of matters ranging from peace and security to democratization and human rights, the OSCE has fifty-five participating states from Europe, Central Asia and North America. The OSCE human rights guarantees are contained in OSCE/CSCE conference documents on the human dimension.[51]

The OSCE also supports the creation and strengthening of national institutions for the promotion and protection of human rights. In the 1990 Document of the Copenhagen meeting of the Conference on the Human Dimension of the CSCE, it was stated that "[t]he participating States will . . . facilitate the establishment and strengthening of independent national institutions in the area of human rights and the rule of law".[52] A 1991 CSCE Seminar of Experts stated that "in addition to the ordinary court system, such institutions could comprise constitutional courts, national human rights commissions, complaints commissions, Ombudsmen or mediators."[53] The OSCE considers national human rights institutions (including the ombudsman) within its human dimension concept, and the Human Dimensions Unit of the Office for Democratic Institutions and Human Rights (ODIHR) provides assistance for the establishment and strengthening of such institutions in OSCE participating states.[54]

ORGANIZATION OF AMERICAN STATES (OAS) AND THE SUMMITS OF THE AMERICAS

The OAS Inter-American human rights system is based on a framework of treaties, other international law and remedial mechanisms.[55] In the late 1990s, the General Assembly of the OAS began to address the establishment of national human rights institutions. In resolutions starting in 1997, the OAS General Assembly gave its support to the various forms of national human rights institutions in the region, called for the establishment of these institutions in member states without such institutions and recommended that the independence of national institutions be promoted.[56] For example, in both 1998 and 1999, the OAS General Assembly resolved:

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[51] See *infra* Chapter 5.

[52] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (June 29, 1990), (1990) 29 Int'l Legal Mat. 1305, Ch. III (27). See also OSCE, *OSCE Human Dimension Commitments: A Reference Guide* (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2001) at 67.

[53] CSCE, *Report to the CSCE Council From the CSCE Seminar of Experts on Democratic Institutions*, Nov. 15, 1991, (1991) 31 Int'l Legal Mat. 375 at 385. In the Charter of Paris for a New Europe, the Human Dimension element included agreement to convene this seminar of experts (adopted at the Meeting of Heads of State or Government of the participating States of the CSCE, Paris, Nov. 21, 1990), (1991) 30 Int'l Legal Mat. 190.

[54] See e.g. OSCE Human Dimension Seminar on Ombudsman and National Human Rights Protection Institutions: Consolidated Summary (Warsaw, May 25-28, 1998), <www.osce.org/odihr/docs/ombu98cs.htm>; (1997) XLV European Yrbk. at OSCE 26-27.

[55] For further discussion on the OAS see *supra* Chapter 3 and on the OAS human rights treaty system see *infra* Chapter 6.

[56] E.g. OAS General Assembly: Support for International Exchanges Among Ombudsmen, OAS AG/RES 1505, XXVII-O/97 (June 5, 1997); 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

> to reiterate its support for the work of ombudsmen, defenders of the people, defenders of the population, human rights attorneys, and human rights commissioners in the countries of the Hemisphere, which is essential to strengthening representative democracy, justice, human rights, and good governance.[57]

More recently, the OAS General Assembly has called for the participation of national human rights institutions in the dialogue on the strengthening of the Inter-American human rights system and the exchange of information on national systems for the protection of human rights to obtain an overview of the link that should exist between the Inter-American and national systems.[58] A 2003 OAS General Assembly resolution called for the promotion of the strengthening of national systems for the promotion and protection of human rights in member states and the development of cooperative relations between the OAS and the Network of National Institutions for the Promotion and Protection of Human Rights in the Americas.[59] Thus, the OAS has explicitly recognized the role of both classical and hybrid ombudsmen in strengthening democracy, good governance and human rights protection.

In the related forum of the Summits of the Americas, the Second Summit of the Americas, held in Santiago, Chile in 1998, resulted in a Declaration that included an agreement to continue to strengthen national and international institutions aimed at human rights protection and promotion.[60]

AFRICAN UNION

The African Union (AU) is in the process of replacing the Organization of African Unity (OAU) as the regional international organization for Africa.[61] The objectives and principles of the AU include the promotion and protection of human and peoples' rights.[62]

(June 3, 1998); 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 1670, XXIX-O/99 (June 7, 1999). The General Assembly is the highest decision making and legislative organ.

57 *Ibid.*, art. 1 of the 1999 and 1998 OAS General Assembly resolutions.

58 OAS General Assembly: Evaluation and Working of the Inter-American System for the Protection and Promotion of Human Rights With a View to its Improvement and Strengthening, OAS AG/RES 1828, XXXI-O/01 (June 5, 2001); Evaluation of the Workings of the Inter-American System for the Protection and Promotion of Human Rights With a View to its Improvement and Strengthening, OAS AG/RES 1890, XXXII-O/02 (June 4, 2002), para. 2(d).

59 OAS General Assembly, Strengthening of Human Rights Systems Pursuant to the Plan of Action of the Third Summit of the Americas, OAS AG/RES 1925, XXXIII-O/03 (June 2003).

60 II Summit of the Americas, Declaration of Santiago (April 19, 1998) (1998) 37 Int'l Legal Mat. 947. For discussion of the Summit of the Americas process see *supra* Chapter 3.

61 Constitutive Act of the African Union (adopted July 11, 2000); rep. in (2000) 8 African Yrbk. Int'l Law 479; <www.africa-union.org>; *Durban Declaration* (July 10, 2002), (2002) 41 Int'l Legal Mat. 1029. For further details see *supra* Chapter 3.

62 Constitutive Act of the African Union, *ibid.*, arts. 3(h) (an objective is the promotion and protection of human and peoples' rights in accordance with the Banjul Charter and other relevant human rights instruments), 4(m) (a principle is respect for human rights).

The regional human rights treaty for Africa is the African Charter on Human and Peoples' Rights (Banjul Charter).[63] Article 26 of the Banjul Charter states that contracting parties "shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."[64] The Charter also establishes the African Commission on Human Rights, and one of its functions is to "encourage national and local institutions concerned with human and peoples' rights."[65] Since 1996, the Commission has placed more emphasis on encouraging member states to establish national human rights institutions, although it has not delved further into issues such as their independence.[66]

THE COMMONWEALTH

The Commonwealth Secretariat has been involved in technical assistance and other programs for ombudsmen and other national human rights institutions for a number of years.[67] In July 2000, a Commonwealth conference of national human rights institutions (including ombudsmen) was held, with the objectives of improving the effectiveness of national institutions, discussing a human rights agenda for the Commonwealth and exploring the role of national institutions in contributing to the protection and promotion of human rights as reflected in the 1991 Harare Commonwealth Declaration.[68]

THE UN SYSTEM

The UN recognizes that classical and human rights ombudsmen constitute national human rights institutions, along with human rights commissions and specialized institutions.[69] As Mary Robinson, then UN High Commissioner for Human Rights, stated in 1998:

> I have become increasingly convinced of the necessity to focus on *preventive* strategies. This has convinced me of the importance of creating strong, independent

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63 African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3, (1982) 21 Int'l Legal Mat. 58 (adopted June 27, 1981, in force Oct. 21, 1986).

64 *Ibid.*, art. 26.

65 *Ibid.*, art. 45.

66 *Protectors or Pretenders?, supra* note 11, "Regional Initiatives".

67 E.g. Commonwealth Secretariat, *National Human Rights Institutions: Best Practice* (London: Commonwealth Secretariat, 2001); Commonwealth Secretariat Human Rights Unit, *National Human Rights Institutions in the Commonwealth: Directory* (London: Commonwealth Secretariat, 3d ed., 1998); Commonwealth Secretariat Human Rights Unit, *National Human Rights Institutions: Manual* (London: Commonwealth Secretariat, 1993). See *supra* Chapter 3 on the Commonwealth.

68 Commonwealth Secretariat Legal and Constitutional Affairs Division, *Protecting Human Rights: The Role of National Institutions*, Commonwealth Conference of National Human Rights Institutions, Sidney Sussex College, Cambridge, July 4-6, 2000 (London: Commonwealth Secretariat, 2000); Harare Commonwealth Declaration, annexed to Harare Communiqué (1991).

69 See *National Human Rights Institutions: A Handbook, supra* note 3; UN Briefing Papers, *Human Rights Today* (New York: United Nations Department of Public Information,1998) at 25-28.

> 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.[70]

Sonia Cardenas has argued that the considerable increase in the number of national human rights institutions would not have occurred without the positive action of the UN in standard setting, capacity building, network facilitation and "membership" granting.[71]

The Road to the Paris Principles

The UN has addressed the subject of national human rights institutions since 1946 when the Economic and Social Council (ECOSOC) invited states to form information groups or local human rights committees to further the work of the UN Commission on Human Rights.[72] While national human rights institutions were discussed only occasionally in the UN until 1960, periodically thereafter ECOSOC, the General Assembly and the Commission on Human Rights recognized the role of national human rights institutions and called on states to establish them.[73] A seminar was organized in 1978 with resulting guidelines for national human rights institutions covering information, education, recommendatory, advisory and law review functions, but lacking any reference to investigatory powers.[74] Starting in the 1980s, the UN Secretary-General began making reports on national human rights institutions to the General Assembly, including a 1987 report that included discussion of ombudsmen whose primary role was to protect rights of individuals against the public administration.[75]

An important milestone in UN action on the subject occurred in 1991 when a UN International Workshop on National Institutions for the Promotion and Protection of Human Rights was held in Paris and produced guidelines entitled "Principles Relating to the

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[70] Mary Robinson, "Human Rights: Challenges for the 21st Century", First Annual Dag Hammarskjöld Lecture (Oct. 1, 1998).

[71] Cardenas, *supra* note 3 at 28-34.

[72] See United Nations, *United Nations Action in the Field of Human Rights* (Geneva and N.Y.: UN Centre for Human Rights, 1994) at 367 (ECOSOC Res. 9 (II) (June 21, 1946)); *National Human Rights Institutions: A Handbook*, *supra* note 3 at 4-6; B. Burdekin and C. Evans, "National Human Rights Institutions: A Global Trend" (2000) 15:2 Can. H.R. Foundation News. 1.

[73] *United Nations Action in the Field of Human Rights, ibid.* at 367-368. See e.g. ECOSOC Res. 772(B) (XXX) (July 25, 1960) and other ECOSOC resolutions in the 1960s; U.N.G.A. Res. 2200C (XXI) (Dec. 16, 1966); U.N.C.H.R. Res. 23 (XXXIV) (March 8, 1978); U.N.G.A. Res. 41/129, UN Doc. A/RES/41/129 (Dec. 4,1986); Fact Sheet No. 19, *supra* note 12 at 3-4; Cardenas, *supra* note 3 at 28-29.

[74] *United Nations Action in the Field of Human Rights, ibid.* The Guidelines were endorsed by U.N.G.A. Res. 33/46 (Dec. 14, 1978), UN Doc. A/RES/33/46 (1978).

[75] *United Nations Action in the Field of Human Rights, ibid.* at 368.

Status of National Institutions" (popularly called the "Paris Principles"). The Paris Principles were approved in 1992 by the UN Commission on Human Rights and in 1993 by the General Assembly.[76]

The Paris Principles list the core requirements for the structure and powers of national human rights institutions. The Paris Principles state that the essential characteristics of a national human rights institution are, as follows:

- independence from government;
- a broad mandate established in the constitution or by legislation;
- a pluralist representation of society in the choice of commission members;
- competence to promote and protect human rights;
- adequate funding;
- the responsibility to submit reports, recommendations, opinions and proposals on any matter concerning human rights protection and promotion;
- the responsibility to promote and ensure the harmonization of national legislation with the state's international obligations;
- the responsibility to encourage the state to become bound by international human rights instruments and ensure their implementation in the domestic system;
- the responsibility to contribute to state reports submitted to UN bodies; and
- the responsibility to cooperate with the UN, other international organizations and other national human rights institutions.[77]

The criteria contained in the Paris Principles are important for the effective functioning of a national human rights institution, especially those addressing independence, a broad mandate, adequate funding and an array of human rights protection functions. However, many of the elements of the Paris Principles are essentially directed at the activities of human rights commissions and also capture many of the aspects of human rights ombudsmen. However, the structure, powers and human rights activities of classical ombudsmen are not reflected adequately in the Principles. The periodic conferences of national human rights institutions convened under UN auspices continue to treat national human rights institutions as primarily constituted of human rights commissions and specialized human rights bodies, and consider the ombudsman as an "other" body falling outside the definition.[78]

In addition, the Paris Principles consider the investigation of complaints to be an optional power for a national human rights institution rather than being a mandatory component of the institution's mandate.[79] While many commissions do have the power of investigation, some commissions (or committees, centres, etc.) are created without

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[76] U.N.G.A. Res. 48/134, UN Doc. A/RES/48/134 (1993), rep. in *National Human Rights Institutions: A Handbook, supra* note 3 at 37-38 [hereinafter Paris Principles].

[77] *Ibid.*

[78] See e.g. *Sixth International Conference Proceedings, supra* note 17.

[79] Paris Principles, *supra* note 76, "Additional principles concerning the status of commissions with quasi-jurisdictional competence": "A national institution *may* be authorized to hear and consider complaints and petitions concerning individual situations. . . ." [emphasis added].

investigative powers. In contrast, the power to investigate complaints from members of the public is always included in the mandate of classical and human rights ombudsmen, and many ombudsmen can also unilaterally launch their own investigations. In this respect, the Paris Principles are too weak because the power to investigate complaints is treated as a non-essential function that governments can choose to leave out of an institution's mandate. A strong argument can be made that the power to investigate public complaints is an essential function for all national human rights institutions.[80]

UN 1993 World Conference on Human Rights and 1995 Beijing World Conference on Women

In 1993, the UN organized the World Conference on Human Rights. Among the topics addressed was that of the role of national human rights institutions. The resulting Vienna Declaration and Programme of Action stated that:

> 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.[81]

Similarly, the Report of the 1995 UN Beijing World Conference on Women called on governments to create or strengthen independent national institutions for the protection and promotion of human rights, including the human rights of women.[82]

Post-1993 UN Support for National Human Rights Institutions

Subsequent to the 1993 World Conference, the UN has increased its activities in support of national human rights institutions, and its focus on domestic institutions has become an important element of its strategy to strengthen human rights at the national level.

The UN High Commissioner for Human Rights, an office created in the aftermath of

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[80] See e.g. *Performance & legitimacy, supra* note 4 at 2.

[81] United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, June 25, 1993, UN Doc. A/CONF.157/24, (1993) 32 Int'l Legal Mat. 1663, Part 1, para. 36. See also *ibid.*, paras. 67-69, 74, 83-85.

[82] Fourth World Conference on Women, *Report of the Fourth World Conference on Women*, UN Doc. A/CONF.177/20 (Oct. 17, 1995), (1996) 35 Int'l Legal Mat. 405, ch. 1, res. 1, annex II, para. 230(e) [hereinafter Beijing Conference on Women Report].

the 1993 Vienna World Conference, has placed considerable importance on capacity building and technical assistance to support the establishment and activities of national human rights institutions.[83] The UN High Commissioner's Human Rights Technical Cooperation Programme is the vehicle for providing UN capacity-building and technical assistance for national human rights institutions.[84] The United Nations Development Programme (UNDP) has also become involved in many initiatives given the connections between good governance, human rights protection and national institutions.[85] The UNDP has recognized the contribution of classical and human rights ombudsmen to human rights protection.[86]

Over the past decade, the UN General Assembly,[87] Secretary-General[88] and Commission on Human Rights[89] have regularly called for the establishment and strengthening of national human rights institutions, and have both prodded and supported the work of the UN High Commissioner for Human Rights on national human rights institutions. By 2002, the UN was placing even greater importance on national human rights institutions. As the Secretary-General stated in his report to the General Assembly on the strengthening of the UN:

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[83] Burdekin and Gallagher, *supra* note 3 at 822-824.

[84] *Human Rights Today, supra* note 69 at 25, 27; Burdekin and Gallagher, *ibid.* at 822; Cardenas, *supra* note 3 at 33; C.G. Mokhiber, "The United Nations Programme of Technical Cooperation in the Field of Human Rights" in *International Human Rights Monitoring Mechanisms*, *supra* note 3 at 415. See also Vienna Declaration and Programme of Action, *supra* note 81, paras. 85-86. See *infra* Chapter 10. The International Coordinating Committee of National Institutions was also created.

[85] Burdekin and Gallagher, *ibid.* at 824.

[86] United Nations Development Programme, *Human Development Report 2000* (N.Y.: Oxford University Press, 2000) at 29, 37, 68-69, 89, 103, 116-118.

[87] E.g. U.N.G.A. Res. 56/158 (Dec. 19, 2001), UN Doc. A/RES/56/158 (Feb. 15, 2002); U.N.G.A. Res. 54/176 (Dec. 17, 1999), UN Doc. A/RES/54/176 (Feb. 15, 2000); U.N.G.A. Res. 53/144 (Dec. 9, 1998), UN Doc. A/RES/53/144 (March 8, 1999), art. 14(3); U.N.G.A. Res. 52/128 (Dec. 12, 1997), UN Doc. A/RES/52/128 (Feb. 26, 1998).

[88] E.g. National institutions for the promotion and protection of human rights: Report of the Secretary-General, UN Doc. A/56/255 (Aug. 1, 2001); Effective Functioning of Human Rights Mechanisms: National Institutions for the Promotion and Protection of Human Rights: Report of the Secretary-General, UN Doc. E/CN.4/1999/95 (Feb. 3, 1999); National Institutions for the Promotion and Protection of Human Rights: Report of the Secretary-General, UN Doc. A/54/336 (1999). See also The causes of conflict and the promotion of durable peace and sustainable development in Africa, Report of the Secretary-General (1998), UN Doc. A/52/871-S/1998/318/1998, (1998) 37 Int'l Leg. Mat. 913, para. 73, "The establishment of credible, independent and impartial national human rights institutions can be a significant confidence building measure, and should be reinforced by the development of indigenous non-governmental human rights organizations and institutions."

[89] E.g. U.N.C.H.R. Res. 2003/76, UN Doc. E/CN. 4/2003/L.11/ Add. 7 (April 25, 2003); U.N.C.H.R. Res. 2001/80, UN Doc. E/CN.4/RES/2001/80 (April 25, 2001); U.N.C.H.R. Res. 2000/76, UN Doc. E/CN.4/2000/76 (April 27, 2000); U.N.C.H.R. Res. 1999/72, UN Doc. E/CN.4/1999/72 (April 28, 1999); U.N.C.H.R. Res. 1998/55, UN Doc. E/CN.4/1998/55 (April 17, 1998); U.N.C.H.R. Res. 1997/40, UN Doc. E/CN.4/RES/1997/40 (April 11, 1997); U.N.C.H.R. Res. 1996/50, UN Doc. E/CN.4/RES/1996/50 (April 19, 1996); U.N.C.H.R. Res. 1995/50, UN Doc. E/CN.4/RES/1995/50 (March 3, 1995); U.N.C.H.R. Res. 1994/54, UN Doc. E/CN.4/RES/1994/54 (March 4, 1994); U.N.C.H.R. Res. 1993/55, UN Doc. E/CN.4/RES/1993/55 (March 9, 1993).

> Building strong human rights institutions at the country level is what in the long run will ensure that human rights are protected and advanced in a sustained manner. The emplacement or enhancement of a national protection system in each country, reflecting international human rights norms, should therefore be a principal objective of the Organization. These activities are especially important in countries emerging from conflict.[90]

Further, UN human rights treaty committees are increasingly addressing the existence and work of national human rights institutions, discussed in more detail at the end of this Chapter.

Human Rights Protection and Promotion Roles of Classical and Human Rights Ombudsmen in Context

DRAWBACKS TO LITIGATION

The courts should be the prime forum for the protection of core human rights, especially in cases involving violence, given their powers of binding decision-making backed up by the enforcement mechanisms of the state. The judicial process may be a reasonable and effective avenue for the enforcement of the human rights of an individual in a number of countries, particularly where constitutional or legislative human rights guarantees exist and the courts are independent and have adequate resources.

However, there are limitations in the use of litigation in a particular case or country. Civil litigation is too expensive for many individuals and there may not be legal aid programs available. Low-income and vulnerable individuals, especially those who have to rely on government social services for their basic needs, may find that the ombudsman is their only recourse. In some countries the courts are ineffective, politicized or corrupt. Furthermore, even if the country does provide a legal system that enshrines human rights guarantees, these laws may be limited to the protection of political and civil rights. In many countries, economic, social and cultural rights are not justiciable either because they are not enshrined in law or are given non-binding status.

National human rights institutions – including the classical and human rights ombudsman – should play a supplementary or complementary role to that of the courts and administrative tribunals. However, the ombudsman (and other national human right institutions) can play an even more important role where judicial intervention is unavailable or unrealistic. The nature and degree of the human rights protection and promotion roles of the ombudsman are primarily dependent on whether the institution is a classical or hybrid human rights institution.

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[90] Strengthening of the United Nations: an agenda for further change, Report of the Secretary-General, UN Doc. A/57/387 (Sept. 9, 2002), para. 50.

THE HUMAN RIGHTS OMBUDSMAN AND HUMAN RIGHTS PROTECTION

The human rights ombudsmen created in the past several decades are given express human rights protection powers and thus have a clear mandate to act as a domestic human rights mechanism. The legal framework of the human rights ombudsman explicitly encompasses human rights laws, such as the international human rights commitments of the state in which the ombudsman is located, domestic constitutional provisions and/or legislation. The constitution or statute law may implement the international human rights obligations of the state.

With reference to national human rights institutions generally, Anne Gallagher has noted that an express reference to international human rights treaties in the legal framework of the institution has an important result, in that the activities of the office:

> whether it be in relation to education about human rights, advising government or investigating violations, must be undertaken with reference to, and in accordance with, international human rights treaty standards.[91]

The hybrid institution may be given a variety of roles in addition to investigating human rights complaints, such as the ability to take constitutional questions to court for legal clarification, bring protective constitutional cases to assist a complainant (such as the *amparo* case in Spanish and Latin American legal systems), make law reform proposals for human rights-related legislation, provide advice and undertake human rights education. Further, the institution may be given stronger powers of enforcement. In those countries with a human rights ombudsman, human rights complaints may be predominant due to the explicit role of the office, its location in a newly established democracy, or the paucity or poor quality of other institutional mechanisms for resolving human rights infringements.

More generally, human rights ombudsmen in new democracies can play a vital role in changing both the domestic human rights law situation and the culture of the bureaucracy. As Ivan Bizjak, former Human Rights Ombudsman of Slovenia, has indicated, a human rights ombudsman in a new democracy can often: draw attention to unacceptable or outdated laws and laws which are inconsistent with the constitution or international law; go to court to request a binding decision on the constitutionality of a law; have a preventive effect in reducing poor bureaucratic behaviour because of the office's presence and monitoring activities; and help change the attitude of the bureaucracy by establishing the principle that the state exists to serve its citizens.[92]

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[91] Gallagher, *supra* note 2 at 210.

[92] I. Bizjak, "The Role and Experience of an Ombudsman in a New Democracy" (1998) 2 Int'l Omb. Yrbk. 57 at 59-60; I. Bizjak, "Special Features of the Role of the Ombudsman in Transition Conditions" (2001) 5 Int'l Omb. Yrbk. 83 at 90-91.

THE CLASSICAL OMBUDSMAN AND HUMAN RIGHTS PROTECTION

In contrast, the classical ombudsman does not have an express human rights protection mandate although, in practice, some ombudsmen do investigate complaints that raise human rights concerns. Accordingly, some classical ombudsmen utilize human rights norms in the resolution of some cases. Although many complaints to a classical ombudsman, especially to those in established democracies with various mechanisms for resolving human rights issues, involve matters that relate purely to administrative unfairness, some complaints do unearth government conduct involving human rights infringements. Thus, the classical ombudsman can also act as a non-judicial domestic mechanism for the protection of human rights.

The classical ombudsman relies on domestic law and often on broader notions of equity and fairness. The power of the ombudsman to base determinations and recommendations arising out of a complaint on legal norms and more expansive standards of equity and justice may be expressly stipulated in the legislation supporting the office. Other ombudsman institutions are given general standards by which to judge the administrative conduct in question which are capable of including both technical legal rules and broader fairness concerns.[93] As the classical ombudsman has jurisdiction to examine complaints of improper administrative conduct, administrative law is an important source of relevant law (including procedural fairness norms) in many investigations. In addition, many other areas of domestic law may be implicated depending on the nature of the specific complaint. Since the treatment of individuals by the administrative branch is at issue, human rights concerns may comprise all or part of a complaint. In other words, the complaint may involve the possibility that government administrative conduct constitutes an infringement of domestic human rights law. These domestic human rights norms may be derived from the international law obligations of the state which have been internalized into constitutional and/or other domestic law. Accordingly, even the classical ombudsman may be able to utilize international and domestic human rights norms in an investigation and any subsequent report.

OMBUDSMAN JURISDICTION OVER HUMAN RIGHTS COMPLAINTS

Extent of Ombudsman Jurisdiction

For both classical and human rights ombudsmen, human rights complaints may arise in dealings between any government department or agency and members of the public. There are certain government administrative entities which are more likely to engage in human rights breaches. These include prisons and other correctional facilities, social services and social assistance departments, child welfare institutions, mental health

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[93] E.g. the National Ombudsman of the Netherlands, who uses the legal standard of propriety to scrutinize administrative conduct. See *infra* Chapter 5.

facilities, immigration and refugee authorities, the police force and the military forces. Certainly in establishing an ombudsman office, it is important that sectors such as the prisons, police forces, military forces and immigration/refugee authorities are included within the jurisdictional scope of the ombudsman.[94] However, it is still the case that a number of classical ombudsmen do not have jurisdiction over the police or military forces of the state, with the result that these offices will not be able to accept as many human rights related cases compared to those ombudsmen which have a broader mandate.[95] Also, complainants should not be limited to adults or to citizens. The ombudsman, as is commonly the case, must have the legal authority to take complaints from non-citizens who are subject to the jurisdiction of the state (such as immigrants and refugees), prisoners, children and other vulnerable persons.

Allocation of Jurisdiction Between National Human Rights Institutions in a State

In a rough sense, countries can be said to have "single-organ", "dual-organ" or "multi-organ" systems of national human rights institutions.[96] States with a single-organ system will have one institution: an ombudsman, human rights commission or hybrid human rights ombudsman. States with a dual organ system often have a separate ombudsman and human rights commission. States with a multi-organ system have "various human rights institutions and ombudsman institutions, each having limited competence."[97] In addition, in federal states there may be ombudsman or other institutions at the national and/or sub-national levels of governance. Where a state has more than one national human rights institution, potential conflicts in jurisdiction will have to be worked out. With respect to relations between ombudsmen and other national human rights institutions, the jurisdictional limits of each institution should be clearly demarcated in the foundational legislation for each body.[98] In some countries with multiple national human rights institutions, the institutions have entered into formal agreements on allocation of different types of cases between them.[99]

Where the ombudsman does not have an express mandate over human rights and

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[94] See e.g. H. Gammeltoft-Hansen, "Refugee Concerns" in *The Ombudsman Concept, supra* note 1 at 201, rep. in *International Ombudsman Anthology, supra* note 1 at 369; H. Gammeltoft-Hansen, "Asylum-seekers, refugees and the Danish Ombudsman" in G. Alfredsson and P. Macalister-Smith, eds., *The Living Law of Nations* (Kehl: N.P. Engel, 1996) at 89.

[95] See M. Oosting, "Roles for the Ombudsmen: Past, Present and Future" in I. Rautio, ed., *Parliamentary Ombudsman of Finland 80 Years* (Helsinki: Parliamentary Ombudsman of Finland, Feb. 7, 2000) 17 at 27. Some countries with classical ombudsmen also have separate police and/or defence force ombudsmen.

[96] L.F.M. Besselink, "Types of National Institutions for the Protection of Human Rights and Ombudsman Institutions: An Overview of Legal and Institutional Issues" in *Human Rights Commissions and Ombudsman Offices, supra* note 8 at 157.

[97] *Ibid.* An example of a multi-organ system is South Africa, see *infra* Chapter 7.

[98] "Remedies: The Relationship Between National Human Rights Institutions and Other Institutions" in *Sixth International Conference Proceedings, supra* note 17 at 31.

[99] *Ibid.* at 32. See e.g. Spain (agreements between the national *Defensor del Pueblo* and some of the regional *defensores*) discussed further *infra* in Chapter 5.

receives a complaint with human rights implications that is technically within jurisdiction, the jurisdictional question becomes more delicate when other national human rights institutions are in place. There may be other institutions with explicit human rights protection roles (e.g. a human rights commission) and, in the event that one or more of the other institutions also has jurisdiction over the case, use of these other remedial avenues may be preferred by the complainant, or the ombudsman may refer the individual to one of the other alternatives. Emile Short, Chairperson of Ghana's Commission on Human Rights and Administrative Justice, has noted that complaints to an ombudsman alleging discrimination based on one of the many recognized grounds should be referred to a human rights commission if one exists because of the commission's expertise, experience and broader range of remedies for discriminatory conduct.[100] However, the jurisdiction of some human rights commissions may be limited (e.g. to discrimination), giving the ombudsman more scope to take jurisdictional complaints involving other human rights concerns.[101] As Daniel Jacoby, former Quebec *Protecteur du citoyen*, has submitted, "anything that, *a contrario*, has not been forbidden to ombudsmen may be used by them."[102] In addition, there are also matters that can be dealt with by the ombudsman and other national human rights institutions acting together cooperatively.[103]

Methods by Which an Ombudsman Can Apply International and Domestic Human Rights Norms

OVERVIEW

In the situation that a complaint involving human rights made to the ombudsman is within the jurisdiction of the office and there is no other feasible alternative institution to handle the complaint, the ombudsman will address human rights issues in the resolution of the case. The ombudsman may be able to rely on human rights laws which bind the state in order to determine whether the complaint is justified and, if so, what recommendations should be made to the public authorities. Use of human rights laws is required for hybrid human rights ombudsmen whereas for classical ombudsmen, who do not have an express human rights protection function, a reference to human rights norms is often possible through application of the constitutional and/or legislative framework supporting the office. In this manner, all ombudsmen can play a role in promoting and protecting human rights, applying international human rights law through the methods described below, and even elaborating in further detail the meaning of human rights norms through their investigations and reports.[104]

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100 E.F. Short, "Remedies: The Relationship Between National Human Rights Institutions and Other Statutory Mechanisms, With Special Reference to Racial Discrimination" in *Sixth International Conference Proceedings, supra* note 17, 123 at 129.

101 Jacoby, *supra* note 30 at 32-33.

102 *Ibid.* at 33.

103 *Ibid.*

104 On the development and elaboration of standards by the ombudsman see B. von Tigerstrom, "The

Both classical and human rights ombudsmen often have the power to undertake own-motion investigations as well as investigations initiated by individual complainants. These own-motion investigations can be valuable in addressing larger or systemic problems, some involving more than one government ministry or agency, which may raise human rights issues.[105] Also, ombudsmen are increasingly being called on to provide advice on the prevention of maladministration, and this can extend to advice on administrative conduct relating to human rights concerns.[106] Further, human rights education is a common function of human rights ombudsmen, and even classical ombudsmen sometimes also become involved in these kinds of educational projects.[107]

If human rights norms are utilized by an ombudsman in the course of resolving complaints, the ombudsman will apply the domestic law of the state, which also includes the nation's domestic human rights law obligations. Furthermore, the internal human rights law obligations of the state include those international human rights law obligations that have become part of or have been implemented into domestic law. To be considered part of the domestic legal system, the international law obligations will either have automatically become part of the national legal system (in monist states) or need to be implemented into domestic law through the constitution or statute law (in dualist states).[108] States that follow the monist approach to treaties include many civil law states.[109] States following the dualist approach to treaties include nations with a British legal heritage.[110] Customary international law norms in the human rights law area will be considered to be part of the domestic legal system if the state follows a monist approach in this area. Decisions of domestic courts may have interpreted the domestic

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Role of the Ombudsman in Protecting Economic, Social and Cultural Rights" (1998) 2 Int'l Omb. Yrbk. 3 at 16; L. Nieminen, "Finnish Parliamentary Ombudsman as Guardian of Human Rights and Constitutional Rights: View From the University of Lapland" in *Parliamentary Ombudsman of Finland 80 Years, supra* note 95, 79 at 84.

105 On systemic investigations see S. Owen, "The Expanding Role of the Ombudsman in the Administrative State" (1990) 40 U. Toronto Law J. 670 at 675.

106 See von Tigerstrom, *supra* note 104 at 18.

107 E.g. M. Aguilar Alvarez, "The Teaching, Learning and Training Process for Human Rights Protection" in *The Ombudsman: Diversity and Development, supra* note 1 at 171, rep. in *International Ombudsman Anthology, supra* note 1 at 695; L.M.P. Laurent, "The Promotion and Protection of Human Rights in the Caribbean – A Case Study by the Parliamentary Commissioner of Saint Lucia" in *The Caribbean Experience, supra* note 1, 198 at 201-202.

108 In states following a monist approach, once a state has become bound by a treaty or customary norm it automatically becomes part of the domestic legal system. For states that follow a dualist approach, the international law obligation does not become part of the legal system and for the international law to be relied on domestically, the state has to implement or "transform" the international law obligations into domestic law, usually through the passage or amendment of a statute. Some states follow the "mitigated dualist" approach whereby a domestic statute simultaneously approves the treaty and incorporates it into domestic law. Some states follow a monist approach for one source of international law (e.g. customary international law) and a dualist approach for the other source of international law (e.g. treaty law). See S.A. Riesenfeld and F.M. Abbott, eds., *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study* (Dordrecht: Martinus Nijhoff Pub., 1994) at 112; C. Heyns and F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (The Hague: Kluwer Law International, 2002).

109 Heyns and Viljoen, *ibid.* at 7.

110 *Ibid.* at 8.

human rights laws and, therefore, will also be applicable as part of the internal legal framework for human rights protection. In this manner, both the classical and human rights ombudsman can be characterized as types of domestic institutions for the application and promotion of international human rights law and obligations using the medium of domestic law.

CRITERIA FOR USE OF INTERNATIONAL HUMAN RIGHTS LAW BY AN OMBUDSMAN

There is no one process common to all ombudsman offices by which they can apply and promote international human rights norms in the domestic context. Each institution will take a different approach which is dependent on a set of criteria which are mainly determined by the international and domestic laws of the jurisdiction in which the ombudsman is located.

The use of international human rights law by an ombudsman is contingent on satisfaction of most or all of the following five criteria:

- the facts of an admissible complaint raise human rights issues;
- the country in which the institution is located has become legally bound by relevant international human rights obligations;
- the international law obligations have become part of the domestic legal system of that country;
- the jurisdiction and mandate of the ombudsman in the domestic legal system permit the ombudsman to use international and/or domestic human rights law directly or indirectly; and
- the ombudsman is receptive to the use of international and domestic human rights norms in the resolution of investigations.

Applied to human rights ombudsmen, these criteria are usually easily satisfied given the express human rights mandate of the institution and the fact that a state creating a human rights ombudsman will often have made a parallel move to become bound by and implement a variety of human rights treaties. Some human rights ombudsmen are even expressly directed to monitor administrative conduct according to the international human rights obligations of the state. However, even human rights ombudsmen can be hindered in their work if the country has not become bound by many human rights treaties or has not internalized them, the state has a weak level of human rights protection under existing domestic laws, the ombudsman is not given a strong mandate and powers to protect human rights, or the appointee is weak in terms of human rights expertise or outlook.

These five criteria are also applicable to classical ombudsmen and will affect their ability to use human rights law in the exercise of their functions. In particular, if a classical ombudsman operates in a country which has become bound by and has internalized a variety of international human rights norms, this body of international human rights law is part of the domestic legal system. Most ombudsmen have the power to determine that administrative conduct is illegal, as well as whether it is procedurally unfair, inequitable or wrong, and so can use this domestic human rights law in

considering whether illegality or inequity has occurred. Of course, a classical ombudsman has to be receptive to this use of internalized international human rights law and other domestic human rights norms in the resolution of investigations – some may be more conservative than others in this respect.

Depending on the combination of these criteria, a classical or human rights ombudsman may be able to use international human rights obligations of the state either "directly" or "indirectly" in the resolution of complaints.[111] Even international human rights law that is not binding on the state or has not been implemented in domestic law can sometimes be indirectly used by an ombudsman.

DIRECT USE OF INTERNATIONAL HUMAN RIGHTS LAW BY THE OMBUDSMAN

The direct use of international law by the ombudsman occurs when the international law obligation of the state has been incorporated into the domestic law system and exists alongside other domestic human rights law. The ombudsman can use this domestic law as the legal foundation for determinations and recommendations at the conclusion of an investigation that includes human rights issues. Human rights ombudsmen will be expressly directed to apply domestic human rights law including the state's internalized international law obligations, whereas classical ombudsmen can use domestic human rights law as one component of domestic law. However, if the international human rights obligation of the state is not implemented in the domestic legal system (e.g. in a state following the dualist approach the government has not passed an implementing statute) or the state has not become bound by an international human rights treaty, then the ombudsman cannot make use of the international human rights norm in a direct manner.

Some ombudsmen in Scandinavia and Western Europe are examples of classical ombudsmen which can make direct use of international human rights law. The National Ombudsman of the Netherlands, a classical ombudsman, can make use of international human rights treaty obligations of the state directly because ratified, published treaties automatically become part of the Dutch legal system and the Ombudsman is given a broad standard of "propriety" to examine administrative conduct.[112] In a more attenuated version of the direct application of internalized international human rights norms, the Ombudsman of the Netherlands has used these obligations as evidence to support the existence and content of fundamental legal principles that are broader than those expressly found in Dutch

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[111] Reif, "The Promotion of International Human Rights Law by the Office of the Ombudsman" in *International Ombudsman Anthology*, *supra* note 1 at 280-282.

[112] M. Oosting, "The Ombudsman and Human Rights Observations Based on the Experience of the National Ombudsman of the Netherlands", *I.O.I. Occasional Paper No. 46* (Edmonton: International Ombudsman Institute, Feb. 1992); P. van Dijk and B.G. Tahzib, "Parliamentary Participation in the Treaty-Making Process of the Netherlands" in *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study*, *supra* note 108 at 109. For further details on international human rights obligations and the Ombudsman of the Netherlands see *infra* Chapter 5. See also the approach of the Belgian federal ombudsman, P.-Y. Monette, "The Parliamentary Ombudsman in Belgium: Strengthening Democracy" in *Human Rights Commissions and Ombudsman Offices*, *supra* note 8, 269 at 275.

law, but which can be used as guiding norms, e.g., the obligation that government action should respect human dignity. Marten Oosting, former National Ombudsman of the Netherlands, has stated that:

> there are certain situations for which the conventions [International Covenant on Civil and Political Rights, European Convention on Human Rights] codify fundamental principles which, as general legal principles, have a broader scope than the particular situations to which the conventions relate. The relevant provisions of the conventions are an elaboration of these principles and are, therefore, also a striking confirmation of the importance of the latter. Their special significance lies in the fact that they embody legal norms for situations in which human freedom, especially in relation to the state, is involved in a manner which has a fundamental bearing on the quality of life.[113]

Similarly, another classical ombudsman, the Danish Ombudsman, occasionally uses international human rights norms that have been implemented into domestic law.[114] Jens Møller has stated that:

> Since from a general point of view the Ombudsman is always concerned with the protection of individual citizens against parts of the apparatus of the state, it is quite clear that the Ombudsman could make use of the human rights standards binding the Danish state – and in many respects elaborated by the human rights organs (especially of course the organs connected to the European Convention) through so-called dynamic interpretation.[115]

In a few investigations, the Danish Ombudsman has referred to European human rights law, United Nations treaty law or constitutional human rights norms.[116] Internalized human rights treaties, particularly the European Convention on Human Rights, have also been used by the Danish Ombudsman when discretionary decisions of the authorities are being scrutinized.[117]

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[113] Oosting, "The Ombudsman and Human Rights Observations Based on the Experience of the National Ombudsman of the Netherlands", *ibid.* at 5-6.

[114] Denmark follows a dualist approach to treaties, E. Holm, "The Danish Ombudsman and the European Convention on Human Rights" (1986) 30 Scand. Studies in Law 75 at 84.

[115] Møller, *supra* note 25 at 39. Denmark implemented the European Convention on Human Rights into domestic law on July 1, 1992, *ibid.* at 38. The Danish Ombudsman took the position that the European Convention on Human Rights could be used even before it was fully implemented into domestic law, Holm, *ibid.* at 98. See also H. Gammeltoft-Hansen and F. Axmark, eds., *The Danish Ombudsman* (Copenhagen: Danish Ombudsman and Ministry of Foreign Affairs Department of Information, 1995); G. Jörundsson, "The Ombudsman and the European Human Rights Institutions" in *The Danish Ombudsman, ibid.* at 79; H. Gammeltoft-Hansen and J. Andersen, "The Ombudsman's Role from a Nordic Perspective: Ombudsmanship in Denmark" in J.J. Hesse and T.A.J. Toonen, eds., (1996) III European Yrbk. Comp. Gov't & Public Admin. 309.

[116] Møller, *ibid.* at 40-41; K. Larsen, "The Parliamentary Ombudsman" in *The Danish Ombudsman, ibid.* at 60-61; J. Olsen and J. Andersen, "Selected Ombudsman Cases" in *The Danish Ombudsman, ibid.* at 213-217, 224-228.

[117] Larsen, *ibid.* at 60; Holm, *supra* note 114 at 78.

INDIRECT USE OF INTERNATIONAL HUMAN RIGHTS LAW BY THE OMBUDSMAN

More broadly, the indirect use of international human rights norms by the classical or human rights ombudsman can occur in various ways, dependent upon whether the state is bound by international human rights laws (e.g. treaties) on the international level.

Under International Law the State is Legally Bound by an International Human Rights Norm, But the Norm has not been Implemented into the Domestic Legal System

a) Use of Unimplemented Treaty as Guidance in Interpreting Domestic Law

Depending on the legal system, it may be possible to use the international human rights obligations of the state to interpret the domestic constitutional or statutory guarantees of rights in harmony with the state's international human rights obligations in a given case. Specifically, in countries where an international law obligation is not considered to automatically become part of the domestic legal system unless implementing legislation has been passed (usually treaty law), and an international human rights obligation of the state has not been implemented into domestic law, it may be possible for the ombudsman to use these unimplemented obligations indirectly as interpretive aids in construing the state's domestic constitutional or statutory human rights laws. Whether an ombudsman can use the international law in this manner will depend upon whether there is permissive constitutional law, statutory law or jurisprudence. As Justice Florence Mumba has noted:

> Even in States where most international instruments already ratified have not been incorporated into domestic law, the spirit of most Constitutions today, promotes the protection of Human Rights such that they can be encompassed within the operations of the Ombudsman without such operations being termed ultra vires the ambit of the Ombudsman.[118]

In the European context, Gaukur Jörundsson argues that ombudsmen can apply the European Convention on Human Rights indirectly if it has not been implemented domestically, by interpreting domestic law in accordance with European Convention obligations of the state.[119] Norway provides an example of a classical ombudsman using certain human rights treaty obligations of the state indirectly until they were implemented domestically and, subsequently, using them directly.[120] The Norwegian Ombudsman

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[118] F. Mumba, "The Ombudsman and Human Rights in Africa" in *Ombudsman and Human Rights*; proceedings of a symposium (The Hague: The National Ombudsman of the Netherlands, Oct. 17, 1995) 10 at 12.

[119] Jörundsson, *supra* note 115 at 86-87.

[120] Established in a 1962 statute, Norway's Ombudsman obtained constitutional status in 1995. See A. Fliflet, "Legal Institution of Ombudsman" in *Human Rights Commissions and Ombudsman Offices, supra* note 8 at 365; J.E. Lane, "The Ombudsman in Denmark and Norway" in *Righting Wrongs, supra* note 28 at 143.

is empowered to ensure that no injustice is done against individuals by the public administration.[121] Human rights issues arise "relatively often" in complaints investigated by the Norwegian Ombudsman.[122] Following the dualist approach, Norway only implemented the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights domestically via statute in 1999.[123] The Ombudsman stated how he used unimplemented treaty obligations indirectly prior to 1999, as follows:

> [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 sections 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.[124]

Since 1999, the Ombudsman has used these implemented treaties directly as part of Norwegian domestic law.[125] In investigations, the Ombudsman has used Norwegian human rights treaty obligations such as the prohibition against torture or cruel, inhuman or degrading treatment, freedom of expression, freedom of association, the right to receive a decision within a reasonable period of time, respect for family life and the rights of the child.[126]

Canada, with classical ombudsman institutions in most provinces and territories, is also illustrative of this indirect approach. The Supreme Court of Canada has rendered decisions permitting unimplemented human rights treaty obligations of Canada and other international instruments (including the European Convention on Human Rights and Protocols to which Canada is not a contracting party) to be used as interpretive aids in the elaboration of the meaning of the constitutional human rights guarantees contained

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[121] Constitution of Norway (1814, as am.), art. 75; *Act Concerning the Storting's Ombudsman for Public Administration* (1962, as am.), ss. 10-11; *Directive to the Storting's Ombudsman for Public Administration*, s. 9, rep. in Commissioner for Civil Rights Protection, *National Ombudsmen: Collection of legislation from 27 countries* (Warsaw: Bureau of the Commissioner for Civil Rights Protection, 1998) at 199.

[122] *Annual Report 2001, supra* note 24 at 20.

[123] E. Møse, "Norway" in *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000, supra* note 26 625 at 628; Council of Europe Commissioner for Human Rights, *2nd Annual Report April 2001 to December 2001*, CommDH(2002)2 (Strasbourg, May 15, 2002) at 49. The treaties were implemented by statute adopted May 21, 1999.

[124] *Annual Report 1990, supra* note 24 at 22-23; A. Fliflet, "The Parliamentary Ombudsman and Human Rights" (1996) at 1 (English translation).

[125] *Annual Report 2001, supra* note 24 at 19.

[126] Fliflet, *supra* note 124 at 4; *Annual Report 2001, ibid.* at 20-21; Norwegian Parliamentary Ombudsman, *Annual Report 1995*, English Summary (Oslo, 1996) at 28, 30-34; Norwegian Parliamentary Ombudsman, *Annual Report 1996*, English Summary (Oslo, 1997) at 42-43, 50-52. Norway also has an Ombudsman for Children, see *infra* Chapter 9.

in the *Canadian Charter of Rights and Freedoms* which is binding on the federal and provincial governments.[127] In 1999, a majority of the Supreme Court of Canada held that an unimplemented human rights treaty obligation of Canada (UN Convention on the Rights of the Child) could be used to provide contextual guidance in the interpretation of a federal statute that was not directly connected to the subject matter of the treaty (the case involved immigration legislation with sections implementing refugee treaty obligations).[128] Arguably, this decision can also be extended to the interpretation of provincial statutes. Therefore, in Canada it is open to provincial/territorial ombudsmen to use international human rights law obligations of Canada and other international human rights instruments to construe provisions of the *Charter* and domestic statute law in the manner described above when they are handling an investigation that raises human rights issues, and the *Charter* or statute law is relevant to the case, e.g. there is a possible breach of the *Charter* or statute law by a provincial administrative authority.

b) Use of International Law Obligations to Construe Broader Ombudsman Standards

Many ombudsmen have been given additional standards which are broader than that of legality by which administrative conduct can be scrutinized, such as concepts of justice, fairness, equity, propriety or wrong. In applying these wider standards, the ombudsman can use the international human rights obligations of the state – whether or not they have not become part of domestic law – as guiding principles or "best practices" for administrative authorities. Thus, even unimplemented international law obligations of the state may have indirect use. Even if administrative behaviour complies with the law, the international human rights law obligations of the state can be used by the ombudsman to determine whether the conduct breaches the wider standards of fairness and equity. Any gaps between the substantive content of the international human rights law obligations of the state and the substance of its domestic law and administrative policy can be scrutinized by the ombudsman as a situation which can constitute inequity or unfairness if the international standard provides better protection. This indirect method of using international law is especially relevant in the area of economic, social and cultural rights since these international human rights are often not implemented into domestic law after a state has assumed international obligations in this area.[129]

The British Columbia (Canada) Ombudsman provides an example of classical ombudsman use of the Convention on the Rights of the Child (CRC) in the context of broader standards of wrong conduct.[130] The use of the CRC by the British Columbia Ombudsman is discussed in more detail in Chapter 9.

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[127] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11. E.g. *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 349 (Dickson C.J. in dissent); *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038 at 1056-57 (majority opinion); and various cases discussed in W.A. Schabas, "Twenty-Five Years of Public International Law at the Supreme Court of Canada" (2000) 79:2 Can. Bar Rev. 174 at 187-191.

[128] *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[129] von Tigerstrom, *supra* note 104 at 15.

[130] E.g. Ombudsman of British Columbia, *Righting the Wrong: The Confinement of the Sons of Freedom Doukhobor Children*, Public Report No. 38 (April 8, 1999).

c) Use of International Human Rights Obligations as Standards for Changes in Domestic Law

While human rights ombudsmen often have an express mandate to try to persuade the state to amend its domestic laws to implement its international human rights obligations, classical ombudsmen do not have this function in express terms. Nonetheless, a classical ombudsman may be faced with the situation where a complainant is put into an unjust situation because the laws and administrative practices in an area may be unfair, ambiguous or nonexistent. If an ombudsman has the power to make recommendations for the drafting of new, or the amendment of existing, law and administrative practice, changes to law and practice can be proposed to fill gaps or eliminate ambiguities in a manner that accords with the state's international human rights law obligations.[131] For example, the Icelandic Ombudsman has the duty to notify the legislature or the responsible minister if the Ombudsman discovers deficiencies in laws. In 1989, he informed the government of the unsatisfactory implementation of Iceland's international human rights obligations in its domestic constitutional law and recommended amendments.[132]

A classical ombudsman may also be requested to assist in the treaty implementation process. For example, the British Columbia Ombudsman provided advice to the provincial government on implementation of the Convention on the Rights of the Child into domestic law and policy.[133]

d) Exercise of Discretion in Accordance With International Law

Where an administrative authority can exercise discretion, it may be possible for the ombudsman to recommend that such discretion be exercised in accordance with the state's international law obligations.[134] It is argued that "good administrative practice demands that administrative authorities take account of the State's obligations under international human rights conventions."[135]

Under International Law the State is not Legally Bound by a Human Rights Treaty or Evolving Customary International Law

There are still a number of states around the world that have not become contracting parties to (or who have withdrawn from) human rights treaties. In this event, the state has no international legal obligations under the treaty. Also, there may be non-legally binding international instruments (e.g. international conference declarations, UN guidelines)

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131 E.g. Jörundsson, *supra* note 115 at 86-87 (in the European context, use of the European Convention on Human Rights).

132 Gauksdóttir, *supra* note 26 at 406.

133 B. Parfitt, "Public Education on the Role of the Ombudsman Office: Geographical Concerns, Targetting Vulnerable Groups" in *The Ombudsman: Diversity and Development, supra* note 1, 159 at 166-167, rep. in *International Ombudsman Anthology, supra* note 1, 683 at 691.

134 See Jörundsson, *supra* note 115 at 87-88 (e.g. the position of the Icelandic Ombudsman).

135 *Ibid.*

and/or developing state practice in a human rights area that has not yet developed into customary international law or has not been included in treaty language.

Even international human rights instruments that are not binding on a state (i.e. the state is not a party to a particular treaty or the instrument or practice is not legally binding) can be used by the ombudsman as informal sources of guidance for what are "best practices" or fair and just conduct of the government in the context of the ombudsman's broader mandate to react to administrative conduct that is legal but otherwise unfair or wrong. These international norms reflect the consensus of the international community on what is appropriate government conduct and, arguably, can be used as contextual support in an ombudsman's investigation.

Spectrum of International Human Rights Law and Use by the Ombudsman

OVERVIEW

International human rights law runs the entire spectrum of civil, political, economic, social and cultural rights, and even some "third generation" or collective rights are evolving, mainly in several of the regional human rights systems. In the UN system, the core instruments are the Universal Declaration of Human Rights,[136] the International Covenant on Civil and Political Rights (ICCPR) and its two Protocols,[137] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[138] and many treaties in subject-specific areas such as the rights of the child, the rights of women, combatting torture and combatting racial discrimination.[139] In addition, there are a number of guidelines and declaratory principles on human rights matters, for example, countering violence against women, the treatment of prisoners, the rights of mentally disabled

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136 U.N.G.A. Res. 217A (III), 3 UN GAOR 71, UN Doc. A/810 (1948). The Universal Declaration of Human Rights is a resolution of the United Nations General Assembly. It is generally argued that some if not all of its provisions are evidence of customary international law.

137 International Covenant on Civil and Political Rights, Annex to U.N.G.A. Res. 2200A, UN GAOR, 21st Sess., Supp. No. 16 at 52, UN Doc. A/16316 (1966); First Optional Protocol on the Right of Individual Petition, Annex to U.N.G.A. Res. 2200A, UN GAOR, 21st Sess., Supp. No. 16 at 59 (1966); Second Optional Protocol to Abolish the Death Penalty, (1990) 29 Int'l Legal Mat. 1464.

138 Annex to U.N.G.A. Res. 2200A, UN GAOR, 21st Sess., Supp. No. 16 at 49, UN Doc. A/16316 (1966).

139 E.g. Convention on the Rights of the Child, Can. T.S. 1992 No. 3; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, (2000) 39 Int'l Legal Mat. 1286; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, (2000) 39 Int'l Legal Mat. 1290; Convention on the Elimination of All Forms of Discrimination Against Women, U.N.G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46 at 193; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, <www.unhchr.ch>; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1984) 1465 U.N.T.S. 85; Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2003), 42 Int'l Legal Mat. 26; Convention on the Elimination of All Forms of Racial Discrimination, (1966) 660 U.N.T.S. 195. See also refugee protection and labour rights treaties.

persons and minority rights.[140] There are regional human rights treaty regimes in Europe, the Americas and Africa.[141] As international human rights obligations address the conduct of government towards persons within its jurisdiction, many of these universal and regional human rights norms are relevant for ombudsman work.

As noted earlier, there are numerous forms of administrative conduct that raise human rights issues. Human rights ombudsmen are often given the power to investigate the entire range of civil, political, economic, social and cultural rights.[142] A number of classical ombudsmen have undertaken investigations in which civil and political rights have been applied.[143] Some classical ombudsmen have even dealt with investigations involving economic, social and cultural human rights.[144]

ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The activities of classical and human rights ombudsmen in addressing economic, social and cultural rights can be a valuable mechanism for implementing these rights domestically given their historically lower profile, the widespread absence of domestic implementation measures, the non-justiciable status often accorded to those which are implemented, and the reality that government services are the route through which most economic, social and cultural rights are provided. As Barbara von Tigerstrom has argued:

> In many respects, the ombudsman is the ideal institution to help in protecting economic, social and cultural rights. First, its jurisdiction will likely include many government agencies which are involved in providing essential services that contribute to the satisfaction of individuals' economic, social (and perhaps cultural) rights. . . . the denial of some of these services for some people may constitute an infringement of one of their rights, for example, to social security, housing or health.[145]

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140 E.g. U.N. Declaration on the Elimination of Violence Against Women, U.N.G.A. Res. 48/104, (1994) 33 Int'l Legal Mat. 1049 (also covers the violence in the public sector); Declaration on the Rights of Mentally Retarded Persons, U.N.G.A. Res. 2856 (XXVI) (1971); Declaration on the Rights of Disabled Persons, U.N.G.A. Res. 3447 (XXX) (1975); Principles for the Protection of Persons With Mental Illness and the Improvement of Mental Health Care, U.N.G.A. Res. 46/119 (1991); Basic Principles for the Treatment of Prisoners, U.N.G.A. Res. 45/111 (1990); Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, U.N.G.A. Res. 43/173 (1988); United Nations Rules for the Treatment of Juveniles Deprived of Their Liberty, U.N.G.A. Res. 45/113 (1990); Code of Conduct for Law Enforcement Officials, U.N.G.A. Res. 34/169 (1979); United Nations Standard Minimum Rules for Noncustodial Measures (Tokyo Rules), U.N.G.A. Res. 45/110 (1990); United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), U.N.G.A. Res. 40/33 (1985); Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, U.N.G.A. Res. 47/135 (1992), all rep. in United Nations, *Human Rights: A Compilation of International Instruments*, vol. I, UN Doc. ST/HR/1/Rev. 5 (New York: United Nations, 1997).

141 For further discussion see *infra* Chapter 5 for the European human rights system, Chapter 6 for the Inter-American human rights system and Chapter 7 for the African human rights regime.

142 E.g. Bizjak, "The Role and Experience of an Ombudsman in a New Democracy", *supra* note 92; Ivan Bizjak, "European Ombudsmen and the Rights of People Deprived of Their Liberty" (1999) 3 Int'l Omb. Yrbk. 89; von Tigerstrom, *supra* note 104 at 20-30. See e.g. *infra* Chapters 5-9.

143 See *supra* text accompanying notes 24 to 31 and examples *infra* in Chapters 5-7.

144 von Tigerstrom, *supra* note 104 at 16-18.

145 *Ibid.* at 15.

In December 1998, the Committee on Economic, Social and Cultural Rights issued General Comment No. 10 on the role of national human rights institutions in protecting economic, social and cultural rights.[146] 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.[147]

The Committee called on states to include economic, social and cultural human rights protection in the powers given to all national human rights institutions.[148] Accordingly, human rights ombudsmen should be given the mandate to protect economic, social and cultural human rights if this jurisdiction has not already been given to the office. Also, classical ombudsmen should recognize that they can use economic, social and cultural rights in investigations if these human rights have been implemented within the domestic legal system or, if not, as broader standards to determine equitable government conduct.

There are some limitations on the ability of the ombudsman to promote social, economic and cultural rights, as the level of their implementation is partially dependent on the economic resources of the state. But, based on the elaboration of the international law on economic, social and cultural rights, "[t]he obligations of a state are qualified, not erased, by a situation of economic hardship."[149]

WOMEN'S HUMAN RIGHTS

Ombudsman institutions should also address methods of improving the rights of women through their various activities.[150] For all types of ombudsmen, there should be greater alertness and sensitivity to complaints which raise issues of women's human rights infringements. Many classical ombudsmen can deal with administrative conduct that is illegal or discriminatory, so that gender discrimination and potentially other women's human rights complaints made against public authorities will fall within ombudsman jurisdiction.[151] Human rights ombudsmen have a broader mandate and can more easily investigate a variety of women's human rights complaints.[152] Those human rights

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146 Committee on Economic, Social and Cultural Rights, General Comment on the Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights, General Comment 10, UN Doc. E/C.12/1998/25 (1998). See *infra* note 157.

147 *Ibid.*, para. 3.

148 *Ibid.*, para. 4.

149 von Tigerstrom, *supra* note 104 at 32.

150 See S. Aurora, "The Role of National Human Rights Institutions in Advancing the Rights of Women" (2000) 15:2 Can. H.R. Foundation News. 12; Beijing World Conference on Women Report, *supra* note 82; V. Ayeni, "Ombudsman Institutions and Democracy in Africa – A Gender Perspective" (1997) 1 Int'l Omb. Yrbk. 61.

151 E.g. gender discrimination case investigated by European Ombudsman, *infra* Chapter 11.

152 E.g. gender discrimination cases investigated by the Greek Ombudsman, *infra* Chapter 5; traditional practices impacting females investigated by Ghana's Commission on Human Rights and

ombudsmen with jurisdiction over both public and private sector conduct have even greater opportunities to address women's human rights issues, including violence against women and sexual harassment. Given the variety of their functions, human rights ombudsmen should also: create programs directed at improving women's rights (which can include encouraging the state to become bound by treaties covering women's rights and draft statutes to realize these rights internally), monitor the conformity of domestic law and policy with international law on women's rights, provide training programs and educational projects, and undertake own-motion investigations.

Christine Chinkin has stated that "[c]onsideration should be given to appointing a Women's Ombudsperson with jurisdiction extending to the private sphere."[153] Only a few countries have established these types of single-sector institutions, typically addressing gender equality, discrimination and sexual harassment in the workplace, for example, in some Scandinavian countries and Lithuania.[154] Another approach taken has been to appoint a deputy to the ombudsman who deals with gender issues, e.g. the regional *Defensor del Pueblo* of Castile-La Mancha (Spain) who must appoint a Deputy *Defensor* for gender equality and the Dominican Republic *Defensor* legislation which mandates a Deputy *Defensor* for women's issues.[155] A number of human rights ombudsman institutions, such as in Latin America and including several with jurisdiction over both the public and private sectors, have departments and programs addressing the rights of women.[156]

Administrative Justice, work by the Namibia Ombudsman to try to increase the number of complaints from women, and the Thai Ombudsman constitutional court complaint concerning discrimination against women, all *infra* Chapter 7.

153 C. Chinkin, *Gender Mainstreaming in Legal and Constitutional Affairs: A Reference Manual for Governments and Other Stakeholders* (London: Commonwealth Secretariat, 2001) at 69.

154 Finland's Ombudsman for Equality established under equality legislation takes complaints, including gender discrimination in the workplace and some sexual harassment cases, with most complainants working in the public sector, see e.g. "Female employee to take leading trade union official to court over discrimination", *Helsingen Sanomat* (June 4, 2002). Sweden's Ombudsman for Gender Discrimination monitors gender discrimination in the workplace. Norway's Equal Rights Ombudsman was established in 1978 to supervise and enforce gender equality legislation. Lithuania's Equal Opportunities Ombudsman, established in 1999 to oversee implementation of equal opportunities legislation, including provisions on discrimination and sexual harassment in the workplace and in educational and scientific institutions, is independent and reports to the Lithuanian legislature. The Lithuanian Equal Opportunities Ombudsman can investigate, on receipt of a complaint or on her own-motion, alleged discrimination and sexual harassment, can make recommendations thereon and can submit proposals to government for the improvement of law and policy on equal rights, see "UN: Committee on Elimination of Discrimination Against Women Takes Up First, Second Reports of Lithuania", *M2 Presswire* (June 19, 2000); Committee on the Elimination of Discrimination Against Women, Concluding Observations: Lithuania, UN Doc. A/55/38, paras. 118-165 (June 16, 2000), para. 120.

155 The *Defensor del Género*, Castile-La Mancha *Ley 16/2001* (Dec. 20, 2001), art. 10(2), in operation 2002; Dominican Republic *Defensor del Pueblo*, office not in operation by mid-2003, see *infra* Chapter 6.

156 E.g. Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Peru, "Comparative Analysis of Ombudsman Laws", Inter-American Institute of Human Rights, <www.iidh.ed.cr/comunidades/Ombudsnet/cuadro.aspx>. The *Defensor del Pueblo* of Peru has a department specializing in women's rights with extensive programs, *Memoria, Defensoría Especializada en los Derechos de la Mujer* (Lima: Defensoría del Pueblo of Peru, April 1998 to April 2000). The *Comisionado de los Derechos Humanos* of Honduras has an area specialization for women, children and the family, and addresses issues such as violence against women, with

Relationship Between Ombudsmen and the UN Human Rights Treaty Committees

Within the UN human rights system, a number of the human rights treaties have committees which examine periodic reports from state parties on compliance with their treaty obligations, provide responses to state reports and issue general comments.[157] Some committees are also empowered to examine petitions from individuals alleging violations by state parties of their human rights obligations in the treaty.[158]

TREATY COMMITTEE WORK AND NATIONAL HUMAN RIGHTS INSTITUTIONS

Overview and Critique

Commentators have stated that there has not been much direct contact between national human rights institutions and treaty committees, and that the relationship needs to be developed further.[159] Anne Gallagher has argued that the committees hardly ever look at the structure and work of national human rights institutions when committees respond to state reports and, conversely, national human rights institutions rarely provide information to treaty bodies, become involved in the preparation of state reports or publicize and monitor these reports and the comments made by the committee.[160]

Gallagher and Buck have suggested ways in which treaty committees can enhance their work in connection with national human rights institutions. They advocate that treaty committees should: (1) determine both the status of national human rights insti-

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complaints of domestic violence comprising almost 2 out of every 10 complaints to the institution, *Derechos Humanos: Dos años de Realidades y Retos 1998-1999* (Honduras: Comisionado de los Derechos Humanos) at 188-200, 235. See *infra* Chapter 6. When Ethiopia's Ombudsman becomes operational, one of the ombudsmen will head a department on women's affairs and children, *infra* Chapter 7.

157 E.g. Human Rights Committee (International Covenant on Civil and Political Rights); Committee on Economic, Social and Cultural Rights (International Covenant on Economic, Social and Cultural Rights); Committee on the Rights of the Child (Convention on the Rights of the Child); Committee Against Torture (Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); Committee on the Elimination of Racial Discrimination (Convention on the Elimination of All Forms of Racial Discrimination); Committee on the Elimination of Discrimination Against Women (Convention on the Elimination of All Forms of Discrimination Against Women); Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families).

158 Human Rights Committee, Committee Against Torture, Committee on the Elimination of Racial Discrimination, Committee on the Elimination of Discrimination Against Women, Committee on the Protection of the Rights of All Migrant Workers. Use of the individual complaints mechanisms under the other treaty regimes are subject to certain admissibility requirements. See *The Future of UN Human Rights Treaty Monitoring, supra* note 2. Only the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child have no power to hear individual complaints.

159 Gallagher, *supra* note 2 at 208-209; J.S. Verma, "Monitoring Legal Frameworks Relevant for Racial Discrimination" in *Sixth International Conference Proceedings, supra* note 17, 92 at 96.

160 Gallagher, *ibid.* at 208.

tutions within a state under scrutiny (including the ombudsman) and the utility of the work of these institutions for the committee;[161] (2) consider inviting national human rights institutions to participate in their discussions when state reports are being considered;[162] and (3) in their responses to periodic state reports, pay greater attention to annual and special reports of national institutions, weaknesses in the performance of the institution or the need for an institution to be established if one does not already exist in the state under examination.[163]

However, some treaty committees have paid attention to national human rights institutions in their general comments and all treaty committees have made references to such institutions in their concluding observations on state reports at least since the early 1990s, albeit to different degrees. A 2001 Report of the Secretary-General indicates that treaty committees regularly request state parties to provide information relating to the establishment of national human rights institutions in their country.[164] The UN is trying to improve the cooperation between the Office of the High Commissioner for Human Rights, treaty committees and national human rights institutions for the information possessed by national institutions on specific human rights issues, for treaty committee reporting and monitoring state action to implement committee observations.[165]

The following sections address treaty committee references to national human rights institutions and the role of such institutions in the preparation of state reports and the monitoring of state compliance with their treaty obligations.

Treaty Committee General Comments Referring to National Human Rights Institutions

In addition to the Paris Principles discussed earlier in this Chapter, a few of the treaty committees have issued General Comments which address national human rights institutions.

In 1993, the Committee on the Elimination of Racial Discrimination issued General Comment No. 17 on the establishment of national institutions to facilitate implementation of the International Convention on the Elimination of All Forms of Racial Discrimination.[166] The General Comment recommended that state parties to the Convention establish national commissions or other appropriate bodies taking into account the Paris Principles and give them functions including activities to eliminate discrimination and the mandate to assist the government in preparing its state reports for the Committee.[167] In 2003, the Committee on the Elimination of Racial Discrimination issued a General Comment on the follow up to the Durban Conference on Racism which, *inter alia*, recommended

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161 *Ibid.* at 216.

162 Buck, *supra* note 17, 41 at 46.

163 Gallagher, *supra* note 2 at 222-223.

164 National institutions for the promotion and protection of human rights, Report of the Secretary-General, UN Doc. A/56/255 (Aug. 1, 2001), *supra* note 88, para. 53.

165 *Ibid.*, para. 54.

166 Committee on the Elimination of Racial Discrimination, General Comment No. 17 (March 25, 1993).

167 *Ibid.*

that national human rights institutions assist their respective states in complying with their Racial Discrimination Convention reporting obligations and closely monitor the follow up to the concluding observations and recommendations of the Committee.[168]

As discussed earlier in this Chapter, in 1998 the Committee on Economic, Social and Cultural Rights issued a General Comment on the importance of including economic, social and cultural rights in the mandate of a national human rights institution.[169] The Committee on Economic, Social and Cultural Rights has also issued a number of General Comments on the specific rights to health, food and water in the ICESCR which state that ombudsmen and human rights commissions should be permitted to address violations of these rights.[170]

In 2002, the Committee on the Rights of the Child issued a General Comment on the role of and criteria for national human rights institutions in the protection and promotion of the rights of the child, which is discussed in more detail in Chapter 9.[171]

References to National Human Rights Institutions in Treaty Committee Concluding Observations

Treaty committees are increasingly addressing the topic of national human rights institutions, including ombudsmen, in their Concluding Observations made in response to periodic state reports. These Concluding Observations may compliment a state for establishing an institution, provide suggestions on improvement of an institution or recommend that a national human rights institution be established in a state.

The Committee on the Rights of the Child has looked at national human rights institutions for children in its concluding observations since its inception, and regularly since 1996. The Committee on the Rights of the Child often recommends that a state without an institution establish a children's ombudsman or other equivalent institution, and will comment positively or make suggestions for improvements to existing institutions. For a number of years the Committee has stated that institutions for children should be created in accordance with the Paris Principles and, after its issue in 2002, has referred to its General Comment on national human rights institutions.[172]

At least since the early 1990s, the Human Rights Committee has commented in a majority of its concluding observations on whether or not the state party has established a national human rights institution, commented on the establishment of an institution as

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[168] Committee on the Elimination of Racial Discrimination, General Comment No. 28 (March 19, 2003), para. 2(a).

[169] Committee on Economic, Social and Cultural Rights, General Comment No. 10, *supra* note 146.

[170] Committee on Economic, Social and Cultural Rights – General Comment No. 12, UN Doc. E/C.12/1999/5 (May 12, 1999), para. 32 (food); General Comment No. 14, UN Doc. E/C.12/2000/4 (July 4, 2000), para. 59 (health); General Comment No. 15, UN Doc. E/C.12/2002/11 (Jan. 20, 2003), para. 55 (water).

[171] Committee on the Rights of the Child, General Comment No. 2, UN Doc. CRC/GC/2002/2 (Oct. 4, 2002).

[172] See *supra* notes 76, 171, *infra* Chapter 9.

a positive development, recommended the establishment of an independent institution in countries without one, or recommended improvements to existing institutions.[173] However, until the late 1990s the comments were quite brief. The Human Rights Committee's comments on national human rights institutions have become more detailed and, in 2003, the Committee made its first reference to the Paris Principles in concluding observations on a state's periodic report.[174]

The Committee on the Elimination of Racial Discrimination has referred to the establishment of new national human rights institutions, the operations of institutions or the lack thereof in its Concluding Observations at least since 1993, and regularly since 1995, but it has only cited the Paris Principles sporadically since 2001 and has only occasionally cited its 1993 General Comment No. 17 on national institutions until 2001.[175] The Committee Against Torture also refers to the subject of national human rights institutions in its concluding Observations, particularly since 2000, but often without much

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[173] E.g. Human Rights Committee – Concluding Observations: Estonia, UN Doc. CCPR/CO/77/EST (April 3, 2003), paras. 5, 18; Concluding Observations: Viet Nam, UN Doc. CCPR/CO/75/VNM (July 26, 2002), para. 11; Concluding Observations: Czech Republic, UN Doc. CCPR/CO/72/CZE (Aug. 27, 2001), para. 7; Concluding Observations: Uzbekistan, UN Doc. CCPR/CO/71/UZB (April 26, 2001), para. 25; Concluding Observations: Venezuela, UN Doc. CCPR/CO/71/VEN (April 26, 2001), paras. 4, 14; Concluding Observations: Kuwait, UN Doc. CCPR/CO/69/KWT, A/55/40, paras. 452-497 (July 27, 2000), para. 45; Concluding Observations: Poland, UN Doc. CCPR/C/79/Add.110 (July 29, 1999), para. 7; Concluding Observations: Cambodia, UN Doc. CCPR/C/79/Add.108 (July 27, 1999), para. 10; Concluding Observations: Tanzania, UN Doc. CCPR/C/79/Add.97 (Aug. 18, 1998), para. 26; Concluding Observations: Zimbabwe, UN Doc. CCPR/C/79/Add.89 (April 6, 1998), paras. 5, 10; Concluding Observations: Georgia, UN Doc. CCPR/C/79/Add.75 (May 5, 1997), paras. 11, 24; Concluding Observations: Brazil, UN Doc. CCPR/C/79/Add.66, A/51/40, paras. 306-338 (July 24, 1996), para. 3; Concluding Observations: Sri Lanka, UN Doc. CCPR/C/79/Add.56, A/50/40, paras. 436-476 (July 27, 1995), para. 3; Concluding Observations: Italy, UN Doc. CCPR/C/79/Add.37, A/49/40., paras. 271-290 (Aug. 3, 1994), paras. 4-5; Concluding Observations: El Salvador, UN Doc. CCPR/C/79/Add.34, A/49/40, paras. 209-224 (April 18, 1994), paras. 3, 5; Concluding Observations: Bulgaria, UN Doc. CCPR/C/79/Add.24 (Aug. 3, 1993), paras. 6, 9; Concluding Observations: Uruguay, UN Doc. CCPR/C/79/Add.19 (May 5, 1993), para. 12; Concluding Observations: Colombia, UN Doc. CCPR/C/79/Add.2, A/47/40, paras. 390-394 (Sept. 25, 1992), para. 391.

[174] Human Rights Committee – Concluding Observations: Mali, UN Doc. CCPR/CO/77/MLI (April 16, 2003), para. 8.

[175] On General Comment No. 17 see *supra* note 166. E.g. Committee on the Elimination of Racial Discrimination – Concluding Observations: Fiji, UN Doc. CERD/C/62/CO/3 (March 21, 2003), para. 9 (Paris Principles); Concluding Observations: Morocco, UN Doc. CERD/C/62/CO/5 (March 21, 2003), paras. 5-6 (Paris Principles); Concluding Observations: Switzerland, UN Doc. CERD/C/60/CO/14 (May 13, 2002), para. 13 (Paris Principles); Concluding Observations: Qatar, UN Doc. CERD/C/60/CO/11 (March 20, 2002), para. 22 (Paris Principles); Concluding Observations: Egypt, UN Doc. A/56/18, paras. 278-297 (Aug. 15, 2001), para. 292 (Paris Principles); Concluding Observations: Haiti, UN Doc. CERD/C/304/Add.84 (April 12, 2001), para. 14 (General Comment 17); Concluding Observations: Guinea, UN Doc. CERD/C/304/Add.86 (April 12, 2001), para. 18 (General Comment 17); Concluding Observations: Germany, UN Doc. CERD/C/304/Add.24 (April 23, 1997), para. 4 (General Comment 17); Concluding Observations: Romania, UN Doc. A/50/18, paras. 262-278 (Sept. 22, 1995), para. 267 (General Comment 17); Concluding Observations: Trinidad and Tobago, UN Doc. A/50/18, paras. 31-48 (Sept. 22, 1995), para. 40 (General Comment 17); Concluding Observations: Nicaragua, UN Doc. A/50/18, paras. 499-541 (Sept. 22, 1995), s. (d) (General Comment 17).

detail and usually with no references to international standards.[176] Since the early 1990s and regularly since the late 1990s, the Committee on Economic, Social and Cultural Rights has made references to national human rights institutions, has focussed on the ability of national institutions to address economic, social and cultural rights, and has occasionally referred to the Paris Principles and its General Comment No. 10 on national human rights institutions.[177] In its Concluding Observations, the Committee on the Elimination of Discrimination Against Women discusses national human rights institutions, looking at both specialized institutions for gender/equal opportunities and the focus of general institutions on women's rights.[178]

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[176] E.g. Committee Against Torture – Concluding Observations: Azerbaijan, UN Doc. CAT/C/CR/30/1 (May 14, 2003), paras. 7(g), 8(a); Concluding Observations: Luxembourg, UN Doc. CAT/C/CR/28/2 (June 12, 2002); Concluding Observations: Indonesia, UN Doc. CAT/C/XXVII/Concl.3 (Nov. 22, 2001), paras. 8(c), 10(a); Concluding Observations: Kazakhstan, UN Doc. A/56/44, paras. 121-129 (May 17, 2001), paras. 124, 129 (Paris Principles); Concluding Observations: Bolivia, UN Doc. A/56/44, paras. 89-98 (May 10, 2001), paras. 92(b), 95(h); Concluding Observations: Paraguay, UN Doc. A/55/44, paras. 146-151 (May 10, 2000), paras. 150, 151; Concluding Observations: Guatemala, UN Doc. A/53/44, paras. 157-166 (May 27, 1998), para. 165(e); Concluding Observations: Sri Lanka, UN Doc. A/53/44, paras. 243-257 (May 19, 1998), paras. 247(c), 255(e); Concluding Observations: Cyprus, UN Doc. A/52/44, paras. 42-51 (Nov. 21, 1997), paras. 45-46.

[177] E.g. Committee on Economic, Social and Cultural Rights – Concluding Comments: Georgia, UN Doc. E/C.12/1/Add.83 (Dec. 19, 2002), paras. 13, 32; Concluding Comments: Estonia, UN Doc. E/C.12/1/Add.85 (Dec. 19, 2002), para. 5; Concluding Comments: Trinidad and Tobago, UN Doc. E/C.12/1/Add.80 (June 5, 2002), para. 34; Concluding Comments: Syria, UN Doc. E/C.12/1/Add.63 (Sept. 24, 2001), para. 28 (Paris Principles); Concluding Comments: Japan, UN Doc. E/C.12/1/Add.67 (Sept. 24, 2001), para. 38 (Paris Principles, General Comment 10); Concluding Comments: China, UN Doc. E/C.12/1/Add.58 (May 21, 2001), paras. 10, 15(d), 32 (Paris Principles, General Comment 10); Concluding Comments: Republic of Korea, UN Doc. E/C.12/1/Add.59 (May 21, 2001), para. 35 (Paris Principles, General Comment 10); Concluding Comments: Belgium, UN Doc. E/C.12/1/Add.54 (Dec. 1, 2000), para. 19 (Paris Principles); Concluding Comments: Morocco, UN Doc. E/C.12/1/Add.55 (Dec. 1, 2000), para. 37 (Paris Principles); Concluding Comments: Jordan, UN Doc. E/C.12/1/Add.46 (Sept. 1, 2000), para. 26 (Paris Principles); Concluding Comments: Mongolia, UN Doc. E/C.12/1/Add.47 (Sept. 1, 2000), para. 19 (Paris Principles); Concluding Comments: Sudan, UN Doc. E/C.12/1/Add.48 (Sept. 1, 2000), para. 31 (Paris Principles); Concluding Comments: Kyrgystan, UN Doc. E/C.12/1/Add.49 (Sept. 1, 2000), para. 25 (Paris Principles); Concluding Comments: Egypt, UN Doc. E/C.12/1/Add.44 (May 23, 2000), para. 30 (Paris Principles); Concluding Comments: Bulgaria, UN Doc. E/C.12/1/Add.37 (Dec. 8, 1999), para. 22 (Paris Principles); Concluding Comments: Tunisia, UN Doc. E/C.12/1/Add.36 (May 14, 1999), para. 20 (General Comment 10). See *supra* note 146 for Committee on Economic, Social and Cultural Rights General Comment No. 10.

[178] E.g. Committee on the Elimination of Discrimination – Concluding Observations: Fiji, UN Doc. A/57/38 (Part I), paras. 24-70 (May 7, 2002), paras. 41-42, 46; Concluding Observations: Nicaragua, UN Doc. A/56/38, paras. 277-318 (July 31, 2001), paras. 289, 311; Concluding Observations: Sweden, UN Doc. A/56/38, paras. 319-360 (July 31, 2001), para. 340; Concluding Observations: Mongolia, UN Doc. A/56/38, paras. 234-278 (Feb. 2, 2001), para. 264; Concluding Observations: Lithuania, *supra* note 154, paras. 131-132, 149; Concluding Observations: Georgia, UN Doc. A/54/38, paras. 70-116 (July 1, 1999), para. 87; Concluding Observations: Peru, UN Doc. A/53/38/Rev.1, paras. 292-346 (July 8, 1998), para. 316; Concluding Observations: South Africa, UN Doc. A/53/38/Rev.1, paras. 100-137 (June 30, 1998), paras. 119-120; Concluding Observations: Slovenia, UN Doc. A/52/38/Rev.1, paras. 81-122 (Aug. 12, 1997), paras. 92, 95; Concluding Observations: Finland, UN Doc. A/50/38, paras. 346-397 (May 31, 1995), paras. 359, 397; Concluding Observations: Sweden, UN Doc. A/48/38, paras. 474-522 (Feb. 1, 1993), para. 489.

National Human Rights Institutions and ICCPR Article 2

Article 2 of the International Covenant on Civil and Political Rights (ICCPR) imposes obligations on contracting parties to ensure ICCPR rights without distinction, adopt legislation or other measures to give effect to ICCPR rights and provide remedies for breaches.[179] In particular, Article 2(3) requires an "effective remedy" for ICCPR breaches and requires parties to provide remedial processes through competent judicial, administrative, legislative or other competent authorities provided for by the legal system.[180] In May 2003, the UN Human Rights Committee issued a draft General Comment on the nature of the general legal obligation imposed on ICCPR parties under Article 2.[181] The General Comment does not expressly refer to national human rights institutions. The draft General Comment does state that Article 2(3) requires that ICCPR parties "must ensure that individuals also have accessible, effective and enforceable remedies to vindicate those rights. The Committee attaches considerable importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law."[182] The draft General Comment also states that Article 2(3) requires parties to make reparations for ICCPR breaches, generally monetary compensation.[183]

Recently, a few of the Human Rights Committee's Concluding Observations to state reports which refer to national human rights institutions also explicitly connect the establishment or operation of such institutions with the fulfilment of Article 2 or 2(3) of the ICCPR.[184] In this respect, the Human Rights Committee appears to accept that a national human rights institution is capable of serving as an effective remedy within the terms of the ICCPR. However, according to the draft General Comment, while a remedy can be administrative and does not have to be judicial, the Comment also states that a

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179 International Covenant on Civil and Political Rights, *supra* note 137.

180 *Ibid.* Art. 2(3) states:
"Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted."

181 Human Rights Committee, The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, Draft General Comment, UN Doc. CCPR/C/74/CRP.4/Rev.3 (May 5, 2003), which will replace their General Comment No. 3.

182 *Ibid.*, para. 14.

183 *Ibid.*, para. 15.

184 Human Rights Committee – Concluding Observations: Togo, UN Doc. CCPR/CO/76/TGO (Nov.28, 2002), para. 8; Concluding Observations: Georgia, UN Doc. CCPR/CO/74/GEO (April 19, 2002), para. 16; Concluding Observations: Democratic People's Republic of Korea, UN Doc. CCPR/CO/72/PRK (Aug. 27, 2001), para. 10; Concluding Observations: Kuwait, UN Doc. CCPR/CO/69/KWT, A/55/40, paras. 452-497 (July 27, 2000), para. 45 (encouragement to establishment an independent and effective mechanism to ensure effective remedies as required by art. 2(3)).

remedy must be accessible, effective and enforceable. With limited exceptions, classical and human rights ombudsmen cannot enforce their recommendations and must rely on moral suasion and public reporting.[185] Thus, following the draft Comment, since most ombudsmen do not provide legally enforceable remedies, those which can only recommend change cannot be considered an "effective remedy" under the ICCPR. A number of human rights ombudsmen can bring court actions for the determination of constitutional issues and rights, but it is the judicial decision which is the legally enforceable remedy. The human rights ombudsman, however, contributes to or is one element of the enforceable remedy.[186]

NATIONAL HUMAN RIGHTS INSTITUTIONS AND STATE REPORTS

The UN Paris Principles state that a national human rights institution shall have the responsibility:

> [t]o contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations, and, where necessary, to express an opinion on the subject, with due respect for their independence.[187]

Although the preparation of a state report is the responsibility of the government of the state concerned, national human rights institutions can support the process by providing relevant information to the government.[188] While classical ombudsmen probably will not have the mandate to become formally involved in the preparation of state reports, human rights commissions or human rights ombudsmen may have the authority to assist a state in the drafting of its report. In this situation, a human rights ombudsman (or commission) must be very careful that any participation in the drafting of a state report does not harm the institution's independence.[189]

Some institutions may consider that any participation in the drafting of a state report will compromise its independence. Instead of participating in the drafting process, the institution could prepare its own shadow report to submit independently to the treaty committee, work with NGOs in sending information to the committee, insert information on the concluding observations of the committee in its annual report or invite members of the treaty committee to visit the country to discuss their observations in a public forum.[190] For example, the Chairperson of India's National Human Rights Commission has stated that the Commission neither participates in the drafting of India's country

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185 But see the human rights ombudsmen in Ghana and Tanzania who can go to court to enforce their recommendations, and a few ombudsmen who can prosecute officials for wrongdoing or corruption, e.g. ombudsmen in Sweden, Finland and Uganda.

186 E.g. human rights ombudsmen in Spain, Portugal, Latin America, and Central and Eastern Europe. See discussion *infra* in Chapters 5 and 6 on analogous provisions in the European and Inter-American human rights treaties.

187 Paris Principles, *supra* note 76, para. 3(d).

188 Gallagher, *supra* note 2 at 217.

189 Buck, *supra* note 17 at 45.

190 *Ibid.* at 45-46.

reports nor prepares shadow reports, as "[t]he first course would tie us too closely to the official report and, frankly, the second course would be too time-consuming."[191] Instead, the Commission analyses the concluding observations of the treaty committee in their annual report and encourages the government to act on their recommendations.[192]

In any event, a state preparing its report for a human rights treaty body is always free to examine the annual and special reports of national human rights institutions during the drafting stage, and should be encouraged to do so.

ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN MONITORING STATE COMPLIANCE WITH TREATY OBLIGATIONS

As Ann Gallagher has recognized:

> The work of national institutions (particularly in relation to complaints and review of legislation to determine its consistency with treaty norms) can provide valuable background information for determining the progress of states parties in implementing their obligations. National institutions can also provide useful insights into laws, practices and traditions which impact upon a state's compliance with its obligations under human rights treaty law.[193]

Human rights treaty committees and other bodies in the United Nations human rights system can look to the reports of classical and human rights ombudsmen, human rights commissions and specialized institutions as a means of monitoring the degree to which states are complying with their human rights treaty obligations and implementing the recommendations of treaty committees.

Other Perspectives on the Ombudsman and Human Rights

This chapter has presented a theoretical approach to the role of classical and human rights ombudsmen in the domestic protection and promotion of international human rights norms. The interface between the UN human rights system and national human rights institutions, including classical and human rights ombudsmen, has also been explored.

The connections between national ombudsmen and the regional human rights systems in Europe, the Americas and Africa will be covered in Chapters 5 to 7. Case studies of the human rights roles of selected classical and human rights ombudsmen in Europe, Latin America, the Caribbean, Africa, Asia and the Pacific will be discussed in Chapters 5 to 7. Human rights ombudsmen established in post-conflict peace-building processes are explored in Chapter 8. Various single-sector ombudsmen – such as ombudsmen for children and ethnic minorities ombudsmen – which also play roles in the promotion and protection of human rights are discussed in Chapters 2 and 9.

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[191] Verma, *supra* note 159 at 95.
[192] *Ibid.* at 96.
[193] Gallagher, *supra* note 2 at 216.

CHAPTER FIVE

The Ombudsman, Good Governance and Human Rights in Europe

Introduction

The modern legislative ombudsman model has its roots in Scandinavia, growing out of the *justitieombudsman* established in Sweden in 1809. As the history is traced in Chapter 1, the ombudsman institution was adopted by other Scandinavian countries only after a gap of over one hundred years, first in Finland in 1919 and thereafter in Denmark (1953, appointed in 1955) and Norway (1962). A few Western European countries established ombudsman institutions during the 1960s and 1970s, such as the United Kingdom, France and Austria. After moving out of the yoke of authoritarian governments during the 1970s, Portugal and Spain moved to democratic forms of government and, faced with the issue of human rights protection as well as improving administrative governance, established hybrid human rights ombudsmen.

However, it was not until the decades of the 1980s and 1990s that European countries adopted or adapted the ombudsman model in large numbers. Countries in different regions of Europe looked to the ombudsman model at different times during this twenty year period for different reasons. Some countries in Western Europe and Scandinavia added new or reformed existing ombudsman offices to refine their established democratic governance structures, with some adopting the classical ombudsman model and others choosing the human rights ombudsman. After the fall of communism in Central and Eastern Europe, countries in this region began the long process of democratization, reform of the bureaucracy and the development of human rights protection. Many states in this region created national human rights institutions starting with Poland in the late 1980s, predominantly adopting the hybrid human rights ombudsman or the human rights commission model. In addition, Bosnia and Herzegovina and Kosovo are examples of European conflict zones where the post-conflict peace building activities of the international community have included the establishment of human rights ombudsmen.

This chapter will explore the classical and human rights ombudsmen found throughout Europe, and their role in promoting good governance by monitoring administrative behaviour and protecting and promoting human rights. The ability of an ombudsman in Europe to act as a non-judicial domestic mechanism for the implementation of the European Convention human rights system will also be examined.

Overview of the Ombudsman in Europe

By mid-2003, classical or hybrid human rights ombudsman institutions can be found in most European countries.[1] Looking at the fifteen European Union (EU) states, there are classical or human rights ombudsmen at the national level in twelve of the fifteen member states.[2] In the remaining three – Italy, Germany and Luxembourg – Italy has many regional/provincial ombudsmen and is considering a national ombudsman, Germany has some regional (*länd*) ombudsmen and Luxembourg is also considering the establishment of a national ombudsman.[3] Four of the twelve EU states with national ombudsmen – Austria, Belgium, Spain and the United Kingdom – also have ombudsmen at sub-national levels of government.[4] The majority of national ombudsmen in the fifteen EU states follow the classical model, and five member states – Finland, Greece, Portugal, Spain and Sweden – have hybrid human rights and administrative justice mandates. This will change when EU enlargement occurs. Of the ten European states expected to become EU members in May 2004, only one has a classical national ombudsman and the remainder have human rights ombudsmen or other forms of human rights institutions.[5]

The forty-five Council of Europe member states provide a pan-European perspective.[6]

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[1] See generally K. Hossain et al., eds., *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (The Hague: Kluwer Law International, 2001) [hereinafter *Human Rights Commissions and Ombudsman Offices*]; R. Gregory and P. Giddings, eds., *Righting Wrongs: The Ombudsman in Six Continents* (Amsterdam: IOS Press, 2000) [hereinafter *Righting Wrongs*]; Commissioner for Civil Rights of Poland, *National Ombudsmen: Collection of legislation from 27 countries* (Warsaw: Bureau of the Commissioner for Civil Rights Protection, 1998) [hereinafter *National Ombudsmen: Collection*]; F. Matscher, ed., *Ombudsman in Europe: The Institution* (Kehl am Rhein: N.P. Engel Verlag, 1994).

[2] Austria, Belgium, Denmark, Finland, France, Greece, Ireland, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.

[3] Italy has the ombudsman (*Difensore Civico*) in almost all of its provinces and autonomous regions. Germany has four state ombudsmen in Rhineland-Palatinate, Mecklenburg-Western Pomerania, Thuringia and Schleswig-Holstein, and also has a legislative military ombudsman. See U. Kempf, "Ombudsmanship Without an Ombudsman: Germany" in J.J. Hesse and T.A.J. Toonen, eds. (1996) III European Yrbk. Comp. Gov't 321; M. Oosting, "Roles for the Ombudsman: Past, Present and Future" in I. Rautio, ed., *Parliamentary Ombudsman of Finland 80 Years* (Helsinki: Parliamentary Ombudsman of Finland, Feb. 7, 2000) 17 at 20. Germany and Luxembourg have legislative petitions committees. See *supra* Chapter 1 for a discussion of the petitions committee.

[4] Austria has some ombudsman offices at the *land* level, Belgium has the Flemish Community Ombudsman and the Walloon Community Ombudsman, Spain has ombudsmen in ten of its seventeen autonomous communities and the United Kingdom has ombudsmen in all its constituent territories. In 2000, the United Kingdom government began to consider consolidating national and local government ombudsmen in England into one Ombudsman Commission, see D. Lewis and R. James, "Joined-up Justice: Review of the Public Sector Ombudsman in England" (2000) 4 Int'l Omb. Yrbk. 109. In 2002, the Scottish government amalgamated their four ombudsman offices into one Scottish Public Services Ombudsman.

[5] Malta has a classical ombudsman. Cyprus, Czech Republic, Hungary, Poland, Slovak Republic and Slovenia have human rights ombudsman institutions. Lithuania's Ombudsmen have some human rights protection functions. Estonia's Chancellor of Justice provides ombudsman and human rights protection functions. Latvia has a human rights office. The Treaty of Accession was signed in Athens on April 16, 2003, and will enter into force on May 1, 2004 after the 25 states have ratified the treaty.

[6] As at mid-2003, the members were Albania (1995), Andorra (1994), Armenia (2001), Austria (1956),

Only eight of the total do not have a national ombudsman in operation or established in law, some of the eight are considering an ombudsman and four – Germany, Italy, Serbia and Montenegro, and Switzerland – have established ombudsmen in varying degrees at the sub-national level.[7] Armenia's legislature passed a human rights ombudsman law in autumn 2003, Bulgaria's human rights ombudsman law enters into force in 2004, and Turkey and Serbia and Montenegro are trying to establish national ombudsmen.[8] Kosovo, still part of Serbia and Montenegro, has a Human Rights Ombudsperson created by the United Nations peace-building mission.[9] Armenia, Azerbaijan, Georgia, Moldova, Russia and Ukraine – members both of the Commonwealth of Independent States (C.I.S.) and the Council of Europe – all have or are establishing human rights ombudsmen.[10]

The European Human Rights System and the Role of the Ombudsman

The international human rights system in Europe operates under the umbrellas of the Council of Europe, the Organization for Security and Cooperation in Europe (OSCE) and the EU.

Azerbaijan (2001), Belgium (1949), Bosnia and Herzegovina (2002), Bulgaria (1992), Croatia (1996), Cyprus (1961), Czech Republic (1993), Denmark (1949), Estonia (1993), Finland (1989), France (1949), Georgia (1999), Germany (1950), Greece (1949), Hungary (1990), Iceland (1950), Ireland (1949), Italy (1949), Latvia (1995), Liechtenstein (1978), Lithuania (1993), Luxembourg (1949), Malta (1965), Moldova (1995), Netherlands (1949), Norway (1949), Poland (1991), Portugal (1976), Romania (1993), Russian Federation (1996), San Marino (1988), Serbia and Montenegro (2003), Slovakia (1993), Slovenia (1993), Spain (1977), Sweden (1949), Switzerland (1963), former Yugoslav Republic of Macedonia (1995), Turkey (1950), Ukraine (1995), United Kingdom (1949). See <www.coe.int>. Monaco and Belarus were not members by mid-2003 and neither have an ombudsman.

[7] Germany, Italy, Latvia, Luxembourg, San Marino, Serbia and Montenegro, Switzerland and Turkey. Switzerland has three cantonal and three municipal ombudsmen. Italy, Luxembourg, Serbia and Montenegro and Turkey are considering the adoption of a national institution. But see e.g. Luxembourg's Consultative Committee on Human Rights, Latvia's human rights office.

[8] On Bulgaria's Ombudsman see *infra* note 215. Armenia passed ombudsman legislation prior to completing its constitutional reforms, see "Armenia Introduces Post of Ombudsman", *RFE/RL Newsline* vol. 7, no. 201, Part I (Oct. 22, 2003); Council of Europe Commissioner for Human Rights, *3rd Annual Report January to December 2002*, CommDH(2003)7 (Strasbourg, June 19, 2003) at 308 [hereinafter *3rd Annual Report*]. The Turkish legislature began to discuss an ombudsman in 2001, see Council of Europe Commissioner for Human Rights, *2nd Annual Report April 2001 to December 2001*, CommDH(2002)2 (Strasbourg, May 15, 2002) at 22-23, 79, 90-91.

[9] For further details on the Kosovo Human Rights Ombudsperson and the developments in Serbia and Montenegro see *infra* Chapter 8.

[10] Of the other C.I.S. states which are not Council of Europe members, Kazakhstan, Kyrgyzstan and Uzbekistan have established hybrid human rights ombudsmen and Belarus, Tajikistan and Turkmenistan do not yet have ombudsmen.

COUNCIL OF EUROPE AND EUROPEAN CONVENTION ON HUMAN RIGHTS SYSTEM

Overview

The Council of Europe has established the most extensive international human rights system in the region through strong treaty and remedial mechanisms.[11] The European human rights law system is composed of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights or European Convention) and its Protocols[12] which contain extensive civil and political rights, the European Social Charter and its Protocols which comprise economic, social and cultural rights,[13] and treaties in subject-specific areas such as torture and minority rights.[14] By mid-2003, all of the Council of Europe members except for Serbia and Montenegro were contracting parties to the European Convention on Human Rights.[15] The European Court of Human Rights (ECHR) is the international judicial mechanism for the enforcement of the rights in the European Convention and its Protocols. In force on November 1, 1998, the Eleventh Protocol eliminated the European Commission on Human Rights and conferred its functions on a reconfigured ECHR, with the Court taking over admissibility and friendly settlement matters in addition to its judicial functions.[16] The Council of Europe supports the establishment and strengthening of national human rights institutions, including classical and human rights ombudsmen.[17] The

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[11] See *supra* Chapter 4 for a description of the Council of Europe; <www.coe.int>. See generally C. Ovey and R.C.A. White, *Jacobs & White European Convention on Human Rights*, 3rd ed. (Oxford: Oxford University Press, 2002); R. Blackburn and J. Polakiewicz, eds., *Fundamental Rights in Europe; The European Convention on Human Rights and its Member States, 1950-2000* (Oxford: Oxford University Press, 2001) [hereinafter *Fundamental Rights in Europe*]; P. van Dijk and G.J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3d ed. (The Hague: Kluwer Law International, 1998).

[12] European Convention for the Protection of Human Rights and Fundamental Freedoms, as am. (signed Nov. 4, 1950, in force Sept. 3, 1953), <www.coe.int>. Additional Protocols containing substantive human rights are the First Protocol, 213 U.N.T.S. 262 (in force 1954); Fourth Protocol, E.T.S. 46 (in force 1968); Sixth Protocol, E.T.S. 114 (in force 1985); Seventh Protocol, E.T.S. 117 (in force 1988); and Thirteenth Protocol (2002) 41 Int'l Legal Mat. 515.

[13] European Social Charter, 529 U.N.T.S. 89 (in force 1965); 1988 Additional Protocol, E.T.S. 128 (in force 1992); 1991 Protocol Amending the European Social Charter, (1992) 31 Int'l Legal Mat. 155; 1995 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints and 1996 Revised European Social Charter (in force July 1, 1999, and will progressively replace the first Social Charter), 1995 Protocol and 1996 revised Charter, rep. in United Nations, *Human Rights: A Compilation of International Instruments*, ST/HR/1/Rev.5, vol. II (New York: United Nations, 1997).

[14] Council of Europe Framework Convention for the Protection of National Minorities, (1995) 34 Int'l Legal Mat. 351; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (in force 1989) and its Protocols, in *Human Rights: A Compilation of International Instruments, ibid.*

[15] Serbia and Montenegro signed the European Convention when it became a member of the Council of Europe in April 2003.

[16] European Convention on Human Rights, am. by Eleventh Protocol, (1994) 33 Int'l Legal Mat. 943 (Commission eliminated after Oct. 1999); Ovey and White, *supra* note 11 at 8.

[17] See *supra* Chapter 4.

Council of Europe Commissioner for Human Rights has a number of human rights promotion functions, including facilitating the work of national ombudsmen or similar human rights institutions, and is discussed further in Chapter 10.[18]

The Ombudsman and the European Convention on Human Rights System

For the purposes of the interpretation of the European Convention on Human Rights, a number of its provisions and principles have been construed in relation to domestic ombudsmen in Convention state parties.

a) Is the Ombudsman an Effective Remedy Before a National Authority?

Article 13 of the European Convention on Human Rights states that:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.[19]

In *Z et al.* v. *United Kingdom*, the ECHR summarized the effect of Article 13, as guaranteeing:

> the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. Article 13 thus requires the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 also varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as law.[20]

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[18] See also *supra* Chapter 4.

[19] European Convention on Human Rights, *supra* note 12. On art. 13 see e.g. *Klass* v. *Federal Republic of Germany*, Judgment of Sept. 6, 1978 (Ser. A, No. 28), 2 E.H.R.R. 214; *Boyle and Rice* v. *United Kingdom*, Judgment of April 27, 1988 (Ser. A, No. 131), 10 E.H.R.R. 425; *Vilvarajah* v. *United Kingdom*, Judgment of Oct. 30, 1991 (Ser. A, No. 215), 14 E.H.R.R. 248; *Chahal* v. *United Kingdom*, Judgment of Nov. 15, 1996, *Reports of Judgments and Decisions*, 1996-V 1853, (1997) 23 E.H.R.R. 413; *Aksoy* v. *Turkey*, Judgment of Dec. 18, 1996 (1997) 23 E.H.R.R. 553; *D.* v. *United Kingdom*, Judgement of May 2, 1997 (1997) 24 E.H.R.R. 423; *Smith and Grady* v. *United Kingdom*, Judgment of Sept. 27, 1999 (2000) 29 E.H.R.R. 493; *Z et al.* v. *United Kingdom*, Judgment of May 10, 2001 (2001) 22 H.R.L.J. 417 (ECHR) .

[20] *Z et al.* v. *United Kingdom, ibid.*, para. 108. See also *Keenan* v. *United Kingdom*, Judgment of April 3, 2001 (2001) 33 E.H.R.R. 913, para. 122; *Smith and Grady* v. *United Kingdom, ibid.*, para. 135; *Vilvarajah* v. *United Kingdom, ibid.*, para. 122; *D.* v. *United Kingdom, ibid.*, para. 69; *Aksoy* v. *Turkey, ibid.*, para. 95; *Soering* v. *United Kingdom* (1989) 11 E.H.R.R. 439, para. 120.

Article 13 refers to an "effective remedy" and does not expressly state that a judicial remedy is required. Assuming there is an arguable complaint under the Convention, the question arises whether a complaint to an ombudsman – a non-judicial institution typically without legally binding powers of decision – can be considered to be an "effective remedy before a national authority" for the purposes of Article 13.

The 1983 ECHR judgment in *Silver* v. *United Kingdom*, a case involving restrictions on the correspondence of prisoners, looked at whether the applicant's complaint about alleged violations of his rights to, *inter alia*, the United Kingdom's Parliamentary Commissioner for Administration (Ombudsman) satisfied Article 13.[21] The ECHR stated that the authority referred to in Article 13 need not be a judicial authority but, if not, the powers and procedural guarantees that an authority does possess are relevant in determining whether it is an effective remedy.[22] In *Silver*, the ECHR decided that the Parliamentary Commissioner, a classical ombudsman, did not constitute an effective remedy, stating that "[a]s regards the Parliamentary Commissioner, it suffices to note that he has himself no power to render a binding decision granting redress."[23]

However, in 1987 in *Leander* v. *Sweden*, the ECHR again considered whether the ombudsman could constitute an effective remedy.[24] The *Leander* case involved a national security-related situation where there are usually very limited remedies available domestically, and Convention Articles 8 (respect for private life) and 10 (freedom of expression). The case concerned an individual whose employment in a museum on a naval base was terminated for national security reasons after secret security checks were conducted. The individual could have complained to the Swedish Ombudsman and/or the Chancellor of Justice, but he only wrote a letter to the government which then obtained a Police Board comment. The majority of the Court considered that the complaint to the government on its own was insufficient but that the aggregate of the alternative remedies noted above, including a possible complaint to the Ombudsman, constituted an Article 13 effective remedy in the particular circumstances of the case.[25] There was a dissenting opinion which stated that both the Ombudsman and the Chancellor of Justice could only render opinions which, according to the dissenting justices, did not constitute effective remedies and, "even when combined, ineffective remedies cannot amount to an effective remedy where . . . their respective shortcomings do not cancel each other out but are cumulative."[26]

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[21] *Silver* v. *United Kingdom*, Judgment of March 25, 1983 (Ser. A, No. 61), 5 E.H.R.R. 347.

[22] *Ibid.*, para. 113; followed in *Leander* v. *Sweden, infra* note 24. See also *Klass* v. *Federal Republic of Germany, supra* note 19, para. 67.

[23] *Silver* v. *United Kingdom, ibid.*, para. 115. Similarly, the ECHR has held that media commissions (including one that could order fines and revoke licences) could not provide an effective remedy in a claim for breach of privacy because the commissions lacked any power to award monetary damages to the applicant, *Peck* v. *United Kingdom*, App. No. 44647/98, Judgment of Jan. 28, 2003, paras. 108-109, <www.hudoc.echr.coe.int/hudoc/>.

[24] *Leander* v. *Sweden*, Judgment of March 26, 1987, *Reports of Judgments and Decisions* (Ser. A, No. 116).

[25] *Ibid.*, paras. 81-84. See also *Chahal* v. *United Kingdom, supra* note 19, para. 145; *Jabari* v. *Turkey*, Judgment of July 11, 2000, (2000) 39 Int'l Legal Mat. 1309, para. 48 ("in certain circumstances, the aggregate of remedies provided by national law may satisfy the requirement of Article 13").

[26] *Leander* v. *Sweden, ibid.*, dissenting opinion of Pettiti and Russo JJ.

The nature of the right in question is also relevant in determining the scope of an effective remedy.[27] For example, where a claim of torture contrary to Article 3 of the Convention is made, the Court has taken a stricter approach to the contents of an effective remedy.[28] In *Chahal* v. *United Kingdom*, the Court distinguished the *Leander* case from cases involving deportation leading to a possible breach of Article 3.[29] In *Chahal*, the ECHR stated that there must be independent scrutiny of the claim, although it need not be provided by a judicial authority as long as the authority concerned has sufficient powers and guarantees to constitute an effective remedy.[30] In 2001, in *Z et al.* v. *United Kingdom*, concerning the alleged negligence of local authorities in monitoring child welfare cases, the applicants (the minors in question) argued that Article 3 of the Convention prohibiting torture or inhuman or degrading treatment had been violated.[31] For redress, the applicants could have resorted to the Local Government Ombudsman, child welfare statutory procedures and/or a criminal injuries compensation board, but the government conceded that, given the circumstances of the case, these procedures were insufficient alone or cumulatively to satisfy Article 13.[32] It was pointed out that the Ombudsman could only issue a recommendation which was not legally enforceable, and that the government was under an obligation to provide compensation, *inter alia*, by "an enforceable Ombudsman's award".[33] The Court confirmed that where a fundamental Convention provision is involved (e.g. the right to life, prohibition against torture) Article 13 requires the payment of compensation where appropriate and, where failure by the authorities to protect persons from others is in issue, the victim should have access to a mechanism that can establish the liability of state officials or bodies for conduct involving a breach of the Convention.[34] The Court did not decide whether only a court action could have satisfied Article 13, although it did state that "judicial remedies indeed furnish strong guarantees of independence, access for the victim and family and enforceability of awards in compliance with the requirements of Article 13."[35]

The same approach was taken to the local government ombudsman process in *T.P. and K.M.* v. *United Kingdom* in 2001, and *E. et al.* v. *United Kingdom* in 2002, both of which found violations of Article 13 in the context of sexual abuse and the failure of social welfare authorities to intervene properly.[36] In both cases, the ombudsman, after

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27 Ovey and White, *supra* note 11 at 390; *Z et al.* v. *United Kingdom, supra* note 19, para. 108.

28 *Aksoy* v. *Turkey, supra* note 19, para. 98, concerning a claim of torture and art. 13: "the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure".

29 *Chahal* v. *United Kingdom, supra* note 19, para. 150, referring to the *Leander* and *Klass* decisions: "The requirement of a remedy which is "as effective as can be" is not appropriate in respect of a complaint that a person's deportation will expose him or her to a real risk of treatment in breach of Article 3, where the issues concerning national security are immaterial."

30 *Chahal* v. *United Kingdom, ibid.*, paras. 151-152.

31 *Z et al.* v. *United Kingdom, supra* note 19.

32 *Ibid.*, para. 107.

33 *Ibid.*

34 *Ibid.*, para. 109.

35 *Ibid.*, para. 110.

36 *T.P. and K.M.* v. *United Kingdom*, App. No. 28945/95, Judgment of May 10, 2001; *E. et al.* v. *United Kingdom*, App. No. 33218/96, Judgment of Nov. 26, 2002, see <www.hudoc.echr.coe.int/hudoc/>.

an investigation, could have made non-binding recommendations, including for compensation. In the *T.P. and K.M.* case, a complaint to the ombudsman could have been made but the ECHR, in holding that pecuniary compensation would provide redress, held that a complaint to the ombudsman would not have provided the applicants with any enforceable right to compensation.[37] In the *E. et al.* case, among other remedies attempted, the applicants complained to the ombudsman who declined to investigate based on his statutory limitations to jurisdiction.[38] Again, the ECHR found that, apart from the jurisdictional bars, the ombudsman process could not have resulted in a binding determination.[39]

Accordingly, a complaint to the ombudsman will usually not constitute an effective remedy for the purposes of Article 13. However, in certain exceptional fact scenarios (e.g. a *Leander*-type case involving national security or other sensitive matters) where judicial remedies are unavailable and the Convention right in question is not one of the core rights (e.g. Articles 2 to 3), the available non-judicial remedies, including the ombudsman, may constitute an effective remedy for the purposes of Article 13. Yet a more conservative approach is increasingly evident in the ECHR judgments and it is quite possible that it will prevail in future cases, rejecting the position that an ombudsman can constitute an effective remedy even in the *Leander*-type scenarios. Further, even human rights ombudsmen in Europe do not have the power to impose legally binding decisions on administrative authorities on the conclusion of an investigation and so, on the same basis, their investigations generally will not constitute an Article 13 effective remedy. Some human rights ombudsmen in Convention states have additional powers, such as those able to launch court actions to obtain judicial protection of individual rights and/or judgments on the constitutionality of laws (e.g. Portugal, Spain, Poland, Slovenia, Hungary), and those which have the power to prosecute officials (e.g. Finland, Sweden). However, it is not the ombudsman litigation alone which constitutes an effective remedy. The availability of a judicial process provided by the state and a court judgment arising out of an action will be the main elements of an effective remedy, with the human rights ombudsman playing a supportive and facilitative role in the judicial process.

b) The Ombudsman and the "Margin of Appreciation" Doctrine

There is a different view put forward on the role of the ombudsman *vis-à-vis* the European Convention. This perspective considers that an ombudsman in a European Convention state can be an important mechanism for "filling the so-called 'margin of appreciation'", the leeway given to states in implementing some of their Convention obligations.[40] As Berhardt states, the margin of appreciation concept:

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37 *T.P. and K.M.* v. *United Kingdom, ibid.*, para. 109.

38 *E. et al.* v. *United Kingdom, supra* note 36, paras. 45, 76-77.

39 *Ibid.*, para. 112.

40 M. Pellonpää, "Finnish Parliamentary Ombudsman as Guardian of Human Rights and Constitutional Rights: View From the European Court of Human Rights" in *Parliamentary Ombudsman of Finland 80 Years, supra* note 3, 73 at 75-76.

> may permit state organs – the legislature as well as the administration and the courts – to interfere with rights guaranteed under the Convention in a manner and to a degree which is not entirely controlled by the international organs.[41]

Although the ECHR may find that a state has not violated its Convention obligations because the application of the margin of appreciation concept gives the state some freedom to determine how to carry out its obligations based on local conditions, the state's ombudsman nonetheless may find that the same government conduct falls below acceptable standards of conduct based the broader ombudsman criteria of equity and justice.[42] Thus, an ombudsman in a European Convention state can make "human-rights-friendly interpretations in situations which, while not in violation of the minimum standards set by international conventions, may nevertheless not be ideal from the point of view of human rights."[43]

c) Is Use of the Ombudsman an Exhaustion of Domestic Remedies?

Pursuant to Article 35(1) (formerly Article 26) of the European Convention, an applicant is required to exhaust all domestic remedies before the ECHR can hear her case.[44] The ECHR now makes decisions on admissibility, having taken over the role of the now-defunct European Commission of Human Rights. In *Montion* v. *France*, the applicant unsuccessfully went to a French administrative court to try to overturn a decree affecting his property and also complained to the French *Médiateur* (Ombudsman) who made recommendations to a government minister for amendments to associated legislation, without success.[45] After Montion turned to the European human rights system, a 1987 decision of the European Commission found the application inadmissible on the ground of non-exhaustion of domestic remedies, stating that "recourse to an organ which supervises the administration, such as the Ombudsman, does not constitute a normal adequate and effective domestic remedy within the meaning of the generally recognised rules of international law."[46] Following this finding, van Dijk and van Hoof state that "[r]ecourse to an organ which supervises the administration but cannot take binding decisions, such as an Ombudsman, does not constitute an adequate and effective remedy. . . ."[47]

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41 R. Bernhardt, "The international protection of human rights: experiences with the European Court of Human Rights" in S. Lee and W. Tieya, eds., *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (Routledge: London, 2001) 387 at 394-395. The margin of appreciation concept is used mainly with respect to those rights which expressly allow some state limitation of those rights, *ibid.*

42 Pellonpää, *supra* note 40 at 75-76.

43 *Ibid.* at 76.

44 Art. 35(1) of the European Convention, *supra* note 12, states that "[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law. . . ." See Ovey and White, *supra* note 11 at 409-411.

45 *Montion* v. *France*, Application 11192/84, (1987) 52 *Decisions and Reports of the European Commission of Human Rights* 227 at 232-233.

46 *Ibid.* at 235. The Commission then looked at the court decision and found the application was time-barred.

47 Van Dijk and van Hoof, *supra* note 11 at 137. See also N.E. Holm, "The Danish Ombudsman and the European Convention on Human Rights" (1986) 30 Scand. Studies in Law 75 at 99;

In the 1997 ECHR decision in *Raninen* v. *Finland*, the ECHR dismissed a preliminary objection arguing non-exhaustion of domestic remedies on the grounds that there is no obligation to have recourse to domestic remedies which are inadequate or ineffective.[48] In the *Raninen* case, the applicant formally declared that he objected to military and substitute service, and his refusal led to several arrests. The applicant's only response was to complain to the Ombudsman about one incident – the Ombudsman of Finland found that the arrest lacked a legal basis and there were insufficient grounds for handcuffing, but the situation did not call for him to order criminal proceedings against the military official involved.[49] The ECHR took note of the results of the complaint to the Ombudsman and the fact that statutory actions for damages probably would not have been successful, and stated that these remedies "did not provide reasonable prospects of success and could not be considered as effective and adequate" with respect to Article 35.[50]

In the 1999 decision of *Lehtinen* v. *Finland*, finding the application inadmissible, the ECHR stated that "as a general rule, a petition to the Ombudsman cannot be regarded as an effective remedy as required by Article 35 of the Convention."[51] More specifically, the ECHR held that where an applicant makes a complaint to the ombudsman and, at the same time, a court action is available that can result in a legally binding remedy but which is not used by the applicant, the exhaustion of domestic remedies requirement has not been satisfied.[52] The ECHR emphasized that, even though the Ombudsman of Finland can bring criminal charges against public servants, the Ombudsman has no power to quash or amend decisions made by the administrative or judicial authorities. In contrast, the ECHR considered the court petition to be available and sufficient for the purposes of Article 35(1). The ECHR distinguished its earlier decision in *Raninen*, stating that in the *Raninen* case, based on its facts, neither a criminal prosecution nor a civil action would have had reasonable prospects of success, and there was no statutory basis for a judicial remedy as was found in the *Lehtinen* case.[53]

Thus, in cases where a judicial remedy with reasonable prospects of success is available, based on *Lehtinen* v. *Finland*, total reliance by an applicant on a complaint to the

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G. Jörundsson, "The Ombudsman and the European Human Rights Institutions" in H. Gammeltoft-Hansen and F. Axmark, eds., *The Danish Ombudsman* (Copenhagen: Danish Ombudsman, 1995) 79 at 89-90; F. Matscher, "L'ombudsman et la protection des droits de l'homme" in *Ombudsman in Europe – The Institution, supra* note 1, 20 at 27.

48 *Raninen* v. *Finland*, Judgment of Dec. 16, 1997, *Reports of Judgments and Decisions* 1997-VIII 2804, paras. 38-42, at para. 41.

49 *Ibid.*, para. 23. As discussed *infra*, text accompanying note 71, the Ombudsmen of Finland and Sweden can launch criminal prosecutions against public officials.

50 *Ibid.*, para. 40. The ECHR stated "[a]gainst this background the Government have not demonstrated that either a criminal prosecution or an action for damages would in the specific circumstances of the case have offered reasonable prospects of success.", *ibid.*, para. 42.

51 *Lehtinen* v. *Finland*, Decision on Admissibility of Oct. 14, 1999 (Case 39076/97), Hudoc REF00004955, <http://hudoc.echr.coe.int>. The concept of an "effective remedy" for the purposes of art. 35 of the Convention is derived from the ECHR jurisprudence.

52 *Ibid.* In *Lehtinen*, after a police search of his home and business, the applicant was charged with commercial law offences, but was acquitted. He complained to the Ombudsman about the police conduct and the Ombudsman concluded that it was not illegal or otherwise incorrect. A statute-based court action was available to the applicant which he did not use. Later, the applicant applied to the ECHR arguing that his rights under art. 8 of the Convention had been violated.

53 *Ibid.*; *Raninen* v. *Finland, supra* note 48.

ombudsman and failure to use the court process will likely not satisfy the exhaustion of domestic remedies rule. However, where there are no criminal, statutory or civil judicial remedies reasonably available to the applicant, pursuant to *Raninen* the ECHR will likely find that the rule is inapplicable, even if the ombudsman is used. The holdings in *Lehtinen* and *Raninen* are also applicable to human rights ombudsmen in European Convention states because, even though these offices have additional powers such as bringing cases to constitutional courts, they invariably do not have the power to force changes in administrative or judicial decisions on the conclusion of their investigations. Their role in judicial procedures may assist in the exhaustion of domestic remedies, but it is the existence, content and potential of a judicial remedy which are paramount factors.

d) Can an Ombudsman Make an Application to the European Court of Human Rights to Protect Human Rights Victims?

Article 34 of the European Convention permits "any person, non-governmental organisation or group of individuals claiming to be the victim of a violation" of a Convention right by a state party to bring an individual application to the ECHR.[54] Some corporations, trade unions, churches and other similar bodies have been considered as falling within the term "person".[55] However, Article 34 only permits "victims" of a Convention breach to make an application.[56] While there have been some limited exceptions where third parties have been permitted to bring claims, these have primarily been family members of deceased victims or parents of minors, and it is unlikely that these exceptions could be expanded to the point that an ombudsman would be permitted to be a third party applicant.[57] In contrast, the more liberal Inter-American human rights system permits any person to access the Inter-American Commission on Human Rights, and in 2001 a human rights ombudsman co-petitioned the Inter-American Commission which found the case admissible.[58]

However, an ombudsman in a European Convention state can provide information to a prospective applicant. As Dr. Gaukur Jörundsson has stated:

> there is not really anything to prevent the national Ombudsman from making a complainant aware of his right of appeal to the Commission [now European Court of Human Rights] and from informing him about the Convention and the relevant decisions reached by the organs of the Convention.[59]

It has also been suggested that an ombudsman could give assistance to an individual in preparing the latter's application to the Court, for example when the person does not have the means to obtain legal assistance.[60]

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54 European Convention on Human Rights, *supra* note 12.
55 Ovey and White, *supra* note 11 at 405-406.
56 See Matscher, *supra* note 47 at 29-30.
57 See Ovey and White, *supra* note 11 at 406-407.
58 See *Janet Espinoza Feria et al.* v. *Peru, infra* Chapter 6, text accompanying notes 25, 56 to 59.
59 Jörundsson, *supra* note 47 at 86. He states that the Icelandic Ombudsman provides such information, but no more than this, *ibid.*
60 See Matscher, *supra* note 47 at 26.

e) Ombudsmen and the Domestic and Supranational Implementation of the European Convention on Human Rights

The preceding section has illustrated the hesitancy of the European Court of Human Rights to consider the ombudsman as an effective domestic remedy for the purposes of both Articles 13 and 35(1) of the European Convention. However, domestic ombudsmen in European Convention states do serve as useful non-judicial mechanisms for the resolution of complaints against public administration in situations where judicial remedies are unavailable or impracticable. Further, illustrated by the case studies in this Chapter, a number of ombudsmen in Convention state parties throughout Europe can and do rely on provisions of the European Convention and other Council of Europe human rights treaty obligations in their activities. In this sense, ombudsmen in Council of Europe states are also non-judicial mechanisms for the domestic application of European Convention obligations.

At the supranational level, as discussed in Chapter 11, the EU's European Ombudsman uses provisions of the European Convention on Human Rights and decisions of the European Court of Human Rights in complaints against European Community institutions and bodies that involve human rights issues.

ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE (OSCE)

As discussed in Chapter 4, the Organization for Security and Cooperation in Europe (OSCE) includes among its functions the strengthening of democracy and human rights, and addresses national human rights institutions. The OSCE human rights guarantees and democratic governance provisions are contained in the OSCE conference documents on the human dimension. These include the Helsinki Final Act (1976), the Vienna Concluding Document (1989), the Copenhagen Human Dimension Document (1990), the Charter of Paris (1990), the Moscow Human Dimension Document (1991) and the Helsinki Summit Declaration and Decisions (1992).[61] These documents support the spectrum of civil, political, economic, social and cultural rights, but they are not treaties; rather they can constitute a form of "soft law", providing evidence of consistent state practice for the development of customary international law in the region and even beyond. In 1992, the position of CSCE (now OSCE) High Commissioner on National Minorities was created by a Helsinki Summit Decision, discussed further in Chapter 10.[62]

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[61] E.g. CSCE, Helsinki Final Act, (1975) 14 Int'l Legal Mat.1292; CSCE, Concluding Document of the Vienna Meeting, (1989) 28 Int'l Legal Mat. 531; CSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension, (1990) 29 Int'l Legal Mat. 1305; CSCE, Charter of Paris for a New Europe and Supplementary Document, (1991) 30 Int'l Legal Mat. 190; CSCE, Document of the Moscow Meeting on the Human Dimension, (1991) 30 Int'l Legal Mat. 1670; CSCE, Declaration and Decisions From Helsinki Summit II, (1992) 31 Int'l Legal Mat. 1385. See e.g. R. Brett, "Human Rights and the OSCE" (1996) 18 H.R.Q. 668. See also the OSCE Office for Democratic Institutions and Human Rights (ODIHR) based in Warsaw.

[62] Declarations and Decisions from Helsinki Summit II, *ibid.* at 1396.

EUROPEAN UNION

For the member states of the European Union, the European Court of Justice has developed a body of jurisprudence on the fundamental rights in Community law, the European Union treaties contain human rights and democracy provisions, and in December 2000 an hortatory EU Charter of Fundamental Rights was adopted. The 2003 draft EU Constitution enshrines the Charter rights. The European Ombudsman, who has jurisdiction over maladministration in Community institutions and bodies, and the European Ombudsman's role in EU human rights protection will be discussed in more detail in Chapter 11. On the level of domestic law, ombudsmen in European Union member states occasionally play a role in examining the application of Community law by the domestic authorities.

The Ombudsman, Good Governance and Human Rights Protection in Europe: Selected Case Studies

This Chapter examines a selection of classical and human rights ombudsmen in Europe to illustrate the variety of roles that these offices play in building good governance in a state through their monitoring of administrative activity and in promoting and protecting human rights.[63] The extent to which some of these institutions use international human rights norms, particularly the regional European Convention and other Council of Europe human rights obligations, will also be explored. Many of the case studies illustrate how both classical and human rights ombudsmen throughout Europe can act as non-judicial domestic mechanisms for the implementation of regional European human rights treaty obligations.

SCANDINAVIA

In Scandinavia, there are legislative ombudsmen in Sweden, Finland, Norway, Denmark (with a separate Ombudsman for Greenland) and Iceland.[64] The Ombudsmen of Sweden and Finland have their distinct structure, with the powers to investigate the judiciary and prosecute public officials, which the other offices, based on the Danish model, do not enjoy.[65] The ombudsmen in Sweden and Finland are hybrid institutions given that they have express jurisdiction over human rights matters in addition to their administrative justice role. The human rights activities of Sweden's Ombudsmen were discussed

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[63] The case studies on Finland, the Netherlands, Spain, Poland and Slovenia are expanded and updated from L.C. Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection" (2000) 13 Harvard H.R.J. 1 at 32-45.

[64] Iceland's Ombudsman was established in 1988, see Jörundsson, *supra* note 47.

[65] For discussion of the Swedish Ombudsman see *supra* Chapter 1. See also T. Modeen, "The Swedish and Finnish Parliamentary Ombudsmen" in *Righting Wrongs, supra* note 1 at 315; J.E. Lane, "The Ombudsman in Denmark and Norway" in *Righting Wrongs, ibid.* at 143. On the Danish Ombudsman see *The Danish Ombudsman, supra* note 47.

in Chapter 1 and those of the Norwegian and Danish classical ombudsmen were discussed in Chapter 4.[66] This section examines the Ombudsman of Finland.

Finland

Finland provides a fascinating example of a classical ombudsman which was turned into a human rights ombudsman in 1995. The Ombudsman of Finland was established in the 1919 Constitution after the country gained its independence in 1917 to 1918, after having been an autonomous grand-duchy in the Russian empire for over 100 years.[67] There is little documentary evidence on the reasons for the establishment of the Ombudsman. Finland had been controlled by Sweden for 600 years and Swedish ideas inevitably influenced Finland's legal system.[68] An ombudsman was proposed, albeit unsuccessfully, in the nineteenth century.[69] When an independent Finland adopted a parliamentary republic, the legislative ombudsman was adopted as an additional control over the executive.[70]

Finland's Ombudsman follows the Swedish model, with the extra powers to investigate the judiciary and prosecute public authorities and the judiciary in the event of serious wrongdoing, although the latter function is rarely exercised.[71] Historically, the jurisdiction of the Ombudsman has been wide in the entities covered and the 2000 Constitution of Finland extends the remit of the Ombudsman even further to cover the President of the Republic.[72] Although the Ombudsman's stated function is to monitor the "legality" of public administration, in the contemporary period legality is construed by the Ombudsman "in broad terms, also embracing notions such as equity, fairness and good governance."[73] Prior to the 1995 reforms, the Ombudsman of Finland did in prac-

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66 On the human rights protection role of the Swedish Ombudsmen see *supra* Chapter 1, text accompanying notes 27 to 28; C. Eklundh, "The Swedish Parliamentary Ombudsman System" in *Human Rights Commissions and Ombudsman Offices, supra* note 1, 423 at 425; *supra* Chapter 4, text accompanying notes 114 to 117, 120 to 126.

67 See generally L. Lehtimaja, "Welcoming Address" in *Parliamentary Ombudsman of Finland 80 Years, supra* note 3 at 9; C. Heyns and F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (The Hague: Kluwer Law International, 2002) at 264; T. Modeen, "The Swedish and Finnish Parliamentary Ombudsmen" *supra* note 65 at 315; T. Modeen, "The Finnish Ombudsman: The First Case of Foreign Reception of the Swedish Justitieombudsman Office" (1981) 1 Omb. J. 41.

68 Lehtimaja, *ibid.* at 9-10; D. Rowat, *The Ombudsman Plan: The Worldwide Spread of an Idea*, 2d rev. ed. (Lanham: University Press of America, 1985) at 15; Heyns and Viljoen, *ibid.* at 264.

69 Lehtimaja, *ibid.*

70 *Ibid.* at 9-10.

71 *Ibid.* at 12; *Report of the Finnish Parliamentary Ombudsman 1997* at 33-34; Constitution Act of Finland (1919, am.1990, 1995), art. 59, rep. in *National Ombudsmen: Collection, supra* note 1 at 47-48, replaced by Constitution of Finland (2000), arts. 109-110 (in force March 1, 2000) <http://www.om.fi/constitution/3340.htm>; *Parliamentary Ombudsman Act* (in force April 1, 2002), replacing 1919 statute. See *supra* Chapter 1.

72 Constitution of Finland (2000), *ibid.*, arts. 112-113, replaces Constitution Act of Finland (1919, as am.), arts. 49, 59; Lehtimaja, *ibid.* In addition to monitoring the lawfulness of the President's conduct, art. 113 states that if the Ombudsman or Chancellor of Justice deem that the President is guilty of treason or a crime against humanity they can communicate this to Parliament, and Parliament can vote for prosecution of the President.

73 "The Ombudsman shall ensure that the courts of law, the other authorities and civil servants, pub-

tice address human rights matters, although the focus was on civil and political rights.[74] Also, an earlier agreement between the Ombudsman and the Chancellor of Justice gave the Ombudsman the responsibility for handling complaints against the police, the defence force, prisons and other closed institutions.[75]

Finland follows the dualist approach with respect to treaties, which must be transformed into domestic law through the passage of implementing legislation or constitutional provision.[76] In 1995, following Finland's revision of constitutional human rights in light of its1990 accession to the European Convention and its other UN human rights treaty obligations, the Ombudsman was given an additional human rights monitoring function.[77] This was maintained in the new 2000 Constitution, which states that "[i]n the performance of his or her duties, the Ombudsman monitors the implementation of constitutional and human rights."[78] The human rights obligations in the 2000 Constitution cover civil, political, economic, social, cultural and environmental rights.[79] The human rights treaties that Finland has become party to have been implemented into domestic law by statute or decree.[80] Thus, in addition to the Constitution, the Ombudsman can refer to treaties implemented into domestic law in the resolution of cases, e.g. the Convention on the Rights of the Child.[81]

In 2001, Lauri Lehtimaja, then Parliamentary Ombudsman of Finland, stated:

> Today in Finland, (domestic) constitutional rights and (international) human rights make up an integrated system of legal safeguards, anchored in the Constitution. This twin set of fundamental rights and liberties is profoundly important in the work of the Parliamentary Ombudsman.[82]

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lic employees and other persons, when the latter are performing a public task, obey the law and fulfil their obligations", Constitution of Finland (2000), *ibid.*, art. 109; Lehtimaja, *ibid.*

74 L. Nieminen, "Finnish Parliamentary Ombudsman as Guardian of Human Rights and Constitutional Rights: View From the University of Lapland" in *Parliamentary Ombudsman of Finland 80 Years, supra* note 3, 79 at 79-80; *Report of the Finnish Parliamentary Ombudsman 1997, supra* note 71 at 48; Heyns and Viljoen, *supra* note 67 at 279.

75 M. Hidén, "Finnish Parliamentary Ombudsman as Guardian of Human Rights and Constitutional Rights: An Integrated Approach" in *Parliamentary Ombudsman of Finland 80 Years, supra* note 3, 61 at 66; Pellonpää, *supra* note 40, 73 at 74. Like Sweden, Finland also has a Chancellor of Justice who performs functions which overlap with those of the Ombudsman, Lehtimaja, *supra* note 67 at 10.

76 Heyns and Viljoen, *supra* note 67 at 9, 268.

77 Constitution Act of Finland (1919, as am.), *supra* note 71, art. 49, replaced by Constitution of Finland (2000), *supra* note 71, art. 109; Lehtimaja, *supra* note 67 at 12. Finland became legally bound by the ICCPR and ICESCR in 1976, and is now a party to some 40 human rights treaties, Parliamentary Ombudsman of Finland, *Annual Report 2001*, English Summary (Helsinki, 2002) at 17.

78 Constitution of Finland (2000), *ibid.*, art. 109. See also *Parliamentary Ombudsman Act* (April 1, 2002).

79 Constitution of Finland (2000), *ibid.*, ch. 2, arts. 6-23; replacing Constitution Act of Finland (1919, as am.), ch. II, *supra* note 71, arts. 5-16a.

80 Parliamentary Ombudsman of Finland, *Annual Report 2000*, English Summary (Helsinki, 2001) at 12.

81 *Ibid.* at 22-23. See *infra* Chapter 9 for a discussion of the Ombudsman of Finland's coverage of children's rights.

82 *Ibid.* at 12.

The Office of the Ombudsman recognizes that its duties include oversight of the observance of Finland's human rights commitments at the national level.[83] Human rights treaties are often cited in the determination of complaints by the Ombudsman, even during the pre-1995 period.[84] The Ombudsman of Finland also provides written advice on the drafting of new legislation when requested by the Council of State and government departments, and this may include constitutional and human rights subject matter.[85]

The Ombudsman of Finland has received cases involving the entire spectrum of rights in the Constitution and in Finland's treaty obligations, such as to: equality before the law and the prohibition of discrimination; life, liberty and security of the person; civil rights in the criminal trial process; freedom of movement; privacy; 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 rights of the child.[86] As noted, the Ombudsman also takes cases against the police, the defence force and public employees in institutions where individuals are involuntarily detained (e.g. prisons, mental health centres), and these public authorities are considered to be "part of the core area of the Ombudsman's oversight of legality".[87] On-site inspections of government facilities – usually places where individuals are confined or limited in their freedom, e.g. prisons, military bases – are an important element of the ombudsman function and also assist in monitoring the implementation of constitutional human rights.[88]

In 2000 and 2001, the greatest number of investigations concerned the social security authorities, the police, the courts and health authorities.[89] It has been noted that, in the past few years, the Ombudsman has devoted more of its activities to the protection of economic, social and cultural rights, and has found that some of the core aspects of these rights are not being properly implemented in particular situations.[90] This is likely due both to the enlargement of the role of the Ombudsman to cover human rights monitoring and the inclusion of economic, social and cultural rights in the Constitution.

The Ombudsman of Finland, one of the earliest ombudsmen to be established, is an example of an office with powers that have been strengthened and broadened. While Finland has a very good human rights record, some problems exist such as racism and poor treatment of conscientious objectors.[91] Finland illustrates how even an established democracy with an ombudsman that has functioned effectively for a relatively long

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83 *Annual Report 2001, supra* note 77 at 9.

84 A. Rosas, "Finland" in *Fundamental Rights in Europe, supra* note 11, 289 at 303.

85 *Annual Report 2000, supra* note 80 at 9.

86 *Report of the Finnish Parliamentary Ombudsman 1997, supra* note 71 at 49-121; *Annual Report 2001, supra* note 77 at 18-19, 22-25, 29-30.

87 *Report of the Finnish Parliamentary Ombudsman 1997, ibid.* at 60; *Annual Report 2000, supra* note 80 at 13-26.

88 *Annual Report 2000, ibid.* at 5, 8.

89 In 2000, out of 2,094 resolved cases: social security (17%), police (14%), courts (11%), health authorities (8%), *Annual Report 2000, ibid.* at 6. In 2001, out of 2,895 resolved cases: social security (19%), police (11%), courts (7%), health authorities (6%), *Annual Report 2001, supra* note 77 at 12-13.

90 Nieminen, *supra* note 74 at 81.

91 Amnesty International, *Amnesty International: Report 2003* (London: Amnesty International Publications, 2003) at 105.

period of time can continue to expand the function of the office to include a human rights protection role.[92] As a result, the Ombudsman of Finland not only promotes good governance but also has a clear mandate to monitor the international and domestic human rights obligations of the state, and thereby assists in the domestic protection of human rights.

WESTERN AND SOUTHERN EUROPE

Western and Southern Europe represent a mix of countries, with both established and younger democracies. Countries such as the United Kingdom, Ireland, France, Austria, Belgium, Liechtenstein and the Netherlands added national (and, in some cases, sub-national) classical ombudsmen as a refinement to preexisting democratic structures.[93] Similarly, Italy, Switzerland and Germany created sub-national classical ombudsmen.[94] Greece, Portugal and Spain built new democracies in the 1970s. In parallel with this "third-wave" democratization movement, the ombudsman model was adapted to respond to the needs of these new democracies.[95] As Portugal and Spain made transitions to democratic governance, the reconfiguration of their governmental structures resulted in the creation of hybrid human rights ombudsmen, with the classical ombudsman model adapted to include human rights protection. After its return to democracy in 1974, Portugal created the *Provedor de Justiça* (Provider of Justice) in 1975 and enshrined the institution in the 1976 Constitution.[96] The *Provedor*, as a human rights ombudsman

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92 On an instructive note for new ombudsman offices, it took several decades for the Ombudsman of Finland to become an accepted part of the state system, see Modeen, "The Swedish and Finnish Parliamentary Ombudsmen", *supra* note 65 at 319; Lehtimaja, *supra* note 67 at 9-11.

93 See e.g. M. Seneviratne, *Ombudsmen: Public Services and Administrative Justice* (Butterworths LexisNexis, 2002); R. Gregory and P. Giddings, "The United Kingdom Parliamentary Ombudsman Scheme" in *Righting Wrongs, supra* note 1 at 21; Lewis and James, *supra* note 4; R.G. Gregory, "The Parliamentary Ombudsman in the United Kingdom" in J.J. Hesse and T.A.J. Toonen, eds. (1996) III European Yrbk. Comp. Gov't & Public Admin. 283; N. Schwäzler, "The Ombudsman Institution in Austria" in *Human Rights Commissions and Ombudsman Offices, supra* note 1 at 247; P.-Y. Monette, "The Parliamentary Ombudsman in Belgium: Strengthening Democracy" in *Human Rights Commissions and Ombudsman Offices, ibid.* at 269; R. Andersen et al., "The Ombudsman in Belgium" in *Righting Wrongs, ibid.* at 107; M. Pauti, "The Ombudsman in France" in *Righting Wrongs, ibid.* at 175; T. Verheijen and M. Millar, "Reforming public policy processes and securing accountability: Ireland in a comparative perspective" (1998) 64 Int'l Rev. Admin. Sciences 97 at 107-110; N. Schwäzler, "The Ombudsman Institution in Austria" in *Human Rights Commissions and Ombudsman Offices, ibid.* at 247.

94 See U. Kempf, "Complaint-Handling Systems in Germany" in *Righting Wrongs, supra* note 1 at 189; Kempf, "Ombudsmanship Without an Ombudsman: Germany", *supra* note 3.

95 See *supra* Chapters 1 and 3.

96 Discussion on the office dated back to 1971. The office was created by Decree-Law 212/75, followed by 1976 Constitution of the Portuguese Republic, revised, Part I, s. I, art. 23, *Statute of the Ombudsman, Law No. 81/77*, replaced by *Statute of the Ombudsman, Law 9/91* (April 9, 1991), as am. by *Law 30/96* (Aug. 14, 1996), rep. in *National Ombudsmen: Collection, supra* note 1 at 219-220. See L. Lingnau da Silveira, "The Provedor de Justiça of Portugal" in *The Experience of the Ombudsman Today* Proceedings of International Symposium (Mexico City: National Commission for Human Rights, 1992) at 71; B. Amaral, "Portugal" in G. Caiden, ed., *International Handbook of the Ombudsman: Country Surveys* (Westport, Connecticut: Greenwood Press, 1983) at 345-347.

with an extensive array of powers, defends and promotes the rights, freedoms and interests of individuals against public authorities at all levels of government and against private persons where a special relationship of dominion is involved.[97] Spain established its national *Defensor del Pueblo* (Defender of the People) in the 1978 Constitution, although the first *Defensor* did not begin operating until 1983. Greece also went through a democratization process in the mid-1970s, but the government only established a human rights ombudsman in 1997. Cyprus established a hybrid human rights ombudsman in 1991 and Malta created a classical ombudsman in 1995.[98]

This section will discuss the classical ombudsman of the Netherlands, and the human rights ombudsmen found in Spain and Greece.

The Netherlands

The National Ombudsman of the Netherlands was created by legislation in 1981, started operations at the beginning of 1982 and was enshrined in the Constitution in 1999.[99] The National Ombudsman is appointed by the Lower House of Parliament, and is one of the High Councils of State in the Netherlands.[100]

The National Ombudsman of the Netherlands is based on the classical Danish model, and so the main role of the institution is to promote good governance in public administration.[101] The National Ombudsman has strong powers of investigation, can conduct on-site inspections, makes recommendations to government on the close of an investigation and reports annually to Parliament.[102] 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, the security service and the refugee/asylum author-

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97 These powers are to: investigate and make recommendations to the public authorities; make law reform recommendations; give opinions on any matter within jurisdiction when requested by Parliament; promote widespread knowledge of constitutional human rights; intervene to protect collective interests when a public entity is involved (e.g. health, education and the environment); and request the Constitutional Court for rulings on the unconstitutionality of any law and parliamentary or government omissions. See 1976 Constitution, *ibid.*, arts. 281, 283; *Law 9/91* as am., *ibid.*, arts. 20(1)-(4), 22(1).

98 The Cyprus Commissioner for Administration investigates violations of human rights, laws and principles of good administration, *The Commissioner for Administration Laws* (Cyprus, 1991, 1994), s. 5(1); Malta, *Ombudsman Act 1995*, rep. in (Jan. & April 1996) 22:1-2 Commonwealth Law Bull. 383.

99 Constitution of the Netherlands, ch. 4, art. 78a, as am. (adopted March 25, 1999); *National Ombudsman Act*, Bulletin of Acts and Decrees 1981, as am., rep. in *National Ombudsmen: Collection, supra* note 1 at 185. See M. Hertogh, "The National Ombudsman of the Netherlands" in *Righting Wrongs, supra* note 1 at 273; J.B.J.M. Ten Berge, "The National Ombudsman in the Netherlands" (1985) 1 Neth. Int'l Law Rev. 204; R. de Rooij, "National Ombudsman of the Netherlands" in *Human Rights Commissions and Ombudsman Offices, supra* note 1 at 343.

100 de Rooij, *ibid.* at 343-344.

101 Both the Danish Ombudsman and the British Parliamentary Commissioner for Administration were influential models in the design of the Netherlands Ombudsman, Hertogh, *supra* note 99 at 282.

102 *National Ombudsman Act, supra* note 99, ss. 19-24, 26-28; de Rooij, *supra* note 99 at 350-351.

ities, and accordingly is able to act as a domestic mechanism for monitoring the state's compliance with its human rights obligations.[103]

The National Ombudsman can use international human rights treaties, in particular the International Covenant on Civil and Political Rights (ICCPR) and the European Convention, in the resolution of these complaints based on several factors. Under the law of the Netherlands, self-executing treaties which the country is bound by automatically become part of the domestic law after publication, are directly enforceable by the courts, and statutes shall not be applied if they conflict with the treaty obligations.[104] Also, the Constitution codifies some of the human rights treaty law. Moreover, the ombudsman statute gives the National Ombudsman a broad standard of "propriety" by which to assess government administration, which permits the use of implemented human rights obligations in the resolution of an investigation.[105] Although the direct use of human rights norms is uncommon, such norms can be used in the determination of whether administrative conduct complies with the law of the Netherlands.[106] There are some investigations, especially involving the police, wherein the National Ombudsman makes direct use of human rights norms found in the Constitution and other sources.[107] However, the National Ombudsman also uses human rights 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

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103 M. Oosting, "Universal Government Obligations and the Protection Afforded by the Ombudsman" in B. Tahzib-Lie and B. van der Heiden, eds., *Reflections on the Universal Declaration of Human Rights: A Fiftieth Anniversary Anthology* (The Hague: Martinus Nijhoff Pub., 1998) at 223; M. Oosting, "The National Ombudsman of the Netherlands and Human Rights" (1994) 12 Omb. J. 1, rep. in L.C. Reif, ed., *The International Ombudsman Anthology: Selected Writings from the International Ombudsman Institute* (the Hague: Kluwer Law International, 1999) at 317 [hereinafter *International Ombudsman Anthology*] [further references to *Anthology*]; M. Oosting, "The Ombudsman and Human Rights Observations Based on the Experience of the National Ombudsman of the Netherlands", *I.O.I. Occasional Paper* No. 46 (Edmonton: International Ombudsman Institute, Feb. 1992).

104 P. van Dijk, "Domestic Status of Human Rights Treaties and the Attitude of the Judiciary: The Dutch Case" in M. Nowak et al., eds., *Festschrift für Felix Ermacora* (Kehl: N.R. Engel Verlag, 1988) at 631; P. van Dijk and B.G. Tahzib, "Parliamentary Participation in the Treaty-Making Process of the Netherlands" in S.A. Riesenfeld and F.M. Abbott, eds., *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study* (Dordrecht: Martinus Nijhoff Pub., 1994) at 109.

105 Oosting, "The National Ombudsman of the Netherlands and Human Rights", *supra* note 103 at 318; Oosting, "Universal Government Obligations and the Protection Afforded by the Ombudsman", *supra* note 103 at 225; Hertogh, *supra* note 99 at 277 (the main groups of criteria to determine if the administrative action was proper are based on 1) legality, including international and human rights law, and 2) guidelines for good governance). The *National Ombudsman Act, supra* note 99, s. 26(1), states that: "The Ombudsman shall determine whether or not the administrative authority acted properly in the matter under investigation." (translation from The National Ombudsman of the Netherlands, *A brief introduction: the national ombudsman of the Netherlands*, 5th ed. (1998)).

106 Oosting, "The National Ombudsman of the Netherlands and Human Rights", *ibid.* at 319; Hertogh, *ibid.*, indicating that the criteria of legality of administrative action in determining propriety includes international and domestic law, including human rights law.

107 Oosting, *ibid.* at 321-330.

principles accepted by the courts."[108] The cases that the National Ombudsman does receive 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.[109]

The National Ombudsman of the Netherlands 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."[110] 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, lapse in tax department record keeping), respect for the home (improper police entry, improper entry by tax department bailiff), protection against inhuman or degrading treatment (treatment in police cells) and equality (conduct by police, tax department and public service recruiters, treatment of aliens).[111] The National Ombudsman also reviews the government administration of matters relating to asylum seekers and refugee claimants, a large source of complaints to his office.[112] 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 refugee determination and deportation processes.[113]

The Netherlands has a good human rights environment, but continues to have some problems such as discrimination and violence against minorities.[114] Other issues are high-

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[108] *Ibid.* at 318, 320-321.

[109] *Ibid.* at 322. In 2000, the Ombudsman received 677 complaints about the police, out of a total of 8,242 complaints, The National Ombudsman of the Netherlands, The National Ombudsman of the Netherlands, *Annual Report 2000: Summary* at 6, 18. By 2001, complaints against the police had risen to 1,093 out of 9,528 complaints, The National Ombudsman of the Netherlands, *Annual Report 2001: Summary* at 13.

[110] Oosting, *ibid.* at 323.

[111] *Ibid.* at 324-331; Oosting, "Universal Government Obligations and the Protection Afforded by the Ombudsman", *supra* note 103 at 228-229.

[112] M. Oosting, "Rights of Refugees and Asylum-Seekers" (1999) 3 Int'l Omb. Yrbk. 114; Oosting, "Universal Government Obligations and the Protection Afforded by the Ombudsman", *ibid.* at 228-229. In 2000, 1,805 out of the total 8,242 complaints received were against the Immigration and Naturalization Service (INS) of the Ministry of Justice, *Annual Report 2000: Summary, supra* note 109 at 26. In 2001, 1,563 of 9,528 complaints were made against the INS, *Annual Report 2001: Summary, supra* note 109 at 13.

[113] The National Ombudsman of the Netherlands, *Annual Report 1998: Summary* at 4-6.

[114] U.S. Department of State, *Country Reports on Human Rights Practices for 2002* (2003) at 1526 [hereinafter *Country Reports 2002*].

lighted in the work of the National Ombudsman of the Netherlands which is an example of a classical ombudsman which addresses human rights issues in some jurisdictional complaints. The Ombudsman of the Netherlands is aided by a broad jurisdiction. However, it is Hertogh's view that "[a]lthough, generally speaking, the Ombudsman is considered to be fairly successful, the impact of his operations on the police forces still appears to be rather limited."[115]

Spain

a) National Level – *Defensor del Pueblo*

Spain started its transition to democracy after the end of the Franco dictatorship in 1975.[116] A "social and democratic state of law" based on a parliamentary monarchy was established in the 1978 Constitution, composed of the national government and seventeen autonomous community governments at the sub-national level.[117]

Article 54 of the 1978 Constitution created the institution of the national *Defensor del Pueblo* (Defender of the People) as a High Commissioner of the *Cortes Generales* (Parliament) appointed by the *Cortes* to protect the 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."[118] Article 54 is placed within Title I of the Constitution which contains human rights provisions. The Organic Law of the *Defensor del Pueblo* was passed in 1981, the first *Defensor* took office in 1982 and commenced activities in 1983.[119]

The desire to end the poor administration and human rights abuses of the Franco regime led to the inclusion of the *Defensor* in the new Constitution.[120] The constitutional drafters were influenced by the classical ombudsman concept but, more importantly, they

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115 Hertogh, *supra* note 99 at 283.

116 See R. Carr and J.P. Fusi, *Spain: Dictatorship to Democracy*, 2nd ed. (London: George Allen & Unwin, 1981); P. Aguilar Fernández, *Memory and Amnesia: The Role of the Spanish Civil War in the Transition to Democracy* (N.Y.: Berghahn Books, 2002).

117 Constitution of Spain, 1978, arts. 1(1), (3), 143-158 (in force Dec. 29, 1978), rep. in A. Blaustein & G. Flanz, eds., *Constitutions of the Countries of the World*, vol. XVIII (New York: Oceana Publications Inc., 1991). See A.E. Perales, "Implementing the Spanish Constitution" in J.J. Hesse and N. Johnson, eds., *Constitutional Policy and Change in Europe* (Oxford: Oxford University Press, 1995) 214.

118 *Ibid.*, art. 54; G.E. Glos, "The New Spanish Constitution, Comments and Full Text" (1979) 7 Hastings Const. Law Q. 47 at 61. On the *Defensor* see L. Díez Bueso, "Spain's Parliamentary Ombudsman Scheme" in *Righting Wrongs, supra* note 1 at 323; J. Vintró Castells, "The Ombudsman and the Parliamentary Committees on Human Rights in Spain" in *Human Rights Commissions and Ombudsman Offices, supra* note 1 at 393; J.L. Carro Fernández-Valmayor, "Defensor del Pueblo y Administracion Publica" in *Estudios Sobre La Constitución Española Homenaje al Profesor Eduardo Garcia de Enterria*, vol. III (Madrid: Editorial Civitas, S.A., 1991) at 2669; V. Fairén Guillén, *El Defensor del Pueblo – Ombudsman*, vol. II (Madrid: Centro de Estudios, 1986).

119 *Ley Organica 3/1981, de 6 de abril, del Defensor del Pueblo* (Organic Law 3/1981, April 6, 1981, Regarding the Ombudsman), as am., BOE 109 (May 7, 1981) [hereinafter *Organic Law*].

120 Bueso, *supra* note 118 at 329.

wanted to ensure the protection of human rights in the new democracy. Margarita Retuerto Buades, a former Acting *Defensor del Pueblo* of Spain, stated that:

> It is true that, when shaping the figure of the Ombudsman, Spanish constitutionalists had the characteristics of the Scandinavian model very much in mind in terms of independence, parliamentary links and control of the administration, in order to avoid abuses and errors in the omnipresent public administration. . . . With the intention of consolidating and strengthening the recently conquered freedoms, a further step was taken by entrusting the Ombudsman with the task of defending fundamental rights. . . .[121]

Despite the focus of Article 54 on the human rights protection role of the *Defensor*, it is accepted that the Constitution taken together with the Organic Law, which gives the same weight to the human rights and traditional ombudsman functions, makes the *Defensor del Pueblo* a hybrid human rights ombudsman.[122] Complaints of administrative misconduct need not be connected to constitutional human rights matters.[123] The *Defensor del Pueblo* has wide jurisdiction over the national public administration, including Ministers and human rights aspects of the military administration, plus the autonomous community and municipal levels of government.[124]

Title I of the Constitution contains a full range of civil, political, economic, social, cultural and various collective or "third generation" norms.[125] However, Article 53 of the Constitution provides differing levels of protection depending on the human rights category in question. Title I, Chapter 2 rights are mainly civil and political rights, with a few economic and social rights. Chapter 2 rights are binding on public authorities and

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121 M. Retuerto Buades, "The Internationalization of Human Rights; Constitution and Ombudsman in Spain" in *Ombudsman and Human Rights; proceedings of a symposium* (The Hague: The National Ombudsman of the Netherlands, Oct. 17, 1995) 37 at 42. See also Bueso, *ibid.* at 323.

122 See *Organic Law*, *supra* note 119, art. 9(1) stating that the *Defensor* can pursue "any investigation conducive to clarifying the actions or decisions of the public administration and its agents regarding citizens . . . and the respectful observance it requires of the rights proclaimed in Title I"; Bueso, *ibid.* at 329; Carro Fernández-Valmayor, *supra* note 118 at 2675-2677.

123 Vintró Castells, *supra* note 118 at 404.

124 *Organic Law, ibid.*, arts. 9(2), 12(1),(2), 14. On the military, art. 14 states that "[t]he Ombudsman shall protect the rights proclaimed in Title I of the Constitution in the field of Military Administration, without however causing any interference in the command of National Defence." See Bueso, *supra* note 118 at 331; Carro Fernández-Mayor, *supra* note 118 at 2682-2685. Pursuant to art. 13, the *Defensor* must refer complaints concerning the administration of justice to the Public Prosecutor for investigation. However, many complaints are received about the administration of justice and the *Defensor* takes the position that art. 13 does not prevent addressing the subject in his annual report, <www.defensordelpueblo.es>; Vintró Castells, *ibid.* at 405. See *infra* text accompanying notes 153 to 156 on coordination of the *Defensor* with the autonomous community ombudsmen.

125 Civil and political rights: e.g., right to life (art. 15), freedom of ideology and religion (art. 16), right to liberty and security (art. 17), freedom of expression (art. 20); economic, social and cultural rights: e.g., right to education (art. 27), right to unionize (art. 28), right to health protection (art. 43), right to housing (art. 47); third generation or collective rights: e.g., right to enjoy an environment suitable for the development of the person (art. 45(1)), guarantees for the preservation and promotion of the historical, cultural and artistic patrimony of the peoples of Spain (art. 46); art. 53(1) (title I, ch. 2 rights bind all public authorities), Constitution of Spain, *supra* note 117.

any law contrary to these rights can be struck down as unconstitutional, but only the core rights found predominantly in Section 1 of Chapter 2 are protected by the *amparo* appeal to the Constitutional Court.[126] In contrast, the principles contained in Chapter 3, which are various economic, social, cultural and third generation rights, are only "guiding principles of economic and social policy" but "recognition, respect and protection of the principles shall guide positive legislation, judicial practice and the actions by public authorities."[127] Article 10(2) of the Constitution states that its human rights norms shall be interpreted in conformity with the Universal Declaration of Human Rights and human rights treaties ratified by Spain.[128] Spain takes the monist approach to treaties – under the Constitution, treaties that Spain has concluded and published automatically become part of the domestic legal system.[129]

The Spanish *Defensor del Pueblo* has additional powers. The *Defensor* can launch civil liability actions against authorities, civil servants and government agents.[130] The *Defensor* can also take to the Constitutional Court unconstitutionality appeals against national and community laws based on Title I, Chapter 2 rights (which will be struck down if found to be unconstitutional) and *amparo* appeals for relief to protect an individual's Title I, Chapter 2, Section 1 rights.[131] The unconstitutionality appeals do not have to be connected to any complaint received by the *Defensor*, while an *amparo* appeal must be connected to an individual complaint. Since its inception, the *Defensor* has made a number of unconstitutionality appeals, despite the risk that he will be perceived as acting politically in appealing (or refusing to appeal) a law drafted by the governing political party.[132] The *amparo* appeal has not been used often by the *Defensor*,

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126 Constitution of Spain, *ibid.*, arts. 14, 15-29, 30(2), 53(1), 161(1)(b). But ch. 2 also contains the right to education (art. 27), the right to unionize freely (art. 28), etc. The *amparo* appeal is "a citizen's action contesting the validity of any law or official disposition adversely affecting constitutionally guaranteed civil rights", Glos, *supra* note 118 at 75.

127 Constitution of Spain, *ibid.*, art. 53.3.

128 *Ibid.*, art. 10(2).

129 *Ibid.*, art. 96(1). It is accepted that treaty law prevails over statutory law in the domestic legal system, see C. Schutte, "The execution of European Court of Human Rights judgments in Spain" in T. Barkhuysen, M. van Emmerik and P.H. van Kemper, eds., *The Execution of Strasbourg and Geneva Human Rights Decisions in the National Legal Order* (The Hague: Martinus Nijhoff Pub., 1999) 147 at 149.

130 *Organic Law, supra* note 119, s. 26.

131 Constitution of Spain, *supra* note 117, arts. 161(1)(a), 162(1)(a) (unconstitutionality appeal, national and community-level laws, decrees and treaties) and arts. 161(1)(b), 162(1)(b), 53(2) (*amparo* appeal to protect the rights in Title I, ch. 2, s. 1); *Organic Law, ibid.*, s. 29; *Organic Act Regarding the Constitutional Court, Ley No. 2/1979*, arts. 31(1)(b), 32, 33, 46(1) and 46(2). See M. Pérez-Ugena y Coromina, "El Defensor del Pueblo en los procesos de tutela constitucional" (1995) 84 Revista de la Facultad de Derecho Universidad Complutense 345; Schutte, *supra* note 129 at 149-150. *Organic Law 6/1984* also gave the *Defensor* the right to institute *habeus corpus* proceedings in court to contest the arrest of an individual, a power that is rarely used given that many other persons can launch such proceedings, Vintró Castells, *supra* note 118 at 410.

132 Bueso, *supra* note 118 at 333; Pérez-Ugena, *ibid.* at 352-357; Vintró Castells, *ibid.* at 411. Unconstitutionality appeals have been made against laws on e.g. conscientious objectors, trade union freedoms and treatment of personal data. But see the criticism of the opposition parties, NGOs and others concerning the decision of the *Defensor* in March 2001 not to pursue an unconstitutionality appeal against a 2000 law on immigrants (*Ley de Extranjería, Ley 8/2000*), despite

in part because individuals also have this right of appeal.[133] With both the unconstitutionality and *amparo* appeals the *Defensor* is empowered, but not required, to launch these appeals.[134] The *Defensor* also can propose new laws and amendments to existing laws, and can publish special reports on human rights matters.[135] Thus, the *Defensor del Pueblo* can investigate the entire spectrum of human rights in the Constitution and, in this respect, is a non-judicial mechanism for the protection of all human rights. However, unconstitutionality and *amparo* actions brought by the *Defensor* are confined to mainly civil and political rights.

Retuerto Buades has stated that, based on Article 10(2) of the Constitution, the *Defensor del Pueblo* has used numerous human rights obligations of Spain, ranging from UN treaties to the European Convention, "both in our daily investigation work and in the recommendations and suggestions".[136] She states that these treaties are "valuable instruments for shaping the significance and scope of constitutional rights to the degree that those covenants can determine the interpretation given to certain precepts, or even alter "preconstitutional" interpretations."[137]

Retuerto Buades surveyed cases investigated during the 1990 to 1994 period and found that the most frequent complaints made to the *Defensor* concerned alleged breaches of the constitutional rights to equality and non-discrimination before the law, physical integrity, privacy, effective legal protection and conscientious objection.[138] Specific complaints included local councils refusing to employ women for rural job positions, police and prison guard conduct, health administration conduct (e.g. treatment of patients in psychiatric facilities) and complaints concerning undue delay in court proceedings.[139] In 1998, complaints involving human rights often concerned prison conditions, treatment of prisoners, detention of asylum-seekers and the processing of their claims, and living conditions found in Romani settlements.[140] In 2000, the *Defensor* received about 25,000 complaints, the majority of which concerned education and social services, with others relating to discrimination, domestic violence and mistreatment by law enforcement agencies.[141] In 2002, 21,192 complaints were received, with the majority falling

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receiving almost 800 petitions calling on him to undertake the appeal, T. Bárbulo, "El Defensor del Pueblo no recurre la Ley de Extranjería porque 'es constitucional' ", *El País* (March 24, 2001) at 11.

133 Bueso, *ibid.*; Pérez-Ugena, *ibid.* at 361-364.

134 *Organic Law, supra*, note 119, s. 29.

135 Bueso, *supra* note 118 at 335.

136 Retuerto Buades, *supra* note 121 at 46. The instruments used by the *Defensor del Pueblo* include the Universal Declaration of Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, European Social Charter, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination Against Women and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *ibid.*

137 *Ibid.*

138 *Ibid.* at 43-45.

139 *Ibid.*

140 U.S. Department of State, *Country Reports on Human Rights Practices for 1998* (1999) at 1507 [hereinafter *Country Reports 1998*].

141 U.S. Department of State, *Country Reports on Human Rights Practices for 2000* (2001) at 1632 [hereinafter *Country Reports 2000*].

in the areas of health and social services, services for immigrants, and prisons.[142] Thus, the protection of economic and social rights are increasingly important components of the workload. As noted above, social, economic and cultural rights in the Constitution cannot be enforced through the courts, so the *Defensor* and the autonomous community ombudsmen play valuable roles as non-judicial domestic mechanisms for the protection of these rights. Also, as is the case with other ombudsmen in Western Europe, as immigration into the country has increased the *Defensor* is receiving proportionately more complaints from refugee claimants and immigrants.

Perales commented positively on the effectiveness of the *Defensor del Pueblo* of Spain just over one decade after its establishment:

> This institution was established despite the scepticism of many sections of society who felt that such a magistracy was something more appropriate to Nordic than to Latin countries. Yet during its ten years of existence this 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 in precisely this way that effective use of public powers can be achieved and improvement in constitutionally protected human rights brought about.[143]

More recently, Bueso noted that after fifteen years of operation, the *Defensor* has been accepted by Spanish political parties, other institutions and the public, with the *Defensor del Pueblo* being the second most widely accepted institution after the monarchy.[144] Government agencies are responsive to the *Defensor's* recommendations.[145] However, one criticism of the institution is the slowness of its complaints procedures due to its extremely broad jurisdiction.[146] The *Defensor del Pueblo* of Spain makes a valuable contribution to strengthening good governance and promoting and protecting human rights in Spain. The *Defensor* takes individual human rights cases and in so doing also plays a role in the domestic implementation and interpretation of Spain's international human rights law obligations through its investigations and constitutional court actions.[147] In terms of consolidated democracies, Spain is a success story and the country has a generally good domestic human rights environment, although it continues to experience some problems such as police brutality, discrimination against Roma, women and immigrants, and prison overcrowding.[148] The *Defensor del Pueblo* has played an important role in this transition and forms one element of a larger network of democratic governance institutions. As will be discussed in Chapter 6, the Spanish *Defensor del Pueblo* has also provided an important institutional model for Latin American states.

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142 *Country Reports 2002, supra* note 114 at 1650.

143 Perales, *supra* note 117 at 220.

144 Bueso, *supra* note 118 at 324.

145 *Country Reports 2002, supra* note 114 at 1650.

146 Bueso, *ibid.* at 336.

147 See Retuerto Buades, *supra* note 121 at 48-49.

148 *Country Reports 2002, supra* note 114 at 1645; *Amnesty International: Report 2003, supra* note 91 at 227; Amnesty International, *Amnesty International: Report 2002* (N.Y.: Amnesty International Publications, 2002) at 225-226; J.J. Linz and A. Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore: Johns Hopkins University Press, 1996) at 87-115.

b) Autonomous Community Level *Defensores*

Human rights ombudsmen have been established at the sub-national level of government in Spain in ten of the seventeen autonomous communities: in Andalusia (*Defensor del Pueblo*), Aragon (*Justicia*), the Basque region (*Ararteko*), the Canary Islands (*Diputado del Común*), Castile-La Mancha (*Defensor del Pueblo*), Castile and Leon (*Procurador del Común*), Catalonia (*Síndic de Greuges*), Galicia (*Valedor do Pobo*), Navarra (*Defensor del Pueblo*) and the Valencian Community (*Síndic de Greuges*).[149] Recently, the Balearic Islands has considered activating a *Síndic de Greuges*.[150] The Spanish Constitution made no specific mention of community-level ombudsmen and, for the most part, these institutions were established in Community Statutes of Autonomy and framework legislation.[151] All of the community-level human rights ombudsmen are appointed by the respective legislative branches. The main roles of these ombudsmen are the protection of human rights and the monitoring of administrative conduct of the community-level governments.[152]

As noted earlier, there is overlapping jurisdiction between the national and autonomous community ombudsmen in Spain.[153] The *Defensor's Organic Law* requires the autonomous community ombudsmen to coordinate their functions and cooperate with the *Defensor*, and in 1985 a law was passed concerning the relationships.[154] The *Defensor del Pueblo* has entered into cooperation agreements with some of the autonomous community ombudsmen, which has only partially settled the allocation of jurisdiction.[155] It is generally agreed, however, that autonomous community ombudsmen have controlling jurisdiction over the local governments in their territory.[156]

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149 See E. Roca Roca, "El Defensor del Pueblo en las Comunidades Autónomas" (1987) 14 Revista de la Facultad de Derecho de la Universidad de Granada 167.

150 The *Síndic de Greuges* was included in the 1983 Statute of Autonomy of the Balearic Islands, art. 29.

151 See e.g. Andalusia Statute of Autonomy, art. 46, *Ley 9/1983* (Dec. 1, 1983); Aragon Statute of Autonomy, art. 33.1, *Ley 4/1985* (June 27, 1985); Canary Islands, Statute of Autonomy, art. 13, *Ley* (Feb. 12, 1985); Castile-La Mancha Statute of Autonomy, art. 4, *Ley 16/2001* (Dec. 20, 2001); Catalonia Statute of Autonomy, art. 35, *Ley 14/84* (March 20, 1984); Galicia Statute of Autonomy, art. 14, *Ley 6/1984* (June 5, 1984); Basque Region Statute of Autonomy, art. 15, *Ley 3/1985* (Feb. 27, 1985); Valencia, Statute of Autonomy, art. 24, *Ley 11/1988* (Dec. 26, 1988), in operation 1993. Castile and Leon and Navarra did not include the ombudsman in their Statutes of Autonomy and established the ombudsman later in legislation: Castile and Leon, *Ley*, March 9, 1994; Navarra, *Ley 4/2000* (July 3, 2000).

152 Bueso, *supra* note 118 at 329-330. Several of the Statutes of Autonomy more clearly give dual human rights protection and general supervision of the administration roles to the institution, e.g. Canary Islands and Aragon. The Aragon *Justicia* is slightly different from the other ombudsmen because, in addition to this dual role, the *Justicia* is mandated to protect the Aragonese legal system and defend the Statute of Autonomy, Statute of Autonomy of Aragon, *ibid.*, art. 33.1(b).

153 *Organic Law, supra* note 119, art. 12(1).

154 *Ibid.*, art. 12(2); *Ley 36/85* (Nov. 6, 1985) to Regulate the Relations Between the Institution of Defensor del Pueblo and the Similar Institutions in the Autonomous Communities. Art. 2(2) states that the *Defensor* and autonomous community *Defensores* shall conclude agreements over the scope of the public administration supervised by each institution and the powers they can exercise, *ibid.*

155 Bueso, *supra* note 118 at 331.

156 *Ibid.* But some municipal governments have their own *defensores*.

The autonomous community ombudsmen protect the human rights contained in Title I of the Constitution of Spain, and apply other community and local law as relevant to a particular investigation. Unlike the national *Defensor del Pueblo*, the ombudsmen of the regional communities do not have any power to take unconstitutionality appeals or *amparo* actions to the Constitutional Court. Some autonomous community ombudsmen engage in mediation activities.[157] It has also been noted that the autonomous community ombudsmen have been effective in protecting economic and social rights at the community level, and in protecting the rights of vulnerable persons such as the elderly, children, prisoners and persons with mental disabilities.[158] However, some of the existing offices are underfunded and seven of the autonomous communities still do not have human rights ombudsmen.[159]

The *Defensor del Pueblo* of Andalusia is one example of an autonomous community human rights ombudsman. The *Defensor del Pueblo* of Andalusia was established in Article 46 of Andalusia's 1981 Statute of Autonomy, and supported by a 1983 statute.[160] Article 46 of the Statute of Autonomy states that the Andalusian *Defensor del Pueblo* is a commissioner of parliament for the defence of the rights and liberties included in Title I of the Constitution and to that end he shall supervise the activities of the autonomous community administration.[161] The Law empowers the *Defensor* to initiate investigations on the receipt of a complaint or on his own-motion to clarify the conduct of the autonomous community administration in the light of Article 103(1) of the Constitution and the respect owed to the rights and liberties in Title I.[162] Article 103(1) of the Constitution states that public administration is fully subject to the law, and acts in accordance with various principles including efficiency, decentralization and coordination.[163] Thus, although the main focus of the Andalusian *Defensor* is the protection of constitutional human rights, general control of the administration is also a function of the office. The *Defensor* exercises jurisdiction over the public administration at the community, provincial and municipal levels of government in Andalusia. This includes members of the Council of Government in the Community, police at the community and local levels and hospitals and educational institutions that are under Community jurisdiction.[164]

The protection of human rights is carried out by the Andalusian *Defensor* through investigations and recommendations to government, special reports on human rights, and advance warning to the legislative branch of emerging human rights problems. On several occasions the Andalusian legislature has asked the *Defensor* for his advice, including on new legislation on the rights and protection of minors. The new legislation on minors also created a *Defensor del Menor* (Defender of Minors), and the position is

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157 *Ibid.* at 335.

158 *Ibid.* at 336.

159 *Ibid.* at 326.

160 *Estatuto de Autonomia de Andalucía, Ley Orgánica 6/81* (Dec. 30, 1981), B.O.E. no. 9 (Jan. 11, 1982); *Ley 9/1983* (Dec. 1, 1983), B.O.J.A. no. 100 (Dec. 9, 1983), am. by *Ley 3/1996*, *Ley 1/1998*. The Andalusian *Defensor* began operations in 1984, <www.defensor-and.es>.

161 *Estatuto de Autonomia de Andalucía, ibid.*, art. 46.

162 *Ley 9/1983*, *supra* note 160, art. 10(1).

163 Constitution of Spain, *supra* note 117, art. 103(1).

164 *Ley 9/1983*, *supra* note 160, art. 10(2).

filled by one of the three Deputy *Defensores*.[165] The *Defensor del Menor* of Andalusia is discussed further in Chapter 9. Cases investigated by the Andalusian *Defensor del Pueblo* cover a broad range of administration and human rights issues, in areas such as public works and transportation, culture, education, the environment, justice, health, social services and provincial and municipal administration.[166] In 2001, the largest number of complaints fell in the housing and urban development, justice (e.g. prisoners, judicial delays), health and education sectors.[167] The *Defensor* has addressed the protection of vulnerable persons such as the rights of the elderly, children, immigrants, prisoners and persons in psychiatric facilities.[168] The institution has issued special reports on a regular basis, many of which involve human rights matters.[169] Much of the human rights protection work of the Andalusian *Defensor* deals with economic and social rights which cannot be protected juridically.[170] The *Defensor del Pueblo* of Andalusia has also engaged in mediation between immigrants in the community and the Andalusian government.

Greece

Greece made the transition to a modern democratic structure in 1974, with the end of a seven-year authoritarian government and a new 1975 Constitution that created a presidential parliamentary democracy.[171] However, it was not until 1997 that the Greek government created an ombudsman institution, which began operations on October 1, 1998. This may have been partly due, as one commentator has stated, to the questions that were raised as to why the European Ombudsman (EU), established in 1995, did not have a national counterpart to liaise with in Greece, unlike most other EU member states which had national ombudsmen.[172] The Greek Ombudsman was also introduced into an

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165 Defensor del Pueblo Andaluz, *Informe al Parlamento 1999* (Sevilla: Defensor del Publo Andaluz, 2000), s. 3, "De los Menores"; Defensor del Pueblo Andaluz, *Informe Especial al Parlamento, El Sistema de Protección de Menores*, 3 vols. (Sevilla: Defensor del Pueblo Andaluz, July 1999); *Ley 1/1998 de los Derechos y la Atención al Menor* (April 20, 1998).

166 *Informe al Parlamento 1999, ibid.*, ss. 2-3.

167 *Intervención ante el Pleno del Parlamento Relativa al Informe Anual de 2001* (Seville, Sept. 2002) at 1, <www.defensor-and.es/informes/info-01pleno.htm>.

168 E.g. *Informe al Parlamento 1999*, *supra* note 165, ss. 2-3; special reports, *infra* note 169.

169 E.g. special reports on: prostitution: the reality and politics of intervention in Andalusia (April 2002); the accommodation and housing of immigrant workers (July and Feb. 2001); persons with mental disabilities in Andalusian penitentiary centres (July 2000); the protection of children/youth (July 1999), *supra* note 165; the situation of drug addicts in Andalusian prisons (May 1999); the social and health treatment of persons with HIV/AIDS in Andalusia (Dec. 1997); the education of the children of temporary/migrant workers (April 1997).

170 *Informe al Parlemento 1999, supra* note 165 at 21-22.

171 G.O. Tsobanoglou, "The Ombudsman and old socio-administrative conditions in Greece" in *Righting Wrongs, supra* note 1 at 219. See generally N.C. Alivizatos and P.N. Diamandouros, "Politics and the Judiciary in the Greek Transition to Democracy" in A.J. McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press, 1997) 27.

172 Tsobanoglou, *ibid.* at 222.

environment that had a history of political patronage and a socio-administrative framework that was relatively weak, compared to other western European states, in matters of administrative law, enforcement of law and transparency.[173]

The Greek Ombudsman, created in 1997 legislation which was replaced in 2003,[174] has the:

> mission to mediate between citizens and public services, local authorities, private and public organizations [under state management] . . . with the view to protect citizens' rights, combating maladministration and ensuring respect of legality. The Ombudsman also has the mission of defending and promoting children's rights.[175]

Children's rights were added to the Ombudsman's mandate in the 2003 legislation and both the public and private sectors are within ombudsman jurisdiction when children's rights are in issue.[176] A Deputy Ombudsman for children's rights is also required by law.[177] In 2001, the Constitution of Greece was amended to enshrine the Ombudsman as an independent authority.[178]

The Ombudsman is instructed to investigate administrative conduct which violates rights or infringes upon the legal interests of persons, including those protected by the Constitution and legislation; cases where the administrative authority refuses to fulfil a specific obligation imposed by a final court decision; cases where the administration refuses to fulfil a specific obligation imposed by a legal provision or administrative act; and cases where the administration engages in conduct in violation of the principles of good administration and transparency or which is an abuse of power.[179] Despite the wording in the legislation, the Ombudsman takes complaints from individuals regardless of citizenship who have had contact with the Greek public administration.[180] The Ombudsman does not have jurisdiction over *inter alia* the judiciary and military services with respect to matters of national defence and security.[181] The Ombudsman has the classical powers of investigation on receipt of a complaint or on his own motion, recommendation and public reporting.[182] On the conclusion of an investigation supported with a report, the Ombudsman "shall mediate in every expedient way to resolve the citizen's problem."[183]

The Greek Ombudsman is a human rights ombudsman, based on the foundational law of the office which instructs the Ombudsman to protect the rights of members of the

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173 *Ibid.* at 220-221, 223.

174 *Law 2477/1997*, rep. in The Greek Ombudsman, *Annual Report 1998: Abridged English Language Version* (Athens: National Printing House, Sept. 2000) at 94; *Law 3094/2003* (Jan. 22, 2003), <www.synigoros.gr>.

175 *Law 3094/2003, ibid.*, arts. 1(1), 3(1).

176 *Ibid.*, art. 3(1). See also *infra* Chapter 9.

177 *Ibid.*, art. 1(2).

178 Constitution of Greece (1975, am. in 1986, 2001), arts. 101A, 103(9).

179 *Law 3094/2003, supra* note 174, art. 3(3).

180 Greek Ombudsman, *The Greek Ombudsman: What is it? What does it do?*.

181 *Law 3094/2003, supra* note 174, art. 3(2).

182 *Ibid.*, art. 4.

183 *Ibid.*, art. 4(6).

public. These comprise the rights found in the Constitution, legislation and international agreements that have been implemented into Greek law.[184] The 2001 Constitution contains civil, political, economic, social and cultural rights.[185] Ratified treaties, by operation of the Constitution, are part of Greek domestic law, although certain treaties must obtain legislative approval.[186] However, the Greek Ombudsman is given only the powers of a classical ombudsman, with none of the additional powers that are often given to human rights ombudsmen.

The Ombudsman now has five Deputy Ombudsmen, each heading a department, with a Deputy for human rights and the abovementioned Deputy for children's rights.[187] From late 1998 to the end of 2002, the bulk of the complaints to the Greek Ombudsman concerned poor administration issues, with human rights complaints comprising only 12.93 percent of the total number.[188] In 1998 and 1999, significant human rights investigations involved citizenship rights, rights to personal freedom relating to nationality (e.g. rights of Greek citizens to leave the country, legal entrance and residence of foreigners in Greece), the right to freedom of religion, the conduct of the police, education rights, the right to work and the freedom to practice a profession, and the right to judicial protection (e.g. non-implementation of judicial decisions involving financial payments).[189] In 1999, the Ombudsman also published a special report recommending changes in the 1997 law on the system of alternative service for conscientious objectors.[190] In 2001, the Ombudsman's human rights activities included obtaining the release of numerous undocumented foreigners detained for long periods without judicial review.[191] The Ombudsman has also investigated and made recommendations in cases involving discrimination against women.[192]

In the first annual report, the Greek Ombudsman highlighted the inconsistent position of the Greek government towards human rights, as follows:

> On the one hand, the Constitution, international agreements, and common legislation have shaped, overall, a legislative framework favourable for the protection of

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184 Presidential Decree 273/99, art. 2(1); Constitution of Greece, *supra* note 178, Part 2; The Greek Ombudsman, *Annual Report 1999*, Executive Summary at 5; *Annual Report 1998, supra* note 174 at 30. The International Covenant on Civil and Political Rights was implemented in Greek legislation in *Law 2462/1997*.

185 Constitution of Greece, *ibid.* See K. Ioannou, "Greece" in *Fundamental Rights in Europe, supra* note 11, 355 at 358-361.

186 Ioannou, *ibid.* at 358.

187 *Annual Report 1998, supra* note 174 at 5-9; *Annual Report 1999, supra* note 184 at 5-10. The other Deputies are in the areas of health and social welfare, quality of life (including land use, urban planning, public works, culture and the environment) and state-citizen relations.

188 See <www.synigoros.gr> with state-citizen relations (36.10%), quality of life issues (22%) and social welfare complaints (28.97%).

189 *Annual Report 1998, supra* note 174 at 28-37; *Annual Report 1999, supra* note 184 at 5-6.

190 *Annual Report 1999, ibid.* at 9-10, 28-29.

191 *Amnesty International: Report 2002, supra* note 148 at 111.

192 E.g. limits on women appointed fire fighters, exclusion of women from municipal government jobs involving strong physical activity, exclusion of females from job training programs for trades and differential maximum age limits for females and males for employment in the border police, "Greece: Discrimination Against Women" (Sept. 2002) No. 8 The European Ombudsman Liaison letter 15.

> human rights. On the other hand, however, in practice, when called upon to implement this legislation, the administration responds with considerable procrastination. Despite some evident improvement in recent years, there continues to be a gulf between the legal framework and daily administrative practice, substantially delaying consolidation of the rule of law in our country.[193]

However, it is seen that the Greek Ombudsman "has proved to be an effective means for resolving human rights and religious freedom concerns."[194]

As a human rights ombudsman with classical ombudsman powers, the Greek Ombudsman has received a relatively low percentage of human rights complaints in relation to the total complaints flow, with the majority of complaints addressing many poor administrative practices However, the human rights complaints dealt with do address serious problems in the implementation of Greece's human rights obligations, and cover civil, political and social rights. Such a mandate is important given the continuing human rights problems in Greece, including police violence, restrictions on freedom of religion and expression, harsh prison conditions and long detention of undocumented migrants and asylum seekers.[195] With the new jurisdiction over children's rights, it is possible that the percentage of human rights complaints will increase in the future.

CENTRAL AND EASTERN EUROPE

The end of the 1980s saw the collapse of the Soviet Union and the beginnings of the democratization of Central and Eastern Europe, and the C.I.S. states in Eurasia. In moving from totalitarian regimes to democratic governance structures, these countries have had to redesign or build new government institutions. Their concerns have been the need to establish the rule of law, create new legislation, overhaul the practice of bureaucracies, improve government human rights records and change the mind set of bureaucrats and the people. The 1990s saw these countries ratify the core human rights treaties and engage in constitution drafting and democratic institution building, with the new governments looking to different legal systems for inspiration or ideas – such as the various approaches to distribution of powers, forms of legislatures and the constitutional court concept.[196] Prior to these transitions to democracy, the office of the *Prokuratura* operated in many of these states and, although some scholars found similarities between

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193 *Annual Report 1998*, supra note 174 at 7.

194 *Country Reports 2002, supra* note 114 at 1359; *Country Reports 2000, supra* note 141 at 1364.

195 *Country Reports 2002, ibid.; Amnesty International: Report 2002, supra* note 148 at 110-111; *Country Reports 2000, supra* note 141 at 1355.

196 E.g. R.R. Ludwikowski, "Constitutional Culture of the New East-Central European Democracies" (2000) 29 Georgia J. Int'l & Comp. Law 1; R.R. Ludwikowski, "'Mixed' Constitutions – Product of an East-Central European Constitutional Melting Pot" (1998) 16 Boston U. Int'l Law J. 1; J.-M. Henckaerts and S. Van der Jeught, "Human Rights Protection Under the New Constitutions of Central Europe" (1998) 20 Loy. L.A. Int'l & Comp. Law. J. 475; H. Schwartz, "The New East European Constitutional Courts" (1992) 13 Mich. J. Int'l Law 741. Some of the difficulties in reform of law and state in post-totalitarian or post-authoritarian regimes are described in Linz and Stepan, *supra* note 148 at 247-252.

this office and the ombudsman concept, it certainly did not amount to an ombudsman in any real sense and was not followed as a model in the transition period.[197]

During the 1990s, most of these countries also established national human rights institutions to try to address the problems of human rights protection and poor administration. In the countries that have established institutions, rather than create separate ombudsmen and human rights commissions, one institution has been established wherein human rights protection is expressly included and often forms the predominant mandate of the office. In this respect, where the term "ombudsman" has been used for the office, it can sometimes be misleading. Many of the institutions are human rights ombudsmen with dual human rights protection and administrative justice mandates. Other nations in the region have established offices that are even closer to the human rights commission model.

New national human rights institutions in Central and Eastern Europe and Eurasia have been faced with a difficult legal, bureaucratic and social environment. As Ivan Bizjak has stated:

> A transition-type transformation means radical changes to legislation, structures of authority and the practice of state bodies. . . .
>
> The consequence of such changes are on the one hand an unstable and, because of frequent changes, not entirely consistent legal system and, on the other, a series of state bodies so overwhelmed by petitions that deciding on them is a lengthy and sometimes ineffective process. To this should be added the great expectations of people who anticipated positive and rapid changes and the righting of wrongs which occurred in the past.[198]

He argues that the role of the (human rights) ombudsman is more important in countries making the transition to democracy – such as those in Central and Eastern Europe – than in established democracies because the ombudsman can contribute to the development of democratic conditions, the strengthening of the rule of law and the modernization of state institutions.[199] In particular, Bizjak states that the ombudsman can have an important influence on the state's transformation and modernization by drawing attention to the need for: (1) legislative change – to improve human rights protection, eliminate problems in the application of new laws to individual cases and ensure the harmonization of laws with the constitution and international human rights obligations; (2) reform of government institutions and structures; and (3) changes in the practice of

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[197] See V. Sládecek, "Parliamentary Commissioners for Civil Rights (Ombudsmen) in the Republic of Hungary" in *Righting Wrongs, supra* note 1, 229 at 229-230. The main role of the *Prokuratura* was to represent the state in criminal matters and it had only a minor role in examining the observance of law by administrative agencies. In any event, the *Prokuratura* was not independent and the communist party typically influenced or hindered its work, *ibid.* See e.g. G.B. Smith, "Soviet Union" in *International Handbook of the Ombudsman: Country Surveys, supra* note 96 at 165.

[198] I. Bizjak, "Special Features of the Role of the Ombudsman in Transition Conditions" (2001) 5 Int'l Omb. Yrbk. 83 at 85. The article was based on a survey in which eleven human rights ombudsmen and commissions participated. Bizjak was the first Human Rights Ombudsman of Slovenia.

[199] *Ibid.* at 84.

public authorities, particularly concerning their attitude towards members of the public.[200]

Many of the institutions deal with human rights issues covering the entire spectrum of political, civil, economic, social and cultural rights. As can be seen from the case studies below, complaints concerning the treatment of persons deprived of their liberty (e.g. detainees, prisoners, persons in psychiatric facilities), police conduct, property rights, social and economic rights, and unreasonable delays in obtaining decisions in court and administrative proceedings feature prominently. In some of these countries, economic and social rights cases are a major source of complaints. However, based on a 2000 survey of eleven human rights ombudsmen from Central and Eastern Europe, the ombudsmen were of the opinion that they were more successful in protecting civil and political rights, and that their ability to protect economic and social rights was weaker because the enjoyment of these rights is at least partly connected to the level of resources allocated by the state.[201]

Looking at Central and Eastern Europe and the C.I.S. states, human rights ombudsmen have been established as follows: Poland Commissioner for Civil Rights Protection (1989 and 1997 Constitutions, 1987 law);[202] Czech Republic Public Protector of Rights (1999 law, in operation 2001);[203] Slovak Republic Public Protector of Human Rights (2001 constitutional amendment and law, in operation 2002); Hungary Parliamentary Commissioner for Civil Rights (1990 Constitution, 1992-1993 law, in operation 1995);[204] Slovenia Human Rights Ombudsman (1991 Constitution, 1993 law, in operation 1995);[205] Lithuania *Seimas* Ombudsmen (1992 Constitution, 1994 Law);[206] Croatia People's Attorney (1990 Constitution, 1992 Law, in operation 1994);[207] Republic of Bosnia and Herzegovina Human Rights Ombudsman (1995 Dayton Accords, 2001 domestic law)[208] and at the entity-level with the Federation of Bosnia and Herzegovina Ombudsmen (1994 Washington Agreement)[209] and the Republika Srpska Ombudsmen (2000 law);[210] Kosovo Human Rights Ombudsperson (2000 UNMIK Regulation);[211] Macedonia Public

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200 *Ibid.* at 90.

201 *Ibid.* at 93.

202 For more detailed discussion see *infra* this Chapter.

203 *Law 349/1999* (Dec. 8, 1999); D.J. Galligan and D.M. Smilov, *Administrative Law in Central and Eastern Europe 1996-1998* (Budapest: Central European University Press, 1999) at 57.

204 For more detailed discussion see *infra* this Chapter.

205 For more detailed discussion see *infra* this Chapter.

206 Composed of five ombudsmen appointed by the legislature, the Ombudsmen investigate abuse of power and human rights infringements by public authorities. The Ombudsmen can make recommendations, and bring court actions for dismissal of officers or for compensation for the complainant. See Transparency International, *National Integrity Systems Country Study Report: Lithuania* (2001) at 13-14, 34-35; Gallagher and Smilov, *supra* note 203 at 190-192.

207 On the problematic structure and early difficulties of the Croatia Ombudsman see D. Milkov, "Ombudsman in the Countries of the Former Socialist Federal Republic of Yugoslavia" in *Righting Wrongs, supra* note 1 at 373; Galligan and Smilov, *ibid.* at 30, 44; legislation rep. in *National Ombudsmen: Collection, supra* note 1.

208 For a more detailed discussion see *infra* Chapter 8.

209 For a more detailed discussion see *infra* Chapter 8.

210 For a more detailed discussion see *infra* Chapter 8.

211 For a more detailed discussion see *infra* Chapter 8.

Attorney (1991 Constitution, 1997 and 2003 Law);[212] Romania People's Advocate (1991 Constitution, 1997 law);[213] Albania People's Advocate (1998 Constitution, 1999 Law);[214] Bulgaria Ombudsman (2003 law, in force 2004);[215] Russian Federation Plenipotentiary for Human Rights (1993 Constitution, 1997 law, in operation 1998)[216] and a number of

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[212] Elected by the legislature, the Public Attorney protects the constitutional and legal rights of citizens against public authorities through investigations and recommendations. See Milkov, *supra* note 207; 1997 legislation rep. in *National Ombudsmen: Collection, supra* note 1, am. in 2003.

[213] *Law No. 35/1997*, rep. in *National Ombudsmen: Collection, ibid.*, am. by *Law No. 181/2002*. Appointed by the Senate, the People's Advocate deals with rights violations and maladministration. The Advocate may express his opinion on unconstitutionality matters on request of the Constitutional Court, he may be consulted by legislators when drafting human rights laws and is the supervising authority for privacy laws. Cases investigated include police violence, property rights and restitution of property, minority rights, rights of the child, social and economic rights and consumer rights *vis-à-vis* state companies. An office for children's rights has been established. The Advocate's recommendations are not accepted by the administration and it has inadequate financial, human and physical resources. See *3rd Annual Report, supra* note 8 at 154, 157; <www.avp.ro>.

[214] Established in the Constitution of Albania (1998), arts. 60-63, and *Law 8454* (April 21, 1999), am. by *Law 8600* (April 10, 2000), the People's Advocate protects the rights and freedoms of individuals against the public administration at the national and local levels by investigating and making recommendations. The People's Advocate can act as *amicus curiae* (friend of the court) in court actions. See E. Dobjani, "The Establishment and Operation of the People's Advocate: The Ombudsman in Albania" (2002) 6 Int'l Omb. Yrbk. 65; "The People's Advocate Institution and its Relations with the Judiciary in the Republic of Albania" (April 2002) 26 European Omb. News. 2; *Amnesty International: Report 2002, supra* note 148 at 28, 164.

[215] *Law on the Ombudsman*, State Gazette No. 48 (May 28, 2003, in force Jan. 1, 2004). To be elected by the legislature, Bulgaria's human rights Ombudsman will intervene when citizen's rights and freedoms are violated by conduct of the national or municipal administration or by persons providing public services. The Ombudsman can, on receipt of a complaint or on own-motion, investigate, make recommendations, mediate between the administration and the complainant, and report and notify authorities (e.g. President, Council of Ministers, minimum of 20% of legislators, Public Prosecutor, Supreme Administrative Court) for approaching the Constitutional Court for interpretation of the Constitution or attacking the unconstitutionality of laws. Sofia has a city ombudsman.

[216] The Russian Plenipotentiary for Human Rights is found in the 1993 Constitution of the Russian Federation, art. 103(1)(e), supported by 1997 *Federal Constitutional Law on the Plenipotentiary for Human Rights in the Russian Federation* (in force March 4, 1997), rep. in W.E. Butler and J.E. Henderson, *Russian Legal Texts* (The Hague: Kluwer Law International, 1998) at 35-36, 100-115. The Plenipotentiary is appointed and removed by the legislature (*Duma*) to defend rights and freedoms against the government, and is guided by the Constitution, law, treaties of Russia and generally recognized principles and norms of international law. The Plenipotentiary has powers to investigate, make recommendations, appeal to the Constitutional Court against the violation of the constitutional rights of a person in a specific case, and make various petitions to state agencies and procurators. The Plenipotentiary can propose amendments to federal legislation, reports annually to the President and *Duma*, and submits special reports to the *Duma*. New legislation prevents the Plenipotentiary from visiting detention centres unless he receives a complaint from an inmate, prevents him from appealing directly to the courts – requiring him to appeal to the Prosecutor's office instead, and allows criminal actions against the Plenipotentiary. See "HR commissioner says even his rights are violated", *gazeta.ru* (June 6, 2003); *Amnesty International: Report 2002, supra* note 148 at 207; Lawyers Committee for Human Rights, "The Price of Independence: The Office of Ombudsman and Human Rights in the Russian Federation" (1995) 13 Int'l Omb. J. 125; B. Bowring, "Sergei Kovalyov: The First Russian Human Rights Ombudsman – and the Last?" in R. Müllerson et al., eds., *Constitutional Reform and International Law in Central and Eastern Europe* (The Hague: Kluwer Law International, 1998) 235. Putin appointed a presidential Commissioner for Human Rights in Chechnya.

regional ombudsmen in Russia;[217] Ukraine Authorized Representative for Human Rights (1996 Constitution, 1997 law, in operation 1998);[218] Georgia Public Defender (1996 law);[219] Moldova Parliamentary Advocates (1997 law);[220] Uzbekistan Authorized Person for Human Rights (1997 law);[221] Azerbaijan Human Rights Representative (2002 constitutional amendments and law); Kyrgystan Human Rights Commissioner (2002 law, 2003 Constitution, in operation 2003);[222] and Kazakhstan Human Rights Commissioner (2002 decree). Latvia has a National Human Rights Office (1995 Cabinet of Ministers regulation, 1996 law), closer to the human rights commission model.[223] In Estonia there is no ombudsman – but in 1999 the legislature gave human rights ombudsman-like tasks to the Legal Chancellor.[224] Also, as noted earlier in this Chapter, Armenia passed human

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217 Legislation rep. in *National Ombudsmen: Collection, supra* note 1. The regional ombudsmen are provided for in art. 5 of the 1997 federal ombudsman legislation. By 2002 21 of the 89 regions/republics had ombudsmen, e.g. Amursk, Astrakhan, Kaliningrad, Kalmikia, Kemerov, Komi, Krasnojarsk, Moscow, Perm, Saratov, Smolensk, St. Petersburg, Sverdlovsk, Tatarstan, Volgograd. See *3rd Annual Report, supra* note 8 at 15.

218 Legislation rep. in *National Ombudsmen: Collection, ibid.* Appointed by and reporting to the legislature, the Authorized Representative investigates human rights complaints made against public authorities and can apply to the Constitutional Court. Major sources of complaints have included police torture, long pre-trial detention periods, violations of economic and social rights, and violence against journalists. See "Ombudsman decries police abuses in Ukraine", *BBC Monitoring Service* (April 18, 2003); "Ombudswoman Reports on Human Rights", 5:15 *RFE/RL* (April 22, 2003); Galligan and Smilov, *supra* note 203 at 394-395.

219 Legislation rep. in *National Ombudsmen: Collection, ibid.*

220 *Ibid.* See <www.iatp.md/cpdom/en/advocates.htm>.

221 *Ibid.* Elected by the legislature from among the deputies, the Authorized Person oversees the observance of human rights laws by government bodies and officials, self-governing bodies, organizations, enterprises and NGOs. Guided by the Constitution, statutes, treaties ratified by Uzbekistan and generally accepted principles and norms of international law, the Authorized Person promotes the improvement of Uzbek human rights law and its harmonization with international law, engages in public human rights education, investigates human rights complaints against government and makes recommendations. In 2002, violations in the law enforcement, social protection, labour and health sectors comprised the majority of complaints. See "Uzbeks file 6,000 complaints with ombudsman in 2002", *BBC Monitoring Service* (April 23, 2003).

222 "Kyrgyz Ombudsman's Office Received Almost 10,000 Complaints in its First Year", 7:234 *RFE/RL* (Dec. 15, 2003).

223 Legislation rep. in *National Ombudsmen: Collection, supra* note 1. The National Human Rights Office, headed by a Director appointed by the legislature upon recommendation by the Cabinet of Ministers, with the purpose of promoting the observance of human rights in Latvia in accordance with the Constitution, law and human rights treaties binding Latvia. The Office informs and educates the public on human rights; advises the government and legislature on compliance with international and domestic human rights obligations; investigates human rights violations in the public and private sectors through the investigation of complaints, use of conciliation and, if conciliation is unsuccessful, the making of recommendations; and holds public inquiries. See *Amnesty International: Report 2002, supra* note 148 at 153; Galligan and Smilov, *ibid.* at 150-151.

224 Under the Constitution and *Legal Chancellor's Act* (1999), the Legal Chancellor is given independence and appointed by Parliament upon a Presidential proposal. The Chancellor monitors the compliance of state and local legislation with the Constitution and the law. The legislation empowers the Chancellor to take applications from individuals and to monitor the conduct of government institutions, including whether they are complying with constitutional human rights obligations. Since 2002, the Chancellor has the power to commence disciplinary processes against judges. In 2004, a new *Legal Chancellor's Act* will enter into force and will enable the Chancellor to address discrimination and take complaints alleging constitutional human rights violations against

rights ombudsman legislation in 2003, Turkey and Serbia and Montenegro have started to consider national ombudsmen, and Serbia and Montenegro has begun to establish the ombudsman at sub-national levels of governance.[225]

This section will examine the human rights ombudsmen in Poland, Slovenia and Hungary.

Poland

The first national human rights institution established in Central and East Europe was Poland's Commissioner for Civil Rights Protection. Legislation creating the office was passed in 1987 during the decline of the Communist government.[226] The institution survived the collapse of Communism – it was included in the 1989 Constitution and strengthened in the 1997 Constitution.[227]

Although the classical ombudsman model was influential, the Commissioner was given an extensive human rights mandate.[228] The Commissioner is appointed by and reports to the legislative branch, with the duties to "safeguard the rights and liberties of citizens as set forth in the Constitution of the Republic of Poland and in other regulations" and investigate whether "the law and/or principle of community life and social justice have been breached" by public bodies.[229] Eva Letowska, the first Commissioner for Civil Rights Protection, argued that the institution is similar to many other ombuds-

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municipal governments, organizations subject to public law and private organizations performing public services. See "The New Competencies of the Legal Chancellor in Estonia" (Feb. 2003) 29 European Omb. News. 12-13; Heyns and Viljoen, *supra* note 67 at 248-249; Galligan and Smilov, *ibid.* at 87.

225 See *supra* text accompanying notes 7-8, and *infra* Chapter 8 on Serbia and Montenegro.

226 *Act of 15 July 1987 on Commissioner for Civil Rights Protection*, as am. in 1991, 2000, rep. in *National Ombudsmen: Collection, supra* note 1. The first Commissioner took office on Jan. 1, 1988. See A. Drzemczewski and M.A. Nowicki, "Poland" in *Fundamental Rights in Europe, supra* note 11, 657 at 670-672; Galligan and Smilov, *supra* note 203 at 220-221; H. Elcock, "The Polish Commissioner for Citizens' Rights Protection: Decaying Communism to Pluralist Democracy Through an Ombudsman's Eyes" (1997) 75 Public Admin. 359; A. Klich, "Human Rights in Poland: The Role of the Constitutional Tribunal and the Commissioner for Citizens' Rights" [1996] St. Louis-Warsaw Transatlantic Law J. 33; E. Letowska, "The Ombudsman in 'New' Democracies: The Polish Perspective" in J.J. Hesse and T.A.J. Toonen, eds., (1996), 3 European Yrbk. Comp. Gov't & Public Admin. 271 at 272; E. Letowska, "The Commissioner for Citizens' Rights in Central and Eastern Europe: The Polish Experience" [1996] St. Louis-Warsaw Transatlantic Law J.1; E. Letowska, "The Polish Ombudsman and Human Rights" in *The Ombudsman in Europe – The Institution, supra* note 1 at 57; E. Letowska, "The Polish Ombudsman (The Commissioner for the Protection of Civil Rights)" (1990) 39 Int'l & Comp. Law Q. 206.

227 Constitution of the Republic of Poland (July 16, 1997), rep. in *National Ombudsmen: Collection, ibid.* at 209; Letowska, "The Commissioner for Citizens' Rights in Central and Eastern Europe", *ibid.* See generally A.S. Walicki, "Transitional Justice and the Political Struggles of Post-Communist Poland" in *Transitional Justice and the Rule of Law in New Democracies, supra* note 171 at 185.

228 Letowska, "The Commissioner for Citizens' Rights in Central and Eastern Europe: The Polish Experience", *supra* note 226 at 2.

229 Constitution of Poland 1997, *supra* note 227, arts. 208(1), 209; *Act of 15 July 1987, supra* note 226, arts. 1(2)&(3), 3, 6. The 1997 Constitution also contains various guarantees of the independence of the office from other state bodies. The Commissioner is appointed by the *Sejm* (lower house) with the approval of the Senate.

men because government administration is scrutinized for its legality, including human rights law violations, and more broadly against equitable standards, including "social justice".[230]

The Commissioner has broad jurisdiction over the administration, including the armed forces, security forces, police, prisons and local government.[231] The Commissioner also has jurisdiction over the court system, but cannot interfere with judicial independence.[232] The Commissioner can: investigate on receipt of a complaint or *suo moto*, 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 to annul final decisions in criminal and civil cases.[233] The Commissioner can also propose that human rights laws be created or amended.[234] Both the 1989 and 1997 Constitutions permit the Commissioner to make applications to the Constitutional Tribunal. The Commissioner 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.[235] The Commissioner can also participate in Constitutional Tribunal actions initiated by individuals and others.[236] The 1997 Constitution contains a range of civil, political, economic, social, cultural and environmental rights, and ratified treaties are, by operation of the Constitution, considered part of the domestic legal system.[237]

The human rights protection role is the most important component of the work of the Polish Commissioner for Civil Rights Protection. Many cases covering the spectrum of human rights have been investigated, especially issues arising in a country that has moved from a socialist to a democratic system.[238] Cases have included equality rights

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230 Letowska, "The Polish Ombudsman (The Commissioner for the Protection of Civil Rights)", *supra* note 226 at 207. However, social justice should be used to soften the effect of law and not used against legal norms, Klich, *supra* note 226 at 39.

231 Letowska, "The Commissioner for Citizens' Rights in Central and Eastern Europe", *supra* note 226 at 3.

232 Drzemczewski and Nowicki, *supra* note 226 at 670.

233 *Law of 15 July 1987, supra* note 226, art. 14; "Poland Commissioner for Civil Rights Protection: 15 years in operation" (March 2003) no. 9 The European Ombudsman Liaison letter 46 at 47 (79 cases in 2000, 54 in 2001, 70 in 2002).

234 *Law of 15 July 1987, ibid.*, art. 16.

235 Constitution of Poland 1997, *supra* note 227, arts. 191, 188, 79(1). 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, Ludwikowski, "'Mixed' Constitutions – Product of an East-Central European Constitutional Melting Pot", *supra* note 196 at 56-57. The 1997 Constitution also introduced direct constitutional appeal by individuals to the Constitutional Tribunal.

236 "Poland Commissioner for Civil Rights Protection: 15 years in operation", *supra* note 233, 46 at 47 (Commissioner participated in 10 cases in 2001 and 8 in 2002).

237 Constitution of Poland 1997, *supra* note 227, arts. 30-76; Drzemczewski and Nowicki, *supra* note 226 at 660.

238 See Klich, *supra* note 226; T. Zieliński, "The International Covenants on Human Rights in the Practice of the Polish Ombudsman" (1995-1996) 22 Polish Yrbk. Int'l Law 7; E. Letowska, The Ombudsman and Basic Rights" (1995) 4 East European Const'l Rev. 63; E. Letowska, "The Polish Ombudsman (The Commissioner for the Protection of Civil Rights)", *supra* note 226 at 210-217.

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.[239] The 1998 reporting year illustrated that the greatest concentration of complaints submitted to the Commissioner included economic and social rights issues.[240] In 2002, the Commissioner's office handled over 50,000 cases.[241] The Commissioner also has a human rights education mandate.

In investigations, applications before the Constitutional Tribunal and other activities, the Commissioner has used provisions of international human rights instruments, particularly those in the Universal Declaration of Human Rights, the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the European Convention, to interpret the constitution and laws.[242] Eva Letowska stated that:

> 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.[243]

Letowska was very active in bringing cases before the Constitutional Court under the 1989 Constitution, many of which were decided in favour of the applicant.[244] The provisions in the 1997 Constitution also facilitate the use of international human rights treaties ratified by Poland in the cases that the Commissioner can take to the Constitutional Tribunal. The Commissioner has continued to bring actions before the Constitutional Tribunal, and in 2001 and 2002 sent twenty-one cases in each year to the Tribunal.[245]

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239 Zielínski, *ibid.*; Letowska, *ibid.* See *infra* Chapter 9 for discussion of Poland's Commissioner for Children.

240 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, Poland, Commissioner for Civil Rights Protection, "Annual Information" (June 1999) 18 European Omb. News. 16; "Poland Commissioner for Civil Rights Protection: 15 years in operation", *supra* note 233 at 47.

241 Ombudsman Report, *Polish News Bull.* (June 4, 2003).

242 Zielínski,*supra* note 238; Letowska, "The Polish Ombudsman and Human Rights", *supra* note 226 at 59-61, 67-68, 70-71; Drzemczewski and Nowicki, *supra* note 226 at 671-672 (European Convention). Poland ratified the European Convention in 1993.

243 Letowska, "The Commisioner for Citizens' Rights in Central and Eastern Europe", *supra* note 226 at 9.

244 Schwartz, *supra* note 196 at 779-780.

245 "Poland Commissioner for Civil Rights Protection: 15 years in operation", *supra* note 233 at 47; "Student Equality", *Polish New Bull.* (Dec. 24, 2002) (Commissioner's complaint resulted in judgment reducing passport fees paid by students); "Pre-War Property Compensation", *Polish New Bull.* (Dec. 24, 2002) (Commissioner's complaint resulted in judgment giving credits for pre-war lost property); "Civil Service Professionalism Upheld", *Polish New Bull.* (Dec. 18, 2002) (Commissioner's complaint resulted in judgment holding appointment of civil servants outside normal application procedures unconstitutional); Ombudsman Report, *supra* note 241; "Annual Information", *supra* note 240.

Poland is a consolidating democracy and human rights are respected generally, although some problems continue such as racist violence, poor prison conditions, lengthy pretrial detention, police mistreatment of refugees, a slow judicial system, and violence against women.[246] The Commissioner for Civil Rights Protection has faced typical post-Communist state dysfunction such as overly-bureaucratic behaviour, government officials poorly educated in human rights law and inadequacies in the legal system.[247] The Commissioner is considered to be an effective and independent institution, contributing to the democratization of Poland through its activities.[248] This can be attributed to the independence of the office, its wide jurisdiction and broad powers, the appointment of strong individuals to the position of Commissioner, the responsiveness of the government to its work, and the perception of the office in the eyes of the populace.[249] The Polish Commissioner for Civil Rights Protection is illustrative of an effective national human rights institution in Central and Eastern Europe which acts as a non-judicial mechanism for the domestic implementation of international human rights obligations of the state, including the regional European human rights law.

Slovenia

With the breakup of the Socialist Federal Republic of Yugoslavia, Slovenia declared independence on June 25, 1991 and, after a very short period of armed conflict, successfully seceded from Yugoslavia.[250] A new Constitution was adopted in December 1991, including Article 159 which states that "[a]n Ombudsman, responsible for the protection of human rights and fundamental freedoms in matters involving State bodies, local government bodies and statutory authorities, shall be appointed pursuant to an Act of Parliament."[251] There was a delay in the institution becoming operational – Slovenia's Parliament passed the *Human Rights Ombudsman Act* on December 28, 1993 and the first Ombudsman took office on January 1, 1995.[252] Ivan Bizjak notes that the design of the institution was influenced both by the Scandinavian model and more recent institutions in Europe, such as the Netherlands and Spain.[253]

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246 *Country Reports 2002*, *supra* note 114 at 1540; *Amnesty International: Report 2002*, *supra* note 148 at 198-199; *Country Reports 1998, supra* note 140 at 1405-1421. See Linz and Stepan, *supra* note 148 at 255-292 on Poland's democratic consolidation.

247 Klich, *supra* note 226 at 58-59.

248 *Country Reports 2002*, *supra* note 114 at 1548; *Country Reports 1998, supra* note 140 at 1414.

249 *Country Reports 2002, ibid.*; Elcock, *supra* note 226 at 376-377 (on the first two Commissioners); Klich, *supra* note 226.

250 See Milkov, *supra* note 207 at 376-380.

251 Constitution of the Republic of Slovenia, 1991, art. 159, rep. in I. Bizjak, "The Human Rights Ombudsman of Slovenia" in *Human Rights Commissions and Ombudsman Offices, supra* note 1, 373 at 379; I. Bizjak, "The Role and Experience of an Ombudsman in a New Democracy" (1998) 2 Int'l Omb. Yrbk. 57; A. Mavčič, "Slovenia" in *Fundamental Rights in Europe, supra* note 11 781 at 789-791; Galligan and Smilov, *supra* note 203 at 362, 375-376.

252 *Human Rights Ombudsman Act*, rep. in *National Ombudsmen: Collection*, *supra* note 1 at 259.

253 Bizjak, "The Human Rights Ombudsman of Slovenia", *supra* note 251 at 375. See also Mavčič, *supra* note 251 at 789-790.

The Human Rights Ombudsman is elected by the National Assembly on the nomination of the President and reports annually to the Assembly.[254] In performing the functions of office, the Ombudsman observes the provisions of the Constitution and international human rights instruments, and may apply the principles of equity and good administration.[255]

The Human Rights Ombudsman has wide jurisdiction over public bodies and has limited jurisdiction over the judiciary, being able to investigate court or other legal proceedings if there is "undue delay in the proceedings or evident abuse of authority."[256] The Ombudsman can launch investigations on receipt of a complaint or on his own-motion and can make recommendations, give opinions and propose that disciplinary measures be taken against the employees of public authorities.[257] The Human Rights Ombudsman can make inspections of prisons, psychiatric facilities and other institutions where persons are detained against their will.[258] The Ombudsman is also empowered to examine more general issues relating to the human rights and legal security of Slovene citizens – the Ombudsman can initiate systemic investigations and make submissions to Parliament and the government on the amendment of statutes.[259] For example, the first Human Rights Ombudsman considered that an important part of his work was to inform the government about laws that were outdated and unfair.[260] Further, the Human Rights Ombudsman can make applications to the Slovenian Constitutional Court to determine the constitutionality and legality of laws, and constitutional complaints to the Court with respect to individual cases under investigation.[261]

The Human Rights Ombudsman does address complaints of poor administration in general, such as arbitrary decisions, delays and mistakes.[262] However, the human rights protection mandate is predominant and, in this respect, the Ombudsman uses both constitutional law and international norms incorporated in domestic law. The 1991 Constitution contains a variety of human rights, including strong provisions on non-discrimination and minority rights.[263] Slovenia has a monist approach to treaties – after ratification and publication they become part of the domestic legal system.[264] The first Human Rights Ombudsman stated that:

> 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

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254 *Human Rights Ombudsman Act, ibid.*, arts. 2, 5, 12. Art. 4 underlines the autonomy and independence of the office.

255 *Ibid.*, arts. 1, 3; Mavčič, *supra* note 251 at 790.

256 *Human Rights Ombudsman Act, ibid.*, art. 24.

257 *Ibid.*, arts. 7, 9, 26, 39.

258 *Ibid.*, art. 42.

259 *Ibid.*, arts. 9, 45.

260 Bizjak, "The Role and Experience of an Ombudsman in a New Democracy", *supra* note 251 at 59.

261 *Constitutional Court Act*, arts. 23, 50, 52; <www.varuh-ri.si>; Human Rights Ombudsman, *Rules of Procedure*, rep. in *National Ombudsmen: Collection, supra* note 1 at 271, arts. 37-38. See Bizjak, "The Human Rights Ombudsman of Slovenia", *supra* note 251 at 376.

262 Bizjak, *ibid.* at 375.

263 Mavčič, *supra* note 251 at 781-782. Slovenia ratified the European Convention in 1994.

264 *Ibid.* at 783-784. Slovenia is also a party to the ICCPR and the ICESCR.

> 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 Convention on the Prevention of Torture or the United Nations Convention on the Rights of the Child.[265]

In 1995 and 1996, the major human rights issues addressed by the Human Rights Ombudsman were: the excessive length and ineffectiveness of proceedings before state bodies, incomplete legislation in the human rights and administrative law fields, inadequate and complex procedures to appeal administrative acts, social rights issues and problems arising out of Slovene independence.[266] From 1998 through 2001, the Human Rights Ombudsman continued to note that the government was slow in passing laws to improve human rights protection, there was a failure to implement laws in force and there were unreasonable periods of time taken to reach decisions in court and administrative proceedings.[267] From 1998 to 2001, the largest source of complaints were in the areas of court and police procedures, administrative affairs, a basket of other matters, and social security matters.[268]

The Human Rights Ombudsman has dealt with a variety of human rights issues, including: civil and political rights of detainees in remand centres and detained juveniles; rights of prisoners and the conditions in prisons; 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 (especially forcible measures); discrimination based on age, sexual orientation; the rights of the disabled; minority rights; and refugee issues.[269] The work of the Human Rights Ombudsman in protecting the rights of children and youth is discussed in Chapter 9.

Slovenia is another example of a country consolidating its democratic structure, where human rights are generally respected but where those problems experienced in post-Communist European states continue, such as delays in judicial and administrative processes, outdated or nonexistent human rights laws, legislative resistance to human rights, police

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265 Bizjak, "The Role and Experience of an Ombudsman in a New Democracy", *supra* note 251 at 59.

266 Republic of Slovenia Human Rights Ombudsman, *Annual Report 1996*, Abbrev. version (Ljubljana, Aug. 1997) at 7.

267 Republic of Slovenia Human Rights Ombudsman, *1998 Annual Report*, Abbrev. version (Ljubljana, May 1999) at 9-30; *1999 Annual Report*, Abbrev. Version, <www.varuh-ri.si>; *2000 Annual Report*, Abbrev. Version (Ljubljana, June 2000) at 7; *2001 Annual Report* (Ljubljana, June 2002) at 5-8, 23, 26.

268 In 1998, court and police procedures (26.3%), administrative affairs (20.8%), social security matters, *1998 Annual Report, ibid.* at 84; in 1999, court and police procedures (27.7%), other matters (20.8%), administrative affairs (18.6%), social security cases (12%), *1999 Annual Report, ibid.*; in 2000, court and police procedures (32.4%), administrative affairs (17.5%), other matters (16.6%), social security matters (14.1%), *2000 Annual Report, ibid.* at 83; in 2001, court and police procedures (28.76%), administrative matters (16.33%), other matters (15.58%), social security matters (15.17%), *2001 Annual Report, ibid.* at 75.

269 *Annual Report 1996, supra* note 266; *1998 Annual Report, ibid.*; *2000 Annual Report, ibid.*; *2001 Annual Report, ibid.*

violence, discrimination against minorities and violence against women.[270] 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.[271] Also, in the early years of its work both the executive and the legislative branches were not responsive to the recommendations and reports of the Human Rights Ombudsman.[272] However, the institution is given a broad jurisdiction and strong human rights protection powers.

Hungary

With the collapse of Communism in Central and East Europe, Hungary made its transition to a democratic state in the 1989 to 1990 period.[273] The 1990 amendments to the Hungarian Constitution established the Parliamentary Commissioner (Ombudsman) for Civil Rights, a Parliamentary Commissioner for the Protection of National and Ethnic Minority Rights and a Parliamentary Commissioner for Data Protection and Freedom of Information.[274] Article 32B(1) of the Constitution states:

> the Parliamentary Commissioner (Ombudsman) for Civil Rights is responsible for investigating or initiating the investigation of cases involving the infringement of constitutional rights which has come to his attention and initiating general or specific measures for their remedy.[275]

Pursuant to Article 32B, the Commissioners must be elected by Parliament on the nomination of the President, and they report to Parliament. However, Hungary did not pass a law on the Parliamentary Commissioner for Civil Rights until 1993, and the first Commissioner did not take office until mid-1995.[276]

The Commissioner for Civil Rights has jurisdiction over many areas of government administration, including aspects of the armed and security forces, police, prisons,

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[270] *Country Reports 2002*, *supra* note 114 at 1639; *Country Reports 1998, supra* note 140 at 1504-1507.

[271] The first Ombudsman was regarded as fair, although some criticized his links to the government, *Country Reports 1998, ibid.* at 1506.

[272] 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, April 29, 1999).

[273] See G. Halmai and K. Lane Scheppele, "Living Well is the Best Revenge: The Hungarian Approach to Judging the Past" in *Transitional Justice and the Rule of Law in New Democracies, supra* note 171, 155 at 157-158.

[274] Constitution of the Republic of Hungary, 1990, ch. V, art. 32B. See Sládecek, "Parliamentary Commissioners for Civil Rights (Ombudsmen) in the Republic of Hungary", *supra* note 197. For further details on the Hungarian Parliamentary Commissioner for the Protection of National and Ethnic Minority Rights see *supra* Chapter 2.

[275] Constitution of Hungary, art. 32B, *ibid.*

[276] *Act LIX of 1993 on the Ombudsman (Parliamentary Commissioner) for Civil Rights*, rep. in *National Ombudsmen: Collection*, *supra* note 1 at 104, am. by *Act XC of 2001*. The Bill was introduced in 1990. See L. Majtényi, "On the History of Adopting the Institution of Ombudsman in Hungary" (1994) 1 J. Const'l Law East. & Central Europe 163; Sládecek, *supra* note 197 at 230; Galligan and Smilov, *supra* note 203 at 121. The delay was due to debates on amendments rather than opposition to the law.

organs of justice except the courts, public utilities, public educational institutions and local government.[277] The Commissioner can launch investigations on receipt of a complaint or on her own motion. The Commissioner has the power to make recommendations, make a motion to the Constitutional Court to examine a law's constitutionality, determine whether a law conflicts with an international agreement, obtain judgment in a constitutional complaint, interpret constitutional provisions, and institute criminal and other proceedings against administrative officials.[278] The Commissioner can also make proposals on the drafting, amendment and repeal of laws, a power which has been used often given the carryover of outdated and unacceptable legislation from the Communist period.[279]

Although the mandate of the Commissioner to investigate breaches of constitutional rights does not expressly refer to human rights, most of these constitutional rights are in fact fundamental human rights.[280] Chapter XII of the Hungarian Constitution contains human rights guarantees covering civil, political, economic, social, cultural and minority rights.[281] The first Parliamentary Commissioner for Civil Rights, Katalin Gönczöl, interpreted her mandate to include economic and social rights, stating that:

> [t]he Act itself does not make restrictions and the ministerial motivations for the Act declare that constitutional rights include all human and civil rights declared by the Constitution and it is to be understood as inclusive of all rights related to the principles of the economic, social and political order.[282]

The Parliamentary Commissioner for Civil Rights receives many individual complaints relating to human rights. In the first eighteen months of operations, the most frequent human rights breaches found were violations of the right to legal security, followed by breaches of the right to social security and support, discrimination, breaches of property rights and breaches of the right to a legal remedy.[283] By 1996 the proportion of complaints concerning taxation matters and health services increased considerably.[284] The Commissioner has also launched many *ex officio* investigations, into areas such as the human rights of members of the defence force, the human rights of disabled persons resident in nursing care facilities and the human rights of persons who have attempted suicide.[285] In 1999, the Commissioner investigated border facilities used for

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277 *Act LIX of 1993, ibid.*, ss. 16(1) & (2), 18(1) and 29 (with limitations on inspection of listed documents).

278 *Ibid.*, ss. 20-24.

279 *Ibid.*, s. 25. By 1996, the Commissioner had proposed new legislation in over 100 cases, Sládecek, *supra* note 197 at 241.

280 Sládecek, *ibid.* at 233.

281 Constitution of Hungary, *supra* note 274, arts. 8, 13-18, 54-70G.

282 K. Gönczöl, "The First Half-Year Experiences of the Parliamentary Commissioner for Civil Rights (Budapest, 1995) at 6, rep. in Sládecek, *supra* note 197 at 234.

283 Sládecek, *ibid.* at 237.

284 *Ibid.* at 238.

285 P. Polt, "The Effectuation of Civil and Human Rights in Hungarian Defense Forces From the Point of View of the Ombudsman" (June 1998) 15 European Omb. News. 38; *Report on the First One and a Half Year Experiences of the Parliamentary Commissioner and of the Deputy Commissioner for Human Rights* (June 1997) 12 European Omb. News. 19.

refugee and asylum claimants and criticized their extremely poor conditions.[286] In 2001, the greatest numbers of complaints fell in the area of local government, such as those concerning building and social issues.[287] Important investigations conducted by the office in 2001 involved the government protection of children in cases where there is family violence, health services for the homeless, the conditions in prisons and the conditions of drains and water pipes (connected to the rights to property and to a healthy environment).[288] Thus, the Hungarian Parliamentary Commissioner for Civil Rights has a caseload that is a mix of civil, political, economic and social rights.

Hungary has made a relatively successful democratic transition. Human rights are generally adhered to, although there are some continuing problems, such as excessive use of force by the police, long pretrial detention, discrimination on various grounds and against Roma, and violence against women.[289] The Hungarian Parliamentary Commissioner for Civil Rights and the single-sector Parliamentary Commissioners for the Protection of National and Ethnic Minority Rights and for Data Protection and Freedom of Information are contributing to democratic development and an improved human rights protection system in Hungary.

Classical and Human Rights Ombudsmen in Europe

This chapter illustrates the considerable number of human rights ombudsmen in Europe. While a majority of European Union states have classical ombudsmen, five have hybrid human rights ombudsmen, and most of the numerous institutions in Central and Eastern Europe are human rights ombudsmen. The ombudsmen in Europe illustrate how the human rights role of an ombudsman in Europe varies depending on whether it is a classical or hybrid human rights ombudsman and on criteria discussed in Chapter 4, such as the human rights treaty obligations of the state, whether the international obligations have been implemented domestically, the legal framework of the institution and the approach of the ombudsman to human rights protection. The ombudsmen surveyed in the case studies contribute to good governance through their investigations and other functions. The cases studies indicate how both classical and human rights ombudsmen in Europe assist in the domestic implementation of their state's international human rights obligations under the European Convention of Human Rights, other Council of

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286 *Country Reports 2000, supra* note 141 at 1377.

287 Hungarian Parliamentary Commissioner for Civil Rights, *The Experience of the Hungarian Parliamentary Commissioner and the Deputy Commissioner for Civil Rights in 2001* (Summary) (Budapest, 2002), <www.obh.hu>.

288 Parliamentary Commissioner for Human Rights of Hungary, "Summary on some important investigations of the Hungarian ombudsman from the end of 2000" (Oct. 2001) 25 European Omb. News. 10-11; *The Experience of the Hungarian Parliamentary Commissioner and the Deputy Commissioner for Civil Rights in 2001, ibid.*

289 *Amnesty International: Report 2003, supra* note 91 at 124; *Amnesty International: Report 2002, supra* note 148 at 122-123; *Country Reports 2002, supra* note 114 at 1365. The Parliamentary Commissioner for the Protection of National and Ethnic Minority Rights takes many complaints from Roma, see *supra* Chapter 2.

Europe human rights treaties and UN treaties. However, in other respects, domestic ombudsmen in Council of Europe states have limited interaction with the European Convention system as the jurisprudence of European Court of Justice militates against domestic ombudsmen being considered as effective or domestic remedies under provisions of the European Convention. Also, given access requirements, it is unlikely that an ombudsman could make an application to the European Court on behalf of a victim.

Post-conflict peace-building missions in Europe – in Bosnia and Herzegovina and Kosovo – have included the establishment of human rights ombudsmen. The institutions in Bosnia at the national and entity levels and in Kosovo will be discussed in Chapter 8. The relationship between the Council of Europe's Commissioner for Human Rights and ombudsmen in member states will be explored in Chapter 10. The Ombudsman of the EU, the European Ombudsman, will be examined in Chapter 11.

CHAPTER SIX

The Ombudsman, Good Governance and Human Rights in Latin America and the Caribbean

Introduction

The western hemisphere (or the Americas) contains countries of considerable diversity. Although Latin American states have similarities based on their Iberian heritage, they are also quite different in other respects.[1] Countries in North America and the Caribbean have been influenced by their European colonizers – primarily Great Britain, France, Spain and the Netherlands.[2] Countries such as Canada and some Caribbean states retain loose ties through membership in the Commonwealth and La Francophonie.[3] For the western hemisphere as a whole, both the Organization of American States (OAS) and the Summit of the Americas process provide fora for discussion and action on matters of common concern.[4] In the Caribbean region, CARICOM and the Organization of Eastern Caribbean States (OECS) enhance regional cooperation.

The evolution of the ombudsman, human rights ombudsman (e.g. defenders of the people, human rights attorneys, the public defender) and other national human rights institutions in the Americas illustrates both the diversity and common cultural ties among nations in the western hemisphere.

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[1] E.g. E. Bradford Burns, *Latin America: A Concise Interpretive History*, 6th ed. (Englewood Cliffs, N.J.: Prentice Hall, 1994); A.F. Lowenthal and G.F. Treverton, eds., *Latin America in a New World* (Boulder: Westview Press, Inc., 1994); S. Jonas and E.J. McCaughan, eds., *Latin America Faces the Twenty-First Century: Reconstructing a Social Justice Agenda* (Boulder: Westview Press, Inc., 1994).

[2] E.g. S.J. Randall and G.S. Mount, *The Caribbean Basin: An international history* (London: Routledge, 1998); B.C. Richardson, *The Caribbean in the wider world, 1492-1992* (Cambridge: Cambridge University Press, 1992).

[3] In the Americas the Commonwealth members are: Canada, Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago. The Americas still contains overseas territories of the United Kingdom. Francophonie members are: Canada, Canada New Brunswick, Canada Quebec, Dominica, Saint Lucia, Haiti and France (with overseas territories).

[4] The OAS and the Summits of the Americas are discussed *supra* in Chapters 3 and 4. The 34 OAS member states are: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, U.S.A., Uruguay and Venezuela. Cuba's membership was suspended in 1962.

The first ombudsmen in the Americas were classical ombudsmen which started operations in 1967 – in the Canadian provinces of Alberta and New Brunswick, Hawaii and Guyana. In the Caribbean, the classical ombudsman spread to some of the other Commonwealth Caribbean states. Other Caribbean ombudsmen, created in the past few years, have been influenced by their respective historical and cultural ties. Latin America adopted the human rights ombudsman concept, commencing in Guatemala in 1987 and spreading to most other Central and South American nations in subsequent years. The classical ombudsman design has not been utilized at all in Latin America. In North America, the classical legislative ombudsman was adopted by most Canadian provinces and territories, commencing in 1967.[5] The legislative ombudsman has not been as popular in the U.S.A. – only five states and two dependent territories have established an ombudsman.[6] Neither Canada nor the U.S. have established human rights ombudsmen, although some North American ombudsmen have additional mandates, e.g. freedom of information oversight.[7] Canada, however, does have human rights commissions.[8]

This chapter will explore the human rights and classical ombudsmen in Latin America and the Caribbean and their roles in building good governance and the promotion and protection of human rights. The relationship between these institutions and the Inter-American human rights system will also be explored.

The Inter-American Human Rights System and the Role of the Ombudsman

OVERVIEW OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

The Inter-American human rights system finds its source in the OAS Charter, which contains only a few general provisions on human rights protection.[9] The core interna-

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[5] Alberta (1967), New Brunswick (1967), Quebec (1968), Manitoba (1970), Nova Scotia (1971), Saskatchewan (1973), Ontario (1975), British Columbia (1979), Yukon (1996), Newfoundland and Labrador (1975-1991, 2001). Only Prince Edward Island, the Northwest Territories and Nunavut do not have ombudsmen. Canada does not have a federal ombudsman, but there are specialized parliamentary commissioners in the areas of official languages, privacy, freedom of information, correctional institutions and the R.C.M.P. There are also some special-sector commissioners at the provincial/territorial level.

[6] Hawaii (1967 legislation, in operation 1969), Nebraska (1969), Iowa (1970 executive office, 1972 legislative office), Alaska (1975), Arizona (1996), Puerto Rico (1977) and Guam (1978, in operation 1979). On the Puerto Rico ombudsman see *infra* note 266; L.B. Hill, "Institutionalizing a Bureaucratic Monitoring Mechanism: The First Thirty Years of Hawaii's Ombudsman" (2000) 4 Int'l Omb. Yrbk. 1. Single-sector, government departmental and private sector ombudsmen are common in the U.S., see *supra* Chapter 2.

[7] See *supra* Chapter 1, text accompanying note 39.

[8] See *supra* Chapter 4, notes 8 to 9.

[9] 1948 OAS Charter, am. by Protocol of Buenos Aires (1967), Protocol of Cartagena de Indias (1985), Protocol of Washington (1992), Protocol of Managua (1993), e.g. arts. 3(k), 16, 44, 48 (1994) 33 Int'l Legal Mat. 981. See generally D. Harris and S. Livingstone, eds., *The Inter-American System of Human Rights* (Oxford: Clarendon Press, 1998); J.S. Davidson, *The Inter-American Human Rights System* (Aldershot: Dartmouth, 1997); T. Buergenthal and D. Shelton, *Protecting Human Rights in the Americas: Cases and Materials*, 4th rev. ed. (Kehl: N.P. Engel, 1995).

tional instruments developed to flesh out the international human rights norms of the Inter-American system are the American Declaration on the Rights and Duties of Man (American Declaration),[10] the American Convention on Human Rights (American Convention)[11] and the San Salvador Protocol on Economic, Social and Cultural Rights (Protocol of San Salvador).[12] The American Declaration contains civil, political, economic, social and cultural rights. Although the American Declaration is not a treaty, the Inter-American Court of Human Rights has found that the rights contained in it define more specifically the human rights obligations of the OAS Charter contracting parties.[13] Like the bifurcation of rights found in the UN human rights covenants and the European human rights system, the American Convention on Human Rights contains predominantly civil and political rights, whereas economic, social and cultural rights are found in the Protocol of San Salvador. More recently, the Inter-American human rights system has established subject-specific treaties: a second protocol to the American Convention on abolition of the death penalty,[14] the Inter-American Convention to Prevent and Punish Torture,[15] the Inter-American Convention on Forced Disappearance of Persons,[16] the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará)[17] and the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities.[18] The drafting of an Inter-American Declaration on the Rights of Indigenous Peoples has been underway for some years.[19] The remedial mechanisms of the Inter-American human rights system are the Inter-American Commission on Human Rights (Inter-American Commission or Commission) and the Inter-American Court of Human Rights (Inter-American Court or Court).

The Inter-American Commission was established in 1959 by resolution, and later received status as an OAS organ by amendment to the OAS Charter effective in 1970.[20] Under the OAS Charter, the Inter-American Commission is given the principal function of promoting the observance and protection of human rights, and now also serves as an

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10 American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (1948).

11 American Convention on Human Rights (1969) O.A.S. T.S. No. 36 (in force July 18, 1978).

12 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988) O.A.S. T.S. No. 69 (in force Nov. 16, 1999).

13 *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Art. 64 of the American Convention on Human Rights*, Advisory Opinion, OC-10/89, July 14, 1989, Inter-Am. Ct. H.R. (Ser. A) No. 10 (1989).

14 Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990) O.A.S. T.S. No. 73 (see art. 4 for treaty applicability).

15 Inter-American Convention to Prevent and Punish Torture (1985) O.A.S. T.S. No. 67 (in force Feb. 28, 1987).

16 Inter-American Convention on the Forced Disappearance of Persons (June 9, 1994), (1994) 33 Int'l Legal Mat. 1529 (in force March 28, 1996).

17 Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (1994), (1996) 3 I.H.R.R. 232 (in force March 5, 1995).

18 Inter-American Convention for the Elimination of All Forms of Discrimination Against Persons With Disabilities (in force Sept. 14, 2001).

19 A Working Group for the Preparation of the Draft American Declaration on the Rights of Indigenous Peoples was set up in Feb. 2003 to start the final drafting.

20 Res. VIII, Vth Meeting of Consultation of Ministers of External Relations (Santiago, 1959); 1967 Protocol of Buenos Aires to OAS Charter (in force Feb. 27, 1970), *supra* note 9.

advisory body to the OAS.[21] The mandate of the Inter-American Commission has grown over time and includes developing awareness of human rights in the Americas, requesting information from member states, conducting on-site visits with the consent of the relevant state, preparing studies and reports, taking individual petitions and making recommendations to member states to increase the protection of human rights.[22] The work of the Inter-American Commission in this respect applies to all OAS member states, including those who are not parties to the American Convention, on the basis of the OAS Charter and American Declaration obligations.[23] Persons and NGOs in OAS states which have not ratified the American Convention can lodge petitions with the Inter-American Commission complaining that their American Declaration rights have been violated, and the Commission will investigate and report on admissible cases.[24]

The American Convention gave the Inter-American Commission additional functions with respect to those OAS states which are American Convention parties: to act as a first stage complaints mechanism when any person, group of persons or NGO complains, in relation to themselves or on behalf of others, that a Convention state has violated the American Convention, the Declaration or other OAS human rights treaties and to take action on such petitions.[25] If the Commission finds a petition admissible, it investigates, attempts to find a friendly settlement which respects international human rights and, if this is unsuccessful, draws up a report containing its conclusions, proposals and recommendations.[26]

The Inter-American Court can accept contentious cases brought only by the Inter-American Commission or the relevant Convention party, and only after the Commission has first dealt with the matter.[27] Unlike the European Court of Human Rights, individuals and NGOs do not have standing to bring a complaint before the Inter-American Court.[28] Also, for the Inter-American Court to have jurisdiction, the relevant state must

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21 OAS Charter, *supra* note 9, art. 111.

22 See Statute of the Inter-American Commission on Human Rights (1979, am. 1980), in Buergenthal and Shelton, *supra* note 9 at 649, arts. 18-20; Rules of Procedure of the Inter-American Commission on Human Rights (2001) 40 Int'l Legal Mat. 752 (in force May 1, 2001), arts. 56-58.

23 *Ibid.* See A.A. Cançado Trindade, "The Inter-American Human Rights System at the Dawn of the New Century: Recommendation for Improvement of its Mechanism of Protection" in *The Inter-American System of Human Rights*, *supra* note 9, 395 at 401.

24 Rules of Procedure of the Inter-American Commission on Human Rights, *supra* note 22, arts. 49-50. Under the new Rules, the Commission can also attempt a friendly settlement in these cases, *ibid.*, art. 41(1).

25 American Convention, *supra* note 11, arts. 41, 44-51. Art. 44 states, "[a]ny person or group of persons, or any non-governmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party." The Rules of Procedure of the Commission, *ibid.*, in s. 23, state that these petitions can be made in one's own name or on behalf of third persons. The complainant(s) must first have exhausted domestic remedies.

26 American Convention, *ibid.*, arts. 46-51.

27 *Ibid.*, art. 61(1). Art. 57 of the Convention states that the Commission shall appear in all cases before the Court. See also Rules of Procedure of the Inter-American Court of Human Rights (in force June 1, 2001), <www.oas.org>, art. 33.

28 However, the Rules of Procedure of the Inter-American Court of Human Rights, *ibid.*, art. 23, gives alleged victims, family members or their accredited representatives standing after an application is admitted to present their own positions throughout the Court's proceedings.

both have become a party to the American Convention and accepted the jurisdiction of the Inter-American Court.[29] The Inter-American Court can also provide advisory opinions requested by any OAS member state on the interpretation of the American Convention and other OAS human rights treaties, and on the compatibility of the member state's laws with these treaties.[30]

THE OMBUDSMAN AND THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

Inter-American Support for the Ombudsman and Other National Human Rights Institutions

The role of ombudsmen and other national human rights institutions can also be examined from the perspective of their relationship with the Inter-American system of human rights. As discussed in Chapter 4, the OAS has passed a series of resolutions supporting the establishment and strengthening of ombudsmen and other national human rights institutions in the western hemisphere.[31] The Summit of the Americas process has also resulted in a commitment to continue to strengthen national human rights institutions.[32]

The Inter-American Human Rights System and the Ombudsman

The relationship between classical and human rights ombudsmen and the Inter-American human rights system can be examined from a variety of perspectives.[33]

a) Does the Ombudsman Satisfy the Right to Judicial Protection?

Article 25(1) of the American Convention contains a right to judicial protection at the domestic level, as follows:

> Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or

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29 As at April 2003, 24 of 34 OAS members were parties to the American Convention and 21 of these had accepted the jurisdiction of the Court. Canada, the U.S. and some Caribbean nations had not become American Convention parties. Trinidad and Tobago recently withdrew from the Convention.

30 American Convention, *supra* note 11, art. 64. OAS ch. X organs can also request advisory opinions on the interpretation of the American Convention and other OAS human rights treaties. See J.M. Pasqualucci, "Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law" (2002) 38 Stanford J. Int'l Law 241.

31 See Chapter 4, text accompanying notes 56 to 59.

32 See Chapter 4, text accompanying note 60.

33 See J.E. Méndez and I. Aguilar, "La relación entre el Ombudsman y el Derecho Internacional de los Derechos Humanos" (1998) 1 Debate Defensorial: Revista de la Defensoría del Pueblo 55.

> by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.[34]

Unlike Article 13 of the European Convention of Human Rights which is more generally worded as the right to "an effective remedy before a national authority", Article 25(1) expressly refers to a right to recourse "to a competent court or tribunal".[35]

The Inter-American Court of Human Rights has issued numerous decisions and opinions involving Article 25(1).[36] In the *Judicial Guarantees in States of Emergency* opinion, the Court underlined "the obligation of the States to provide to all persons within their jurisdiction, an effective judicial remedy to violations of their fundamental rights"[37] and has reiterated the right in various cases.[38] Pursuant to Article 25, "the State has the

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[34] American Convention, *supra* note 11, art. 25(2) states:
"The States Parties undertake:
a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
b) to develop the possibilities of judicial remedy; and
c) to ensure that the competent authorities shall enforce such remedies when granted."

[35] See *supra* Chapter 5, text accompanying notes 19 to 39, for discussion of art. 13 of the European Convention on Human Rights and the ombudsman.

[36] See e.g. *Juan Sánchez Case*, Judgment of June 7, 2003, Inter-Am. Ct. H.R. (Ser. C) No. 99 (2003); *Cantos Case*, Judgment of Nov. 28, 2002, Inter-Am. Ct. H.R. (Ser. C) No. 97 (2002); *Hilaire, Constantine and Benjamin et al. Case*, Judgment of June 21, 2002, Inter-Amer. Ct. H.R. (Ser. C) No. 94 (2002); *The Mayagna (Sumo) Indigenous Community of Awas Tingni*, Judgment of Aug. 31, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 79 (2001); *Ivcher Bronstein Case*, Judgment of Feb. 6, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 74 (2001); *Baena Ricardo et al. Case*, Judgment of Feb. 2, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 72 (2001); *Constitutional Court Case*, Judgment of Jan. 31, 2001, (2002), Inter-Am. Ct. H.R. (Ser. C) No. 71 (2001), 23 H.R.L.J. 178; *Barrios Altos Case*, Judgment of March 14, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 75 (2001), (2002) 41 Int'l Legal Mat. 93; *Bámaca Velásquez Case*, Judgment of Nov. 25, 2000, Inter-Am. Ct. H.R. (Ser. C) No. 70 (2000), (2001) 22 H.R.L.J. 367; *Cantoral Benavides Case*, Judgment of Aug. 18, 2000, Inter-Am. Ct. H.R. (Ser. C) No. 69 (2000); *Durand and Ugarte Case*, Judgment of Aug. 16, 2000, Inter-Am. Ct. H.R. (Ser. C) No. 68 (2000); *The "Street Children" Case*, Judgment of Nov. 19, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 63 (1999), (2000) 21 H.R.L.J. 195; *Cesti Hurtado Case*, Judgment of Sept. 29, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 56 (1999), (2000) 21 H.R.L.J. 174; *Castillo Petruzzi et al. Case*, Judgment of May 30, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 52 (1999); *Paniagua Morales et al. Case*, Judgment of March 18, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 37 (1998); *Suárez Rosero Case*, Judgment of Nov. 12, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 35 (1997); *Castillo Paez Case*, Judgment of Nov. 3, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 34 (1997); *Velásquez Rodríguez Case*, Preliminary Objections, Judgment of June 26, 1987, Inter-Am. Ct. H.R. (Ser. C) No. 1 (1987); *Fairen Garbi and Solis Corrales Case*, Preliminary Objections, Judgment of June 26, 1987, Inter-Am. Ct. H.R. (Ser. C) No. 2 (1987); *Godínez Cruz Case*, Preliminary Objections, Judgment of June 26, 1987, Inter-Am. Ct. H.R. (Ser. C) No. 3 (1987); *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, Advisory Opinion OC-9/87, Oct. 6, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 9 (1987); *Habeus Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights)*, Advisory Opinion OC-8/87, Jan. 30, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987).

[37] *Judicial Guarantees in States of Emergency, ibid.*, para. 23, followed in *Constitutional Court Case, ibid.*, para. 89.

[38] E.g. *Cesti Hurtado Case, supra* note 36, para. 121; *The "Street Children" Case, supra* note 36, para. 234 ("to a competent court or judge"); *Ivcher Bronstein Case, supra* note 36, para. 135; *The Mayagna (Sumo) Indigenous Community of Awas Tingni, supra* note 36, para. 112.

obligation to design and embody in legislation an effective recourse, and also to ensure the due application of the said recourse by its judicial authorities."[39] An effective judicial remedy in Article 25 must be substantiated in accordance with the due process of law requirement in Article 8(1) of the Convention.[40] The Court has noted that the formal existence of recourse is insufficient – the recourse must be effective in that persons must be given the "real possibility of filing a simple and prompt recourse",[41] and the recourse must "give results or responses to the violation of Convention rights."[42] The Court has specified that a remedy "which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective."[43]

The Court has found that *amparo* and *habeus corpus* court actions fall within the meaning of Article 25(1).[44] However, these actions must be effective in protecting persons in specific cases.[45] A number of decisions have found states in breach of Article 25 for having ineffective *habeus corpus* and similar actions given the state of their judicial and legal systems.[46] For example, in the *Bámaca Velásquez* decision, none of a number of domestic recourses used to try to find a disappeared person – including *habeus corpus* petitions, criminal actions and a special pre-trial investigative procedure by the Guatemalan human rights ombudsman – were found to be effective, and it was held that the state had violated Article 25.[47]

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39 *The "Street Children" Case, ibid.*, para. 237.

40 E.g. *Velásquez Rodríguez Case, supra* note 36, para. 91; *Fairen Garbi and Solis Corrales Case, supra* note 36, para. 90; *Godínez Cruz Case, supra* note 36, para. 93.

41 *Constitutional Court Case, supra* note 36, para. 90. See also *Juan Sánchez Case, supra* note 36, para. 121; *Cantos Case, supra* note 36, para. 52 ; *The Mayagna (Sumo) Indigenous Community of Awas Tingni, supra* note 36, para. 114; *Hilaire, Constantine and Benjamin Case, supra* note 36, para. 150; *Cantoral Benavides Case, supra* note 36, para. 164.

42 *Bámaca Velásquez Case, supra* note 36, para. 191.

43 *Judicial Guarantees in States of Emergency, supra* note 36, para. 24; *Ivcher Bronstein Case, supra* note 36, para. 137; *Juan Sánchez Case, supra* note 36, para. 121.

44 *Habeus Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), supra* note 36, para. 32. The *amparo* action, found in Latin American states and e.g. Spain was defined by the Court as "a simple and prompt remedy designed for the protection of all of the rights recognized by the constitutions and laws of the State Parties and by the [American] Convention", *ibid.* The Court defined the writ of *habeus corpus*, found in legal systems throughout the Americas as "a judicial remedy designed to protect personal freedom or physical integrity against arbitrary detentions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered", *ibid.*, para. 33. Comparing the two actions, the Court stated "it is possible to conclude that "amparo" comprises a whole series of remedies and that habeus corpus is but one of its components", *ibid.*, para. 34. See also *Juan Sánchez Case, ibid.*, para. 122; *The Mayagna (Sumo) Indigenous Community of Awas Tingni, supra* note 36, para. 131 (*amparo*); *Cantoral Benavides Case, supra* note 36, para. 165; *Castillo Petruzzi Case, supra* note 36, para. 187.

45 E.g. *Paniagua Morales Case, supra* note 36, para. 164.

46 E.g. *The Mayagna (Sumo) Indigenous Community of Awas Tingni, supra* note 36, para. 134; *Durand and Ugarte Case, supra* note 36, paras. 108-109; *Cantoral Benavides Case, supra* note 36, paras. 167-169; *Castillo Petruzzi Case, supra* note 36, para. 82.

47 *Bámaca Velásquez Case, supra* note 36, paras. 121, 182, 190, 196.

As with the relationship between the ombudsman and the European human rights system discussed in Chapter 5, the question arises whether use of the ombudsman process satisfies the right to judicial protection in Article 25(1) of the American Convention. The wording of the analogous provision in the European Convention is wider, but the European Court of Human Rights has found in most cases that the ombudsman process does not constitute an "effective remedy".[48] Given the narrower wording and the judicial interpretation of Article 25(1), the classical or human rights ombudsman – a mechanism which is neither a court nor a tribunal – likely cannot satisfy Article 25(1), regardless of the availability of a judicial action. The ombudsman can only investigate and make non-binding recommendations. The wording of Article 25(1) and the Court's interpretation of the provision focus on the need for the availability of an effective judicial or adjudicative process for violation of Convention or domestic legal rights so that the absence or inadequacy of such a process, regardless of the intervention of the ombudsman, would likely constitute a breach of Article 25(1).

It is the case that most national human rights ombudsmen in Latin America have the power to bring *amparo, habeus corpus* and other similar actions before the courts and the Jamaican Public Defender can send constitutional human rights cases to court.[49] However, it is not the human rights ombudsman who provides the judicial remedy – these are tasks for the state, in creating judicial recourse and legal remedies, and for the courts, by dealing with matters fairly and promptly.[50] Human rights ombudsmen assist the judicial process, by initiating *amparo, habeus corpus* or other actions and by arguing in favour of the applicant and a judicial remedy. It is more accurate to consider human rights ombudsmen with litigation powers as contributing to or facilitating the fulfilment of the right to judicial protection.[51] In this sense, the ombudsman may be considered to be one component of the judicial protection process under Article 25(1).

b) Can an Ombudsman Lodge a Petition With the Inter-American Commission on Human Rights?

The question arises whether a classical or human rights ombudsman falls within the classes of persons who can lodge petitions with the Inter-American Commission and thereby access the Inter-American human rights system. As discussed above, in addition to the victim, any person or NGO can make a complaint to the Inter-American Commission that another person's American Convention or American Declaration rights have been violated.[52]

In 1996, the *Defensor del Pueblo* of Argentina lodged a petition with the Inter-

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48 See *supra* Chapter 5, text accompanying notes 19 to 39.

49 See *infra* this Chapter, e.g. Argentina, Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Nicaragua, Panama, Paraguay, Peru, Venezuela. El Salvador's *Procurador* is discussed *infra* Chapter 8.

50 See e.g. *The "Street Children" Case, supra* note 36, para. 237.

51 Méndez and Aguilar, *supra* note 33 at 68-69.

52 American Convention, *supra* note 11, art. 44; Commission Rules of Procedure, *supra* note 22, s. 23.

American Commission after recommendations he had made in an investigation – involving a three-year delay by Argentina's Supreme Court in deciding the claims of more than 65,000 pensioners – were not implemented by the government of Argentina.[53] The *Defensor* argued that Article 25(1) of the American Convention had been violated by the Argentine government.[54] In October 1996, the Inter-American Commission opened a file on the *Defensor's* complaint in order to determine its admissibility.[55] However, in December 1996, before the Commission was able to decide formally on admissibility, the *Defensor* withdrew his submission because the Supreme Court handed down a decision resolving the matter.

On August 2, 2001, the acting *Defensor del Pueblo* of Peru and the general coordinator of the Manuela Ramos Movement lodged a petition with the Inter-American Commission in the *Janet Espinoza Feria* case, arguing that the Peruvian National Elections Panel had discriminated on the basis of gender and had violated women's rights in electoral districts where the thirty percent quota of women on electoral lists was not followed, contrary to Articles 23, 24 and 1(1) of the American Convention.[56] The *Defensor* had taken up the case domestically, without success, before participating in the petition.[57] On October 10, 2002, the Inter-American Commission decided that the complaint was admissible and that it was competent to hear the merits of the case.[58] The Commission did not question the capacity of the *Defensor* to bring a petition.[59] More recently, Argentina's *Defensor del Pueblo* has become involved in a petition concerning the rights of indigenous peoples in proceedings before the Inter-American Commission.[60]

Since there is broad scope for persons to submit complaints to the Inter-American Commission that Convention or Declaration rights have been violated and, given the decision of the Commission in the *Janet Espinoza Feria* case, classical and human rights

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53 See J.L. Maiorano, "Justice Administration and the Defensor del Pueblo", *I.O.I. Occasional Paper* No. 64 (Edmonton: International Ombudsman Institute, Jan. 1998); L.C. Reif, "Ombudsman and Human Rights Protection and Promotion in the Caribbean: Issues and Strategies" in V.A. Ayeni, L.C. Reif and H. Thomas, eds., *Strengthening the Ombudsman and Human Rights Institutions in Commonwealth Small and Island States: The Caribbean Experience* (London: Commonwealth Secretariat, 2000) 160 at 170 [hereinafter *The Caribbean Experience*]; Méndez and Aguilar, *supra* note 33 at 72-74.

54 American Convention, *supra* note 11, art. 25(1). Prior to that date, Argentina had become a contracting party to the American Convention. While the *Defensor del Pueblo* did not have jurisdiction over the judiciary in substantive terms, he proceeded on the basis that the administration of justice (e.g. delay in proceedings) did fall within his remit. The judiciary took the opposite view.

55 See Reif, "Ombudsman and Human Rights Protection and Promotion in the Caribbean: Issues and Strategies", *supra* note 53 at 170.

56 Defensoría del Pueblo, *Executive Summary of the Fifth Ombudsman Report to Congress 2001-2002* (Lima: Defensoría del Pueblo, 2002) at 21; Inter-American Commission on Human Rights, *Janet Espinoza Feria Case*, Admissibility, Case No. 12.404 (Oct. 10, 2002), paras. 1-2.

57 *Janet Espinoza Feria Case*, Admissibility, *ibid.*, paras. 9-19.

58 *Ibid.*, paras. 56-57.

59 Rather, the main issue concerned the identity of the victims, accepted as the identified women who aspired to election in the electoral districts in question who also were taken to represent the unnamed 892,868 identified by the *Defensor* as potential victims, *ibid.*, paras. 34-36.

60 Defensor del Pueblo of Argentina, *Annual Report 2002* at 16, concerning surrender of community property, <www.defensor. gov.ar>.

ombudsmen and other national human rights institutions in OAS member states must be considered as falling within the definition of persons who can lodge petitions with the Commission, i.e., persons making petitions on behalf of the victim.[61]

Méndez and Aguilar do have concerns about ombudsmen lodging petitions with the Inter-American Commission. First, they raise the question whether a state institution should have the ability to denounce its own state before an international body, and suggest that such petitions should be limited to those which are like class actions.[62] To date, the petitions that have been made by human rights ombudsmen against their state have been collective complaints, made on behalf of a group of victims. It is likely that this will continue to be the type of case that a domestic ombudsman will consider bringing before the Inter-American system given the potential widespread benefits. However, there will probably be situations where an ombudsman may wish to assist an individual victim, e.g. the importance of the human right at stake, and the Commission should not bar these types of petitions by ombudsmen. Second, Méndez and Aguilar rightly argue that if ombudsmen are permitted to lodge petitions, the practice should not be used as a means of rationalizing the number of petitions emanating from individuals.[63] Their reasoning is that ombudsmen will not always be impartial and independent of government. However, when an ombudsman makes a petition, the ombudsman thereby takes a public position against its government – and if an ombudsman is unduly influenced by its government, the petition is unlikely to be made at all.

If the Commission does investigate an ombudsman-initiated complaint, the result may be amicable solutions, or reporting and recommendations in an attempt to resolve the matter. Given the more restrictive requirements for standing before the Inter-American Court, an ombudsman does not have the standing to apply to the Inter-American Court. However, if the Commission investigates a complaint lodged on behalf of the victim by an ombudsman and the matter is not resolved informally, the Commission may take the case to the Inter-American Court.

Another possibility is that the victim (or representative) could make the complaint to the Inter-American Commission and be assisted or advised by an ombudsman. However, this will depend on the powers of the particular classical or human rights ombudsman.

c) Is Use of the Ombudsman an Exhaustion of Domestic Remedies?

Under Article 46(1)(a) of the American Convention, a complainant must have exhausted his or her domestic remedies before a complaint made to the Inter-American Commission will be admissible, although there are exceptions in Article 46(2) where

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[61] It is unlikely that an ombudsman or other national human rights institution could be considered to be a "nongovernmental entity legally recognized in one or more member states of the Organization" since this clearly refers to NGOs and like bodies, whereas ombudsmen are public sector entities, albeit situated at the periphery of the range of government institutions. See also Méndez and Aguilar, *supra* note 33 at 73.

[62] *Ibid.*

[63] *Ibid.* at 73-74.

domestic remedies need not be exhausted.[64] The Court has noted that generally recognized principles of international law are relevant in applying Article 46(1)(a) including matters such as the definition of "domestic remedies" and proof of their exhaustion.[65] The Court has also recognized the connections between Article 46 and other substantive provisions of the Convention, such as Articles 25 and 8(1), because when it is argued that Article 46(2) exceptions apply to render the rule inapplicable it also raises the allegation that the state has violated other provisions of the Convention such as Articles 25 and 8(1).[66]

Similar to the arguments with Article 25(1) of the Convention, where a domestic judicial remedy is available, because ombudsmen can only make recommendations for change and human rights ombudsmen can only assist a complainant in obtaining a judicial remedy, use of the ombudsman process alone likely cannot constitute exhaustion of the domestic remedies rule. The human rights ombudsman with the power to launch judicial action, however, can contribute to the exhaustion of domestic remedies through the court or tribunal process.[67] For example, in the 2002 *Janet Espinosa Feria Case* admissibility decision, the Inter-American Commission found that the petitioners and victims had exhausted available domestic remedies for electoral matters satisfactorily by going before the National Elections Panel several times – on the basis of applications made by the *Defensor* and the Manuela Ramos Movement on behalf of the women – with the Panel holding the petitions inadmissible, baseless and not open to appeal.[68] In this case, the ombudsman can be seen to be contributing to or supporting the exhaustion of domestic remedies.

In cases where a judicial or tribunal remedy is not available and the applicant complains to an ombudsman or human rights ombudsman, the exhaustion of domestic remedies rule may be found to be inapplicable in the circumstances, based on the exceptions to the rule in Article 46(2). The interpretation of the analogous provisions in the

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64 American Convention, *supra* note 11, art. 46(1)(a) states that a complaint to the Commission will be admissible only when "the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." Art. 46(2) states that art. 46(1)(a) is not applicable when:
"(a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
(b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
(c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies."
See e.g. *Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights)*, Advisory Opinion OC-11/90 (Aug. 10, 1990), Inter-Am. Ct. H.R. (Ser. A) No. 11 (1990) (persons who are indigent and thereby cannot access domestic remedies, or persons who are unable to obtain legal representation because of a general fear in the community do not need to exhaust domestic remedies); *Velásquez Rodríguez Case, supra* note 36, paras. 87-88.

65 *Velásquez Rodríguez Case, ibid.*, para. 87.

66 *Ibid.*, para. 91; *Fairen Garbi and Solis Corrales Case, supra* note 36, para. 90; *Godínez Cruz Case, supra* note 36, para. 93.

67 See Méndez and Aguilar, *supra* note 33 at 67-69.

68 *Janet Espinosa Feria Case*, Admissibility, *supra* note 56, paras. 38, 46-47, 48-49, 51-52.

European Convention also support these conclusions.[69] From another perspective, the ombudsman can draw attention to situations where the state has not provided domestic remedies or proper access to them in accordance with Inter-American and other international law obligations of the state.[70]

d) *Amicus Curiae* Briefs Submitted by Ombudsmen to the Inter-American Human Rights System

When hearing a case, the Inter-American Court of Human Rights has permitted *amicus curiae* briefs to be submitted by third parties such as individuals and NGOs.[71] Human rights ombudsmen have begun to submit *amicus curiae* briefs to the Court (or Commission).

The *Defensor del Pueblo* of Peru has submitted a number of *amicus curiae* briefs, which have taken legal positions against the Peruvian government. The *Defensor del Pueblo* submitted a brief about the Peruvian and international law on the *habeus corpus* remedy in the *Cesti Hurtado Case*.[72] Hurtado, a retired armed forces officer, detained by the armed forces for allegedly committing fraud and other offences, obtained a *habeus corpus* remedy from a civilian court which was ignored by the Supreme Council of Military Justice. After the *Defensor* investigated the matter in 1997 and recommended unsuccessfully that the Supreme Council comply with the *habeus corpus* order, a petition was made to the Inter-American Commission which later took the case to the Inter-American Court.[73] The *Defensor* decided to submit the brief after considering the autonomy of his office, the collective importance of compliance with *habeus corpus* decisions including by military tribunals, and the victim's right to liberty.[74] In another instance, the *Defensor* submitted an *amicus curiae* brief to the Inter-American Commission in a petition by civil servant pensioners whose cases he had investigated earlier.[75] The case was later heard by the Inter-American Court and their judgment in the *Five Pensioners Case* was issued on February 23, 2003.[76] The pensioners' representatives presented copies of the *Defensor's* resolution and his *amicus curiae* brief to

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69 See *supra* Chapter 5, text accompanying notes 44 to 53.

70 Méndez and Aguilar, *supra* note 33 at 69.

71 See Rules of Procedure of the Inter-American Court, *supra* note 27, art. 62(3); D. Shelton, "The Participation of Nongovernmental Organizations in International Judicial Proceedings" (1994) 88 Am. J. Int'l Law 611 at 638-640.

72 *Cesti Hurtado Case*, *supra* note 36, at para. 62; Caso Cesti Hurtado, "Informe de *amicus curiae* del Defensor del Pueblo del Perú" (June 10, 1998), (1998) 1 Debate Defensorial: Revista de la Defensoría del Pueblo 358.

73 Caso Cesti Hurtado, "Informe de *amicus curiae* del Defensor del Pueblo del Perú", *ibid.*, para. 7.

74 *Ibid.*, paras. 10, 14.

75 Caso No. 12.034, "Informe de *amicus curiae* del Defensor del Pueblo del Perú" (June 24, 1999), (1999-2000) 2 Debate Defensorial: Revista de la Defensoría del Pueblo 249 (their pensions were reduced substantially, with the *Defensor* arguing a violation of art. 26 of the Convention and of other international instruments).

76 *Five Pensioners Case*, Judgment of Feb. 23, 2003, Inter-Am. Ct. H.R. (Ser. C) No. 98 (2003).

the Court, and a report of the *Defensor* was used in the judgment.[77] Peru's *Defensor* also submitted an *amicus curiae* brief in the 2001 interpretation of the judgment in the *Barrios Altos Case*.[78]

In June 2003, Central American human rights ombudsmen presented an *amicus curiae* brief to the Court in advisory opinion proceedings requested by Mexico on the compatibility of the law in some OAS states applicable to Mexican migrants and migrant workers with Inter-American and other international human rights law.[79]

e) Reliance on Ombudsman Reports and Evidence in Inter-American Court of Human Rights Proceedings and Judgments

Increasingly, reports and other documents issued by human rights ombudsmen are being relied on by the Inter-American Court and Commission, and ombudsmen are being used as expert witnesses before the Court.

In the 1999 *Cesti Hurtado* Case, a Deputy *Defensor del Pueblo* of Peru appeared as an expert witness in the Court's proceedings on the request of the Commission.[80] In the 2001 *Barrios Altos Case* interpretation of the judgment on the merits, the Commission argued that the judgment, on the incompatibility of Peruvian amnesty laws with the Convention, applied generally.[81] The Commission relied on a resolution of Peru's *Defensor del Pueblo* which contained a report stating that the Court's judgment was general in scope and should be applied in all cases.[82] The Court relied on its prior decisions and found that its judgment had general effect.[83] In the course of its decision in the 2003 *Five Pensioners Case*, the Court quoted from a 1998 report of Peru's *Defensor del Pueblo*, assisting it to reach the decision that the Peruvian administration had not complied with judicial decisions in favour of the pensioners, leading to a violation of Article 25 of the Convention.[84]

In the 2003 judgment in the *Juan Sánchez Case*, the Court heard Leo Valladares Lanza, the former National Commissioner for the Protection of Human Rights of Honduras, as an expert witness and also made considerable use of his testimony in their

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77 *Ibid.*, paras. 39, 123(c), 137, 138, 141. See *infra* text accompanying note 84.

78 *Barrios Altos Case*, Interpretation of the Judgment on the Merits (art. 67(1) American Convention), Judgment of Sept. 3, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 83 (2001), para. 7.

79 Submitted by the Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama ombudsmen forming the Central American Council of Human Rights Attorneys, Inter-American Court of Human Rights, OC-18, see <www.iidh.ed.cr/comunidades/ombudsnet/ doc/doctrina/doctrina eventosccpdh/amicus.htm> (submitted June 4, 2003).

80 *Cesti Hurtado Case, supra* note 36; "Resolucion Defensorial No. 56-99/DP in (1999-2000) 2 Debate Defensorial: Revista de la Defensoría del Pueblo 197 at 198.

81 *Barrios Altos Case*, Interpretation of the Judgment on the Merits, *supra* note 78.

82 *Ibid.*, para. 14; Ombudsman Report No. 57, *Amnesty vs. Human Rights*, approved in Resolucion Defensorial No. 019-2001/DP.

83 *Ibid.*, para. 18.

84 *Five Pensioners Case, supra* note 76, paras. 39, 123(c), 137, 138, 141.

judgment.[85] The expert evidence given by the former Commissioner was unsuccessfully contested by Honduras.[86] His evidence described the situation in Honduras during the late 1980s and early 1990s, marked by disappearances, torture and killings, the control of the armed forces over the police and judicial systems, the slowness and weakness of the courts and the inefficacy of *habeus corpus* actions, as detailed in his 1993 report which documented many disappearances including that of the victim.[87] The Court expressly relied on the former human rights ombudsman's testimony in describing the usual manner of disappearances, torture and killing in coming to the conclusion that the victim had been tortured contrary to Article 5 of the American Convention.[88] The victim's representatives also claimed that Article 4, the right to life, had been violated and used the 1993 report to argue that the victim had been caught up in the pattern of disappearances and killings – the Court gave high probative value to the evidence and held that Article 4 had been breached.[89] The Court also found that Article 25 was violated because of the ineffectiveness of the *habeus corpus* action in Honduras at the time, specifically highlighting the statements of the former Commissioner that the recourse usually was ineffective because the judiciary was influenced by the military forces.[90]

Conversely, a state has tried to use its ombudsman to counter the jurisdiction of the Court. In the *19 Merchants Case*, Colombia tried to contest the jurisdiction of the Court – when the Commission lodged a petition after Colombia had not complied with the Commission's recommendations in its report to the state – by arguing that it had asked its *Defensor del Pueblo* to report on how to comply with the Commission's recommendations.[91] The Commission argued that Colombia was only expressing an intention to comply with any ombudsman recommendations and not with those of the Commission, and that the ombudsman recommendations could be different from those of the Commission.[92] The Court affirmed its jurisdiction over the case, *inter alia* finding that the Commission has discretionary powers to decide whether a state's reply to its report is adequate.[93]

f) Ombudsmen and the Domestic Implementation of Inter-American Human Rights Law

Latin American states have become parties to the American Convention on Human Rights and human rights ombudsmen in these states can and do assist in the domestic

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[85] *Juan Sánchez Case*, *supra* note 36.

[86] *Ibid.*, para. 59. Honduras argued that it should be disqualified because of his cross-examination and the existence of contradictory evidence.

[87] *Ibid.*, paras. 44(h), 38. The report, Honduras National Commission for the Protection of Human Rights, *The Facts Speak for Themselves: Preliminary Report on the Disappeared in Honduras 1980-1993* (1993), detailed 184 disappearances, none of which resulted in a judgment.

[88] *Ibid.*, paras. 99-100.

[89] *Ibid.*, paras. 104, 108, 113.

[90] *Ibid.*, paras. 123, 135-136.

[91] *19 Merchants Case*, Preliminary Objections, Judgment of June 12, 2002, Inter-Am. Ct. H.R. (Ser. C) No. 93 (2002), para. 24.

[92] *Ibid.*, para. 25(b).

[93] *Ibid.*, para. 33.

implementation of their state's Inter-American human rights obligations.[94] The case studies discussed later in this Chapter illustrate these activities.

Classical ombudsmen in the Americas which do not have an express human rights mandate, such as those in the Caribbean and in North America, do not have numerous human-rights related investigations and do not have additional protective, educational and law promotion functions. However, some of these offices do address human rights issues and use international human rights norms in some cases, e.g., Antigua and Barbuda, Saint Lucia, and British Columbia, Saskatchewan and Quebec in Canada.[95] However, Canada, the U.S.A. and most Caribbean nations with classical ombudsmen are not contracting parties to the American Convention which limits, but does not exclude, the utility of the Inter-American human rights system for these offices.[96]

Ombudsmen throughout the Americas can also use the UN-sponsored human rights treaties and instruments, and general customary international law on human rights.[97]

Proposals for Reform of the Inter-American Human Rights System and the Ombudsman

Proposals for reform of the OAS human rights machinery have been made, including those for enhancing the relationship of the OAS with ombudsmen and other national human rights institutions.

In 1996, OAS Secretary General César Gaviria made proposals for reform of the Inter-American human rights system.[98] Several of his proposals related to national human rights institutions, including "the possibility of [the OAS] developing a new, functional-institutional linkage between its human rights protection mechanism and the *fiscalias, defensorias del pueblo* and/or ombudsman offices of the Hemisphere."[99] Specific suggestions were made, as follows: first, if an ombudsman could not make progress in the domestic sphere it could present its case to the inter-American system for special, expedited disposition; second, when the Inter-American Commission needed further

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94 See *supra* note 29; Méndez and Aguilar, *supra* note 33 at 58-62, 65-66.

95 See e.g. Office of the Ombudsman of Antigua and Barbuda, *Annual Report 2001* at 69-73; Office of the Ombudsman of Antigua and Barbuda, *Annual Report 2000* at 16-17, 50; L.M.P. Laurent, "The Promotion and Protection of Human Rights in the Caribbean – A Case Study by the Parliamentary Commissioner of Saint Lucia" in *The Caribbean Experience, supra* note 53 at 198. In Canada see e.g. the Ombudsmen in Quebec, Saskatchewan and British Columbia, *supra* Chapter 4, note 30 and *infra* Chapter 9.

96 In the Caribbean, Antigua and Barbuda, Belize, Guyana, Saint Lucia and Trinidad and Tobago are not parties to the American Convention as at April 2003, whereas Barbados, the Dominican Republic, Grenada, Haiti, Jamaica and Suriname are Convention parties. See the Canadian provincial and U.S. state ombudsmen, *supra* notes 5 to 6. See *supra* text accompanying notes 20 to 24 for discussion of applicability of some human rights obligations to all OAS members.

97 See *supra* Chapter 4.

98 C. Gaviria, *Toward a New Vision of the Inter-American Human Rights System* (Washington, D.C.: Organization of American States, Nov. 26, 1996), abbrev. version rep. in (1996) 4:2 J. Latin Am. Affairs 4.

99 *Ibid.* at 18.

information in a case it could ask the national ombudsman for aid in gathering evidence; third, the ombudsman could be asked to assist in friendly settlement negotiations between the Inter-American Commission and the government of the OAS member state in which the ombudsman was located; and, fourth, special access could be granted to national ombudsmen to present *amicus curiae* briefs in cases involving nationals of their state and even legal intervention by the ombudsman could be permitted in cases in which they had an interest.[100] By 1999, in a report by the Secretary General reviewing the prior five year period in OAS activities, the only reference to ombudsman institutions was a recognition that a future challenge in the human rights area involved exploring the possibility of linking the regional and national human rights systems through "special working ties with national magistrates, public prosecutors, and ombudsmen."[101]

Commentators have also made suggestions for cooperation between ombudsmen in the Americas and the Inter-American human rights system. Méndez and Aguilar have proposed that, given problems with lack of state cooperation with the Inter-American Commission, coordination between national ombudsmen and the Commission could assist the latter considerably in its fact-finding investigations.[102] They have also suggested that: (1) ombudsmen could be permitted to request advisory opinions of the Inter-American Court of Human Rights on interpretation of the system's human rights treaties pursuant to Article 64 of the American Convention, on the basis that each state party could permit their ombudsman to make such requests; (2) ombudsmen could submit *amicus curiae* briefs to national and international tribunals and (3) ombudsmen could be given express powers to cooperate with organs of international protection in areas of investigation, mediation and the supervision of compliance with agreements and judgments.[103]

Ideas or proposals for reform are still, for the most part, under consideration. Several ideas have already been implemented by different Latin American human rights ombudsmen, i.e. submitting *amicus curiae* briefs to the Inter-American Commission and Court and lodging petitions with the Inter-American Commission. Also, ombudsman reports and expert evidence on the human rights situation and law in the state under scrutiny are increasingly being used by the Commission and Court. However, some of the proposals made in 1996 by the OAS Secretary General may not be acceptable to ombudsmen, on the basis that they may go beyond the legal frameworks of the institutions concerned. In particular, classical ombudsmen in the Caribbean and in North America do not have express human rights protection mandates. Further, some of the ideas put forward by the Secretary General and commentators may require amendment of the Inter-American human rights treaties and rules.

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[100] *Ibid.*

[101] OAS Secretary General, *Toward the New Millennium: The road traveled 1994-1999* (Washington, D.C.: Organization of American States, June 1999), "IV. Future Challenges".

[102] Méndez and Aguilar, *supra* note 33 at 71.

[103] *Ibid.* at 71-72, 74-75. The American Convention, *supra* note 11, art. 64, permits state parties and specified OAS organs to request advisory opinions. Pasqualucci, *supra* note 30 at 288 suggests broadening standing to request advisory opinions, but does not mention the ombudsman among her proposed candidates.

Overview of the Ombudsman in Latin America

Apart from the few Latin American nations which maintained democratic governments through the second half of the twentieth century, between the late 1970s and early 1990s Latin American countries adopted democratic governance structures after shedding authoritarian regimes.[104] The depth and strength of the democratic framework varies from country to country in Latin America, and the quality of some of these democracies has degraded in the recent past.[105]

Over decades in the twentieth century, severe human rights abuses were committed by military dictatorships and governments embroiled in civil conflicts in many Latin American states.[106] Although the military regimes started to collapse during the 1980s, most civil conflicts were resolved during the 1990s and human rights in a number of Latin American states have improved – especially with respect to the core rights – human rights protection problems in the region have continued.[107] In addition, the considerable income disparities in the region and recent economic setbacks in some nations make the connection between poverty, development and human rights acute.[108] Also, concerns continue over the judicial systems in Latin America, although some reform activities are taking place.[109]

Over this period of democratization, various attempts were made in Latin American states to strengthen government institutions and improve the efficiency and fairness of public administration. At the same time, many Latin American countries had to confront

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104 See e.g. J. Peeler, *Building Democracy in Latin America* (Boulder: Lynne Rienner Publishers, 1998), chs. 2-4; J.L. Linz and A. Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore: The Johns Hopkins University Press, 1996) chs. 10-14.

105 E.g. L. Diamond, *Developing Democracy: Toward Consolidation* (Baltimore, The Johns Hopkins University Press,1999) at 31-49; Freedom House, *Freedom in the World 2002*, <www.freedomhouse.org>.

106 See generally E.L. Lutz and K. Sikkink, "International Human Rights Law and Practice in Latin America" (2000) 54 Int'l Org. 633; K. Sikkink, "Human rights, principled issue-networks, and sovereignty in Latin America" (1993) 47 Int'l Org. 411; S.C. Ropp and K. Sikkink, "International norms and domestic politics in Chile and Guatemala" in T. Risse, S.C. Ropp and K. Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999) at 172.

107 E.g. Lutz and Sikkink, *ibid.*; Amnesty International, *Amnesty International: Report 2002* (New York: Amnesty International Publications, 2002).

108 See J. Madrazo Cuellar, "The Ombudsman and his Relationship With Human Rights, Poverty and Development" (1998) 2 Int'l Omb. Yrbk. 129; L. Valladares Lanza, "The Challenges Facing the Ombudsman in Latin America" (1998) 2 Int'l Omb. Yrbk. 159 at 163-165.

109 See judicial conduct contested in *The "Street Children" Case, supra* note 36, *Constitutional Court case, supra* note 36; M. Ungar, *Elusive Reform: Democracy and the Rule of Law in Latin America* (Boulder: Lynne Rienner Publishers, Inc., 2002) at 187-211; J. Buchanan, *Judicial Reform in the Americas* (Canadian Foundation for the Americas, Ottawa, Nov. 2001); P. Domingo, "Judicial Independence and Judicial Reform in Latin America" in A. Schedler, L. Diamond, and M.F. Plattner, eds., *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder: Lynne Rienner Publishers, 1999) at 151; R. MacLean, "The Culture of Service in the Administration of Justice" (1996) 6 Transnat'l Law & Contemp. Probs. 139; M. Dakolias, "A Strategy for Judicial Reform: The Experience in Latin America" (1995) 36 Virginia J. Int'l Law 167.

a history of widespread and severe human rights abuses committed by the state. In an attempt to increase the domestic protection of human rights, many countries in the region established national human rights institutions. All of the institutions are either human rights ombudsmen or are closer to the human rights commission model.[110] In Latin America, the usual practice has been to establish only one national human rights institution, rather than creating separate human rights commission and ombudsman institutions.[111] Some countries also have human rights ombudsmen at the sub-national level of government. In designing their national human rights institutions, Latin American countries have been strongly influenced by the Spanish institution of *Defensor del Pueblo* (Defender of the People), created in the 1978 Constitution of Spain after its transition to democracy, which adds a general ombudsman role to the core mandate of protecting the human rights of the populace against government action.[112]

By mid-2003, human rights ombudsmen (*defensores*, *procuradores*, etc.) or human rights commissions were present in Mexico, all of the Central American states and most of the South American countries.[113] More specifically, human rights ombudsmen have been established as follows: Guatemala *Procurador de los Derechos Humanos* (1985 Constitution, in operation 1987);[114] El Salvador *Procurador para la Defensa de los Derechos Humanos* (1992 constitutional amendment and law);[115] Costa Rica *Defensor de los Habitantes* (1992 law);[116] Honduras *Comisiónado Nacional de Proteccion de los Derechos Humanos* (1992 decree, 1995 Constitution);[117] Nicaragua *Procurador para la Defensa de*

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110 See generally J.L. Maiorano, "The Defensor del pueblo in Latin America" in R. Gregory and P. Giddings, eds., *Righting Wrongs: The Ombudsman in Six Continents* (Amsterdam: IOS Press, 2000) 263 [hereinafter *Righting Wrongs*]; J.L. Maiorano, *El Ombudsman: Defensor del Pueblo y de las Instituciones Republicanas*, 2d ed., 4 vols. (Buenos Aires: Ediciones Macchi, 1999) at 334 [hereinafter *El Ombudsman*]; Ungar, *supra* note 109 at 36-59.

111 But see Venezuela and Guatemala with several institutions.

112 For a detailed discussion of Spain's *Defensor del Pueblo* see *supra* Chapter 5, text accompanying notes 116 to 148. See also Maiorano, "The Defensor del pueblo in Latin America", *supra* note 110 at 269-270; Maiorano, *El Ombudsman, supra* note 110 at 334-335.

113 The Puerto Rico, Dominican Republic, Guyana and Belize Ombudsman are discussed under the Caribbean region, *infra* this Chapter. Suriname and French Guiana, without ombudsmen, are also classified under the Caribbean region.

114 See *infra* this Chapter.

115 See *infra* Chapter 8.

116 Established in 1992 in a Congressional statute, *Ley No. 7319*, as am. (1994, 1997, 1999), with supporting executive *Decree No. 22266-J* (June 1993), the *Defensor* is elected by and responsible to the legislature. The *Defensor* is a hybrid ombudsman with jurisdiction over the protection of the human rights of the inhabitants of Costa Rica and the supervision of the administration. The *Defensor* ensures that the public administration complies with the constitution, laws and treaties binding on Costa Rica. The *Defensor* can investigate complaints, make recommendations and law reform proposals, bring unconstitutionality, *habeus corpus* and *amparo* actions, and disseminate human rights. See R.A. Carazo, "The Ombudsman of Costa Rica" in K. Hossain et al., eds., *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (The Hague: Kluwer Law International, 2001) at 299 [hereinafter *Human Rights Commissions and Ombudsman Offices*]; Maiorano, "The Defensor del pueblo in Latin America", *supra* note 110 at 265; "Comparative Analysis of Ombudsman Laws", Inter-American Institute of Human Rights, <www.iidh.ed.cr/comunidades/Ombudsnet/ cuadro.aspx> [hereinafter "Comparative Analysis"].

117 Closer to the human rights commission model, the Honduran National Commissioner for the Protection of Human Rights was established by the President in *Executive Decree* 26/92 (June 8, 1992), am.

los Derechos Humanos (1995 constitutional reforms and law);[118] Panama *Defensor del Pueblo* (1996 law);[119] Colombia *Defensor del Pueblo* (1991 Constitution, 1992 law);[120] Argentina national *Defensor del Pueblo* (1993 law, 1994 Constitution) plus *Defensores* for some provinces and municipalities;[121] Peru *Defensor del Pueblo* (1993 Constitution, 1995 law, in operation 1996);[122] Ecuador *Defensor del Pueblo* (1996 Constitution, 1997

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by *Executive Decree* 51/92 (Sept. 8, 1992), and later inserted in the Constitution, art. 59, *Executive Decree* 191/94, *Executive Decree* 2/95 (Feb. 7, 1995), *Organic Law of the National Commissioner of Human Rights* (Oct. 24, 1995), *Executive Decree* 153/95 (Nov. 21, 1995). The National Commissioner is elected by Congress and has the duty to guarantee the rights and liberties of individuals contained in the Honduran Constitution, the Universal Declaration of Human Rights and treaties ratified by Honduras against the public administration at all levels and private entities providing public services. The Commissioner investigates on his own-motion or on receipt of a complaint and makes recommendations, and has a human rights education mandate. The office also investigates domestic violence complaints. See <www.conadeh.hn>; Maiorano, *El Ombudsman*, *supra* note 110 at 355-356; Comisionado Nacional de los Derechos Humanos, *Derechos Humanos: Dos años de Realidades y Retos 1998-1999*; "Comparative Analysis", *ibid.*

[118] The *Procurador* was established in 1995 reforms, in art. 138(29)-(30), of the 1987 Constitution of Nicaragua and by statute, *Ley 212* (Dec. 13, 1995, in force Jan. 8, 1996). The mandate of the *Procurador* is to protect and promote human rights in the Constitution and in international treaties, pacts and declarations on human rights ratified by Nicaragua, by investigating the conduct of the public administration. The *Procurador* has mediation, education and law reform mandates, and encourages the state to subscribe to human rights treaties. The *Procurador* can bring unconstitutionality, *amparo* and *exhibicion personal* actions. See Maiorano, "The Defensor del pueblo in Latin America", *supra* note 110 at 266; Maiorano, *El Ombudsman, ibid.* at 353-354; "Comparative Analysis", *ibid.*

[119] Panama's *Defensor* was created in *Ley 7* (Dec. 12, 1996, in force Feb. 5, 1997, modified by Supreme Court decisions of 1998, 2000). Elected by the legislature and appointed by the President, the *Defensor* protects the human rights contained in the Constitution, laws and treaties on human rights, supervising the conduct of the national and municipal levels of public administration. The *Defensor* has mediation, human rights education and law reform mandates and researches issues of internal incorporation of international human rights law. The *Defensor* can also bring popular, nullity, *amparo* and *habeus data* actions. See Maiorano, *El Ombudsman, ibid.* at 354-355; <www.defensoriadelpueblo.gob.pa>; "Comparative Analysis", *ibid.*

[120] The Colombian *Defensor del Pueblo*, created in arts. 281-283 of the 1991 Constitution and *Law 24* (1992), has more limited independence because, although the *Defensor* is elected by the legislature, the nominees are listed by the President and the institution is part of the Ministry of Justice "under the supreme direction of" the Attorney-General. The *Defensor* investigates, makes recommendations and can bring *habeus corpus, tutela* (actions to protect an individual's constitutional rights provided for in art. 86 of the Constitution), unconstitutionality and popular actions to protect victims. The *Defensor* has mediation and human rights education functions. The Uribe government unsuccessfully attempted to weaken the institution. See J.F. Castro Caycedo, "The Defender of the Public of the Republic of Colombia" in *Human Rights Commissions and Ombudsman Offices, supra* note 116 at 289; Maiorano, "The Defensor del pueblo in Latin America", *supra* note 110 at 265; Maiorano, *El Ombudsman, ibid.* at 348-350; "Comparative Analysis", *ibid.*; D.T. Fox and A. Stetson, "The 1991 Constitutional Reform: Prospects for Democracy and the Rule of Law in Colombia" (1992) 24 Case W. Res. J. Int'l Law 139 at 160-161; Amnesty International, "Colombia: Democratic security or insecurity for all?", *News Release* AMR 23/139/2002 (Dec. 10, 2002).

[121] See *infra* this Chapter on the national *Defensor del Pueblo*. *Defensores del Pueblo* have been established in some provinces, e.g. Córdoba, Formosa, Rio Negro, San Juan, Santa Fe, Santiago del Estero and Tucumán. There are municipal *Defensores* in some cities, e.g. Buenos Aires, Posadas, Rio Cuarto, La Banda, Chilecito, La Plata, Corrientes, Florencio Varela, Neuquén, Quilmes, Vincente Lopez, San Luis and Santiago del Estero.

[122] See *infra* this Chapter.

law);[123] Bolivia *Defensor del Pueblo*, 1994 Constitution, 1997 law, in operation 1998);[124] Venezuela *Defensor del Pueblo* (1999 constitution);[125] and Paraguay Parliamentary Commissioner for Human Rights (1992 Constitution, 1995 law, in operation 2001).[126] Human rights commissions have been established in Mexico, with the National Commission of Human Rights (*Comisión Nacional de Derechos Humanos*, 1990) at the national level plus human rights commissions at the state-level.[127] Although Chile, Brazil and Uruguay

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123 The 1996 Constitution, art. 96, and 1997 legislation created Ecuador's *Defensor del Pueblo*, elected by Congress, with the mandate to defend and promote individual and collective human rights in the Constitution, laws and ratified treaties. The *Defensor* has mediation and human rights education mandates and can bring *habeas data*, *amparo* and unconstitutionality actions. See Maiorano, "The Defensor del pueblo in Latin America", *supra* note 110 at 267-268; Maiorano, *El Ombudsman, supra* note 110 at 361-362; "Comparative Analysis", *supra* note 116.

124 Established in arts. 127-131 of the 1994 Constitution and fleshed out in *Ley 1.818* (Dec. 22, 1997), the Bolivian *Defensor* is elected by Congress and is a hybrid with jurisdiction over the defence, promotion and dissemination of human rights, plus general supervision of the administration including its observance of human rights. The *Defensor* provides human rights education, proposes changes to human rights laws and recommends that the state subscribe to human rights treaties. The *Defensor* investigates and makes recommendations and can bring unconstitutionality, nullification, *amparo* and *habeas corpus* actions. See Maiorano, "The Defensor del pueblo in Latin America, *ibid.* at 266; Maiorano, *El Ombudsman, ibid.* at 352-353; "Comparative Analysis", *ibid.*

125 Established in the 1999 Constitution, arts. 273, 280-283, and an Organic Law, Venezuela's *Defensor* is an institution of the new citizen's branch of government (one of five branches of government) and is elected by the legislature. The *Defensor* promotes, defends and monitors human rights and guarantees in the Constitution and human rights treaties, the legitimate collective and diffuse interests of citizens, and the correct functioning of the public administration through investigations and recommendations. The *Defensor* has human rights education and law reform mandates, and is constitutionally required to protect the rights of indigenous peoples. The *Defensor* has the additional powers to bring unconstitutionality, *amparo, habeus corpus* and *habeus data* actions, and is to promote law reform for the progressive protection of human rights. See <www.defensoria.gov.ve>; "Comparative Analysis", *ibid.*; Ungar, *supra* note 109 at 40. See concerns about the National Ethics Council which includes the *Defensor* as a member, UN Human Rights Committee, Concluding Observations: Venezuela, UN Doc. CCPR/CO/71/VEN (April 26, 2001), para. 14. The states of Mérida and Anzoategui also have *Defensores* and Venezuela has a national human rights commission.

126 Paraguay's Parliamentary Commissioner for Human Rights, pursuant to arts. 276- 280 of the 1992 Constitution and 1995 statute, is elected by the legislature and investigates complaints of violation of human rights in the Constitution and law, protects community interests, channels mass complaints, provides human rights education and undertakes law reform initiatives. The *Defensor* can launch *amparo* actions and intervene in *habeus corpus* actions. See Maiorano, "The Defensor del pueblo in Latin America", *supra* note 110 at 268; Maiorano, *El Ombudsman*, *supra* note 110 at 350-352; "Comparative Analysis", *ibid.* The first Commissioner was appointed in Oct. 2001, almost 10 years after the constitution, a delay criticized by the Inter-American Commission on Human Rights, *Third Report on the Situation of Human Rights in Paraguay*, OEA/Ser.L/VII.110, doc. 52 (March 9, 2001), paras. 57-63. Paraguay has a city ombudsman in Asunción.

127 Established by 1990 presidential decree, inserted in the Mexican Constitution in 1992, art. 102B, amended in 1999, giving the National Commission autonomy and empowering the Senate to elect the President. The Commission investigates complaints that government authorities have violated human rights in the Constitution and treaties signed by Mexico, and can make recommendations and promote conciliation between the complainant and the public authority. The Commission has additional mandates such as: research, education, law reform proposals and encouraging the state to sign human rights treaties. The Commission does not have jurisdiction over the private sector. See <www.cndh.org.mx>; International Council on Human Rights Policy, *Performance & legitimacy: national human rights institutions* (Versoix: International Council on Human Rights Policy,

did not have national human rights ombudsmen by mid-2003, they are considering their establishment (and Brazil has some institutions at the state and municipal levels).[128]

There are many similarities in the human rights ombudsmen in Latin America. Most institutions are enshrined and protected in the constitution, in addition to framework legislation and all are elected by the legislative branch. All of the Latin American human rights ombudsmen have the powers to investigate individual cases and make recommendations for change. Most offices have additional powers to bring court actions to protect human rights victims, primarily unconstitutionality, *amparo, habeus corpus, habeus data* and popular actions.

With respect to those Latin American states with *defensores del pueblo*, Mark Ungar has stated that:

> Some of those governments may be gambling that the *Defensoría* will relieve political pressure and improve state functioning without threatening real interests. But *Defensorías* can become more powerful than expected as they grow adept at nurturing allies and publicizing abuses. The agency already enjoys high levels of public popularity and credibility as a new and politically untainted institution, and its ability to collect information has given it a vocal advocacy role. With its mandate over the full range of human rights, it also makes politically potent links between the human rights that most officials prefer to approach separately, such as when the *Defensorías* of Colombia and Peru blame political conflict for the economic suffering of women and indigenous people.[129]

Ungar recognizes how human rights ombudsmen in Latin America also serve as important vehicles for assisting the public in gaining access to the judiciary and other state institutions, determining public opinion, mediating conflict and helping vulnerable and

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2000) 37-55; J. Madrazo Cuellar, "New Policies on Human Rights in Mexico: The National Commission for Human Rights 1988-1993 (1994) 12 Omb. J. 19, rep. in L.C. Reif, ed., *The International Ombudsman Anthology: Selected Writings From the International Ombudsman Institute* (The Hague: Kluwer Law International) 1999 at 337 [hereinafter *International Ombudsman Anthology*]; R.M. Sanchez, "Mexico's Governmental Human Rights Commissions: An Ineffective Response to Widespread Human Rights Violations" (1994) 25 St. Mary's Law J. 1041; J. Fernández Ruiz, "Derechos Humanos y Ombudsman en México", *Problemas actuales del derecho constitucional: estudios en homenaje a Jorge Carpizo* (Mexico: Universidad Autonoma, 1994) 117; Madrazo Cuellar, *supra* note 108; "Comparative Analysis", *ibid.*

128 See UN Human Rights Committee, Concluding Observations: Brazil, UN Doc. CCPR/C/79/Add.66, A/51/40, paras. 306-338 (July 24, 1996), para. 3, Concluding Observations: Uruguay, UN Doc. CCPR/C/79/Add.90 (April 8, 1998), para. 13; Maiorano, "The Defensor del pueblo in Latin America", *supra* note 110 at 268-269. Brazil has executive human rights ombudsmen (*Ouvidoria Geral do Estado*) in the states of Paraná, Ceará and the Federal District (Brasilia). Brazil also has a number of municipal ombudsmen, and the Paraná state ombudsman provides coverage for almost 100 municipalities within the state. The State of São Paulo has passed a law to create ombudsmen in each government department. The States of São Paulo and Rio de Janeiro have specialty Police Ombudsmen. In Sept. 2002, in recommendations sent to the presidential candidates, Amnesty International recommended that an independent, fully-funded federal human rights ombudsman with the power to investigate human rights violations be created, Amnesty International Press Release, "Brazil: Where are human rights?" (Sept. 20, 2002).

129 Ungar, *supra* note 109 at 37.

marginalized groups.[130] Many of the Latin American institutions have internal departments, deputies and/or programs focussing on vulnerable populations, such as women,[131] children,[132] the elderly,[133] indigenous peoples[134] and ethnic minorities.[135]

The Ombudsman, Good Governance and Human Rights Protection in Latin America: Selected Case Studies

The human rights ombudsman offices in Guatemala, Argentina and Peru will be examined in more detail in this Chapter, and the El Salvador institution is discussed in detail in Chapter 8.[136]

GUATEMALA

The civil conflict in Guatemala dates back to 1960, although the guerrilla opposition did not organize formally until the mid-1970s and the Guatemalan National Revolutionary Unit (URNG) formed later in 1982.[137] As discussed further below, the civil conflict did not end until 1996 with the signing of a peace agreement. Despite this state of affairs, a new Constitution was passed in 1985, the *Procurador de los Derechos Humanos* (PDH, Attorney or Counsel for Human Rights) was enshrined therein and put into operation in 1987 – making it the first national human rights institution to be established in Latin America.[138]

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130 *Ibid.* at 198-199.

131 E.g. Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Peru, "Comparative Analysis", *supra* note 116; see *supra* Chapter 4, text accompanying notes 150 to 156.

132 E.g. Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, see *ibid., infra* Chapter 9.

133 E.g. Colombia, Ecuador, El Salvador, Guatemala, *ibid.*

134 E.g. Bolivia, Colombia, Costa Rica, Ecuador, Guatemala, Mexico, Nicaragua, Peru, Venezuela, *ibid.*

135 E.g. Colombia, Costa Rica, Ecuador, Mexico, *ibid.*

136 The case studies on the human rights ombudsmen of Guatemala and Argentina are updated from L.C. Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection" (2000) 13 Harvard H.R.J. 1 at 50-61.

137 See S. Jonas, "Between Two Worlds: The United Nations in Guatemala" in T.S. Montgomery, ed., *Peacemaking and Democratization in the Western Hemisphere* (Miami: North-South Center Press, University of Miami, 2000) at 91; H. Hey, "Peace Operations: New Opportunities for the United Nations to Promote and Protect Human Rights in the 21st Century" in M. Castermans-Holleman, F. van Hoof and J. Smith, eds., *The Role of the Nation-State in the 21st Century: Human Rights, International Organisations and Foreign Policy* (The Hague: Kluwer Law International, 1998) 307 at 309-310. See also Ropp and Sikkink, *supra* note 106.

138 Constitution of the Republic of Guatemala 1985, arts. 273-275; *Law of the Human Rights Commission of the Congress of the Republic and of the Procurator of Human Rights*, Laws 54/86 and 32/87; R. de Léon de Carpio, "The Ombudsman in Guatemala" in *Symposium: The Experience of the Ombudsman Today – Proceedings* (Mexico City: National Commission for Human Rights, 1992) at 113; "Comparative Analysis", *supra* note 116. The idea originated with the College of Lawyers and Notaries who suggested the establishment of a human rights ombudsman prior to the drafting of the new constitution, which was supported by some of the new legislators who had

The PDH is a hybrid human rights ombudsman. As a Commissioner of Congress, the PDH is elected by and responsible to the legislature to defend constitutional and international human rights obligations of the state and supervise the administration.[139] The PDH has powers to: promote the good functioning of government administration in human rights matters, investigate and criticize administrative behaviour detrimental to the interests of persons, and investigate human rights violation complaints.[140] The PDH has the powers to investigate, make recommendations, issue public censures for conduct contrary to constitutional rights, bring judicial or administrative actions or appeals, report annually to the legislature and provide human rights education.[141] The PDH's jurisdiction over human rights complaints in the public and private sectors, plus educational and other functions, gives the PDH some aspects of the human rights commission model.[142] The PDH defends human rights included in the Constitution, the Universal Declaration of Human Rights and treaties that Guatemala has ratified.[143] The Constitution states that treaties ratified by Guatemala take precedence over domestic law.[144] Thus, the PDH can assist in the domestic implementation of Guatemala's international human rights obligations through its investigations and recommendations and through its education functions.

During the 1990s, PDH investigations included those concerning 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.[145] The PDH improved its operations in human rights information and protection during the 1989 to 1993 period when Ramiro de Léon Carpio was the *Procurador*.[146] Despite the poor human rights environment in Guatemala in the years leading up to 1996, the PDH was seen to have a positive influence on the human rights situation, with Prado and Holiday stating that the PDH:

> 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. . . . however, its investigative activity has, as yet, been limited.[147]

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been College members, *ibid.* at 113-114. 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, but without human rights investigation power.

139 Constitution of Guatemala, *ibid.*, art. 274; *Law, ibid.*, arts. 10, 12.

140 Constitution of Guatemala, *ibid.*, art. 275; *Law, ibid.*, art. 13.

141 Constitution of Guatemala, *ibid.*, arts. 274-275; *Law, ibid.*, arts. 13, 14, 23, 36; Carpio, *supra* note 138 at 118.

142 Carpio, *ibid.* at 116-117.

143 Law, *supra* note 138, art. 8.

144 Constitution of Guatemala, *supra* note 138, art. 46.

145 E.g. International Commission of Jurists, "Guatemala: Massacre of Santiago Atitlán and Peace Talks" (June 1991) 46 Rev. 9; R. de Léon Carpio, *Human Rights: A Commitment to Justice and Peace – Human Rights Officer, First Constitutional Period, 1987-1992* (Guatetola, 1992); U.S. Department of State, *Country Reports on Human Rights Practices for 1998* (1999) at 632-648 [hereinafter *Country Reports 1998*].

146 Ropp and Sikkink, *supra* note 106 at 189, 191.

147 T. Palencia Prado and D. Holiday, *Towards a New Role for Civil Society in the Democratization of Guatemala* (Montreal: International Centre for Human Rights and Democratic Development, 1996) at 76.

Although the initial impetus for peace negotiations in both Guatemala and El Salvador occurred in the 1987 Esquipulas Peace Agreement between Central American governments, the Guatemalan peace talks were given new life after de Léon Carpio was appointed President.[148] The UN became materially involved in the peace negotiations between the Guatemalan government and the URNG in 1993, and a Peace Agreement was reached in December 1996.[149] A Comprehensive Agreement on Human Rights had been signed by the parties earlier, in March 1994, and was carried through into the 1996 Agreement.[150] The Comprehensive Agreement on Human Rights contains commitments to strengthen existing institutions for the protection of human rights, including the PDH. The government agreed to support and strengthen the PDH, support the actions of the *Procurador*, strengthen laws to improve the operation of the PDH and increase the institution's resources.[151]

Under the Comprehensive Agreement on Human Rights, the PDH was required to determine whether members of the volunteer civil defence committees had been forced to join these committees against their will or whether their human rights had been violated.[152] If the PDH determined that there had been such violations, he could take whatever decisions thought necessary and was required to start judicial or administrative action to punish the human rights violations.[153] Further, the PDH had to include information on the scope and contents of the Comprehensive Agreement on Human Rights in the work of the institution.[154]

The 1996 Peace Agreement also continued the UN mission to verify human rights compliance with the Agreement as part of a larger UN international verification mission (United Nations Verification Mission in Guatemala or MINUGUA).[155] MINUGUA human rights operations started in November 1994 with human rights monitors and the provision of assistance to government bodies involved in human rights protection, including the PDH.[156] The verification elements of the Comprehensive Agreement on Human Rights called on MINUGUA *inter alia* to: establish that national institutions were carrying out their investigations independently, effectively and in accordance with

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148 Hey, *supra* note 137 at 311, 314. He was the popular choice after President Serrano's attempted *auto-golpe*.

149 Guatemala-*Unidad Revolucionaria Nacional Gualtemalteca*, Agreement on a Firm and Lasting Peace and 10 Integral Agreements [including Comprehensive Agreement on Human Rights], Dec. 29, 1996, (1997), 36 Int'l Legal Mat. 262; Hey, *ibid.* at 311; W. Stanley and D. Holiday, "Broad Participation, Diffuse Responsibility: Peace Implementation in Guatemala" in S.J. Stedman, D. Rothchild and E.M. Cousens, *Ending Civil Wars: The Implementation of Peace Agreements* (Boulder: Lynne Rienner Publishers, 2002) 421.

150 Comprehensive Agreement on Human Rights, *ibid.*; C. Arnson, Introductory Note (1997) 36 Int'l Legal Mat. 258 at 260.

151 Comprehensive Agreement on Human Rights, *ibid.*, II.1, 3 and 4.

152 *Ibid.*, V.2-4, 6.

153 *Ibid.*, V.4.

154 *Ibid.*, V.8.

155 *Ibid.*, X; Agreement on the Implementation, Compliance and Verification Timetable for the Peace Agreement, VI.198. United Nations Mission for the Verification of Human Rights and of Compliance with the Comprehensive Agreement on Human Rights in Guatemala (MINUGUA) established in 1994 agreement for UN to verify human rights in period before cease fire.

156 Arnson, Introductory Note, *supra* note 150 at 260.

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.[157]

The PDH gives special attention to the areas of children's rights, women's rights, the disabled, the elderly, migrants, due process and prisoners through the use of deputies in the office for these areas.[158] In 1999, the majority of the complaints concerning individual rights concerned the right to security, with an increasing number of complaints against the national police, and in other areas the rights to health, education and work were particular issues.[159] During 1999, the PDH was also engaged in verifying the elections process, mediating in lynching cases, and training military and civilian security forces.[160]

Although the complaints of disappearances and torture made to the PDH declined over the 1998 to 2000 period, there has been little recent progress in implementing the Peace Agreement.[161] Although the human rights situation began to improve after 1996, reverses began in the past few years.[162] There are ongoing extra-judicial killings, police torture and abuse, poor prison conditions, discrimination (especially against indigenous peoples, women and the disabled) and increasing amounts of "social cleansing" and lynchings.[163] The Guatemalan judiciary is subject to delay, some corruption and intimidation.[164] In the past few years there has been a considerable increase in both criminal and politically-motivated violence in Guatemala, with increased levels of violence against judges, human rights defenders and journalists.[165] Local offices of the PDH have been threatened.[166] MINUGUA and the PDH have argued that the rule of law in Guatemala is also being threatened.[167] The relationship between the PDH and MINUGUA improved markedly after the election of a new *Procurador* in 2002, and the PDH will take over MINUGUA's human rights verification function when the latter ends.[168]

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157 Comprehensive Agreement on Human Rights, *supra* note 149, X.3, 5, 16.

158 See Inter-American Commission on Human Rights, *Fifth Report on the Situation of Human Rights in Guatemala*, OEA/Ser.L/V/II.111, doc. 21 rev. (April 6, 2001), para. 35.

159 *Ibid.*, para. 36.

160 *Ibid.*

161 *Amnesty International: Report 2002*, *supra* note 107 at 112; U.S. Department of State, *Country Reports on Human Rights Practices for 2000* (2001) at 2581-2582 [hereinafter *Country Reports 2000*]; *Country Reports 1998, supra* note 145 at 649-656; Lutz and Sikkink, *supra* note 106 at 653.

162 *Amnesty International: Report 2002, ibid.*

163 *Ibid.* at 112-113; U.S. Department of State, *Country Reports on Human Rights Practices for 2002* (2003) at 2593 [hereinafter *Country Reports 2002*]; *Country Reports 2000*, *supra* note 161 at 2581-2582; *Country Reports 1998*, *supra* note 145 at 649-656; Lutz and Sikkink, *supra* note 106 at 653.

164 *Country Reports 2002*, *ibid.*; *Country Reports 2000, ibid.* at 2582.

165 E.g. U.N.G.A. Res. 57/161 (Dec. 16, 2002), UN Doc. A/RES/57/161 (Jan. 28, 2003), para. 14; Amnesty International, *Amnesty International: Report 2003* (London: Amnesty International Publications, 2003) at 114.

166 Amnesty International, *Guatemala: Civil patrollers hold human rights institutions to ransom*, Press Release AMR 34/060/2002 (Sept. 26, 2002).

167 "Guatemala: U.N. Warns That Rising Violence Threatens Rule of Law", *UN Wire* (Jan. 31, 2003).

168 *Country Reports 2002*, *supra* note 163 at 2610; see *infra* note 169.

The PDH of Guatemala operates in a difficult environment. In its governing law, the PDH is given 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 has not always been receptive to the institution and its recommendations.[169] 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.[170] Thus, the PDH has been given a good legal and constitutional structure, but its ultimate effectiveness is influenced by larger political and economic factors which lie within the control of the government.

ARGENTINA

Argentina made the transition from military dictatorship, with its severe human rights abuses, to democratic governance in 1983 and attempted to consolidate its democracy in the following years.[171] Governmental support for the establishment of a national human rights institution in Argentina dates back to the 1970s, although the pressure to create a *Defensor* began in 1984 to 1985, and coalesced in the 1993 to1994 period.[172] Mark Ungar states that:

> this rare party agreement resulted partly from the fact that the opposition Radicals favored an institution that could check the executive itself, as did the then-opposition Peronists in the 1980s. Further political momentum came from positive media coverage . . . and the success of the *Defensorías* established after 1986 in San Juan, La Rioja, Salta, Córdoba and Rio Negro provinces and the Federal Capital. . . .[173]

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169 The first *Procurador*, de Léon Carpio, was well-respected during his tenure. Arango Escobar took some strong positions, such as issuing criticism of the President for trying to restrict freedom of the press and joining the Spanish action filed by Rigoberta Menchu and others against former Guatemalan leaders for human rights abuses committed during the civil conflict. In Feb. 2003 the Spanish Supreme Court held that Spanish courts could exercise jurisdiction over acts of torture in Guatemala involving Spanish victims. Sergio Morales was elected *Procurador* in 2002, backed by civil society. See *Decision of the Spanish Supreme Court concerning the Guatemala Genocide Case* (2003) 42 Int'l Legal Mat. 686; *Country Reports 2002, ibid.; Amnesty International: Report 2003, supra* note 165 at 115; *Country Reports 2000, supra* note 161 at 2589, 2605; *Country Reports 1998, supra* note 145 at 653-654; *Amnesty International: Report 2002, supra* note 107 at 113.

170 *Country Reports 2002, ibid.; Fifth Report on the Situation of Human Rights in Guatemala, supra* note 158, paras. 37, 85 (recommending increases in resources and support); *Country Reports 2000, ibid.* at 2582; *Country Reports 1998, ibid.*; UN Human Rights Committee, Concluding Observations: Guatemala, UN Doc. CCPR/C/79/Add.63 (April 3, 1996), para. 27 (recommending increased resources), Concluding Observations: Guatemala, UN Doc. CCPR/CO/72/GTM (Aug. 27, 2001), para. 4 (commending efforts to provide additional resources).

171 See e.g. D. Rock, *Argentina 1516-1987: From Spanish Colonization to Alfonsín* (Berkeley: University of California Press, 1987) at 367-403; C.H. Acuña and C. Smulovitz, "Guarding the Guardians in Argentina: Some Lessons About the Risks and Benefits of Empowering the Courts" in A.J. McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press, 1997) at 93.

172 J.L. Maiorano, "Argentina: The Defensor del Pueblo de la Nación" in *Righting Wrongs, supra* note 110 at 65; Ungar, *supra* note 109 at 39.

173 Ungar, *ibid.*

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.[174] 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, and omissions of the Administration; and control over the exercise of public administrative functions.[175]

The structure of the office is based on that of the Spanish *Defensor del Pueblo*. Appointed by the National Congress, the *Defensor del Pueblo* of Argentina is a hybrid, with the dual mandate to protect constitutional human rights and monitor public administration.[176] On receipt of a complaint or *suo moto*, the *Defensor* can investigate the conduct of national public administration and its agents which is illegitimate, faulty, irregular, abusive, arbitrary, discriminatory, negligent, seriously inconvenient or inadequate, including conduct affecting diffuse or collective interests.[177] The *Defensor* has jurisdiction over the national public administration and private entities rendering public services.[178] This has permitted the *Defensor* to investigate complaints against privatized public utility companies. However, the *Defensor* does not have jurisdiction over the judicial activities of the courts and the defence and security forces.[179] The *Defensor* has taken the position that he does have jurisdiction over the administrative activities of the judicial branch.[180]

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174 Decree 1.786 (repealed Dec. 2, 1993); Law No. 24.284 (Dec. 1, 1993), am. by Law No. 24.379 (1994).

175 Constitution of Argentina (Aug. 23, 1994, in force Aug. 24, 1994), art. 86, rep. in A. Blaustein and G. Flanz, eds., *Constitutions of the Countries of the World*, vol. I (New York: Oceana Publications Inc., 1991). The provision was also supported by the Radical Party, Ungar, *supra* note 109 at 44. See <www.defensor.gov.ar>; N.P. Sagüés, "An Introduction and Commentary to the Reform of the Argentine National Constitution" (1996), 28 U. Miami Inter-Am. Law Rev. 41. On the *Defensor* see J.L. Maiorano, "The *Defensor del Pueblo* in Argentina: A Constitutional Institution of Control and Protection" (1995) 13 Int'l Omb. J. 115, rep. in *International Ombudsman Anthology, supra* note 127 at 359; Maiorano, *El Ombudsman*, *supra* note 110; J.L. Maiorano, "The Challenges Facing the Ombudsman in Argentina and Around the World" (1999) 3 Int'l Omb. Yrbk. 187; J.L. Maiorano, "The Ombudsman Institution in Argentina" in *Human Rights Commissions and Ombudsman Offices, supra* note 116 at 233; "Comparative Analysis", *supra* note 116.

176 Constitution of Argentina, *ibid.*

177 Law 24.284, *supra* note 174, s. 14. 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, Law 24.284, *ibid.*, ss. 14-15.

178 *Ibid.*, ss. 16-17.

179 *Ibid.*, s. 16. The Municipality of Buenos Aires is also excluded, but Buenos Aires has its own municipal *Defensor del Pueblo*.

180 Maiorano, "The Ombudsman Institution in Argentina", *supra* note 175 at 235. See also the *Defensor's* 1996 complaint to the Inter-American Commission on Human Rights, *supra* text accompanying notes 53 to 55.

The *Defensor* can make recommendations (including for the amendment of law and policy) and warnings.[181] The Constitution of Argentina gives the *Defensor* the power to launch *amparo* actions 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.[182] The 1994 Constitution incorporates nine human rights treaties and two declarations on human rights.[183] The Constitution states that all treaties ratified by Argentina are given a status superior to that of domestic law.[184] Human rights guarantees are found in Part I of the Constitution.[185] As a result, the constitutional human rights norms 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.[186] Accordingly, the *Defensor del Pueblo* of Argentina can act as a non-judicial mechanism for the domestic implementation of the international human rights obligations of Argentina.

The *Defensor del Pueblo* received extremely large numbers of complaints over the first four years of operations, which have dropped by approximately fifty percent since 1999.[187] Over the entire period to the end of 2002, the highest number of complaints fell in the area of economic administration, including against privatized companies providing public services (e.g. water, electricity, financial services).[188] Material numbers of

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181 Law 24.284, *supra* note 174, ss. 27-28.

182 Constitution of Argentina, *supra* note 175, art. 43.

183 *Ibid.*, 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; Convention on the Rights of the Child. The declarations are the American Declaration on the Rights and Duties of Man; and the Universal Declaration of Human Rights. See J. Koven Levit, "The Constitutionalization of Human Rights in Argentina: Problem or Promise?" (1999) 37 Columbia J. Transnat'l Law 281.

184 Constitution of Argentina, *ibid.*

185 *Ibid.*, part I, ch. 1, arts. 14-35, ch. 2, arts. 36-43 (mainly third-generation rights). But 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 183 at 310-312, criticizing the ch. 1 rights for their weakness compared to the substance of modern international human rights norms.

186 Maiorano, "The *Defensor del Pueblo* in Argentina: A Constitutional Institution of Control and Protection", *supra* note 175 at 364; Constitution of Argentina, *ibid.*, arts. 41-42.

187 In 1998, the office started 30,434 proceedings, 25,082 in 1997, 22,697 in 1996 and 7,256 in 1995. In 1999, 18,000 complaints were lodged, compared to 14,716 in 2000, 14,335 in 2001 and 11,702 in 2002, Defensor del Pueblo of Argentina, *Presentation Before the National Congress – Annual Report 1998*, May 26, 1999 (English version, *Defensor del Pueblo*, Argentina) at 2; Defensor del Pueblo of Argentina, *Informes de Actuaciones: Total general* (1994-2002), <www.defensor.gov.ar/informes/estad01-sp.htm>.

188 To the end of 2002, 41.6% of total complaints fell in the area of economic administration and public services, *Informes de Actuaciones: Total general* (1994-2002), *ibid.* See also *Annual Report 1998, ibid.*; Defensor del Pueblo of Argentina, *Summary of the 1997 Annual Report* (English ver-

complaints also involved employment and social security matters, followed by complaints about the environment, health, education and cultural administration.[189] Complaints about human rights, administration of justice, women's issues and social action constituted only twelve and one-half percent of total complaints in the 1994 to 2002 period.[190] Human rights complaints have covered issues such as discrimination, the rights of children, the disabled, indigenous peoples, prisoners and persons in mental health care facilities, delay in rendering judicial decisions and the right to reproductive health.[191] The economic and monetary system collapse suffered by Argentina starting in 2001 has also had an impact on complaints.[192] The *Defensor del Pueblo* launched court actions on behalf of all bank depositors after restrictions on the withdrawal of funds from bank accounts (*corralito*) and the "pesification" of depositors' dollar-denominated funds were imposed by decree in late 2001.[193] In 2002, with the economic crisis, complaints featuring property rights were more prominent.[194] Thus, the major concerns of complainants in Argentina, due in part to the neoliberal policies of the Menem government and the more recent economic crisis, are in the realm of economic and social rights.

Argentina is a state continuing to struggle with democratic development, and good governance still seems elusive.[195] Although the judiciary is independent overall, there has been some politicization, corruption and delay.[196] Although human rights in Argentina are generally respected, there are still violations occurring in areas such as police conduct (violence, torture and mistreatment of detainees, arbitrary arrest and detention), poor prison conditions, discrimination and children's rights.[197] Also, as the

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sion, *Defensor del Pueblo*, Argentina, 1997) at 4-5; Defensor del Pueblo of Argentina, *Summary of the 1996 Annual Report* (English version, *Defensor del Pueblo*, 1996) at 4.

189 To the end of 2002, 32% addressed employment and social security matters; environment, health, education and cultural administration complaints amounted to 13.6%, *Informes de Actuaciones: Total general* (1994-2002), *ibid.*

190 *Informes de Actuaciones: Total general* (1994-2002), *ibid.*

191 *Annual Report 2002, supra* note 60 at 16-47; *Annual Report 1998, supra* note 187 at 6-7, 10; *1997 Annual Report, supra* note 188 at 8- 9, 13, 22; *1996 Annual Report, supra* note 188 at 9-10.

192 See P.A. Haslam, *Argentina: Governance in Crisis*, Policy Paper (Ottawa: Canadian Foundation for the Americas, Feb. 2003).

193 *Decree No. 1570/2001*; "Argentina ruling vs banking restrictions to benefit all depositors – ombudsman", *AFX* (July 9, 2002); "Judge accepts class action case against deposit freeze", *Business News Americas* (July 10, 2002); Argentina National Ombudsman, "'Corralito': Mondino Contested the National Executive's Decree", *Press Release* (July 25, 2002); "Argentine president accused of abuse of authority". *EFE* (July 25, 2002); E. Mondino, Argentina National Ombudsman, "Exemplary Ruling Against an Unconstitutional and Arbitrary Decree", *La Cronica* (July 21, 2002). On September 13, 2002, an appeals court determined that the withdrawal restrictions, the pesification decree and the temporary ban on court activity were unconstitutional, "Argentine Court Rejects Conversion of Deposits", *The New York Times* (Sept. 15, 2002) at 15. Some of the restrictions were lifted in early 2003, see Haslam, *ibid.*

194 *Annual Report 2002, supra* note 60 at 21.

195 Linz and Stepan, *supra* note 104 at ch. 12.

196 *Country Reports 2002, supra* note 163 at 2357; *Country Reports 2000, supra* note 161 at 2356; *Country Reports 1998, supra* note 145 at 483; Haslam, *supra* note 192 at 8-10.

197 *Country Reports 2002, ibid.*; *Amnesty International: Report 2003, supra* note 165 at 34.; *Amnesty International: Report 2002, supra* note 107 at 34-35; *Country Reports 2000, supra* note 161 at 2356; Amnesty International, *The Rights of the Child in Argentina*, AMR 13/018/2002 (Dec. 2002).

complaints to the *Defensor* indicate, social and economic rights are problematic areas.

The *Defensor del Pueblo* also has strong constitutional and legal guarantees of independence, jurisdiction and powers. However, unlike some of the other human rights ombudsmen in Latin America, it has a greater percentage of complaints in the fields of administrative conduct, especially in the economic and social sectors. In this respect, the *Defensor del Pueblo* works to improve good governance in Argentina, and also assists in the monitoring and implementation of economic, social and cultural rights. The provision of appropriate levels of financial support, improving the responsiveness of the executive branch to the institution and appointing strong individuals to the post are all important for its future effectiveness.

PERU

The state of democracy in Peru over the course of the 1980s and 1990s was tenuous and the human rights situation was poor.[198] The Fujimori government was marked by the dominance of the executive, a weak legislature and judiciary, widespread corruption in government and restrictions on human rights.[199] However, the collapse of the Fujimori government in November 2000 and the democratic elections held in 2001 marked the start of an improvement in the human rights environment.[200]

After President Fujimori's 1992 self-coup, a new Peruvian Constitution was enacted in 1993, with a number of provisions that were a step backwards from the 1979 Constitution.[201] However, Articles 161 and 162 of the 1993 Constitution did create the office of *Defensor del Pueblo*.[202] The *Defensor* is an autonomous office at the national level, supported by an organic law, and the public authorities are constitutionally obligated to cooperate with the *Defensor*.[203] Stalling by the executive branch, however, resulted in the *Organic Law* being passed in 1995 and the first *Defensor* appointed in 1996.[204] The *Defensor* is elected by Congress and enjoys independence in the exercise of his functions.[205] Article 162 of the Constitution states that:

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198 See G. Acosta and J. Ciurlizza, *Democracy in Peru: A Human Rights Perspective* (Montreal, International Centre for Human Rights and Democratic Development, Aug. 1997).

199 *Ibid.* at 7-14, 35-40.

200 Human Rights Watch Backgrounder, *Peru: Human Rights After Fujimori* (March 21, 2002); *Country Reports 2000, supra* note 161 at 2745-2746; *Amnesty International: Report 2002, supra* note 107.

201 Constitution of Peru (1993), rep. in Defensoría del Pueblo, *La Fortaleza de la Persuasion*, 2d ed. (Lima: Defensoría del Pueblo, April 1997) at 179 (in Spanish). See Acosta and Ciurlizza, *supra* note 198 at 32-33. The Peruvian Congress has begun to discuss the drafting of a new Constitution.

202 Constitution of Peru (1993), *ibid.* See <www.ombudsman.gob.pe>.

203 Constitution of Peru (1993), *ibid.*, art. 161.

204 *Ley Orgánica de la Defensoría del Pueblo, Ley No. 26520*, am. by *Ley No. 26535* (Oct. 4, 1995), *Ley No. 27831* (Oct. 21, 200), <www.ombudsman.gob.pe> [hereinafter *Organic Law*]; Ungar, *supra* note 109 at 39; "Comparative Analysis", *supra* note 116.

205 Constitution of Peru (1993), *supra* note 201, art. 161; *Organic Law, ibid.*, art. 5. However, the proposed budget for the office is submitted to the executive power and defended before both the executive and Congress, *ibid.*

> [i]t is the duty of the office of the *Defensor del Pueblo* to defend the constitutional and fundamental rights of persons and the community and to oversee the performance of the duties of the State administration and the delivery of public services to the citizenry.[206]

As a hybrid, with the dual authority to protect human rights and oversee government administration, the jurisdiction of the *Defensor* includes national, regional and local administrations, the armed forces, the national police and the administrative activities of the judicial branch.[207] The *Defensor* also has jurisdiction over non-state juridical entities providing public services.[208] The *Defensor* reports annually to the legislature and can also present extraordinary reports "when the gravity or urgency of the facts warrant it".[209]

The powers of the institution are extensive. The Peruvian *Defensor* can initiate and pursue, upon complaint or *ex officio*, any investigation conducive to clarifying acts and decisions of the public administration and its agents that involve the illegitimate, defective, irregular, slow, abusive, excessive, arbitrary or negligent exercise of its functions, or affect the full effectiveness of the constitutional and fundamental rights of the person and the community.[210] Like the traditional ombudsman, upon the conclusion of an investigation, the *Defensor* can give advice, warnings, recommendations, reminders of legal obligations or suggestions for the adoption of new policies, but does not have the power to render legally binding decisions. When the *Defensor* receives complaints about the administration of justice, he is permitted to obtain from the relevant institutions information for the investigation, but his investigation is not allowed to interfere with judicial authority.[211] If the *Defensor* concludes that there has been an irregularity, he can inform the Executive Council of the judiciary or the Minister of Justice.[212]

The *Defensor* can bring before the Constitutional Court: unconstitutionality actions against rules with the force of law; *habeus corpus*, *amparo* and *habeus data* actions; popular actions; and compliance actions for the protection of the constitutional and fundamental rights of the person and the community.[213] The *Defensor* can also initiate or participate in, *ex officio* or upon petition, any administrative proceeding to represent a person or group of persons for the defence of the constitutional and fundamental rights of the person and the community.[214]

The *Defensor* is also empowered to: initiate the drafting of legislation; propose measures that facilitate the best performance of his functions; promote the signature of,

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206 Constitution of Peru (1993), *ibid.*, art. 162.

207 J. Santistevan de Noriega, "Defensoría del Pueblo en el Perú" in *La Fortaleza de la Persuasion*, *supra* note 201 13 at 22, 25; *Organic Law*, *supra* note 204, arts. 9(1), 14.

208 *Organic Law, ibid.*, art. 30.

209 *Ibid.*, art. 27; see also art. 14.

210 *Ibid.*, art. 9(1). Complaints can be made individually or collectively without any restriction, *ibid.*, art. 10.

211 *Ibid.*, art. 14.

212 *Ibid.*

213 *Ibid.*, art. 9(2). Rules with the force of law are laws, legislative decrees, emergency decrees, regulations of Congress, regional norms of a general character and municipal ordinances, Santistevan de Noriega, "Defensoría del Pueblo en Perú", *supra* note 207 at 26.

214 *Organic Law*, *ibid.*, art. 9(3).

ratification of and accession to treaties; and publicize human rights treaties.[215] With respect to the initiation of new legislation, the *Defensor* can become involved in different ways, by intervening in the process when bills are presented to Congress, becoming involved in the drafting of the legal text, issuing a report on the draft law which is submitted during legislative debate or, based on his mandate, proposing new laws that will improve human rights protection.[216] More unusually, the *Defensor* is responsible for organizing, operating and developing the National Register of Detainees and Sentenced Prisoners.[217] During states of emergency the *Defensor* may suggest to the administrative, judicial or military authorities "the measures which, in his judgment, are overtly contrary to the Constitution or affect the essential nucleus of the constitutional and fundamental rights of the person and the community, and for this reason should be revoked or modified immediately."[218] The *Defensor* also exercises any other powers established by the Constitution or the *Organic Law* – and this has included oversight of the 2000 and 2001 national elections.[219] During the 2000 election, the *Defensor* criticized a number of its aspects and subsequently came under attack from Fujimori supporters in Congress.[220]

The 1993 Constitution contains provisions on human rights, although with a number of limitations.[221] The 1993 Constitution downgraded the influence of international law inside the Peruvian legal system by giving ratified treaties only the force of domestic laws and by failing to incorporate or refer to any international human rights instruments.[222]

Commencing in September 1996, the *Defensor* received a growing number of complaints annually to April 2002 with complaints falling in both the government administration and human rights areas, with the majority falling under government or public services maladministration.[223] More revealing statistics show that the government insti-

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215 *Ibid.*, art. 9(4)-(5); Constitution of Peru (1993), *supra* note 201, art. 162.

216 Santistevan de Noriega, "Defensoría del Pueblo en Perú", *supra* note 207 at 28.

217 *Organic Law, supra* note 204, art. 9(6). The development of the Register was an attempt to address the absence of a centralized system to catalogue who was detained or imprisoned, the lack of records exacerbating human rights breaches, Santistevan de Noriega, *ibid.* at 29.

218 *Organic Law, ibid.*, art. 29.

219 *Ibid.*, art. 9(8). See J. Santistevan de Noriega, "La labor de supervision electoral de la Defensoría del Pueblo" in (1999-2000) 2 Debate Defensorial: Revista de la Defensoría del Pueblo 11; S.B. Abad Yupanqui, "Aportes defensoriales al proceso electoral" (1999-2000) 2 Debate Defensorial: Revista de la Defensoría del Pueblo 61; P.P. Marzo and R. Pereira, "Intervención defensorial en el proceso electoral: Análisis de casos" (1999-2000) 2 Debate Defensorial: Revista de la Defensoría del Pueblo 77.

220 The *Defensor* gave priority to supervision of the neutrality of public officials, use of state resources in the election campaign, equal access to the media and the impartiality and operational capacity of election officials, *Resume Ejecutivo del Tercer Informe del Defensor del Pueblo al Congreso de la República 1999-2000* (Lima: Defensoría del Pueblo, April 11, 1999 to April 10, 2000) at 19; Ungar, *supra* note 109 at 40.

221 Constitution of Peru (1993), *supra* note 201, arts. 1-35; Acosta and Ciurlizza, *supra* note 198 at 32.

222 Constitution of Peru (1993), *ibid.*, art. 200; Acosta and Ciurlizza, *ibid.* at 33; Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, doc. 59 rev. (June 2, 2000), para. 30. Peru is a party to numerous human rights treaties, *ibid.*, paras. 31-32.

223 Defensoría del Pueblo, *Second Ombudsman's Report to Congress (Executive Summary)* (Lima:

tutions with large numbers of complaints lodged against them were the National Pension Office, the judicial branch, the national police force, the Lima municipality, the armed forces, the ministry of education and the health sector.[224] Human rights complaints are still material – constituting 29.3 percent of total cases in 2001 to 2002 – and include disappearances, excessive delay in pension payments, court delays, judicial misconduct, police torture and misconduct, prison conditions and high numbers of detainees.[225] As discussed earlier in this Chapter, the *Defensor* has also interacted with the Inter-American human rights system.

Basic maladministration problems often include excessive delay in the processing of cases by state agencies, the lack of or inadequate information given to complainants in diverse administrative procedures and the failure of state agencies to pay wages, pensions and social benefits.[226] Numerous complaints are also received about public utility companies concerning their charges, poor service quality and violation of laws.[227]

The *Defensor del Pueblo* also established a specific department focussing on the protection and promotion of the rights of women.[228] The Peruvian women's rights department in the *Defensoría* has, *inter alia*, addressed violence against women, sexual abuse, state coercion in the rights of reproduction and problems with the application of family violence protection law.[229] During the 1998 to 2000 period, the *Defensor* investigated numerous complaints about the government's programs that resulted in the forced sterilization of women.[230] The *Defensor* made a number of recommendations to the government for changes, many of which have been implemented.[231] In 2001, the *Defensor* and the Manuela Ramos Movement lodged a petition with the Inter-American Commission on the violation of women's rights in the interpretation of electoral quotas

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Defensoría del Pueblo, April 11, 1998 to April 10, 1999); *Resume Ejecutivo del Tercer Informe del Defensor del Pueblo, supra* note 220; *Executive Summary of the Fifth Ombudsman Report, supra* note 56 at 11-12.

224 *Second Ombudsman's Report to Congress, ibid.; Resume Ejecutivo del Tercer Informe del Defensor del Pueblo, ibid.* at 12; *Executive Summary of the Fifth Ombudsman Report, ibid.* at 15.

225 *Second Ombudsman's Report to Congress, ibid.; Resume Ejecutivo del Tercer Informe del Defensor del Pueblo, ibid.* at 16-19; *Executive Summary of the Fifth Ombudsman Report, ibid.* at 12-21.

226 *Resume Ejecutivo del Tercer Informe del Defensor del Pueblo, ibid.* at 20-22.

227 Defensoría del Pueblo de Peru, *Memoria: Defensoría Especializada en los Derechos de la Mujer* (abril 1998-abril 2000) [hereinafter *Memoria*]; *Resume Ejecutivo del Tercer Informe del Defensor del Pueblo, ibid.* at 20-22; Ungar, *supra* note 109 at 39.

228 "Propuesta para el Programa de los Derechos de la Mujer" in *La Fortaleza de la Persuasión, supra* note 201 at 75.

229 *Second Ombudsman's Report to Congress, supra* note 223; *Executive Summary of the Fifth Ombudsman Report, supra* note 56 at 20-21.

230 The surgery was carried out without prior information, without prior consent and before the mandatory seventy-two hour reflection period expired, there was insufficient post-surgical care and not all the deaths related to surgical sterilization had been investigated judicially, Defensoría del Pueblo de Peru, *Anticoncepción Quirurgica Voluntaria I: Casos investaigados por la Defensoría del Pueblo*, Informe No. 7 (Lima: enero 1998); *Second Ombudsman's Report to Congress, ibid.*; Resolución Defensorial No. 03-DP-2000, *Memoria, supra* note 227 at 141.

231 *Resume Ejecutivo del Tercer Informe del Defensor del Pueblo, supra* note 220 at 18; *Country Reports 2000, supra* note 161 at 2757.

for women, which was deemed admissible in 2002.[232] There is also specialized attention to the rights of the disabled and indigenous peoples' rights.[233]

The *Defensor del Pueblo* of Peru was involved in activities pertaining to the justice system and persons condemned for terrorist activities. Harsh anti-terrorism laws introduced by Fujimori after his self-coup contained broad, vaguely defined offences with long prison sentences and, until 1997, separate anti-terrorism courts (called "faceless courts" because of the hooded judges) tried defendants without adequate rights to a fair trial.[234] The Ad-Hoc Commission established in 1996 to review cases and provide recommendations to the President that he grant amnesty or parole to persons wrongly condemned for terrorism and treason was attached to the office of the *Defensor* for three years.[235] As head of the Commission, the first *Defensor* investigated and concluded that many of the persons wanted for terrorism were innocent and many of the arrest warrants were improperly issued.[236] The Commission recommended pardons or shorter sentences in appropriate cases and proposed legislation to permit those who renounced terrorism to file appeals of their cases.[237] By the end of the *Defensor's* involvement, a majority of individuals were freed, pardoned or absolved of wrongdoing.[238]

During the Fujimori period, the *Defensor* operated under difficult financial circumstances.[239] The institution came under attack from time to time.[240] However, since its inception, the *Defensor del Pueblo* has been considered to be an independent, effective and respected institution.[241] In 2000, the Inter-American Commission reported on Peru, and commented positively on the work of the *Defensor*, stating that it "considers that the autonomous and independent existence of the Office of the Human Rights Ombudsman is one of the most significant elements favouring respect for human rights in Peru."[242] Post-Fujimori, although the interim and Toledo governments have worked

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232 *Janet Espinoza Feria et al.* v. *Peru*, Admissibility, *supra* text accompanying notes 56 to 59.

233 The 1999 Law on disabled persons required the *Defensor* to establish an adjunct office for specialized defence of the rights of the disabled, but budget limitations required the *Defensor* to assign the mandate to the Human Rights department of the office, *Second Ombudsman's Report to Congress, supra* note 223; *Resume Ejecutivo del Tercer Informe del Defensor del Pueblo, supra* note 220.

234 *Peru: Human Rights After Fujimori, supra* note 200 at 2.

235 G. Costa, "Dos años de la Comisión Ad-hoc: resultados y perspectivas" (1998) 1 Debate Defensorial: Revista de la Defensoría del Pueblo 127; *Resume Ejecutivo del Tercer Informe del Defensor del Pueblo, supra* note 220 at 15-16; *Second Ombudsman's Report to Congress, supra* note 223.

236 *Second Ombudsman's Report to Congress, ibid.* A majority of those with arrest warrants against them were indigenous peoples. See also *Resume Ejecutivo del Tercer Informe del Defensor del Pueblo, ibid.* at 16.

237 Ungar, *supra* note 109 at 202.

238 *Resume Ejecutivo del Tercer Informe del Defensor del Pueblo, supra* note 220 at 16.

239 Santistevan de Noriega, "Defensoría del Pueblo en Perú", *supra* note 207 at 33. International aid provided extra resources.

240 E.g. in a confrontation with Peru's Supreme Council of Military Justice in the *Cesti Hurtado* case discussed *supra* text accompanying notes 72 to 74; Ungar, *supra* note 109 at 39-40.

241 *Country Reports 2002, supra* note 163 at 2773; Ungar, *ibid.* at 198; *Country Reports 2000, supra* note 161 at 2767.

242 *Second Report on the Situation of Human Rights in Peru, supra* note 222, para. 47.

to improve the human rights situation in Peru, problems still remain such as police brutality and torture, poor prison conditions, discrimination (women, indigenous peoples, the disabled, minorities) and the maintenance of some anti-terrorism legislation.[243] In addition, the position of *Defensor del Pueblo* had not been filled on a formal basis by mid-2003, with an acting *Defensor* in place since late 2000. Congress tried to elect a new *Defensor* in April 2002, but members were unable to muster the two-thirds majority required.[244] Later in 2002, Congress amended the *Defensor's* Organic Law to try to make it easier to obtain the special majority vote.[245] Given the delay in appointment, "critics expressed concern at the apparent lack of political will to establish a strong Office of the Ombudsman."[246]

Overview of the Ombudsman in the Caribbean

The greater Caribbean area is comprised of the many islands lying between the Caribbean Sea and the Atlantic Ocean, plus some of the countries in the Central American isthmus and on the northern coast of South America. The origins of the ombudsman institution in the Caribbean are closely connected with the former British colonial ties of a number of the states.[247] To date, most classical and human rights ombudsmen and other institutions have been established in Commonwealth Caribbean states and overseas territories of Great Britain.[248] There continue to be various human rights problems in the Caribbean, which are exacerbated by the poor economic conditions in the region.[249]

The first ombudsman established in the Caribbean was the Ombudsman of Guyana, established in the 1966 independence Constitution.[250] The rationale for the creation of

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243 *Country Reports 2002*, *supra* note 163 at 2760; *Amnesty International: Report 2003*, *supra* note 165 at 197; *Peru: Human Rights Under Fujimori*, *supra* note 200 at 1-2; *Country Reports 2000*, *supra* note 161 at 2746-2747; *Amnesty International Report 2002*, *supra* note 107 at 194-196; Amnesty International, *Peru: Justice for all*, Press Release, AMR 46/002/2003 (Jan. 15, 2003) (judicial declaration of unconstitutionality of a number of parts of 1992 anti-terrorist laws).

244 *Country Reports 2002*, *ibid.*, at 2773.

245 *Organic Law*, *supra* note 204, art. 3; *Country Reports 2002*, *ibid.* The change permits Congress to vote to ask a person to run for the position if a minimum twenty percent of members back the person's candidacy.

246 *Amnesty International: Report 2003*, *supra* note 165 at 198.

247 See *supra* note 3 for a listing of Commonwealth members in the Caribbean; *The Caribbean Experience*, *supra* note 53.

248 *The Caribbean Experience*, *ibid.*; V. Meerabux, "The Ombudsman and Human Rights Institutions in the Caribbean: An Overview" in *ibid.* at 29.

249 See e.g. *Amnesty International: Report 2002*, *supra* note 107; S.V. Stuart, "Human Rights Protection and Promotion in the Caribbean: Issues and Strategies – An NGO Perspective" in *The Caribbean Experience*, *supra* note 53 at 151; Reif, "Ombudsman and Human Rights Protection and Promotion in the Caribbean: Issues and Strategies", *supra* note 53 at 160; C. Thomas, "International Labour Standards and Fundamental Human Rights: Application in the Caribbean" in *The Caribbean Experience*, *ibid.* at 182.

250 Meerabux, *supra* note 248 at 30; S.Y. Mohamed, "The Role of the Ombudsman and Human Rights Institutions in Guyana" in *The Caribbean Experience*, *supra* note 53 at 79.

the Guyana Ombudsman was actually human-rights related, as racial bias and conflict in Guyana led to the idea that an ombudsman would be an effective mechanism to receive and investigate complaints of racial discrimination.[251] Later, as various Caribbean islands obtained their independence from Britain, ombudsman provisions were included in some of the new constitutions and, in other cases, governments subsequently provided for the establishment of the ombudsman. Thus, ombudsman offices were established as follows: Guyana Ombudsman (1966 Constitution, 1967 law, 1980 Constitution);[252] Trinidad and Tobago Ombudsman (1976 Constitution, 1977 law);[253] Jamaica Ombudsman (1978 to 2000) replaced by Public Defender (1999 law, in operation 2000), Political Ombudsman (2002);[254] Barbados Ombudsman (1980 law, in operation 1981);[255] Saint Lucia Parliamentary Commissioner (1978 Constitution, in operation 1981, 1982 law);[256] Antigua and Barbuda Ombudsman (1981 Constitution, 1994 law, in operation 1995);[257] and Belize

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251 See D.C. Rowat, "The Suitability of the Ombudsman Plan for Developing Countries" (1984) 50 Int'l Rev. Admin. Sciences 207 at 207-208; Mohamed, *ibid.*

252 *Guyana Independence Order 1966*, S.I. 1966/575 (U.K.) (May 16, 1966), Schedule 2, art. 52; Constitution of Guyana (1980), arts. 191-196; *Ombudsman Act* (No. 17 of 1967) ch. 19:04. The Ombudsman is appointed by the President after consultation with the Minority Leader. The Ombudsman investigates complaints of injustice sustained in consequence of a fault in public administration at the national and local levels, makes recommendations and reports annually and in special cases to the legislature. The ombudsman jurisdiction covers discrimination on the grounds of race, place of origin, political opinions, colour or creed, Constitution of Guyana (1980), *ibid.*, arts. 196, 149. See also "Comparative Analysis", *supra* note 116; Mohamed, *supra* note 250 at 79.

253 Constitution of the Republic of Trinidad and Tobago (1976), ss. 91-98; *Ombudsman Act* (1977), ch. 2:52. An Officer of Parliament, the Ombudsman is appointed by the President after consultation with the Prime Minister and Leader of the Opposition. The Ombudsman investigates injustice sustained in consequence of a fault in administration, and has a limited corruption mandate, see *infra* note 261. The Ombudsman has jurisdiction over national and local administration and can make inspections, recommendations and annual and special reports to the legislature. See G.A. Edoo, "Types of Complaints and the Complaint Handling Process" in *The Caribbean Experience, supra* note 53 at 91.

254 For further information on Jamaica's Public Defender and earlier ombudsman system see *infra* this Chapter.

255 *Ombudsman Act* (1980), ch. 8A. The Ombudsman of Barbados is appointed by the Governor-General with the approval of both houses of the legislature. On receipt of a complaint or on own-motion under certain conditions the Ombudsman investigates injustice caused by administrative conduct, and can make recommendations and reports annually and in special cases to the legislature. See "Comparative Analysis", *supra* note 116.

256 Saint Lucia Constitution Order 1978, ch. IX, ss. 110-117, Schedule 3; *Parliamentary Commissioner Act 1982*, No. 12 (1982). The Parliamentary Commissioner, an officer of Parliament, is appointed by the Governor-General after consultation with the Prime Minister and Leader of the Opposition. The Commissioner investigates injustice sustained as a result of a fault in administration and has a limited corruption mandate, see *infra* note 261. The Commissioner has jurisdiction over national and local administration and has the classical powers of recommendations and reporting. See L.M.P. Laurent, "The Role and Jurisdiction of the Office of the Parliamentary Commissioner in Saint Lucia" in *The Caribbean Experience*, *supra* note 53 at 72; Laurent, "The Promotion and Protection of Human Rights in the Caribbean – A Case Study by the Parliamentary Commissioner of Saint Lucia", *supra* note 95 at 198.

257 Constitution of Antigua and Barbuda (1981), s. 66; *Ombudsman Act, 1994*, No. 5 (1994). Appointed by resolutions of each house of Parliament as an officer of Parliament, the Ombudsman investigates complaints that a person has been aggrieved or has sustained injustice as a result of public

Ombudsman (1994 law, in operation 1999).[258] Most of these institutions follow the classical ombudsman model, with the function of investing administrative injustice. However, the Guyanese Ombudsman, due to the background events leading to its establishment, received an express human rights mandate, but only with relation to complaints of discrimination on the grounds of race, place of origin, political opinions, colour or creed.[259] The Belize Ombudsman received a broader human rights role – allowing it to take complaints of discrimination based on the grounds of religion, language, race, sex, colour or creed, plus all other constitutional human rights matters – and the office was also given a corruption-fighting mandate.[260] Both Saint Lucia and Trinidad and Tobago have mild corruption-fighting mandates.[261] More recently, Jamaica reformed its ombudsman institution by adding a human rights protection role and renaming it the Public Defender. Looking at overseas territories of the United Kingdom, the Turks and Caicos Islands and the British Virgin Islands have Complaints Commissioners, and Bermuda has had a Human Rights Commission since 1981 and recently obtained a constitutional amendment for an ombudsman, with legislation to follow.[262] Dominica – which has an ombudsman provision in its 1978 Constitution, Grenada and Saint Vincent and the Grenadines have expressed interest in establishing an ombudsman.[263]

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administration. The Ombudsman can make recommendations and makes annual and special reports to Parliament. See H. Thomas, "The Role of the Ombudsman in Antigua and Barbuda" in *The Caribbean Experience, ibid.* at 63.

258 *The Ombudsman Act, 1994* No. 7 (1994). The Belize Ombudsman is appointed by the Governor-General acting on the recommendations of both houses of the National Assembly. The Ombudsman has jurisdiction over both national and local government, and can investigate: corruption or other wrongdoing by government administration or an officer thereof, injustice, and injury or abuse sustained by a person or body of persons as a result of public administration. Abuse is defined to include discrimination on a number of grounds. The Act also permits the Ombudsman to investigate even when the complainant has a constitutional right to apply to the Supreme Court about breaches of constitutional human rights, indicating that the Ombudsman can also investigate constitutional human rights cases. The Ombudsman makes recommendations and reports annually and in special cases to the legislature. Belize also has a Contractor-General and an Integrity Commission.

259 Constitution of Guyana, *supra* note 252, arts. 196, 149.

260 *Supra* note 258.

261 Trinidad and Tobago Constitution, *supra* note 253, s. 94(2); Saint Lucia Constitution Order 1978, *supra* note 256, s. 113(2)-(3), both allowing the Ombudsman to investigate complaints of administrative injustice that raise issues of corruption or integrity of the public service, allows conditions resulting from or facilitating corruption to be investigated, but prevents the Ombudsman from investigating specific charges of corruption against individuals.

262 Turks and Caicos Islands, *Constitution Order 1988*, S.I. 1988, No. 247, Schedule 2, ss. 65-66 (Complaints Commissioner); UN Committee on the Rights of the Child, Concluding Observations: United Kingdom (Overseas Territories), UN Doc. CRC/C/15/Add.135 (Oct. 16, 2000), para. 5 (Complaints Commissioners: Turks and Caicos Islands, British Virgin Islands); Constitution of Bermuda, s. 93A and B (in force 2003) (ombudsman); Bermuda Human Rights Commission which has a discrimination focus, see W.J. Francis, "Management Problems of Ombudsman and Human Rights Institutions: The Bermuda Experience" in *The Caribbean Experience*, *supra* note 53 at 143.

263 E.g. UN Committee on the Rights of the Child – Concluding Comments: Grenada, UN Doc. CRC/C/15/Add.121 (Feb. 28, 2000), para. 9. See also Concluding Comments: United Kingdom (Overseas Territories), UN Doc. CRC/C/15/Add.135 (Oct. 16, 2000), para. 5 (Cayman Islands).

In the past decade, a few other Caribbean nations outside the Commonwealth have established classical or human rights ombudsmen. Haiti established a *Protecteur du Citoyen* in its 1987 Constitution and gave the institution a legislative base in 1995 after its move toward democratic government.[264] It is an office influenced by the Quebec *Protecteur* and Francophone *Médiateur* institutions. In early 2001, the Dominican Republic promulgated a law on a human rights ombudsman, the *Defensor del Pueblo*, influenced by the Spanish and Latin American models, although an appointment had not been made by mid-2003.[265] Puerto Rico also has a classical ombudsman, called the *Procurador del Ciudadano* (Citizen's Attorney).[266] However, there are still a number of Caribbean states and overseas dependent territories without ombudsmen or other national human rights institutions.[267]

Thus, ombudsmen protected by constitutional protection are those in Antigua and Barbuda, Guyana, Haiti, Saint Lucia, Trinidad and Tobago, and the future ombudsman in Bermuda, while the remaining classical and human rights ombudsmen only have statutory protection.[268] Most of the Caribbean ombudsmen are appointed by the head of state, either after consulting with legislative leaders or after the approval or consensus of the full legislature, while Antigua's Ombudsman and the prospective Dominican Republic *Defensor del Pueblo* are legislative appointees. Ombudsmen in the Caribbean with express corruption mandates are Belize and, in limited terms, Saint Lucia and Trinidad and Tobago. In terms of ombudsmen in the Caribbean with human rights functions, only the Jamaican Public Defender, the Dominican Republic *Defensor del Pueblo* and the Guyanese and Belize Ombudsmen have express mandates in addition to their ombudsman role. As

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264 Constitution of Haiti (1987), arts. 207-207-3; Decree (Dec. 16, 1995), the *Protecteur* is appointed by consensus between the Presidents of the Republic and both houses of the legislature to protect against all forms of abuse by the public administration. The *Protecteur* investigates complaints, makes recommendations and reports. The office is not fully operational. See "Comparative Analysis", *supra* note 116; UN Committee on the Rights of the Child, Concluding Observations: Haiti, UN Doc. CRC/C/15/Add.202 (March 18, 2003), para. 11; <www.democratie.francophonie.org/sijip/html/AOMF/>.

265 Created in *Ley 19-01* (Feb. 1, 2001), to be appointed by the legislature. The *Defensor* has the mandate to safeguard individual and collective constitutional rights against the public authorities and to strive for the proper functioning of the public administration and privatized public services. The *Defensor* can investigate, make recommendations, report, undertake inspections, provide international and domestic human rights education, and mediate in collective complaints. Deputies are to be designated for the areas of human rights, the environment, women's affairs, children and youth, and consumer affairs. See R.B. Martínez Portorreal, *En Busca del Defensor del Pueblo: La prehistoria de la creación del ombudsman dominicano* (Santo Domingo, 2001).

266 Established in 1977 as an executive office, becoming a legislative ombudsman in 1987 (*Ley 134*, July 1, 1977, am. by *Ley 6*, March 16, 1987, *Ley 432*, 2000). The *Procurador* is appointed by the Governor with the advice and consent of the majority of each house of the legislature. The *Procurador* investigates administrative conduct, makes recommendations and reports. See "Comparative Analysis", *supra* note 116; C.A. Pesquera, "Puerto Rico" in G.E. Caiden, ed., *International Handbook of the Ombudsman: Country Surveys* (Westport: Greenwood Press, 1983) at 263.

267 E.g. states without institutions are the Bahamas, Cuba, Dominica, Grenada, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname.

268 Barbados, Belize, Dominican Republic, Haiti, Jamaica (Public Defender and Political Ombudsman), Puerto Rico. See Meerabux, *supra* note 248 at 30.

noted earlier in this Chapter, ombudsmen without express human rights mandates, such as those in Saint Lucia and Antigua and Barbuda, do deal with some human rights cases in practice and even use international human rights law in their work.[269]

The Ombudsman, Good Governance and Human Rights Protection in the Caribbean: Selected Case Study

This section examines the Jamaican Public Defender, a classical ombudsman which was subsequently given an additional human rights mandate, and briefly discusses the new Political Ombudsman.

JAMAICA

Jamaica obtained its independence from Great Britain in 1962, and its legal system has been shaped by its British colonial heritage.[270] Jamaica established a traditional ombudsman in 1978.[271] The Ombudsman had considerable independence as a legislative appointee and had the powers to investigate whether injustice had been sustained by any person as a result of administrative conduct, make recommendations and report to the legislature.[272] Jamaica also instituted a separate office of the Political Ombudsman but, in 1994, the office of the Political Ombudsman was collapsed into that of the Ombudsman, giving the Ombudsman the additional duty to investigate action taken by any of the political parties, which allegedly breached any agreement in force between the parties or which was likely to prejudice good relations between them.[273]

However, the mandate of the Ombudsman was altered again – the ombudsman statute was repealed and new legislation entered into force in April 2000, creating a human rights ombudsman renamed the Public Defender.[274] The Public Defender is a commission of Parliament, appointed by the Governor-General after consultation with the Prime Minister and the Leader of the Opposition.[275] In addition to its ombudsman mandates, the reforms gave the Public Defender a human rights protection role. The new legislation enabled any person or body of persons who has sustained injustice or has suffered

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269 *Supra* notes 95 to 96.

270 C. Heyns and F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (The Hague: Kluwer Law International, 2002) at 348, 352.

271 *Ombudsman Act*, Act 23 (1978). See G.E. Green, "Jamaica" in *International Handbook of the Ombudsman: Country Surveys, supra* note 266 at 321.

272 *Ibid.*

273 *Ombudsman Act, supra* note 271, s. 12(1)(b). See also the Contractor-General to monitor the award of government contracts, D. McKoy, "The Jamaican Contractor-General: An Ombudsman for Contracts" (1990-1991) 9 Omb. J. 53.

274 *Public Defender (Interim) Act* (1999), Act 33 (in force April 16, 2000). See *The Office of the Public Defender – Its Role and Purpose* (2000). The legislation is interim pending work to amend the Constitution to provide for the Public Protector. See also the Jamaica Council for Human Rights.

275 *Public Defender (Interim) Act, ibid.*, s. 4. The Public Defender holds office until attaining the age of seventy years, *ibid.*, s. 5(1).

or is likely to suffer an infringement of constitutional rights as a result of any action taken by the public authorities to complain to the Public Defender.[276]

The Public Defender conducts an investigation and if an injustice or a constitutional infringement is found the Public Defender has the power to make recommendations for redress.[277] Usually, the Public Defender tries to resolve the problem through persuasion and negotiation with the administration.[278] The Public Defender can also recommend changes in laws or compensation for the complainant.[279] However, if the Public Defender considers that there is a constitutional rights issue that should be litigated the Public Defender can recommend that the complainant launch a court action against the government authority in question.[280] If this occurs, the complainant shall be provided with access to professional advice and given legal representation (and legal aid where necessary), although the Public Defender cannot go to court to obtain redress.[281] Rather, the Public Defender is required to compile a list of lawyers with expertise in constitutional law and has to invite the complainant to select a lawyer from the list (or if no selection is made, the Defender makes a recommendation from the list).[282] The constitutional case is litigated by this lawyer and paid for out of a special legal aid fund that is administered by the Public Defender.[283]

The Public Defender is not an advocate for complainants and, complying with his legislative mandate, may conclude at the end of an investigation that there has been no infringement of constitutional rights or that there is an infringement but it is not serious enough to warrant litigation.[284] If the latter occurs, a complainant can still attempt to go to court to pursue the constitutional issue but will have to proceed without the support provided by the Public Defender legislation.[285] The Public Defender can still make recommendations in these situations, including for the amendment of laws which infringe or may cause an infringement of constitutional rights.

Although with general maladministration complaints the Public Defender can launch investigations on receipt of a complaint or on his own-motion, with constitutional rights cases the Public Defender cannot launch own-motion cases and has to wait for a public complaint to pursue the matter.[286] Further, the Public Defender does not have jurisdiction over a number of areas, including actions relating to orders to the defence force or proceedings under the defence force legislation, and action which the Constitution prohibits courts of law from examining.[287]

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276 *Ibid.*, s. 13(1)(a).

277 *Ibid.*, s. 15. The Public Defender has strong investigatory powers, *ibid.*, ss. 17-19, 25.

278 *The Office of the Public Defender – Its Role and Purpose, supra* note 274 at 7.

279 *Public Defender (Interim) Act, supra* note 274, s. 16(11).

280 *Ibid.*, s. 15(4).

281 *Ibid.*, s. 15(5).

282 *Ibid.*, s. 15(5)-(6); *The Office of the Public Defender – Its Role and Purpose, supra* note 274 at 6-7.

283 *Public Defender (Interim) Act, ibid.*

284 *The Office of the Public Defender – Its Role and Purpose, supra* note 274 at 8.

285 *Ibid.* The funds are provided by Parliament and the accounts are audited annually by the Auditor-General, *Public Defender (Interim) Act, supra* note 274, s. 22.

286 *Public Defender (Interim) Act, supra* note 274, s. 15(1).

287 *Ibid.*, s. 13(2)-(3).

The Jamaican Constitution contains only civil and political rights.[288] Jamaica is a party to most of the major human rights treaties.[289] Although Jamaica is an OAS member and a party to the American Convention, it has not submitted to the jurisdiction of the Inter-American Court of Human Rights.[290] Jamaica follows a dualist approach to treaties, with the result that implementing legislation needs to be passed in order to change domestic law.[291]

In 2001, the Public Defender attempted to obtain compensation for youths detained by soldiers, investigated the conduct of security forces and criticized violence against homosexuals.[292] Also in 2001, the Public Defender took up the case of the right to freedom of religion of a Rastafarian prisoner, and launched a constitutional case against the government in 2002.[293] The Public Defender's argument is that the prisoner's right to freedom of religion was infringed by the prison officials because he was denied use of the prison chapel for a baptism and had no rights to receive visits from the Rastafarian clergy.[294] In 2002, the Public Defender successfully sought compensation from the government in several cases involving prisoners – one where small children were put in the jail cells with their mothers.[295] The Public Defender is also pursuing the case of a police officer whose murder conviction was overturned after the appeal was delayed for five years because the government failed to provide necessary documents to the Privy Council.[296]

In spring 2002, in the context of politically-motivated violence and in the runup to national elections, the Jamaican political parties signed a revised code of political conduct.[297] The code of conduct includes prohibitions on the use of violence, intimidation and bribery of voters.[298] In July 2002, the Jamaican legislature passed a statute that reconstituted the Office of the Political Ombudsman and took this particular function away from the Public Defender, on the grounds that the code requires dedicated monitoring and the function is inappropriate for the Public Defender.[299] The Political Ombudsman ensures that the terms of the new code of political conduct are observed and has the

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288 Constitution of Jamaica (1962, am. 1999), ch. III; Heyns and Viljoen, *supra* note 270 at 356.

289 Jamaica is a party to the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child, but not the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Heyns and Viljoen, *ibid.* at 353. Jamaica withdrew from the First Optional Protocol to the ICCPR in 1997, *ibid.*

290 *Supra* notes 29, 96; Heyns and Viljoen, *ibid.* at 348. The Jamaican government has also commented that it might withdraw from the American Convention, *ibid.*

291 *Ibid.* at 352.

292 U.S. Department of State, *Country Reports on Human Rights Practices for 2001* (2002) 2907.

293 *Country Reports 2002*, *supra* note 163 at 2676; U.S. Department of State, *International Religious Freedom Report 2002*: Jamaica (Oct. 7, 2002).

294 *Ibid.*

295 *Country Reports 2002*, *supra* note 163 at 2677.

296 *Ibid.*

297 V. Daley, "Revised political code of conduct ratified", *Jamaica Gleaner* (June 12, 2002).

298 *Ibid.*

299 *Political Ombudsman (Interim) Act* (2002), *supra* note 274; *Amnesty International: Report 2003*, *supra* note 165 at 141; *Country Reports 2002*, *supra* note 163 at 2677; "Senate approves Political Ombudsman Act", *The Jamaica Observer* (July 29, 2002).

power to investigate complaints against political parties, their members or supporters when he is of the opinion that the conduct constitutes a breach of the code or any agreement or arrangement between parties, or is likely to prejudice good relations between the political parties.[300] The legislation also permits the Political Ombudsman to appoint a tribunal composed of representatives of the political parties to assist him in an investigation. The October 2002 election resulted in almost sixty complaints investigated by the Political Ombudsman.[301] However, the Public Defender still is involved with matters of political violence – in 2002 he engaged in talks with the government about the possibility of compensation for the victims of the 2001 West Kingston violence.[302]

The legislative reform movement in Jamaica has turned the traditional ombudsman into a hybrid who has been given a human rights protection function that is somewhat different compared to the human rights ombudsman models in Europe, Latin America and Africa. A human rights ombudsman is needed in Jamaica. The country has human rights problems, including high levels of security force violence, prolonged detention without charge or trial, torture and mistreatment of detainees, high numbers on death row, poor prison conditions, discrimination, child labour and violence against women.[303] The courts are overworked with resultant delay in the judicial process.[304] Given the recent levels of political violence, Jamaica has also seen the importance of recreating a separate Political Ombudsman.

Classical and Hybrid Ombudsmen in the Americas

This chapter illustrates how the human rights ombudsman model is used through most of Latin America. Human rights ombudsmen in the Americas play an active role in applying international and domestic human rights norms in their human rights protection activities. For example, this occurs in the resolution of investigations, bringing court actions, advising government on the harmonization of domestic law with international human rights law, calling on the government to sign and ratify human rights treaties, educating public officials and the general public on human rights, and engaging with the Inter-American human rights system.[305] In addition to their human rights mandate, Latin American ombudsmen also contribute to good governance through their maladministration investigations and other work. Caribbean ombudsmen are primarily classical ombudsmen, although a few offices have an additional human rights mandate and several have weak anti-corruption functions. Ombudsmen in Canada and the U.S. are classical ombudsmen. While classical ombudsmen focus on administrative justice and

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300 See *Country Reports 2002, ibid.*

301 "Ombudsman continues to probe post-election complaints", *Jamaica Observer* (Jan. 3, 2003).

302 *Amnesty International: Report 2003, supra* note 165 at 142.

303 *Country Reports 2002, supra* note 163 at 2671; *Amnesty International: Report 2003, supra* note 165 at 141; *Amnesty International: Report 2002, supra* note 107 at 139-140; *Country Reports 2000, supra* note 161 at 2662.

304 *Country Reports 2000, ibid.*

305 See Méndez and Aguilar, *supra* note 33 at 58-62, 65-66.

good governance, some classical ombudsmen in the Caribbean and North America address human rights in some of their investigations, as discussed in this chapter and Chapters 4 and 9.

In comparison to the other regional human rights systems, the Inter-American human rights system is relatively more accessible to domestic ombudsmen and both the Inter-American Commission and Inter-American Court are increasingly relying on human rights reports and evidence provided by ombudsmen. To date, it is the work of human rights ombudsmen that has been used in the Inter-American human rights system. Also, a number of Latin American human rights ombudsmen have turned to the Inter-American human rights system to try to resolve certain cases which have not met with success at the domestic level.

CHAPTER SEVEN

The Ombudsman, Good Governance and Human Rights in Africa, Asia and the Pacific Region

Introduction

The ombudsman was introduced in some Commonwealth countries in Africa, Asia and the Pacific, starting in New Zealand in 1962, followed by Tanzania and Mauritius during the 1960s, and in others during the 1970s and 1980s. Even at this stage, although the classical ombudsman model was predominant, adaptations began to occur, such as the executive ombudsman, use of multi-member bodies or conferral of leadership code enforcement duties on the ombudsman. Ombudsmen were established in greater numbers during the 1990s, expanding outside the Commonwealth. Several factors can been seen as contributing to this development, such as the democratization of a number of countries in these regions during the 1990s and the increased interest of the international community, especially development agencies and donor governments, in good governance and national human rights institutions. Starting in the 1990s, classical and hybrid ombudsmen, human rights commissions and specialized institutions began to proliferate in Africa and, to a lesser extent, in Asia and the Pacific. In particular, extreme examples of hybrid ombudsmen can be found in Africa, with institutions that add human rights protection, anti-corruption, leadership code enforcement and/or environmental protection mandates to the ombudsman function. In Asia and the Pacific region, while human rights ombudsmen are still the exception, anti-corruption and leadership code enforcement mandates have often been conferred on ombudsmen.

This chapter will explore the variety of ombudsmen in Africa, Asia and the Pacific region and their different mandates in promoting good governance and human rights protection. In particular, the multiple roles of some of the more recent ombudsmen will be highlighted in the case studies. The developing regional human rights system in Africa and the possible role of the ombudsman will also be examined. While there is no regional human rights system in Asia or the Pacific, the increase in national human rights institutions indicates some interest in developing a more indigenous approach to human rights protection and promotion.

The African Human Rights System and the Role of the Ombudsman

The African Charter on Human and Peoples' Rights (African Charter or Banjul Charter) was drafted under the aegis of the Organization of African Unity (OAU), entering into force in 1986, and containing first, second and third generation human rights.[1] By late 2001, most of the states in Africa and all OAU members were parties to the African Charter.[2] As noted in Chapter 3, the Constitutive Act of the African Union (AU) was adopted in 2000, it was formally established in 2001 and inaugurated on July 9, 2002, and will replace the OAU.[3] Human rights protection provisions are found in both the objectives and principles of the AU.[4]

The African Commission on Human Rights (African Commission) was established in the African Charter.[5] The African Commission has a variety of functions, including promotional, research, protective and interpretive roles.[6] As discussed in Chapter 4, the African Charter calls on the African Commission to encourage national and local institutions concerned with human and peoples' rights.[7] Among its duties, the Commission can, in limited circumstances, take communications from entities other than state parties.[8] Non-state petitioners are not limited to victims, with the result that third parties can lodge petitions, and many NGOs have taken advantage of this possibility.[9] Given the broad language of the Charter, domestic ombudsmen and other national human rights institutions from member states should be able to make communications to the Commission arguing that a member state has violated one or more of its African Charter obligations.

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1 African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3, (1982) 21 Int'l Legal Mat. 58 (adopted June 27, 1981, in force Oct. 21, 1986). See V.O. Orlu Nmehielle, *The African Human Rights System: Its Laws, Practice, and Institutions* (The Hague: Martinus Nijhoff Pub., 2001); J. Allain and A. O'Shea, "African Disunity: Comparing Human Rights Law and Practice of North and South African States" (2002) 24 H.R.Q. 86. See also the African Charter on the Rights and Welfare of the Child, rep. in M.R. Saulle and F. Kojanec, *The Rights of the Child: International Instruments* (Irvington-on-Hudson: Transnational Pub. Inc., 1995) at 759 (in force 1999).

2 As of Aug. 2003, 53 states were contracting parties to the African Charter.

3 See *supra* Chapter 3, text accompanying notes 117 to 118; Orlu Nmehielle, *supra* note 1 at 71-73.

4 Constitutive Act of the African Union (adopted July 11, 2000), (2000) 8 African Yrbk. Int'l Law 479, arts. 3(h), 4(l), (m), (n). Art. 3(h) states that one of the objectives of the AU is to "promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments" and the principles in art. 4(l), (m) and (n) are promotion of gender equality; respect for democratic principles, human rights, the rule of law and good governance; and the promotion of social justice.

5 African Charter on Human and Peoples' Rights, *supra* note 1, arts. 30-44; see <www.achpr.org>.

6 African Charter on Human and Peoples' Rights, *ibid.*, arts. 45-63; Orlu Nmehielle, *supra* note 1 at 175-183; C.A. Odinkalu and C. Christensen, "The African Commission on Human and Peoples' Rights: The Development of its Non-State Communication Procedures" (1998) 20 H.R.Q. 235.

7 African Charter of Human and Peoples' Rights, *ibid.*, art. 45(1)(a).

8 *Ibid.*, arts. 46-54, 55-59, 62; Orlu Nmehielle, *supra* note 1 at 191-241; Odinkalu and Christensen, *supra* note 6 at 242-269; N.J. Udombana, "So Far So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights" (2003) 97 Am. J. Int'l Law 1.

9 African Charter of Human and Peoples' Rights, *ibid.*, art. 55 states that communications "other than those of State Parties" can be made; see <www.achpr.org>; Odinkalu and Christensen, *ibid.*

The Commission, however, is a non-adjudicative body with relatively weak powers. In any event, ombudsmen in Africa have not taken advantage of the possibility of submitting communications to the Commission. This stands in contrast with the Inter-American human rights system with similar initial access rules, discussed in Chapter 6, where some Latin American human rights ombudsmen have begun to use the regional system proactively. In 1998, the African Commission resolved to allow African national human rights institutions to have observer status before the Commission if they meet certain criteria, including conformity with the Paris Principles.[10]

A treaty to establish an African Court of Human Rights (African Court) was adopted in 1998, and will enter into force in early 2004.[11] The African Court will be able to hear contentious cases and provide advisory opinions.[12] In contentious cases, the African Commission and relevant states are permitted to submit cases to the African Court and, in addition, "[t]he Court may entitle relevant Non Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it" if a state makes a declaration accepting the competence of the Court to receive these cases.[13] Advisory opinions can be requested by any OAU member state, the OAU and any of its organs, or "any African organization recognized by the OAU" (the OAU is being replaced by the AU).[14] Thus, in limited situations, ombudsmen and other national human rights institutions may be able to access the future African Court directly in contentious cases i.e., possibly, in the case of an ombudsman or commissioner, in an individual capacity on behalf of a victim. However, as noted above, in contentious cases there are additional hurdles as the relevant state must have accepted the competence of the African Court to receive individual complaints and the Court itself must exercise its discretion to permit such a complaint. In addition, similar to the Inter-American system, the African Commission could bring a complaint before the Court in which a national human rights institution has an interest. In advisory opinions, national human rights institutions do not appear to fall within any of the bodies permitted to request an opinion from the Court unless they are recognized in future by the AU.

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[10] African Commision on Human and Peoples' Rights, Res. No. 30 (Oct. 31, 1998); Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa* (New York: Human Rights Watch, 2001), "Regional Initiatives" [hereinafter *Protectors or Pretenders?*]. For the Paris Principles see *supra* Chapter 4, text accompanying notes 76 to 79.

[11] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, rep. in (1998) 6 African Yrbk. Int'l Law 419. See M. Mutua, "The African Human Rights Court: A Two-Legged Stool?" (1999) 21 H.R.Q. 342; Orlu Nmehielle, *supra* note 1 at 259-308.

[12] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, *ibid.*, arts. 3-4.

[13] *Ibid.*, arts. 5(1),(3), 34(6). The Court must also consider the admissibility requirements used for communications to the Commission, *ibid.*, art. 6(2).

[14] *Ibid.*, art. 4(1).

The Ombudsman, Good Governance and Human Rights in Africa

Overview of the Ombudsman in Africa

Although the first ombudsman in Africa was established in Tanzania in 1966, followed by a few more ombudsmen through to the 1980s, the popularity of the ombudsman and other national human rights institutions only materially increased in Africa in the 1990s.

Until the last decade, most post-independence states in Africa were military regimes or one-party states. A number of African states continue to suffer from recurrent civil conflict. As a result, the history of the ombudsman in Africa is fraught with complicating factors.[15] From the outset, African ombudsmen did not duplicate the classical ombudsman model, and adapted the concept to fit the political, legal, economic and social particularities of Africa. One result is that only about fifty percent of ombudsmen in Africa are protected in the state's constitution in addition to legislation, with the remainder created only by statute or executive decree. The latter are more vulnerable to abolition or weakening of the institution. Another result is that most ombudsmen in African states are executive ombudsmen, albeit in a few cases the executive power is limited.[16] As discussed in Chapter 1, there is debate over the ability of an executive ombudsman to operate with independence and impartiality given that investigations are taken against the appointing body, although there is also the view that an executive ombudsman can work effectively depending on the political-legal structure of government and the framework of the institution.[17] Emile Francis Short, Chairperson of

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[15] For a history of the development of the ombudsman in Africa, see E.F. Short, "The Development and Future of the Ombudsman Concept in Africa" (2001) 5 Int'l Omb. Yrbk. 56; V.O. Ayeni, "Evolution of and prospects for the ombudsman in Southern Africa" (1997) 63 Int'l Rev. Admin. Sciences 543 at 547-555. See also V.O. Ayeni, "The Changing Nature and Contemporary Role of National Ombudsman Institutions in the Commonwealth and Elsewhere: Lessons of Experience" (2000) 4 Int'l Omb. Yrbk. 91; J. Edokpa, "Strategies for Improving Ombudsman Institutions in Africa" (1999) 3 Int'l Omb. Yrbk. 171; V. Ayeni, "Ombudsman Institutions and Democracy in Africa – A Gender Perspective" (1997) 1 Int'l Omb. Yrbk. 61; V. Ayeni, "Evaluating Ombudsman Programmes" (1993) 11 Omb. J. 67; V. Ayeni, Training for Ombudsman Work in Africa – An Agenda for Recovery" (1992) 10 Omb. J. 39; M.R.K. Matembe, "Human Rights of the Disadvantaged Under the Ombudsman" (1992) 10 Omb. J. 139; B. Thompson, "Spatial Diffusion of the Ombudsman Institution: African Adaptations of a European Innovation – The Consolidation Problem" (1992) 10 Omb. J. 57; J. Hatchard, "The Ombudsman in Africa Revisited" (1991) 40 Int'l & Comp. Law Q. 937; J. Hatchard, "The Institution of the Ombudsman in Africa With Special Reference to Zimbabwe" (1986) 35 Int'l & Comp. Law Q. 255.

[16] See *infra* this Chapter, Malawi's Ombudsman, appointed by a Public Appointments Committee of the legislature and Ethiopia's Ombudsmen to be appointed by the legislature. Among executive appointments see e.g. the Mauritius Ombudsman, appointed by the President who has no material executive power; South Africa's Public Protector, appointed by the President on the nomination of the legislature after a legislative committee interviews all the candidates; and Namibia and Zimbabwe Ombudsmen, appointed by the President on the recommendation of a Judicial Service Commission.

[17] See e.g. R. Gregory, "Building an Ombudsman Scheme: Provisions and Operating Practices" (1994) 12 Omb. J. 83, rep. in L.C. Reif, ed, *The International Ombudsman Anthology: Selected Writings*

Ghana's Commission on Human Rights and Administrative Justice, argues that "the majority of African ombudsman institutions still retain the essential characteristics of the classical model."[18]

At the same time as some African states moved towards democratic forms of government in the 1990s, the international community focussed on the promotion of good governance and the establishment of national human rights institutions.[19] Many African states established new national human rights institutions in this period, including human rights commissions, classical ombudsmen and hybrid ombudsmen.[20] A number of these countries have created hybrid ombudsmen with additional human rights protection, corruption-fighting and/or leadership code enforcement powers. Several of these hybrid ombudsmen even have an environmental protection role, namely the Ombudsman of Namibia and the Ombudsman of Lesotho. A few other countries have reformed their classical ombudsman institutions. For example, Ghana and Tanzania shut down their classical ombudsman institutions and replaced them with hybrid ombudsmen. While the earlier classical ombudsmen were usually more restricted in their powers, some of the new ombudsmen have been given a broader jurisdiction and stronger powers.

There has been a mixed record for these reforming states in the past fifteen years. The political legacy of these states lingers on, as the paucity of a heritage of independent state institutions in the region affects current attitudes and in many countries "the political culture of the military or one-party state has not really been overcome".[21] Short has recognized the difficulties faced by classical and hybrid ombudsmen in Africa:

> In many of the emerging democracies of Africa . . . the ombudsman faces peculiar challenges. The checks and balances expected to exist between the various organs of state are weak, the realization of good governance is still a huge challenge and human rights abuses are rampant. In many African countries, the rule of law is not regularly observed and the arbitrary exercise of state power is rather pervasive. Corruption is rampant and institutionalized.[22]

From the International Ombudsman Institute (The Hague, Kluwer Law International, 1999) 132, at 134-136 [hereinafter *International Ombudsman Anthology*], for both sides of the debate, and M.G.J. Kimweri, "The Effectiveness of an Executive Ombudsman" in L. Reif, M. Marshall and C. Ferris, eds., *The Ombudsman: Diversity and Development* (Edmonton: International Ombudsman Institute, 1993) at 37, rep. in *International Ombudsman Anthology, ibid.* at 379.

18 Short, "The Development and Future of the Ombudsman Concept in Africa", *supra* note 15 at 58.

19 For discussion of good governance see *supra* Chapter 3 and for national human rights institutions see *supra* Chapter 4.

20 See R. Carver and P. Hunt, "National Human Rights Institutions in Africa" in K. Hossain et al., eds., *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (The Hague: Kluwer Law International, 2001) at 733 [hereinafter *Human Rights Commissions and Ombudsman Offices*]; *Protectors or Pretenders?, supra* note 10; R. Carver, "Some Bright Spots: National Human Rights Institutions in Africa" (2000) 15:2 Can. H.R. Foundation News. 20.

21 International Council on Human Rights Policy, *Performance & legitimacy: national human rights institutions* (Versoix: International Council on Human Rights Policy, 2000) at 57 [hereinafter *Performance & legitimacy*].

22 Short, "The Development and Future of the Ombudsman Concept in Africa", *supra* note 15 at 57.

By 2003, classical and hybrid ombudsmen are found in Africa as follows: Botswana Ombudsman (1995 law, in operation 1997);[23] Burkina Faso *Médiateur* (1994 decree and law, in operation 1996);[24] Chad *Médiateur*;[25] Republic of the Congo *Médiateur*;[26] Côte d'Ivoire *Grand Médiateur* (2000 Constitution, not in operation by early 2003);[27] Djibouti *Médiateur* (1999, in operation 2000);[28] Ethiopia Ombudsman (1994 Constitution, 2000 law, not in operation by mid-2003);[29] Gabon *Médiateur*;[30] Gambia Ombudsman (1997

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[23] The Ombudsman, established in the 1995 *Ombudsman Act* with a classical mandate to investigate cases of "injustice in consequence of maladministration" committed by administrative authorities (excluding, e.g., the police and defence forces, civil service appointments), makes recommendations and reports to the legislature. The Ombudsman is appointed by the President after consulting the legislature's Leader of the Opposition. See *Ombudsman Act 1995*, rep. in (1997) 23:1-2 Commonwealth Law Bull. 375; V. Ayeni and K.C. Sharma, eds., *Ombudsman in Botswana* (London: Commonwealth Secretariat, 2000); L.A. Maine, "The Ombudsman in Botswana: Case Study of a Newly Established Institution" in V. Ayeni, ed., *The Ombudsman and Good Governance in the Kingdom of Lesotho* (London: Commonwealth Secretariat, 2000) at 67; E.K. Quansah, "The Ombudsman Arrives in Botswana: A Note on the Ombudsman Act, 1995"(1995) 39 J. African Law 220; V. Ayeni, "An Ombudsman for Botswana?" (1994) 12 Omb. J. 65.

[24] *Decree No. 94-219* (June 13, 1994), promulgating *Organic Law No. 22/94* (May 17, 1994). Appointed by the President after consultation with the Prime Minister, and the Presidents of the houses of the legislature and of the Supreme Court. The *Médiateur* investigates complaints about poor public administration, makes recommendations and reports annually to the President, legislature and President of the Supreme Court. The *Médiateur* can also make recommendations to the President for changes to laws and regulations. See <www.mediateur.gov.bf>; <www.democratie.francophonie.org/sijip/html/AOMF/>.

[25] See <www.democratie.francophonie.org/sijip/html/AOMF/>.

[26] See <www.democratie.francophonie.org/sijip/html/AOMF/>. Formerly Congo-Brazzaville.

[27] Côte d'Ivoire Constitution (2000), arts. 115-118. To be appointed by the President on the advice of the President of the National Assembly. A human rights commission is also planned. See UN Committee on the Elimination of Racial Discrimination, Concluding Observations: Côte d'Ivoire, UN Doc. CERD/C/62/CO/1 (March 21, 2003), paras. 6, 18; <www.democratie.francophonie.org/sijip/html/AOMF/>.

[28] Created by *Law* No. 51/AN/99 (Aug. 21, 1999), the *Médiateur* is appointed by the President, investigates complaints of poor administration against both national and local public administration, makes recommendations and reports annually to the President and Parliament. In 2000, 492 complaints were received mainly against the Ministries of Finance, the Interior and Employment and National Solidarity. See <www.ifrance.com/mediateurdjibouti/>; U.S. State Department, *Country Reports on Human Rights Practices for 2002* (2003) at 194 [hereinafter *Country Reports 2002*]; <www.democratie.francophonie.org/sijip/html/AOMF/>.

[29] Ethiopia's Ombudsman will be a multiple-member body, appointed by and accountable to the legislature. The Ombudsman is to bring about good governance based on the rule of law, by way of ensuring that citizen's rights are respected by executive organs. The Ombudsman is a human rights ombudsman: ensuring that administrative directives, decisions and practices do not violate constitutional rights and laws; receiving and investigating maladministration complaints, and making recommendations; researching and conducting studies on curbing maladministration; and making recommendations for the amendment of laws/practice and the enactment of new laws/policies to obtain better governance. Own-motion investigations can be launched. One Ombudsman will head a women's affairs and children's department. Ethiopia also will have a Human Rights Commission. The ombudsman law determines which institution has jurisdiction when a case raises human rights issues. See 1994 Constitution of the Federal Democratic Republic of Ethiopia, art. 55(15) and *Proclamation No. 211/2000, A Proclamation to Provide for the Establishment of the Institution of the Ombudsman*, No. 211/2000 (July 4, 2000), rep. in *Human Rights Commissions and Ombudsman Offices, supra* note 20 at 849; M. Abdo, "Challenges Facing the New Ethiopian Ombudsman Institution" (2002) 6 Int'l Omb. Yrbk. 77; UN Committee on the Rights of the Child, Concluding Observations: Ethiopia, UN Doc. CRC/C/15/Add.144 (Feb. 21, 2001), paras. 5, 20-21.

[30] See <www.democratie.francophonie.org/sijip/html/AOMF/>.

Constitution, 1999 law);[31] Ghana Ombudsman (1969 and 1979 Constitutions, 1970 and 1980 laws, in operation 1980 to early 1990s), replaced by 1993 Commission for Human Rights and Administrative Justice (1992 Constitution, 1993 law);[32] Lesotho Ombudsman (1993 Constitution, 1996 law);[33] Madagascar *Médiateur* (1992 Ordinance);[34] Malawi Ombudsman (1994 Constitution, in operation 1995, 1996 law);[35] Mali *Médiateur* (1997 law);[36] Mauritania *Médiateur*;[37] Mauritius Ombudsman (1967 Constitution, 1969 law, in operation 1970);[38] Morocco *Wali Diwan Al-Madhalim* (Ombudsman) (2002 royal decree);[39]

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31 Constitution of Gambia (1997), s. 163, in operation 1999.

32 For a more detailed discussion see *infra* this Chapter.

33 Established in Lesotho's 1993 Constitution, ss. 134-135, and *Ombudsman Act*, (1996), the Ombudsman has jurisdiction over injustice; maladministration; corruption; violations of fundamental rights and freedoms by administrative authorities; and degradation, depletion, destruction or pollution of the natural resources, environment or ecosystems of Lesotho. The Ombudsman is appointed by the monarch on the advice of the Prime Minister, and reports to Parliament. See *The Ombudsman and Good Governance in the Kingdom of Lesotho*, *supra* note 23; H.M. Nts'aba, "Lesotho's Ombudsman Experience" in *Ombudsman in Botswana*, *supra* note 23 at 107.

34 Ord. No. 92-012 (April 29, 1992). The *Médiateur* is appointed by executive decree. See <www.democratie.francophonie.org/sijip/html/AOMF/>.

35 Established in the 1994 Constitution of Malawi, ss. 15(2), 120-128, and the *Ombudsman Act, 1996* to investigate injustice and constitutional human rights breaches. The Ombudsman is appointed by a committee of the National Assembly and reports to the Assembly. Malawi also has a Human Rights Commission, Prisons Inspectorate and Anti-Corruption Bureau. The Ombudsman is a member of the Human Rights Commission, Prisons Inspectorate, Police Service Commission and Senate. The Ombudsman is subject to judicial review. Recent threats to the rule of law and state institutions in Malawi, including the Ombudsman, are discussed in International Bar Association report, <www.ibanet.org/pdf/MalawiReport1.pdf> (Aug. 2002). See E.D.A. Chibwana, "The Institution of the Ombudsman in Malawi" in *The Ombudsman and Good Governance in the Kingdom of Lesotho*, *supra* note 23 at 71; J. Makoza Chirwa, "A General Overview of the Set up of the Malawi Office of the Ombudsman" in *Human Rights Commissions and Ombudsman Offices*, *supra* note 20 at 533; *Country Reports 2002*, *supra* note 28 at 374.

36 Created in *Law* No. 97-022 (March 14, 1997), the *Médiateur* is appointed by the President and investigates complaints of poor administration. See UN Human Rights Committee, Concluding Observations: Mali, UN Doc. CCPR/CO/77/MLI (April 16, 2003), para. 4; <www.democratie.francophonie.org/sijip/html/AOMF/>.

37 See <www.democratie.francophonie.org/sijip/html/AOMF/>.

38 Enshrined in the 1967 Constitution of Mauritius (in force 1968), ss. 96-102A, and the 1969 *Ombudsman Act*, the first Ombudsman was appointed in 1970. The Ombudsman is appointed by the President after consulting the Prime Minister, the Leader of the Opposition and other party leaders. On receipt of a complaint or on own-motion the Ombudsman investigates injustice in consequence of maladministration and allegations of fraud or corruption made against listed public officials. The Ombudsman also has jurisdiction over the police and prisons. The Ombudsman makes recommendations and reports annually to the President, with the report also sent to Parliament. The Ombudsman did investigate human rights complaints until the Human Rights Commission was established in April 2001. See S.M. Hatteea, "The Ombudsman in Mauritius – Thirty Years On" (1999) 3 Int'l Omb. Yrbk. 165; V. Bhadain, "The Institution of the Ombudsman in Mauritius" in *Human Rights Commissions and Ombudsman Offices, supra* note 20 at 315; *Country Reports 2002*, *supra* note 28 at 403; R. Sewgobind, "The Ombudsman Institution in Mauritius", *I.O.I. Occasional Paper* No. 8 (Edmonton: International Ombudsman Institute, 1980) at 21-24; <www.democratie.francophonie.org/sijip/html/AOMF/>.

39 "Moroccan king appoints ombudsman, inaugurates human rights council", *BBC Monitoring Service* (Dec. 10, 2002); UN Committee on the Elimination of Racial Discrimination, Concluding Observations: Morocco, UN Doc. CERD/C/62/CO/5 (March 21, 2003), para. 6.

Namibia Ombudsman (1990 Constitution and law, in operation 1992);[40] Nigeria Public Complaints Commission (1975 military decree, 1990 law);[41] Rwanda Ombudsman (2003 Constitution and presidential decree);[42] Senegal *Médiateur* (1991 decree and law);[43] Seychelles Ombudsman (1993 Constitution);[44] Sierra Leone Ombudsman (1991 Constitution, 1997 law, in operation 2002);[45] South Africa Public Protector (1993 and 1996 Constitutions, 1994 law, in operation 1995);[46] Sudan Public Grievances and Correction Board (1973 Constitution and 1974 law to 1985, replaced by 1995 decree);[47] Tanzania Permanent Commission of Enquiry (1965 and 1977 Constitutions, 1966 law to 2001)

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[40] For a more detailed discussion see *infra* this Chapter. See also 1986 ombudsman while under South African control.

[41] Established by Military Decree No. 31 in 1975, as. am., the institution has been maintained through military and civilian governments to the present, now supported by the *Public Complaints Commission Act*, ch. 377 (1990). Commissioners investigate, on receipt of a complaint or on own-motion, administrative conduct that is illegal or unfair and make recommendations thereon. See J.L. Edokpa, "The Ombudsman Institution – The Nigerian Experience" in *Human Rights Commissions and Ombudsman Offices*, *supra* note 20 at 561; V. Ayeni, "State Complaints Offices in Nigeria – Coping With a Federalized Ombudsman System in the Third World" (1990-91) 9 Omb. J. 73; T. Agarah, "The Ombudsman System in Nigeria: An Assessment" (1989) 35 Indian J. Public Admin. 125; M.A. Ikhariale, "The Constitutional Reform of the Ombudsman System in Nigeria" (1989) 8 Omb. J. 113; V.O. Ayeni, "The Adoption of the Ombudsman Plan in Nigeria: Background and Aftermath of Decree 31 of 1975" (1984-85) 4 Omb. J. 3. See also 2000 Independent Corrupt Practices and Other Related Offences Commission (ICPC).

[42] Created in the 2003 Rwandan Constitution as an anti-corruption ombudsman with jurisdiction over public and private bodies, a presidential decree was passed and the executive appointed the ombudsman in Oct. 2003, "Rwanda: Draft constitution adopted", *BBC Monitoring Service* (April 23, 2003); "Rwandan president chairs first post-poll cabinet meeting; appoints government officials", *BBC Monitoring Service* (Oct. 25, 2003); "Cabinet appoints state ombudsman", *Xinhua* (Oct. 27, 2003).

[43] *Law No. 91-14* (Feb. 11, 1991), implemented by *Decree No. 91-140* (Feb. 12, 1991). Senegal's *Médiateur* takes complaints concerning national and local administration, makes recommendations and reports to the President. See UN Human Rights Committee, Concluding Observations: Senegal, UN Doc. CCPR/C/79/Add.82 (Nov. 19, 1997), para. 5; <www.democratie.francophonie.org/sijip/html/AOMF/>.

[44] The Ombudsman is established and empowered in the Seychelles Constitution (1993), ss. 143-144 and Schedule 5. Part 3 contains a Charter of Fundamental Rights and Freedoms. The Ombudsman is appointed by the President from candidates proposed by the Constitutional Appointments Authority, and is given constitutional independence. The Ombudsman can investigate complaints of injustice, infringement of fundamental rights, fraud and corruption. The Ombudsman makes recommendations and reports to the President and National Assembly. The Ombudsman can also assist a complainant in legal proceedings concerning a breach of the Charter of Fundamental Rights and, with leave of the court, can become a party to the proceedings. The Ombudsman can initiate court action to determine the constitutionality of a law. See <www.democratie.francophonie.org/sijip/html/AOMF/>.

[45] Constitution of Sierra Leone (1991), s. 146; 1997 legislation (in force 2002). The Constitution requires Parliament to establish an Ombudsman by legislation with a mandate to include the investigation of administrative conduct. For recent peace-building developments in Sierra Leone involving the human rights commission see *infra* Chapter 8.

[46] For a more detailed discussion see *infra* this Chapter. See also Advocate-General followed by Ombudsman during apartheid era.

[47] The People's Assembly Committee for Administrative Control, established in the 1973 Constitution and 1974 law, was shut down in 1985. The Public Control and Administrative Evaluation Bureau was established by 1995 decree, appointed by the President. See Hatchard, "The Ombudsman in Africa Revisited", *supra* note 15 at 938; Hatchard, "The Institution of the Ombudsman in Africa With Special Reference to Zimbabwe", *supra* note 15 at 256.

replaced by Commission for Human Rights and Good Governance (2000 constitutional amendments, 2001 law, in operation 2002),[48] Tunisia *Médiateur Administratif* (1992 decree, 1993 law);[49] Uganda Inspectorate of Government (1987 law replaced by 2002 law, 1995 Constitution);[50] Zambia Commission for Investigations (1973 Constitution and 1974 law, in operation 1974, replaced by 1991 law and 1996 Constitution);[51] and Zimbabwe Ombudsman (1979 Constitution and 1982 law, both amended).[52]

In 2003, Kenya took steps to establish an ombudsman in a draft constitution.[53] Cape

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[48] The Permanent Commission of Enquiry (PCE), in the 1965 Interim Constitution, maintained in the 1977 Constitution, with the *Permanent Commission of Enquiry Act*, Act No. 25 (1966) and Act No. 1 (1980), was an executive ombudsman composed of 5 members. With a classical mandate, the PCE investigated administrative misconduct, but in practice handled some human rights and corruption cases. There were mixed views on its effectiveness. On the PCE see J.F. Mbwiliza, "The Permanent Commission of Enquiry: For Justice and Promotion of Human Rights in Tanzania" (1999) 3 Int'l Omb. Yrbk. 150; Carver and Hunt, *supra* note 20 at 744; Kimweri, "The Effectiveness of an Executive Ombudsman", *supra* note 17; M.G.J. Kimweri, "Twenty-Five Years of the Permanent Commission of Enquiry (Tanzania Ombudsman Office): Dream and Reality" (1992) 10 Omb. J. 95; P.M. Norton, "The Tanzanian Ombudsman" (1973) 22 Int'l & Comp. Law Q. 603; B. Frank, "The Tanzanian Permanent Commission of Enquiry – The Ombudsman" (1972) 2 Denver J. Int'l Law & Pol'y 255. On the new hybrid see L. Magawa, "Tanzania's Commission for Human Rights and Good Governance: A Critique of the Legislation" (2002) 6 Int'l Omb. Yrbk. 101; *infra* text accompanying notes 107 to 109.

[49] *Decree No. 92-2143* (Dec. 10, 1992), *Law No. 93-51* (May 3, 1993). Attached to the President and appointed by decree, Tunisia's *Médiateur* takes complaints about national and local administration, makes recommendations and reports to the President. See <www.democratie.francophonie.org/sijip/html/AOMF/>.

[50] For a more detailed discussion see *infra* this Chapter.

[51] Established in the 1973 Constitution and 1974 legislation, replaced by 1991 *Commissioner for Investigations Act*, Act No. 20, c. 39 and the 1996 Constitution, Zambia's Investigator-General and three commissioners have jurisdiction over maladministration and abuse of office. The Inspector-General is appointed by, makes recommendations to and reports in every case to the President. Annual reports are made to the legislature. The President can terminate an investigation. In 2003, Transparency International stated that a decade of government corruption and impunity plus gross underfunding had produced a "moribund" ombudsman, Transparency International, *National Integrity Systems, Transparency International Country Study Report: Zambia 2003* at 6, 42, 76. See J.K. Kampekete, "The Investigator-General (Ombudsman) of Zambia" in *Human Rights Commissions and Ombudsman Offices, supra* note 20 at 437; K. Banda, "The Organization and Functioning of the Ombudsman Institution in Zambia" (1994) 12 Omb. J. 131.

[52] In the Zimbabwe Constitution, ss. 107-108, the Ombudsman is appointed by the President on the advice of the Judicial Service Commission to investigate whether a person has suffered injustice caused by administrative conduct. Amended in 1996, the Constitution permits the Ombudsman to investigate complaints of the breach of constitutional rights by any officer, person or authority, *ibid.*, s. 108(1)(b). The ombudsman legislation was amended in 1997 to permit the ombudsman to examine any law to determine whether it violates constitutional rights and to promote public awareness of human rights. Due to staff and financial limitations, the Ombudsman had not started to implement the new human right mandate by 2000. See M. Makova, "The Ombudsman as an Instrument of Public Accountability: The Case of Zimbabwe" in *The Ombudsman and Good Governance in the Kingdom of Lesotho, supra* note 23 at 90; Hatchard, "The Institution of the Ombudsman in Africa With Special Reference to Zimbabwe", *supra* note 15 at 260-269; UN Human Rights Committee, Concluding Observations: Zimbabwe, UN Doc. CCPR/C/79/Add.89 (April 6, 1998), paras. 5, 10.

[53] Kenya opened an ombudsman-like office under the Office of the President and the Ministry of Justice until the Constitution enters into force, P. Wachira, "Government opens public complaints office", *The East African Standard* (April 16, 2003).

Verde has also begun the process of creating an ombudsman.[54] An Ombudsman existed in Swaziland from 1983 to 1987.[55] Algeria had a *Médiateur* which could take human rights complaints, but the government replaced it and the human rights observatory with a National Consultative Commission for the Protection and Promotion of Human Rights in late 2001.[56]

AFRICAN CLASSICAL OMBUDSMEN, HYBRID OMBUDSMEN AND HUMAN RIGHTS COMMISSIONS

Africa has a somewhat confusing mix of national human rights institutions. Given the influence of France, Francophonie nations have adopted the *Médiateur* version of the ombudsman model. Some classical and hybrid ombudsmen in Africa are multi-member bodies, e.g. Ghana, Nigeria, Tanzania, Zambia and prospectively in Ethiopia. Some countries have opted for separate ombudsmen and human rights commissions (or council, committee, etc.), such as Benin, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Djibouti, Ethiopia, Gabon, Gambia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Nigeria, Senegal, Sudan, Sierra Leone, South Africa, Tunisia, Uganda and Zambia.[57] Despite the existence of a separate human rights body, a few of these ombudsmen also have human rights functions in law or practice, e.g. Ethiopia, Malawi and South Africa.

A growing number of countries have created hybrid ombudsmen, which include one or more of human rights protection, corruption fighting, enforcing leadership codes, good governance promotion and/or environmental protection mandates in addition to the classical ombudsman function. Primarily, these are the Ethiopia Ombudsman (ombudsman, good governance, human rights), Ghana Commission on Human Rights and Administrative Justice (ombudsman, human rights, anti-corruption, leadership code), Lesotho Ombudsman (ombudsman, human rights, anti-corruption, environmental protection), Malawi Ombudsman (ombudsman, human rights), Mauritius Ombudsman (ombudsman, fraud, anti-corruption), Namibia Ombudsman (ombudsman, human rights, environmental protection, anti-corruption), Rwanda Ombudsman (ombudsman, anti-corruption), Seychelles Ombudsman (ombudsman, human rights, anti-corruption, fraud), South Africa Public Protector (ombudsman, anti-corruption, code of ethics enforcement, some human rights in practice), Tanzania Commission for Human Rights and Good Governance (ombudsman, good governance, human rights), Uganda Inspectorate of Govern-

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[54] *Country Reports 2002*, *supra* note 28 at 88.

[55] Appointed by and reporting to the King, the Ombudsman was not independent and received very few complaints. See J.R.A. Ayee, "The Ombudsman Experiment in the Kingdom of Swaziland: A Comment" (1988) 21 V.R.Ü. 7.

[56] See *Country Reports 2002*, *supra* note 28 at 1867; UN Human Rights Committee, Concluding Observations: Algeria, UN Doc. CCPR/C/79/Add.95 (Aug. 18, 1998), para. 4.

[57] See e.g. Carver and Hunt, *supra* note 20; *Protectors or Pretenders?*, *supra* note 10; Carver, *supra* note 20; J. Hatchard, "A new breed of institution: the development of human rights commissions in Commonwealth Africa with particular reference to the Uganda Human Rights Commission" (1999) 32 Comp. & Int'l Law J. Southern Africa 28.

ment (ombudsman, anti-corruption, leadership code, good governance) and Zimbabwe Ombudsman (ombudsman, human rights).[58] A few of the hybrid human rights ombudsmen in Africa have the jurisdiction to investigate complaints against private persons and bodies as well as complaints against public authorities, e.g. Ghana, Namibia and Tanzania.

Some African states have a human rights commission or other body, but no ombudsman, e.g. Benin, Liberia, Niger and Togo. Other African countries have no national human rights institutions at all, e.g., Angola, Comoros, Democratic Republic of the Congo, Eritrea, Guinea, Guinea Bissau, Libya, Mozambique, Sao Tome and Principe, Somalia and Swaziland.

THE OMBUDSMAN, GOOD GOVERNANCE AND HUMAN RIGHTS PROTECTION IN AFRICA: SELECTED CASE STUDIES

Of the numerous ombudsman offices in Africa, this Chapter will examine four that have varying degrees of hybrid status: Ghana's Commission on Human Rights and Administrative Justice, Uganda's Inspectorate of Government, Namibia's Ombudsman and South Africa's Public Protector.[59]

Ghana

In 1966, a military regime took power in Ghana and, in the same year, established the Expediting Committee of the National Liberation Council to take complaints from the public about poor administration and claims of victimization in the public service from junior officials.[60] Despite operating within a non-democratic environment, the Expediting Committee "performed its functions with some credit".[61] The 1969 Constitution contained a provision for an ombudsman, ombudsman legislation was passed in 1970 ending the tenure of the Expediting Committee, but political unrest intervened and there was no ombudsman appointment until 1980 after the insertion of the ombudsman in the 1979 Constitution and the passage of a new ombudsman statute in 1980.[62] The Ombudsman followed the classical model, investigating injustice in administration. In the early 1980s

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58 Algeria had a hybrid *Médiateur* (ombudsman, human rights) until 2001 and, in practice, the Mauritius Ombudsman investigated human rights complaints until the Mauritius Human Rights Commission was created, *supra* notes 38, 56.

59 The case studies on the Namibia Ombudsman and the South Africa Public Protector are updated from L.C. Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection" (2000) 13 Harvard H.R.J. 1 at 61-68.

60 Short, "The Development and Future of the Ombudsman Concept in Africa", *supra* note 15 at 59.

61 *Ibid.* Ghana obtained its independence from Great Britain in 1957.

62 *Ombudsman Act of 1970*, Act 340 (1970); Constitution of Ghana (1979), art. 110; *Ombudsman Act of 1980*, Act 400. See Short, "The Development and Future of the Ombudsman Concept in Africa", *ibid.* at 59-60; N. Lante Wallace-Bruce, "Ghana's Ombudsman – An Unusual Breed" (1992) 10 Omb. J. 67; Hatchard, "The Institution of the Ombudsman in Africa With Special Reference to Zimbabwe", *supra* note 15 at 256.

another military government took power until January 1993 when a civilian government was reinstated.[63] Between 1987 and 1993, the Ombudsman office was moribund.[64]

The Commission on Human Rights and Administrative Justice (CHRAJ), which replaced the Ombudsman, was established in Ghana's new 1992 Constitution and 1993 legislation.[65] The CHRAJ is a hybrid, combining in one institution ombudsman, human rights protection, corruption-fighting and leadership code enforcement functions. One reason for the establishment of Ghana's hybrid institution was the view that the country could not financially support both an ombudsman and a human rights commission.[66]

One Commissioner and two Deputies are appointed by the President in consultation with the Council of State.[67] Although executive appointees, their strong tenure provisions have enhanced the institution's independence.[68] The Commissioners have independence in law in the performance of their duties.[69] The CHRAJ has extensive powers to: investigate complaints of injustice, corruption, abuse of power, unfair treatment or violations of fundamental rights and freedoms by a public official; investigate complaints about the operation of the public service, the administrative organs, the armed forces, the police service and the prison service which allege a failure to achieve a balanced structure of those services, equal access to recruitment or fair administration of these services; investigate complaints about the conduct of private persons, enterprises and other institutions when it is alleged that they have violated fundamental rights in the Constitution; investigate cases of alleged corruption and the misappropriation of public moneys by government officials; educate the public about human rights; enforce the Code of Conduct for Public Officers in Chapter 24 of the Constitution; and report annually to Parliament.[70] Although the CHRAJ does not have any express power to conduct

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63 Short, "The Development and Future of the Ombudsman Concept in Africa", *ibid.* at 60.

64 E.F. Short, "The Ombudsman in Ghana" in R. Gregory and P. Giddings, eds., *Righting Wrongs: The Ombudsman in Six Continents* (Amsterdam: IOS Press, 2000) 207 at 208 [hereinafter *Righting Wrongs*].

65 Constitution of Ghana (1992), ss. 216-230; *The Commission on Human Rights and Administrative Justice Act*, Act 456 (1993). See E.F. Short, "The Development and Growth of Human Rights Commission in Africa – the Ghanian Experience" in *Human Rights Commissions and Ombudsman Offices, supra* note 20 at 187; Short, "The Ombudsman in Ghana", *ibid.; Performance & legitimacy, supra* note 21 at 9-20; *Protectors or Pretenders?, supra* note 10.

66 Short, "The Development and Growth of Human Rights Commission in Africa – the Ghanian Experience", *ibid.* at 189; Carver, *supra* note 20 at 21.

67 Constitution of Ghana (1992), *supra* note 65, ss. 216-217; *The Commission on Human Rights and Administrative Justice Act, supra* note 65, s. 2. The Council of State is non-partisan and composed of elder statespersons, see Short, "The Development and Growth of Human Rights Commission in Africa – the Ghanian Experience", *ibid.*

68 The procedure for removal is the same as for Justices of the Court of Appeal, Constitution of Ghana (1992), *ibid.*, s. 228; *The Commission on Human Rights and Administrative Justice Act, ibid.*, s. 5; *Performance & legitimacy, supra* note 21 at 9-10.

69 Constitution of Ghana (1992), *ibid.*, s. 225; *The Commission on Human Rights and Administrative Justice Act, ibid.*, s. 6.

70 Constitution of Ghana (1992), *ibid.*, s. 218; *The Commission on Human Rights and Administrative Justice Act, ibid.*, ss. 7, 19; Short, The Development and Future of the Ombudsman Concept in Africa", *supra* note 15 at 64; Short, "The Development and Growth of Human Rights Commission in Africa – the Ghanian Experience", *supra* note 65 at 197-198. The Code of Conduct for Public Officers *inter alia* prohibits conflict of interest and requires public officers to submit statements of assets and liabilities.

own-motion investigations, it does occasionally undertake these types of investigations.[71] Transitional provisions in the Constitution also gave the CHRAJ the mandate to investigate confiscations of property undertaken by military governments from 1981 to 1993.[72]

With respect to complaints, the CHRAJ can engage in negotiation and compromise between the parties, bring proceedings in court for a remedy to stop the offending behaviour and bring proceedings to restrain the enforcement of legislation or other measures if the offending conduct is sought to be justified by law which is unreasonable or *ultra vires*.[73] For the purposes of performing his functions, the Commissioner may bring any action before any court and may seek any remedy which may be available from the court.[74] Unlike most ombudsmen and other national human rights institutions, Ghana's CHRAJ not only has the power to make recommendations for change, it also has the power to go to any court to enforce its recommendations if they have not been complied with within three months.[75] Although the provision proved controversial in Ghana, it was added to support the CHRAJ's work and avoid the prior state of affairs where the recommendations of the Ombudsman were often ignored.[76] However, the law is silent on whether the court shall automatically register the determination of the CHRAJ as a court order or hear the matter *de novo*.[77] The enforcement function is not utilized often.[78] As Emile Francis Short has noted:

> The enforcement powers of the Commission, therefore, serve as a back-up power, which may be invoked in those relatively few cases where it becomes necessary. . . . The real danger in the exercise of such enforcement powers is that if a court refuses to enforce recommendations of the ombudsman, or dismisses a criminal prosecution for corruption brought by an ombudsman, it can undermine the dignity of the institution.[79]

This fear was allayed in 2001, when the Ghana Court of Appeal held that when the CHRAJ goes to court to enforce its recommendation in a particular case the court has no jurisdiction to take over the functions of the CHRAJ or reopen the case *de novo*, but

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71 Short, "The Ombudsman in Ghana", *supra* note 64 at 211; Short, "The Development and Growth of Human Rights Commission in Africa – the Ghanian Experience", *ibid.* at 195; *Performance & legitimacy, supra* note 21 at 15.

72 See Short, "The Development and Growth of Human Rights Commission in Africa – the Ghanian Experience", *ibid.* at 191.

73 Constitution of Ghana (1992), *supra* note 65, s. 218(d); *The Commission on Human Rights and Administrative Justice Act, supra* note 65, s. 7(1)(d).

74 Constitution of Ghana (1992), *ibid.*, s. 229; *The Commission on Human Rights and Administrative Justice Act, ibid.*, s. 9.

75 *The Commission on Human Rights and Administrative Justice Act, ibid.*, s. 18(1)-(2).

76 Short, "The Development and Growth of Human Rights Commission in Africa – the Ghanian Experience", *supra* note 65 at 193. Opponents of the provision argued that the CHRAJ could lose its impartiality if given the power to enforce cases it had investigated and mediated, *ibid.*

77 *Performance & legitimacy, supra* note 21 at 13-14.

78 Short, "The Development and Future of the Ombudsman Concept in Africa", *supra* note 15 at 67-68. By late 2000, the Commissioner indicated that of over 21,000 cases handled by the CHRAJ, only 20 cases had been taken to court for enforcement action, Short, "The Ombudsman in Ghana", *supra* note 64 at 214.

79 Short, "The Development and Future of the Ombudsman Concept in Africa", *ibid.* at 68.

can only grant an order requiring the respondent to comply with the CHRAJ recommendation unless it is "clearly in breach of the principles of natural justice or otherwise unjustified in law and/or in fact."[80] Accordingly, Short has concluded that:

> [i]t is reasonable to anticipate that the courts in Ghana will defer to the specialized expertise and competence of the Commission in deciding human rights and administrative justice complaints, while retaining jurisdiction to review decisions of the Commission on strict questions of law. This, in turn, should serve to enhance public confidence in the Commission and to reduce the heavy caseload on the courts. The cumulative effect of such a dynamic relationship would be to make justice more accessible, and to ensure a more expeditious delivery system in the area of human rights complaints.[81]

There have also been several Ghana Supreme Court decisions that have construed the jurisdiction of the CHRAJ in a broad manner. A 1996 corruption investigation, resisted by the government, led to a 1998 decision of Ghana's Supreme Court permitting the CHRAJ to investigate matters occurring prior to the 1992 Constitution and another Supreme Court decision held that the CHRAJ is not bound by the statute of limitations which controls the time period within which court actions can be started.[82] A 2002 Supreme Court decision held that the CHRAJ has the jurisdiction to investigate sexual harassment complaints.[83]

The Constitution of Ghana contains a spectrum of civil, political, economic, social and cultural rights.[84] Ghana is a contracting party to the main UN human rights treaties and is a contracting party to the African Charter.[85]

The CHRAJ has dealt with a wide variety of cases and the annual complaints numbers have increased substantially over the years.[86] Cases of administrative injustice have

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[80] E.F. Short, "Remedies: The Relationship Between National Human Rights Institutions and Other Statutory Institutions/Mechanisms, With Special Reference to Racial Discrimination" in *The Sixth International Conference for National Human Rights Institutions, Proceedings*, Copenhagen and Lund, April 10-13, 2002 (Copenhagen: The Danish Centre for Human Rights) 123 at 131, quoting from *The Commissioner Human Rights and Administrative Justice* v. *The Ghana Commercial Bank*, Suit No. CA/165/2000, Judgment of Dec. 20, 2001 (Ghana C.A.).

[81] *Ibid.* at 134.

[82] U.S. State Department, *Country Reports on Human Rights Practices for 2000* (2001) at 286 [hereinafter *Country Reports 2000*]; Short, "The Development and Growth of Human Rights Commission in Africa – the Ghanian Experience", *supra* note 65 at 193; Short, "The Ombudsman in Ghana", *supra* note 64 at 212; *Attorney General* v. *Commissioner for Human Rights and Administrative Justice* (Case No. 17/96, Judgment July 31, 1998) on the statute of limitations. The Supreme Court did hold, however, that the CHRAJ did not have jurisdiction to investigate property confiscated by special courts and tribunals during specified military governments, *Country Reports 2000, ibid.*

[83] Short, "Remedies: The Relationship Between National Human Rights Institutions and Other Statutory Institutions/Mechanisms, With Special Reference to Racial Discrimination", *supra* note 80 at 134.

[84] Constitution of Ghana (1992), *supra* note 65, ss. 12-33.

[85] Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* (as of July 7, 2003), <www.unhchr.ch> [hereinafter *Status of Ratifications*].

[86] In the 1993 to 1998 period, the CHRAJ received on average 4,000-5,000 complaints per year, *Country Reports 2000, supra* note 82 at 286. In 2000, 9,265 cases were submitted, *Country Reports*

included many about wrongful termination of employment and other labour-related misconduct by both public and private employers, property issues and improper cancellation of or refusal to grant licenses.[87] A number of corruption investigations have been undertaken over the years.[88] Many human rights complaints are made against private entities, although only constitutional human rights issues can be raised against private actors.[89] The investigation of some complaints against private actors has been based on an very liberal interpretation of the CHRAJ's jurisdiction.[90] However, human rights cases represent a relatively small proportion of total cases.[91] They have involved improper conduct and detention by the security forces, police conduct, delay in criminal and civil trials, gender discrimination, sexual harassment in the workplace, domestic violence and children's rights.[92] The CHRAJ also focuses on economic, social and cultural rights.[93] Human rights education programs are provided for public officials, police, students, women's groups and members of the public.[94] Investigations and public education programs have been undertaken to try to stop cultural practices that the CHRAJ considers violate constitutional human rights, such as *trokosi* (women and girls are enslaved to serve priests in fetish shrines as a punishment for the conduct of their family members) and the banishment or lynching of women thought to be witches.[95]

Human rights protection has improved substantially in Ghana over the past years, although some problems remain such as excessive police force, mistreatment of prisoners and prison conditions, police corruption and violence against women (including traditional practices).[96] The judiciary is independent in law but has inadequate resources and is subject to some corruption.[97]

2002, *supra* note 28 at 276. In 2001, the CHRAJ received 10,595 complaints, Ghana Commission on Human Rights and Administrative Justice, *Annual Report 2001*, 5, 46-47.

87 *Annual Report 2001, ibid.* at 18-29; Short, "The Development and Growth of Human Rights Commission in Africa – the Ghanian Experience", *supra* note 65 at 194-195; *Performance & legitimacy, supra* note 21 at 14. Of total complaints in 2000, 23.8% involved administrative justice issues, *Country Reports 2002, ibid.*

88 Short, "The Development and Growth of Human Rights Commission in Africa – the Ghanian Experience", *ibid.* at 198; *Performance & legitimacy, ibid.* at 17; *Annual Report 2001, ibid.* at 6.

89 E.g., in 2000, of the total of 9,265 cases submitted, 7,321 were against private actors, *Country Reports 2002*, *supra* note 28 at 276.

90 *Performance & legitimacy, supra* note 21 at 14-15 (e.g. wrongful dismissal complaints against private employers).

91 *Ibid.* at 14 (21% in 1997). In 2000, only 11% of complaints concerned human rights issues, *Country Reports 2002*, *supra* note 28 at 276.

92 *Annual Report 2001, supra* note 86 at 18-29; Short, "The Development and Growth of Human Rights Commission in Africa – the Ghanian Experience", *supra* note 65 at 195; Transparency International, *National Integrity Systems Country Study Report: Ghana 2001* at 4 (between 1993 and 1998, complaints against the police amounted to 5% of the total).

93 *Annual Report 2001, ibid.* at 49-50.

94 Short, "The Development and Growth of Human Rights Commission in Africa – the Ghanian Experience", *supra* note 65 at 196.

95 *Ibid.* at 197; *Performance & legitimacy*, *supra* note 21 at 16.

96 *Country Reports 2002*, *supra* note 28 at 266; *Country Reports 2000, supra* note 82 at 272; *Performance & legitimacy, ibid.* at 9.

97 *Country Reports 2002, ibid.* at 265; *National Integrity Systems Country Study Report: Ghana 2001, supra* note 92 at 9.

The CHRAJ is considered to be independent and to play an important role in protecting human rights in Ghana.[98] The work of the CHRAJ in dealing with traditional practices affecting the human rights of women and girls is particularly noteworthy. There is strong public support for the CHRAJ.[99] The first Commissioner is considered to be a strong and proactive appointee.[100] The strong position of the CHRAJ appears to be due to the combination of good legal foundations, a strong Commissioner, the proactive activities of the institution and a supportive judiciary. While the government does not openly interfere in the operations of the CHRAJ, in the early years of its operations the government was resistant to its findings.[101] The CHRAJ is only one of a number of mechanisms for addressing corruption in Ghana, and the absence of a comprehensive law and mechanism for fighting corruption has been criticized as engendering confusion, "conflict, forum shopping and loopholes".[102] The anti-corruption activities of the CHRAJ were seen to decelerate in the early 2000s, potentially due to insufficient resources, but in 2001 the CHRAJ created a specialized anti-corruption unit and has undertaken a number of corruption investigations.[103] As Short has recognized, a hybrid institution is likely to receive large numbers of complaints and must be given sufficient financial and human resources to operate effectively given its numerous mandates.[104] Overall, insufficient funding by the government is the major challenge facing the CHRAJ.[105] In the CHRAJ 2001 annual report, the Commissioner stated that the CHRAJ cannot effectively discharge its multiple functions and proposed a constitutional amendment to increase the number of Commissioners to a minimum of seven.[106]

The CHRAJ model has been influential in the design of Tanzania's new Commission on Human Rights and Good Governance, in operation in 2002.[107] With Commissioners appointed by the President on the recommendation of an Appointments Committee, the hybrid Commission has ombudsman, human rights protection and good governance mandates. Its main functions are to: promote human rights protection in Tanzania; inves-

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98 *Performance & legitimacy, supra* note 21 at 19-20; *Protectors or Pretenders?, supra* note 10, "1993: Ghana"; UN Committee Against Racial Discrimination, Concluding Observations: Ghana, UN Doc. CERD/C/62/CO/4 (March 21, 2003), para. 6.

99 *Performance & legitimacy, ibid.*

100 The first Commissioner is Emile Francis Short, see *ibid.* at 10; *Protectors or Pretenders?, supra* note 10, "1993: Ghana".

101 See *Country Reports 2002, supra* note 28 at 276; *Country Reports 2000, supra* note 82 at 286; *National Integrity Systems Country Study Report: Ghana 2001, supra* note 92 at 13.

102 *National Integrity Systems Country Study Report: Ghana 2001, ibid.* at 3. Other bodies are the Auditor General, the Serious Fraud Office and the police, *ibid.* at 3, 11.

103 *Ibid.* at 13; *Annual Report 2001, supra* note 86 at 5-6.

104 Short, "The Development and Growth of Human Rights Commission in Africa – the Ghanian Experience", *supra* note 65 at 189, 199.

105 *Ibid.* at 199; Short, "The Ombudsman in Ghana", *supra* note 64 at 208, 217; *Country Reports 2002, supra* note 28 at 276; *Country Reports 2000, supra* note 82 at 286; *Performance & legitimacy, supra* note 21 at 11, 18, 20; *Protectors or Pretenders?, supra* note 10, "1993: Ghana". The CHRAJ relies on additional funding from international, state and NGO donors, and the funding problem and lack of public awareness of the CHRAJ have affected its operations in rural areas.

106 *2001 Annual Report, supra* note 86 at 5-6.

107 Created in 2000 amendments to Tanzania's Constitution, art. 129, and the *Commission for Human Rights and Good Governance Act, 2001*, Act No. 7 (2001), in operation March 15, 2002. On the

tigate complaints about human rights violations; investigate complaints about the conduct of public administration (including private institutions and individuals) alleging abuse of power, injustice or the unfair treatment of any person; conduct enquiries on violations of human rights and the contravention of principles of administrative justice; conduct research into human rights, administrative justice and good governance; visit and inspect prisons and other places of detention; provide advice to government, other public organs and private institutions on specific issues relating to human rights and administrative justice; make recommendations about proposed or existing laws or administrative provisions to ensure compliance with human rights norms and standards and good governance principles; and promote state ratification of human rights treaties and harmonization of national legislation with Tanzania's international human rights obligations.[108] In fulfilling its mandates, Tanzania's Commission can: investigate complaints on receipt of a complaint or on its own initiative; promote negotiation, compromise, mediation and reconciliation between disputants; make recommendations; institute court proceedings to terminate or redress breaches of human rights or administrative justice; and go to court to enforce its own recommendations.[109]

Uganda

In 1966, four years after its independence, constitutional government was toppled in Uganda and the following twenty years saw civil strife and massive human rights violations, including the atrocities of Adi Amin.[110] After the National Resistance Movement (NRM) government under Museveni gained control of Uganda in early 1986, the Inspector-General of Government was established in the same year in order to deal with the human rights abuses and corruption of the prior governments.[111] In addition, the Ugandan government created a Commission of Inquiry into Violations of Human Rights (Oder Commission) to investigate human rights violations in Uganda from its independence

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strengths and weaknesses of the Commission see Magawa, *supra* note 48; UN Committee on the Rights of the Child, Concluding Observations: Tanzania, UN Doc. CRC/C/15/Add.156 (July 9, 2001), paras. 16-17. The Commission replaced the PCE, *supra* note 48.

108 *Commission for Human Rights and Good Governance Act, 2001*, *ibid.*, s. 6(1).

109 *Ibid.*, ss. 6(1)(e),(i),(n), 15, 28. Section 28(3) permits the Commission to bring a court action to enforce its recommendation.

110 H.P. Schmitz, "Transnational activism and political change in Kenya and Uganda" in T. Risse, S.C. Ropp and K. Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999) 39 at 39-42, 44-50, 67-71; J. Tumwesigye, "The Role of the Inspectorate of Government in Promoting the Rule of Law in Uganda" (1999) 3 Int'l Omb. Yrbk. 122 at 124.

111 Short, "The Development and Future of the Ombudsman Concept in Africa", *supra* note 15 at 60. See Tumwesigye, *ibid.*; E.R.B. Nkalubo, "The Uganda Human Rights Commission, Including the Inspectorate of Government (Ombudsman)" in *Human Rights Commissions and Ombudsman Offices, supra* note 20 at 579; J. Oloka-Onyango, "The Dynamics of Corruption Control and Human Rights Enforcement in Uganda: The Case of the Inspector General of Government" (1993) 1 East African J. Peace & H.R. 23; A. Kiapi, "The Inspector-General of Government: Uganda's Ombudsman of All Trades" (1990-1991) 9 Omb. J. 91.

in 1962 to the start of 1986.[112] One of the recommendations of the Commission was the establishment of a permanent national human rights institution.[113]

The Uganda Inspector-General of Government (IGG) was initially established as a hybrid human rights and corruption-fighting ombudsman.[114] The IGG was given the multiple functions of: "protecting and promoting the protection of human rights and the rule of law in Uganda, and eliminating and fostering the elimination of corruption and abuse of public offices."[115] The IGG could investigate, on receipt of a complaint or on his own-motion, allegations of human rights violations by government officials, in particular fundamental rights and the methods by which law enforcement and state security entities executed their functions, and could take measures for the detection and prevention of corruption in public office through a variety of functions including the investigation of complaints of corrupt practices.[116] The IGG made recommendations and reported to the President and legislature. However, the institution did not have any stronger powers to back up its anti-corruption work, with problematic results.[117] The institution was seen have limited effect in fulfilling its human rights protection function, on the grounds that the first Inspector-General interpreted the human rights mandate narrowly and the IGG had insufficient resources.[118]

The mandate of the IGG was changed with the drafting of the 1995 Constitution and the establishment of Uganda's Human Rights Commission.[119] The human rights mandate was taken from the IGG and conferred on the new Human Rights Commission. The 1995 Constitution and 2002 legislation renamed the IGG the "Inspectorate of Government", and gave it classical ombudsman, anti-corruption and leadership code of conduct enforcement functions, with stronger powers in the corruption-fighting arena.[120] However, some human rights related matters continued to be handled by the Inspectorate of Government.[121]

Under the new legal regime, the Inspectorate is independent in law and responsible only to Parliament, and the Inspector-General is appointed by the President with the approval of Parliament, and reports principally to Parliament.[122] The Inspectorate of Government also has an independent budget appropriated by Parliament and controlled by the Inspector-General.[123] The functions of the Inspectorate of Government include:

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112 See Carver and Hunt, *supra* note 20 at 747; Tumwesigye, *ibid.* at 125.

113 Nkalubo, *supra* note 111 at 580.

114 *The Inspector-General of Government Statute, 1987*, Statute No. 2 (in force 1988).

115 *Ibid.*, s. 7(1).

116 *Ibid.*, ss. 7, 17(1).

117 *Ibid.*, s. 23(1); Olaka-Onyango, *supra* note 111 at 40.

118 Olaka-Onyango, *ibid.* at 35; Schmitz, *supra* note 110 at 68-69.

119 On Uganda's Human Rights Commission see Nkalubo, *supra* note 111; Hatchard, "A new breed of institution: the development of human rights commissions in Commonwealth Africa with particular reference to the Uganda Human Rights Commission", *supra* note 57.

120 Constitution of Uganda (1995), ss. 223-236; *Inspectorate of Government Act, 2002*, <www.igg.go.ug>.

121 Tumwesigye, *supra* note 110 at 125; Nkalubo, *supra* note 111 at 590.

122 Constitution of Uganda (1995), *supra* note 120, ss. 223(4), 227, 231; *Inspectorate of Government Act, supra* note 120, ss. 4(1)-(2), 10.

123 Constitution of Uganda (1995), *ibid.*, s. 229(1); *Inspectorate of Government Act, ibid.*, s. 31.

promoting and fostering strict adherence to the rule of law and principles of natural justice in administration; eliminating and fostering the elimination of corruption, abuse of authority and of public office; promoting fair, efficient and good governance in public offices; enforcing the Leadership Code of Conduct; investigating the conduct of public administration; stimulating public awareness about the values of constitutionalism; inquiring into the methods by which law enforcing agents and the state security agencies execute their functions and affect the rule of law; and taking necessary measures for the detection and prevention of corruption in public offices, including advice, the dissemination of information and the fostering of public complaints and the making of recommendations thereon.[124]

The Inspectorate of Government has broad jurisdiction over officers and leaders in government offices, including the Cabinet, Parliament, Courts of law, police, the prison force, national security organizations, national and local defence forces, government-aided educational institutions, local government and self-governing professional bodies.[125] The Inspectorate can launch investigations into administrative conduct on receipt of a complaint or *suo moto*.[126] In cases of corruption or abuse of public office or of authority, the Inspectorate of Government has strong investigatory powers and even stronger enforcement powers, enabling the institution to arrest and prosecute those accused of these offences.[127] In all cases prosecuted by the Inspector-General, he has the same powers of appeal as the Director of Public Prosecutions.[128] The Inspectorate of Government submits a report to Parliament every six months, making recommendations as necessary, and a copy is forwarded to the President.[129] The Constitution required Parliament to draft a Leadership Code of Conduct for persons holding public office which requires the declaration of income, assets and liabilities, and the designation of prohibited conduct relating to dishonesty, bias, corruption and related matters.[130] The Leadership Code was enacted in 1992, in 1996 the Inspectorate of Government was given the mandate to enforce the Code and in doing so is able use all the powers conferred by the 2002 legislation.[131]

The Inspectorate of Government investigates a broad array of cases dealing with poor administration and corruption. The institution has addressed many complaints of wrongful dismissal of civil servants, lack of or delay in payment of salaries or pensions, unfair awards of tenders and contracts, unreasonable delay in delivery of services, abuse of

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124 Constitution of Uganda (1995), *ibid.*, s. 225(1); *Inspectorate of Government Act, ibid.*, s. 8(1).

125 *Inspectorate of Government Act, ibid.*, s. 9.

126 Constitution of Uganda (1995), *supra* note 120, s. 225(2); *Inspectorate of Government Act, ibid.*, s. 8(2).

127 Constitution of Uganda (1995), *ibid.*, s. 230(1)-(4); *Inspectorate of Government Act, ibid.*, ss. 8(1)(h), 12-14, 26-27, 35.

128 *Inspectorate of Government Act, ibid.*, s. 14(9).

129 Constitution of Uganda (1995), *supra* note 120, s. 231; *Inspectorate of Government Act, ibid.*, s. 29.

130 Constitution of Uganda (1995), *ibid.*, s. 233.

131 Constitution of Uganda (1995), *ibid.*, s. 234; *Inspectorate of Government Act, supra* note 120, ss. 8(1)(d), 14(7); <www.igg.go.ug>.

office and mismanagement of public funds.[132] Recent cases include abuse of office by the principal of an agricultural college, corruption and abuse of office by the former headmaster of a primary school, theft by aviation police and interference with the police investigation, and the recruitment process for parliamentary staff.[133]

While Uganda has experienced economic development and there has been some improvement in the human rights situation, the implementation of good governance programs has not automatically led to positive changes in human rights protection.[134] Insurgent groups threaten the stability of the state and the Museveni government is resistant to democratic pluralism.[135] Human rights infringements continue including torture, poor prison conditions, limits on freedom of religion and expression, discrimination on the basis of sexual orientation, and arbitrary detention and harassment of opposition figures, plus both security forces and armed opposition groups have violated human rights.[136] The judiciary is underfunded, resulting in long delays. Recently there have been positive developments in combatting corruption in Uganda.[137] In the context of its new mandate, the Ugandan Inspectorate of Government is seen to be successful.[138] However, the Inspectorate of Government has complained of insufficient financial and human resources, with the concomitant negative effect on efficiency and service to the public.[139] The Ugandan Inspectorate of Government is an example of a hybrid anti-corruption and leadership code enforcement ombudsman with strong powers in law, but with insufficient resource support given the multiple functions of the institution.

Namibia

Until 1990, Namibia (formerly South West Africa) was controlled by the South African apartheid regime.[140] UN transition assistance over a decade, culminating in a UN peace-building mission, led to Namibia's independence.[141]

An Ombudsman had been created in 1986 legislation, but disappeared along with South African control.[142] The current Namibia Ombudsman was established in 1990 in

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132 Tumwesigye, *supra* note 110 at 126-127.

133 See <www.igg.go.ug/cases.htm>.

134 M. Kjœr and K. Kinnerup, "How Does Good Governance Relate to Human Rights?" in H.O. Sano and G. Alfredsson, eds., *Human Rights and Good Governance: Building Bridges* (The Hague: Kluwer Law International, 2002) 1 at 14-15.

135 Schmitz, *supra* note 110 at 71; *Country Reports 2002, supra* note 28 at 615-616.

136 Amnesty International, *Amnesty International: Report 2003* (London: Amnesty International Publications, 2003) at 258-259; *Country Reports 2002, ibid.; Country Reports 2000, supra* note 82 at 623; Amnesty International, *Amnesty International: Report 2002* (New York: Amnesty International Publications, 2002) at 251-252.

137 *Country Reports 2002, ibid.*

138 Kjœr and Kinnerup, *supra* note 134 at 14-15.

139 Tumwesigye, *supra* note 110 at 128.

140 *Country Reports 2000, supra* note 82 at 623.

141 See S. Morphet, "Organizing Civil Administration in Peace-Maintenance" (1998) 4 Global Governance 41 at 47-49.

142 Ayeni, "Evolution of and prospects for the ombudsman in Southern Africa", *supra* note 15 at 551-552.

the new Constitution.[143] The Ombudsman is appointed by the President on the recommendation of the Judicial Service Commission, and is given guarantees of independence under the Constitution.[144] The first Ombudsman took office in 1992.

The Namibian Ombudsman is a hybrid ombudsman with ombudsman, human rights protection, anti-corruption and environmental protection mandates. In addition to the investigation of administrative conduct by public authorities at the national and local levels, the Ombudsman has the powers to investigate: complaints of human rights infringements, abuse of power, unfair, harsh, insensitive or discourteous treatment, manifest injustice or corruption by government officials; complaints of human rights violations by private persons/entities; complaints against administrative organs, the defence force, the police force and the prison service relating to their failure to achieve a balanced structuring of such service, equal access in recruitment matters or fair administration; and 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.[145] The Ombudsman cannot investigate the judicial branch.[146] In 2003, the Namibian legislature, having rejected a proposal for an independent anti-corruption commission, confirmed that the Ombudsman would carry out this function in Namibia.[147]

The human rights and fundamental freedoms monitored by the Ombudsman are found in the Constitution, and comprise civil, political, economic, social and cultural rights.[148] The Constitution holds that treaties and general rules of international law binding Namibia are part of Namibian law unless they conflict with the Constitution or Act of Parliament.[149] Namibia has become a contracting party to the major UN human rights treaties and is a contracting party to the African Charter.[150]

In addition to the usual ombudsman powers to investigate, recommend and report, the Namibian Ombudsman has been given stronger remedial powers. She can refer matters to the Prosecutor-General and the Auditor-General; bring court proceedings to halt

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143 Constitution of Namibia (1990), *Government Gazette of the Republic of Namibia*, March 21, 1990, R2.60, No. 2, ch. 10, arts. 89-94. See J. Cottrell, "The Constitution of Namibia: An Overview" [1991] 35 J. African Law 56; J. Hatchard and P. Slinn, "Namibia: The Constitutional Path to Freedom" (April 1991) Commonwealth Law Bull. 644; G.J. Naldi, "Some Reflections on the Namibian Bill of Rights" (1994) 6 R.A.D.I.C. 45. On the Namibia Ombudsman see M. Maree, "The Institution of Ombudsman in the Republic of Namibia" (1999) 3 Int'l Omb. Yrbk. 141; J. Malan, "The Office of the Ombudsman in Namibia" in *Human Rights Commissions and Ombudsman Offices, supra* note 20 at 331.

144 Constitution of Namibia (1990), *ibid.*, arts. 32(4)(a), 90, 89(2)-(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.

145 Constitution of Namibia (1990), *ibid.*, art. 91; *Ombudsman Act No. 7 of 1990, Government Gazette of the Republic of Namibia*, June 14, 1990, R0.50, No. 32 replicates and enlarges the powers of the Ombudsman.

146 Constitution of Namibia (1990), *ibid.*, art. 93.

147 L. Dentlinger, "County Accused of Lacking Drive to Root Out Corruption", *The Namibian (Windhoek)* (July 22, 2003).

148 Constitution of Namibia (1990), *supra* note 143, ch. 3.

149 *Ibid.*, art. 144.

150 *Status of Ratifications, supra* note 85; Allain and O'Shea, *supra* note 1 at 95.

or alter offending action or prohibit its enforcement by challenging the validity of laws which are used to justify such conduct; and determine whether laws predating Namibian independence violate the Constitution and, if so, make recommendations to government for their abolition or reform.[151] In addition, the Constitution gives the Ombudsman discretionary power to provide legal assistance and advice to persons engaging in litigation to uphold their constitutional human rights.[152] This unusual feature recognizes that many Namibians do not have access to justice because of lack of resources, the absence of a legal aid program and shortages of trained lawyers.[153]

The Ombudsman of Namibia receives complaints that cover the range of her jurisdiction. Between 1994 and 1998 complaints in the areas of administrative unfairness or illegality were substantial, although there were human rights complaints (especially against the police and the prison service), and small numbers of complaints involved the environment and corruption.[154] In the 1999 to 2001 period, complaints against prisons, the police, the Department of Justice, and the health, education, public works and transportation departments formed the largest number of total complaints against public authorities.[155] Also, there were many complaints against private companies and persons.[156] In 2001, for example, the largest number of complaints concerned disputes against private persons, appeals or sentences, unfair treatment in prisons and employment disputes.[157] The Ombudsman has undertaken an initiative to encourage women to use the services of the institution – however, by 2001, complaints from women only comprised twenty percent of the total.[158]

Namibia is a multi-racial and multi-party democracy, although it has some continuing human rights problems such as police brutality, long detentions, poor prison conditions, restrictions on freedom of expression, targeting of homosexuals, violence against women and children, and discrimination.[159] The Namibian judiciary is independent, but insufficient funding results in some delay.[160] As a hybrid, the Namibian Ombudsman has been given numerous mandates and enforcement powers that go far beyond the remit of the classical ombudsman and are extensive even for a hybrid institution. As a result,

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151 Constitution of Namibia (1990), *supra* note 143, art. 91(e); *Ombudsman Act, supra* note 145, ss. 4-5; Malan, *supra* note 143 at 337.

152 Constitution of Namibia (1990), *ibid.*, art. 25(2).

153 J. Hatchard, "Developing Governmental Accountability: The Role of the Ombudsman" (1992) Third World Legal Studies 215 at 222.

154 Ombudsman of Namibia, *Annual Report (1998)* at 14-17. 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%). Disputes between private entities comprised 7% of total complaints.

155 Office of the Ombudsman of Namibia, *Annual Report 2001* at 14.

156 *Ibid.* at 16.

157 *Ibid.* at 20.

158 *Ibid.* at 13.

159 *Amnesty International: Report 2003*, *supra* note 136 at 183; Amnesty International, *Report 2002, supra* note 136 at 179-180; *Country Reports 2002*, *supra* note 28 at 424; *Country Reports 2000, supra* note 82 at 434.

160 *Country Reports 2002, ibid.; Country Reports 2000, ibid.* at 438.

the provision of sufficient resources by government is essential in order for the Ombudsman to exercise its functions effectively.

South Africa

The apartheid government in South Africa engaged in massive violations of the human rights of the vast majority of the population.[161] During this time, the government established an ombudsman-like official called the Advocate-General in 1979, later replaced by the 1991 Ombudsman, and puppet ombudsmen operated in the homelands until the latter were abolished on the collapse of apartheid.[162] The Advocate-General was limited in jurisdiction to financial conduct in administration, whereas the 1991 Ombudsman which replaced it and operated until 1995, was closer to the classical ombudsman model.[163]

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 1996 Final Constitution.[164] The independent institutions in the 1996 Constitution, the so-called "Chapter 9 institutions", include the Public Protector (Ombudsman) and Human Rights Commission.[165] Chapter 2 of the South African Constitution is the "Bill of Rights", containing civil, political, economic, social, cultural and environmental rights.[166]

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161 See e.g. C. Heyns and F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (The Hague: Kluwer Law International, 2002) at 539; D. Black, "The long and winding road: International norms and domestic political change in South Africa" in *The Power of Human Rights: International Norms and Domestic Change, supra* note 110 at 79-105.

162 See Ayeni, "Evolution and prospects for the ombudsman in Southern Africa", *supra* note 15 at 550-551; S.A.M. Baqwa, "South Africa's Ombudsman" in *Human Rights Commissions and Ombudsman Offices, supra* note 20, 639 at 640; South Africa Public Protector and Lawyers for Human Rights, *South Africa's Public Protector: An Introduction* at 3.

163 Baqwa, "South Africa's Ombudsman", *ibid.; South Africa's Public Protector: An Introduction, ibid.*

164 Constitution of South Africa (adopted May 8, 1996, am. Oct. 11, 1996, in force Feb. 7, 1997); *Republic of South Africa Constitution Act, 1996*, Act No. 108 (1996), art. 181; Interim Constitution, *Republic of South Africa Constitution Act, 1993*, Act No. 200 (1993). See e.g. J. Sarkin, "The Drafting of South Africa's Final Constitution From a Human-Rights Perspective" (1999) 47 Am. J. Comp. Law 67; M. wa Mutua, "Hope and Despair for a New South Africa: The Limits of Rights Discourse" (1997) 10 Harvard H.R. J. 63; J. Dugard, "Retrospective Justice: International Law and the South African Model" in A.J. McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press, 1997) at 269; J. Dugard, "The Influence of International Human Rights Law on the South African Constitution" (1996) 49 Current Legal Probs. 305.

165 Constitution of South Africa (1996), *ibid.*, ch. 9, s. 181. On South Africa's Human Rights Commission see <www.sahrc.org.za>; Constitution of South Africa (1996), *ibid.*, s. 184; *Human Rights Commission Act, 1994*, Act No. 54 (1994); N.B. Pityana, "National Institutions at Work: The Case of the South African Human Rights Commission" in *Human Rights Commissions and Ombudsman Offices, supra* note 20 at 627; D. McQuoid-Mason, "The Role of Human Rights Institutions in South Africa" in *Human Rights Commissions and Ombudsman Offices, ibid.* at 618-619. See also the Commission for Gender Equality, Auditor-General, Electoral Commission and Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, McQuoid-Mason, *ibid.* at 617.

166 Constitution of South Africa (1996), *ibid.*, ch. 2.

The Constitution also states that courts, tribunals or forums, *inter alia*, "must consider international law" when interpreting the Bill of Rights.[167] South Africa is a party to the main UN human rights treaties, and these treaties were influential in the drafting of the human rights norms in the Constitution.[168] On a regional basis, South Africa is a party to the African Charter on Human and Peoples' Rights.[169]

The office of the Public Protector was included in both the Interim and Final Constitution, supported by 1994 legislation, and began operations on October 1, 1995.[170] Although the Interim Constitution included provincial Public Protectors, the Final Constitution included only the national Public Protector, but required the Public Protector to be accessible to all persons and communities.[171] In response, the Public Protector has established regional offices. The Public Protector is appointed by the President on the recommendation of the National Assembly, and reports to the National Assembly.[172] The Public Protector is given independence by the Constitution, which also requires both the Public Protector to be impartial and organs of state to assist and protect the Public Protector to ensure its independence, impartiality, dignity and effectiveness.[173] The Public Protector is a hybrid ombudsman with mandates comprising the classical ombudsman function, anti-corruption work and investigating and reporting on alleged violations of the codes of ethics for members of the executive branch of government and for members of parliament.[174]

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 is alleged or suspected to be improper or to result in any impropriety or prejudice."[175]

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167 *Ibid.*, s. 39. Also, s. 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.

168 *Status of Ratifications, supra* note 85; Heyns and Viljoen, *supra* note 161 at 540, 543, 552.

169 Heyns and Viljoen, *ibid.*

170 Constitution of South Africa (1996), *supra* note 164, ss. 182-183; *Public Protector Act, 1994*, Act. No. 23, 353:16107 Gov. Gazette (Nov. 24, 1994); *Public Protector Amendment Act, 1998*, Act No. 113, 401:19524 Gov. Gazette (Nov. 27, 1998). See <www.polity.org.za/html/govt/pubprot>; S. Baqwa, "The Role of the Public Protector Vis-à-vis Other Institutions That Redress Grievances in South Africa" (1999) 3 Int'l Omb. Yrbk. 129; Baqwa, "South Africa's Ombudsman" *supra* note 162; S.A.M. Baqwa, "Office of the Public Protector of the Republic of South Africa: Contemporary Challenges, Opportunities and Impact on Governance and Development" in *The Ombudsman and Good Governance in the Kingdom of Lesotho, supra* note 23 at 78; S.A.M. Baqwa, "The Public Protector of South Africa" in *Ombudsman in Botswana, supra* note 23 at 101; N. Mandela, "Address" (2001) 5 Int'l Omb. Yrbk. 10; McQuoid-Mason, *supra* note 165 at 617-618; J. Sarkin, "The Development of a Human Rights Culture in South Africa" (1998) 20 H.R.Q. 628.

171 Constitution of South Africa (1996), *ibid.*, s. 182(4); Sarkin, "The Development of a Human Rights Culture in South Africa", *ibid.* at 653.

172 Constitution of South Africa (1996), *ibid.*, ss. 181(5),193(4)-(6). The legislature recommends a nominee selected by a legislative committee and approved by resolution of the Assembly adopted by a minimum 60% majority. The Constitution also strictly limits the grounds for removal from office by the President upon special resolution of the legislature, *ibid.*, s. 194.

173 *Ibid.*, s. 181(2)-(3). These governing principles apply to all the ch. 9 institutions.

174 Baqwa, "The Public Protector of South Africa", *supra* note 170 at 102. The statutory code for executive members covers the President, Deputy President, Premiers, Cabinet members, Deputy Ministers and members of provincial Cabinets, *ibid.*

175 Constitution of South Africa (1996), *supra* note 164, s. 182(1)(a); *Public Protector Act, supra* note 170, Preamble.

The office has wide jurisdiction, covering all levels of government and the police but it cannot investigate the judicial functions of courts or the private sector.[176] More specifically, the Public Protector investigates, on receipt of a complaint or *suo moto*, maladministration in connection with the affairs of government; abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function; 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.[177] The Public Protector has strong powers of investigation, during an investigation the Public Protector can engage in mediation, conciliation or negotiation, and on its conclusion can make recommendations and can notify prosecutors if he is of the opinion that an offense has been committed.[178] 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 Public Protector deems it to be necessary or in the public interest.[179] Complaints cover a full range of poor administration including denial of due process, unreasonable delay, insufficient reasons given for decisions, incorrect or unreasonable interpretation of laws, regulations, guidelines, criteria, etc., inequitable provision of public services and denial of access to information.[180] A number of special reports have been submitted, on topics such as nepotism in government, conservation, financial irregularities, and irregularities in the granting of university degrees.[181] Investigations also involve conflict of interest, corruption and financial misconduct by public officials.[182]

Despite the fact that the Public Protector has no express human rights mandate, the institution considers the violation of human rights by public authorities to fall within the concept of "improper prejudice" suffered by a person.[183] In this manner, the Public Protector can enforce constitutional human rights indirectly.[184] Pursuant to an understanding with the Human Rights Commission, the Public Protector investigates individual cases of human rights violations by the public authorities, while the Human Rights Commission investigates "the wider tendencies of human rights abuses".[185] In addition, the South African Constitution contains a right to administrative action.[186] In this sense:

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176 Constitution of South Africa (1996), *ibid.*, s. 182(1)-(3); *Public Protector Act, ibid.*, s. 6(6).

177 *Public Protector Act, ibid.*, s. 6(4)-(5).

178 *Ibid.*, ss. 6(4)(b)-(c), 7-9.

179 *Ibid.*, s. 8(2).

180 Public Protector of South Africa, *Annual Report 1999* at 18.

181 *Ibid.*; <www.polity.org.za/html/govt/pubprot/>. See also *infra* note 188.

182 E.g. *Annual Report 1999, ibid.* at 19-35; "Public Protector Prepares to Investigate Defence Minister", *South African Press Association (Johannesburg)* (June 1, 2003).

183 *South Africa's Public Protector: An Introduction, supra* note 162 at 9.

184 *Ibid.*

185 *Ibid.* at 9; Baqwa, "The Role of the Public Protector Vis-à-vis Other Institutions that Redress Grievances in South Africa", *supra* note 170 at 136.

186 The Constitution of South Africa (1996) *supra* note 164, s. 33:

> "(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 . . .".

> [w]hen adjudicating upon complaints about state administration, the Public Protector is therefore bound in terms of the Bill of Rights to see that the complainant is treated lawfully, reasonably and procedurally fairly.[187]

Thus, the human rights guarantees in the South African Constitution are relevant for the work of the Public Protector. While administrative issues comprise the bulk of complaints, the institution has investigated complaints concerning police conduct, discrimination, racism, prison conditions, the right to privacy, breach of a right to a safe environment and unreasonable and unfair administrative action.[188] In 1998, the South African Human Rights Commission finalized a National Action Plan for human rights protection and promotion.[189] The National Action Plan, covering a five-year period, named the Public Protector as one of the domestic institutions invited to monitor and implement specified civil, political, economic and social rights.[190]

As another multi-racial and multi-party democracy, some human rights problems also continue in South Africa, including police misconduct, poor prison conditions, xenophobia and high levels of violence against women and girls.[191] The judicial system is independent, although sometimes slow, and has an important role in protecting human rights.[192] The jurisdiction and powers of the Public Protector are reasonably strong, although the appointment provisions for the Public Protector and Human Rights Commission have been criticized as not being sufficiently independent from the executive branch.[193] Like other ombudsmen in Africa, the ability of the Public Protector to carry out its multiple mandates has been hampered by insufficient funding provided by the government.[194] In establishing its national human rights institutions, South Africa chose separate institutions for administrative oversight and human rights breaches. Nonetheless, the Public

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187 *South Africa's Public Protector: An Introduction, supra* note 162 at 8-9.

188 Baqwa, "The Role of the Public Protector Vis-à-vis Other Institutions that Redress Grievances in South Africa", *supra* note 170 at 136; Baqwa, "Office of the Public Protector of the Republic of South Africa: Contemporary Challenges", *supra* note 170 at 80; McQuoid-Mason, *supra* note 165 at 618; *Country Reports 2002*, *supra* note 28 at 546. See e.g. Republic of South Africa, Public Protector, *Investigation Concerning the Sarafina II Donor*, Special Report No. 2 (Sept. 11, 1996), in which ss. 13 (right to privacy) and 23 (access to information) of the Constitution of South Africa (1996), *supra* note 164, were applied to the use of donor funding by the health department to promote AIDS awareness in a musical. The Independent Complaints Directorate takes complaints against the police.

189 Republic of South Africa, National Action Plan for the Protection and Promotion of Human Rights (Dec. 1998), <www.sahrc.org.za>. See recommendation to states in Vienna Declaration and Programme of Action (1993) 32 Int'l Legal Mat. 1661, para. 71.

190 Political rights, the rights of aliens, criminal due process rights and the rights to: privacy, access to justice, just administrative action, freedom of expression, health, food, social security and development, National Action Plan for the Protection and Promotion of Human Rights, *ibid.*

191 *Amnesty International: Report 2003*, *supra* note 136 at 225-226; Amnesty International, *Report 2002, supra* note 136 at 222-224; *Country Reports 2002*, *supra* note 28 at 533; *Country Reports 2000, supra* note 82 at 538.

192 *Country Reports 2002, ibid.; Country Reports 2000, ibid.* at 544.

193 Sarkin, "The Drafting of South Africa's Final Constitution From a Human-Rights Perspective", *supra* note 164 at 84-85; Dugard, "The Influence of International Human Rights Law on the South African Constitution" *supra* note 164 at 312.

194 E.g. *Country Reports 2002*, *supra* note 28 at 546.

Protector undertakes some human rights related investigations. Accordingly, the institution is one of the non-judicial domestic mechanisms for human rights protection in South Africa.

The Ombudsman, Good Governance and Human Rights in Asia and the Pacific Region

HUMAN RIGHTS IN ASIA AND THE PACIFIC REGION AND THE OMBUDSMAN

Asia and Pacific states do not have any regional human rights treaty and remedial systems. There has been much debate about the different attitudes and approaches to human rights in Asia based on the different historical, cultural and political contexts, especially in East and Southeast Asia.[195] However, Asia is not monolithic: there are differences between sub-regions and some changes with respect to human rights are occurring on a country-by-country basis.[196] While the record of Asian and Pacific states in becoming contracting parties to UN-sponsored human rights treaties is mixed, and constitutional human rights norms may not accurately reflect the reality of human rights protection, a growing number of states in Asia and the Pacific region are establishing national human rights institutions in the form of human rights commissions, and classical and hybrid ombudsmen.[197] Some of these nations, e.g. India, Sri Lanka, Australia, New Zealand and

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[195] See e.g. The Bangkok Declaration, Report of the Regional Meeting for Asia of the World Conference on Human Rights (Bangkok, March 29-April 2, 1993), UN Doc. A/CONF.157/ASRM/8/CONF.157/PC/59 (1993); D.A. Bell, *East Meets West: Human Rights and Democracy in East Asia* (Princeton: Princeton University Press, 2000); Y. Ghai, "Human Rights and Governance: The Asia Debate" (1994) 15 Aust. Yrbk. Int'l Law 1; M.C. Davis, "Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values" (1998) 11 Harvard H.R.J. 109; D.A. Bell, "The East Asian Challenge to Human Rights: Reflections on an East West Dialogue" (1996) 18 H.R.Q. 641.

[196] See I. Neary, *Human Rights in Japan, South Korea and Taiwan* (London: Routledge, 2002); L. Thio, "Implementing Human Rights in ASEAN countries: 'promises to keep and miles to go before I sleep'" (1999) 2 Yale H.R. & Dev't Law J. 1; V. Sripati, "Toward Fifty Years of Constitutionalism and Fundamental Rights in India (1998) 14 American U. Int'l Law Rev. 413; T.L. McDorman and M. Young, "Constitutional Structures and Human Rights in Southeast Asia: Cambodia, Indonesia, Thailand and Vietnam" (1998) 47 U.N.B. Law J. 85; P. Eldridge, "Human Rights and Democracy in Indonesia and Malaysia: Emerging Contexts and Discourse" (1996) 18:3 Contemp. Southeast Asia 298; Ghai, *ibid.* at 4-6.

[197] See *Status of Ratifications*, *supra* note 85; McDorman and Young, *ibid.* Human rights commissions have been established in the Pacific in e.g. Australia, New Zealand, Fiji, with developments in Papua New Guinea, and in Asia in e.g. Afghanistan, India, Indonesia, Malaysia, Mongolia, Nepal, Philippines, South Korea, Sri Lanka, Thailand, with developments in Bangladesh, Cambodia, Japan and Taiwan. See A. Whiting, "Situating Suhakam: Human Rights Debates and Malaysia's National Human Rights Commission" (2003) 39 Stanford J. Int'l Law 59; S. Cardenas, "National Human Rights Commissions in Asia" (2002) 4:1 H.R. Rev. 30; *Country Reports 2002*, *supra* note 28 at 826; A.H. Monjurul Kabir, "Establishing National Human Rights Commissions in South Asia: A Critical Analysis of the Processes and the Prospects" (2001) 2 Asia-Pacific J.H.R. & Law 1; V. Sripati, "A Critical Look at the Evolving Role of India's National Human Rights Commission

some other Pacific islands, have a Commonwealth heritage that has produced complementary judiciaries and national human rights institutions.[198] In some Asian nations, non-judicial domestic human rights mechanisms such as national human rights institutions may be more acceptable than adjudicative systems for human rights matters given the cultural context that prefers conciliatory means of dispute settlement.[199]

OVERVIEW OF THE OMBUDSMAN IN ASIA AND THE PACIFIC REGION

Asia

In Asia, the first ombudsman institutions appeared in the 1970s and early 1980s in India, Sri Lanka and Pakistan. With the democratization of some Asian states during the 1990s, more ombudsmen began to appear during this period. Classical and hybrid ombudsmen have been established in the following Asian nations: India in some states (first law in 1971);[200] Pakistan *Wafaqi Mohtasib* (1983) and in some provinces;[201] Sri Lanka Parliamentary Commissioner for Administration (1978 Constitution, 1981 law);[202] South Korea Ombudsman (1993 law, in operation 1994);[203] Hong Kong (China) Ombudsman (1988

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in Promoting International Human Rights Law" (2001) 5 Int'l Omb. Yrbk. 163; V. Sripati, "India's National Human Rights Commission: A Shackled Commission?" (2000) 18 Boston U. Int'l Law J. 1; M. Gomez, "Sri Lanka's New Human Rights Commission" (1998) 20 H.R.Q. 281; *Performance & legitimacy, supra* note 21 at 21-36 (Indonesia).

198 See e.g. P. Hyndman, *The Protection of Human Rights in the Pacific Region* (London: Commonwealth Secretariat, June 1991).

199 See e.g. Bell, "The East Asian Challenge to Human Rights: Reflections on an East West Dialogue", *supra* note 195 at 659-660.

200 E.g., states of Andhra Pradesh, Assam, Bihar, Gujurat, Himachal Pradesh, Karnataka, Maharashtra, Madhya Pradesh, Punjab, Rajsthan, Uttar Pradesh. Some of the ombudsmen also handle corruption complaints. There have been a number of proposals to create a national ombudsman in India over the years. See "Cabinet Approves Lok Pal Bill", *The Hindu* (June 28, 2003); S.N. Sangita and G. Suvarchala, "The Lokayukta Institution in Karnataka: A Trend Setter for Three Tier Structure: Ombudsman in India" (1989) 35 Indian J. Public Admin. 904; U.C. Agarwal, "Case for a National Level Ombudsman" (1988) 34 Indian J. Public Admin. 249; R. Ranjan Jha, "The Lokayukta in Bihar: Expectations and Achievements (1973-1983)" (1984-85) 4 Omb. J. 49; D.C. Rowat, "The State Ombudsmen in India" (1984) 30 Indian J. Public Admin. 1.

201 See also the single-sector Federal Tax Ombudsman (2000) investigating complaints of maladministration and corruption by the tax department. There are some provincial ombudsmen, e.g. Punjab, Sind, plus the North-West Frontier Province which, after introducing Islamic law, recently decided to establish an ombudsman supported by a religious police force to prevent "immoral" behaviour, V. Burnett, "Pakistani parties seek Taliban-like laws", *Boston Globe* (May 28, 2003).

202 Constitution of Sri Lanka (1978), art. 156; *Parliamentary Commissioner for Administration Act* (1981) No. 17 as am. Appointed by the President, the Parliamentary Commissioner investigates the infringement of fundamental human rights or other injustices caused by administrative action, makes recommendations, reports annually to the President and legislature. See M.J.A. Cooray, "Ombudsman in Asia: A Case-study of Hong Kong and Sri Lanka" in *Righting Wrongs, supra* note 64 at 75; UN Human Rights Committee, Concluding Observations: Sri Lanka, UN Doc. CCPR/C/79/Add.56, A/50/40, paras. 436-476 (July 27, 1995), para. 3. See also Sri Lanka's Human Rights Commission.

203 In operation in 1994, pursuant to the 1993 *Civil Petitions Treatment Act*, the Ombudsman is composed of 10 ombudsmen including a Chief Ombudsman, who are appointed by the President and

ordinance, in force 1989);[204] Macao (China) Commission Against Corruption (CCAC) (1990 law, in operation 1992, 1999 Basic Law, 2000 law);[205] the Philippines Ombudsman (1973 Constitution and 1978 decree, 1987 Constitution and 1989 law, in operation 1988);[206] Taiwan *Control Yuan* (1947 Constitution, with 1991, 1994 amendments, 1948

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under the control of the Prime Minister. The Ombudsman can investigate public complaints about infringement of the rights of citizens, their inconveniencing or burdening as a result of administrative conduct. The Ombudsman provides guidance, consults, makes recommendations and reports annually to the President. In 2002, the Ombudsman received 16,811 written complaints, with the greatest number of complaints falling in the areas of construction/urban matters (28.7%), finance/taxation (16.8%), criminal/judicial matters (15.6%) and welfare/environment (8.3%). While the mandate of the Ombudsman could cover human rights issues, in practice the office does not appear to address them. South Korea also has a Human Rights Commission and an Independent Commission Against Corruption. See <www.ombudsman.go.kr>; The Ombudsman of Korea, *Annual Report 2002* at 7-9; The Ombudsman of Korea, *The Ombudsman of Korea.*

[204] *The Ombudsman Ordinance*, c. 397, Laws of Hong Kong, formerly *Commissioner for Administrative Complaints Ordinance*, no. 67, (1988, in force Feb. 1, 1989, as am.), established under British governance, renamed Ombudsman in 1996. An executive ombudsman appointed by the Chief Executive of the Hong Kong SAR (formerly appointed by the Governor), the Ombudsman has a classical mandate and investigates on receipt of a complaint or own-motion maladministration, makes recommendations and reports to the executive. The Ombudsman has jurisdiction over access to information complaints. See *infra* note 218 on its human rights cases. Hong Kong also has an Independent Commission Against Corruption, Equal Opportunities Commission and other specialized institutions. See <www.ombudsman.gov.hk>; A. Tai, "The Impact of Social and Political Environments and Their Influence on the Work of the Ombudsman: Hong Kong" (2001) 5 Int'l Omb. Yrbk. 73; Cooray, "Ombudsman in Asia: A Case-Study of Hong Kong and Sri Lanka", *supra* note 202; M.J.A. Cooray, "Hong Kong's Ombudsman: The First Decade" (1999) 3 Int'l Omb. Yrbk. 71; I. Scott, "Reforming the ombudsman: the evolution of the Commissioner for Administrative Complaints Office in Hong Kong" (1994) Public Law 27.

[205] Formerly known as the High Commission Against Corruption and Administrative Illegality, the CCAC now operates in the Macao Special Administrative Region of the PRC (after its transfer from Portugal to the PRC on Dec. 20, 1999) under art. 59 of the 1999 Basic Law, Law 10/2000 (Aug. 14, 2000) and regulations. Although the Basic Law states that the CCAC operates independently, the Commissioner reports to the Chief Executive. The CCAC is an ombudsman for investigating corruption and fraud, including electoral fraud, with additional powers of inspection, detention, search and seizure, and use of weapons (investigators have the status of criminal investigative police). The CCAC protects the rights, freedoms, safeguards and legitimate interests of individuals and ensures that public administration abides by the criteria of justice, legality and efficiency. The CCAC makes recommendations and reports. See <www.ccac.org.mo>; CCAC, *10 Years of Safeguarding Honesty and Transparency in Macao* (Macao: CCAC, Sept. 2002); CCAC of Macao S.A.R., *Annual Report of the Commission Against Corruption 2000.*

[206] The Ombudsman (*Tanodbayan*) was contained in the 1973 Constitution and 1978 Presidential Decree 1487. The Ombudsman was included in the 1987 Constitution, art. XI(2), (5)-(15), supported by Executive Order No. 243 (July 24, 1987) and put into operation on May 12, 1988, followed by the *Ombudsman Act*, No. 6770 (Nov. 17, 1989). Given constitutional independence, the Ombudsman and his Deputies are appointed by the President as an anti-graft and anti-corruption ombudsman. The Ombudsman, with jurisdiction over national and local administration, has strong powers *inter alia* to investigate on receipt of a complaint or own-motion alleged illegal, unjust, improper or inefficient conduct by public administration; direct public officials to perform acts required by law or halt, correct etc. any improprieties; make recommendations for the elimination of the causes of inefficiency, red tape, mismanagement, fraud and corruption in government; and investigate and initiate proper action for the recovery of ill-gotten wealth and/or unexplained wealth amassed after Feb. 25, 1986 and prosecute the parties involved. E.g., the prosecution power has been used against former President Estrada on corruption and graft charges. See <www.ombuds-

law amended in 1992);[207] Thailand Ombudsman (1997 Constitution, 1999 law, in operation 2000);[208] and Indonesia National Ombudsman Commission (2000 executive decree).[209] The legislation for East Timor's ombudsman (Provider of Human Rights and Justice) was being considered in 2003 based on the 2002 Constitution.[210] More broadly, some Central Asian states have human rights ombudsmen, and some states in the Middle East have created national human rights institutions of varying independence and powers.[211] Bangladesh provided for an ombudsman in its constitution and has made several unsuccessful attempts to put an ombudsman in operation.[212] Japan has an administrative counselling system that cannot be classified as an ombudsman.[213] Malaysia has a Public

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man.gov.ph>; S.T. Carlota, "The Ombudsman: Its Effectivity and Visibility Amidst Bureaucratic Abuse and Irregularity" (1990) 65 Philippine Law J. 12.

207 Created in 1948, the *Control Yuan* was reformed in 1991 and 1994 constitutional amendments, and 1992 amendments to the 1948 law, with the new body in place in 1993. The current *Control Yuan* has 29 members including a President, who are nominated by and, with the legislature's consent, appointed by the President. The *Control Yuan* is the highest control body of the state with the powers to: investigate public complaints that national and local public administration has acted illegally or violated their duties, make recommendations to the *Executive Yuan* and its departments, censure, audit and impeach public officials. Powers of impeachment are controlled, but cover central and local public officials including members of the *Judicial Yuan*, and the President and Vice-President. Some impeachment cases have involved human rights breaches in violation of law by public officials. The *Control Yuan* has an Auditor-General who operates under separate audit legislation, with the audit function covering anti-corruption work. Senior public officials must also report their assets to the *Control Yuan*. Taiwan is considering a human rights commission. See <www.cy.gov.tw>; Hwang Yueh-chin, "Role and Responsibility of the Control Yuan" in L.C. Reif, ed., *The Ombudsman Concept* (Edmonton: International Ombudsman Institute, 1995) at 23; Su Chen-ping, "The Government Auditing System of the Republic of China" in, *The Ombudsman Concept, ibid.* at 83; Lee Shen-yi, "Impeachment Powers and Human Rights" (International Ombudsman Institute VI International Conference, Buenos Aires, Oct. 20-24, 1996).

208 See *infra* this Chapter.

209 *Presidential Decree 44/2000* established the National Ombudsman Commission. With eight Commissioners appointed by the President, the Commission was mandated to help develop a conducive environment to fight corruption, collusion and nepotism in public administration (including law enforcement bodies and the judiciary), plus the protection of the rights of the public in receiving public services, justice and improved welfare. The Commission has the power of investigation. See (June 2000) 22:2 International Ombudsman Institute News. 16; J. McBeth, "Money still tips the scales of justice, but a new ombudsman in Jakarta may help strike a balance", *Far Eastern Economic Review* (May 18, 2000). Bandung has also established a municipal ombudsman, (Dec. 2001) 23:4 International Ombudsman Institute News. 5.

210 For a further details on East Timor's ombudsman in the context of post-conflict peace-building, see *infra* Chapter 8.

211 See *supra* Chapter 5, notes 10, 221-222 for Azerbaijan, Kazakhstan, Kyrgyzstan and Uzbekistan, and Chapters 1 and 4 on the Middle East, e.g. Israel, Jordan, Palestinian Territories, Egypt, Qatar, Yemen, Bahrain, Iran and Lebanon developments.

212 The Constitution (1972 as am.), art. 77, states that Parliament may establish an Ombudsman to investigate public administration and report annually to Parliament. Not in operation by mid-2003, there have been some attempts at passing legislation, most recently in 2003.

213 The Ministry of Public Management, Home Affairs, Posts and Telecommunications monitors administration through the Administrative Evaluation Bureau, the Administrative Grievance Resolution Promotion Council and about 5,000 decentralized administrative counsellors. See Government of Japan, *Japan's Administrative Counseling System* (March 2003); T. Hiramatsu, "Why an Ombudsman May not Be Introduced in Japan: Japan's Unique Manner of Decision-Making and Complaint-

Complaints Bureau and a special-sector ombudsman in the state of Selangor.[214] Other countries in Asia without ombudsmen include Afghanistan, Bhutan, Brunei, Cambodia, Laos, Maldives, Mongolia, Myanmar, Nepal, North Korea, Singapore, Vietnam and the People's Republic of China.[215]

A slim majority of the states with ombudsmen in Asia have given the institutions constitutional or equivalent protection: Sri Lanka, Philippines, Macao (China), Taiwan, Thailand and East Timor. However, most ombudsmen in Asia are executive appointments.[216] A majority of Asian ombudsmen have hybrid mandates. The additional anti-corruption, audit and/or leadership code enforcement functions are the most common, notably some states in India (anti-corruption), Indonesia (anti-corruption), Macao (China) (anti-corruption), the Philippines (anti-corruption), Taiwan (audit, anti-corruption, leadership code) and possibly East Timor (considering anti-corruption). These offices are sometimes given additional powers to back up their anti-corruption work, such as the powers to prosecute (Philippines) or impeach (Taiwan), and powers of detention, search, seizure and use of weapons (Macao). While it is a classical ombudsman, the Ombudsman of Hong Kong (China) does engage in some investigations involving corruption.[217]

A few hybrid ombudsmen in Asia have been given human rights protection powers, most notably those in Sri Lanka, Thailand and East Timor. Sri Lanka's Parliamentary Commissioner for Administration does not appear to play a material role in human rights protection, especially given Sri Lanka's more recent Human Rights Commission. The Thai Ombudsman is given a modest but important role in human rights protection, as discussed further below. Both the Thai Ombudsman and the ombudsman proposed for East Timor can bring constitutional issues to court for determination, which can include human rights. While South Korea's Ombudsman can investigate breach of citizens' rights, the office appears to operate as a classical ombudsman. Also, several of the Asian ombudsmen without an express human rights powers do indicate that in practice they

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Handling", *International Ombudsman Institute Occasional Paper* No. 43 (Edmonton: International Ombudsman Institute, May 1988). See also the government Office of Trade and Investment Ombudsman.

214 Established under urban and rural planning law, the Ombudsman examines the impact of development projects on the environment.

215 The PRC has a Ministry of Supervision with jurisdiction over national ministries and provincial, regional and municipal governments. The Minister of Supervision is appointed by the President. The Ministry oversees administration to "guarantee the smooth implementation of government decrees, maintain administrative discipline, facilitate the building of an honest and clean government, improve administration and raise administrative efficiency", *Law on Administrative Supervision* (1997), art. 1. Citizens have the right to complain to supervisory organs about the conduct of administrative organs and officials, and these organs can discipline wrongdoers or make recommendations. Ministry reports are not made public. See K. Buhmann, "Administrative Law Reform and Increased Human Rights Observance in Public Administration and Beyond: the People's Republic of China" in *Human Rights and Good Governance: Building Bridges, supra* note 134, 229 at 245, 249.

216 But see the future East Timor ombudsman who is to be appointed by the legislature, see *infra* Chapter 8, and the role of the legislature in the appointment of the Thai Ombudsman, *infra* text accompanying note 245.

217 Tai, *supra* note 204 at 74.

deal with some human rights matters, for example Hong Kong (China) and Taiwan.[218]

Although most hybrid ombudsmen in Asia have dual mandates, the Taiwan *Control Yuan* has multiple roles (ombudsman, anti-corruption, audit and leadership conduct) and the future East Timor ombudsman may have ombudsman, human rights protection and anti-corruption mandates.

Pacific Region

In addition to their indigenous heritages, the island states of the Pacific region usually have had colonial backgrounds, related to Britain and France in particular, and some were formerly UN trust territories.[219] New Zealand was the first state outside Scandinavia to establish an ombudsman, following the classical Danish model, in 1962.[220]

The classical and hybrid ombudsman institutions in the Pacific region are: Australia's ombudsman offices at the federal and state levels (various statutes starting in 1972),[221] New Zealand Ombudsmen (1962 law),[222] Fiji Ombudsman (1970 Constitution and law,

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[218] Although the Hong Kong Ombudsman does not have an express human rights mandate (except for discriminatory conduct which is often part of the classical mandate), the Ombudsman does investigate some cases with human rights aspects. Many complaints concern health, social, educational and subsidized housing services and thus concern economic, social and cultural rights. One of its own-motion investigations concerned the accommodation provided by employers for foreign domestic workers. The Ombudsman does not have maladministration jurisdiction against the police. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are implemented in domestic Hong Kong Law, Hong Kong is a party to other major UN human rights treaties and there are some human rights provisions in the Basic Law, arts. 25-40, and in ordinances on sex discrimination, disability discrimination and family status discrimination. See Office of the Ombudsman, Hong Kong, *The Ombudsman and the Protection of Human Rights in Hong Kong* (1998); Tai, *ibid.* at 74, 80-81. On Taiwan see *supra* note 207.

[219] See Hyndman, *supra* note 198 at 41-44.

[220] J. Robertson, "The Ombudsman – World Trends" in *The Ombudsman Concept*, *supra* note 207, 3 at 4

[221] See D. Pearce, "Ombudsman in Australia" in *Righting Wrongs*, *supra* note 64 at 93; K. Del Villar, "Who Guards the Guardians? Recent Developments Concerning the Jurisdiction and Accountability of Ombudsmen in Australia" (2002) 6 Intl Omb. Yrbk. 3; E. Biganovsky, "The Experiences of the South Australian Ombudsman: "Policy – Administration – Jurisdiction of the Ombudsman" (1993) 11 Omb. J. 139; J.E. Richardson, "The Australian Commonwealth Ombudsman State of the Institution" (1984-1985) 4 Omb. J. 115. See the Commonwealth and Defence Force Ombudsman (1977), Ombudsman of New South Wales (1975), Ombudsman of the Northern Territory (1978), Queensland Ombudsman (1974), Ombudsman of South Australia (1972), Ombudsman of Tasmania (1979), Parliamentary Commissioner for Administrative Investigations of Western Australia (1992), Ombudsman of Victoria (1973) and Capital Territory Ombudsman (filled by Commonwealth Ombudsman). See *infra* Chapter 9 on New South Wales Ombudsman and various state-level commissioners for children.

[222] A classical ombudsman which does, in practice, take a few human rights related cases. See <www.ombudsmen.govt.nz>; A. Satyanand, "The Ombudsman Concept and Human Rights Protection", *I.O.I. Occasional Paper No. 68* (Edmonton: International Ombudsman Institute, Jan. 1999); *supra* Chapter 4, note 29; S.V. Anderson, "The Prison Work of the New Zealand Ombudsman" (1981) 1 Omb. J. 24. See *infra* Chapter 9 on New Zealand's Commissioner for Children.

appointed 1972, most recently 2000 Constitution, 1998 law),[223] Papua New Guinea Ombudsman Commission (1975 Constitution and organic laws),[224] Solomon Islands Ombudsman (1978 Constitution, 1980 law),[225] Cook Islands Ombudsman (1984 law, in operation 1985),[226] Samoa Ombudsman (1988 law, in operation 1994),[227] Vanuatu Ombudsman (1980 Constitution, 1995 law replaced by 1998 law)[228] and Tonga Commissioner for

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223 Originally created in the 1970 Constitution and 1970 legislation, in operation 1972, maintained in the 1990 and 1997 Constitutions, see *Fiji Constitution (Amendment) Act 1997*, ss. 157-164, and new *Ombudsman Act 1998*, Act No. 11 of 1998. Appointed by the Constitutional Offices Commission following consultation with the Prime Minister, the Ombudsman investigates administrative conduct that is illegal, based on mistake of law or fact, unreasonable, unjust, oppressive, improperly discriminatory or wrong; makes recommendations; and reports. The Ombudsman can investigate breaches of the constitutional Bill of Rights, and has received complaints mainly against the police and prisons, Constitution, *ibid.*, s. 159(3)(b). With the creation of a Human Rights Commission in 1999, the Ombudsman refers complaints to the Commission when appropriate. The Ombudsman is Chair of the Human Rights Commission, Constitution, *ibid.*, art. 42(3). For the Leadership Code of Conduct see Constitution, *ibid.*, s. 156. See Parliament of Fiji, *Thirtieth Annual Report of the Ombudsman* (March 2001-Feb. 2002), Parl. Paper No. 30 (2002) at 45-46 51-60; I. Scott, "The Ombudsman in Fiji: Patterns of Mediation and Institutionalization" (1982) 2 Omb. J. 1.

224 Empowered by the 1975 Constitutions, 217-220, 26-31 (Leadership Code of Conduct), *Organic Law on the Ombudsman Commission* (1975) and *Organic Law on the Duties and Responsibilities of Leadership* (1975), the Ombudsman Commission, comprising the Chief Ombudsman and two Ombudsmen, are appointed by the head of state on the advice of an appointments committee (Prime Minister, Leader of the Opposition and other public officials). The Commission has a dual mandate, investigating (on receipt of a complaint or own-motion) maladministration at national and local levels, and administering and investigating alleged breaches of the constitutional Leadership Code applicable to senior public office-holders. The Leadership Code enables the Commission to investigate corruption. The Commission can also investigate discriminatory practices in both the public and private sectors. If the Commission finds a leader *prima facie* guilty of misconduct under the Leadership Code it must refers the case to the Public Prosecutor for prosecution before a Leadership Tribunal. Leaders must also submit annual financial statements to the Commission. The Commission makes recommendations and reports annually to the head of state for transmission to Parliament. See G. Toop, "The Ombudsman Commission of Papua New Guinea: An Overview of the first 17 years" in G. Hassall and C. Saunders, eds., *The Powers and Functions of Executive Government: Studies from the Asia Pacific Region* (University of Melbourne: Centre for Comparative Constitutional Studies, 1994) at 131; C. Maino, "Ethical Considerations: The Leadership Code of Papua New Guinea" in *The Ombudsman Concept, supra* note 207 at 53, rep. in *International Ombudsman Anthology*, *supra* note 17 at 435; C. Maino, "Investigating Corruption in Institutions: The Legislative Mandate" in *The Ombudsman: Diversity and Development*, *supra* note 17 at 123; H.A. Amankwah and K.I. Omar, "Buttressing Constitutional Protection of Fundamental Rights in Developing Nations: The Ombudsman Commission of Papua New Guinea – A New Hybrid" (1989) 17 Melanesian Law J. 74.

225 Constitution of the Solomon Islands (1978), s. 97, giving the Ombudsman the power to investigate complaints of illegal, unfair or discriminatory conduct by public administration. The Leadership Code of Conduct is found in ss. 93-94. The Ombudsman is limited by a shortage of resources, *Country Reports 2002*, *supra* note 28 at 1057.

226 *Ombudsman Act* (1984), in operation 1985.

227 *Ombudsman Act 1988*, No. 40. Formerly Western Samoa.

228 Created in the 1980 Constitution, arts. 61-65, *Ombudsman Act*, No. 14 (1995), repealed June 26, 1998, replaced by *Ombudsman Act*, No 27 (1998, in force 1999). The Ombudsman has additional Leadership Code enforcement and official languages mandates. Appointed by the President after consulting with the Prime Minister, Speaker of Parliament and other public officials, the Ombudsman investigates, on receipt of a complaint or own-motion, injustice as a result of administrative conduct against standards of illegality, error of law or fact, delay or unreasonableness. The

Public Relations (2001 law, in force 2002).[229] Pacific states without an ombudsman or other national human rights institution are Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Niue, Palau and Tuvalu. Debate on the establishment of an ombudsman is currently underway in Tuvalu and Niue.

Only the ombudsmen in Fiji, Papua New Guinea, Solomon Islands and Vanuatu have constitutional protection. More of the Pacific region ombudsmen are legislative ombudsmen and those which are executive appointments are often made with input from the legislative branch. Ombudsman institutions in the Pacific region which have hybrid mandates are: Fiji (human rights), Papua New Guinea (leadership code enforcement, anti-corruption and anti-discrimination) and Vanuatu (leadership code enforcement, anti-corruption, official languages). Only the Fiji Ombudsman has an express mandate to investigate breaches of constitutional human rights although, with the establishment of a human rights commission, there is now a shared jurisdiction. The Vanuatu Ombudsman also has an official languages protection mandate.[230] In addition, some classical ombudsmen in the region can interpret their mandate to investigate human rights issues and some can expressly address discriminatory conduct or laws, the New South Wales Ombudsman has been given jurisdiction over child abuse matters and the hybrid Papua New Guinea Ombudsman Commission has jurisdiction over discriminatory practices in both the public and private sectors.[231] The issues of government corruption and the conduct of government leaders are of major concern in the Pacific region. Papua New Guinea, Vanuatu and the Solomon Islands have constitutional leadership codes of conduct and leadership code legislation, required in Fiji pursuant to the 1997 Constitution, is being considered by the government.[232] These codes apply to senior elected and public officials, prohibiting conflict of interest, use of office for private gain and other similar behaviour.[233]

Ombudsman makes recommendations and reports. Under the Constitution, the Ombudsman takes complaints from citizens who cannot obtain public services in his or her own official language (French, English, Bislama). The Ombudsman and takes complaints about infringement of the Leadership Code of Conduct, Constitution, arts. 66-68, *Leadership Code Act*, No. 2 (1998). The current *Ombudsman Act* is a weaker replacement for the 1995 statute, Parliament's response to the first Ombudsman's extensive investigations of government corruption (e.g. it requires the Public Services Commission to appoint members of the Ombudsman's staff). The current statute gives the Ombudsman the power to engage in mediation during an investigation. See *Country Reports 2002*, *supra* note 28 at 1089; E.R. Hill, "The Ombudsman as Mediator: Challenges, Limitations and Opportunities in Vanuatu" (2001) 5 Int'l Omb. Yrbk. 146; <www.democratie.francophonie.org/sijip/html/AOMF/>.

229 Appointed by His Majesty in Council, the Commissioner has the classical ombudsman function, investigating administrative conduct on receipt of a complaint or on own-motion, reporting and making recommendations. See *Tonga Commissioner for Public Relations Act 2001*, No. 10 (2001, in force Jan. 2, 2002).

230 *Supra* note 228.

231 See e.g. New South Wales Ombudsman, *supra* note 221; New Zealand Ombudsman, *supra* note 222; Fiji Ombudsman, *supra* note 223; Solomon Islands Ombudsman, *supra* note 225; Papua New Guinea Ombudsman, *supra* note 224; Vanuatu Ombudsman, *supra* note 228, *Press Release*, Ref: 3159/0114/PR (Feb. 24, 2003) (use of Convention on the Rights of the Child to criticise placement of child in the same prison cell with adult prisoners).

232 See Hyndman, *supra* note 198 at 7-9.

233 *Ibid.*

The ombudsmen in Papua New Guinea and Vanuatu have been given leadership code enforcement functions, which extend to cover anti-corruption activities.[234]

THE OMBUDSMAN, GOOD GOVERNANCE AND HUMAN RIGHTS PROTECTION IN ASIA AND THE PACIFIC REGION: SELECTED CASE STUDY

This section examines the Ombudsman of Thailand. East Timor's proposed ombudsman institution is discussed in the peace-building context in Chapter 8.

Thailand

Thailand does not have a colonial heritage, with the state being governed by an absolute monarch until 1932, with most of rest of the twentieth century seeing undue military influence over civil government.[235] However, practices that have been maintained in Thailand over time include "the role of the Monarchy, the existence of civilian government, the independence of the judiciary and the lack of large-scale social, economic, religious or political repression."[236] Thailand has improved its democratic governance since the early 1990s, leading to the 1997 Constitution.[237]

Consideration of an ombudsman for Thailand dates back to 1975. At this time, the Constitutional Drafting Assembly for a new Constitution included an ombudsman in the draft document, but the provision was deleted by the legislative branch for various reasons.[238] In the early 1990s, the concept of an ombudsman became more popular among legislators, academics and members of the public, resulting in 1995 amendments to the 1991 Constitution providing for up to five Ombudsmen.[239] However, the institution was not put into operation as political changes led to the 1997 Constitution.

The 1997 Constitution increases the breadth of human rights protection and creates new state institutions to protect those rights.[240] The 1997 Constitution contains an array of civil, political, economic, social and cultural human rights, and Thailand is now party to most of the UN human rights treaties.[241] The new constitutional institutions include a

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234 See e.g. Maino, "Investigating Corruption in Institutions: The Legislative Mandate", *supra* note 224 at 140-146 (Papua New Guinea).

235 See V. Muntarbhorn and C. Taylor, *Roads to Democracy: Human Rights and Democratic Development in Thailand* (Bankok and Montreal: International Centre for Human Rights and Democratic Development, July 1994) at 1-10; McDorman and Young, *supra* note 196 at 90-91, 93-95.

236 McDorman and Young, *ibid.* at 94-95.

237 Muntarbhorn and Taylor, *supra* note 235.

238 "The Ombudsman of Thailand", <www.ombudsman.go.th>.

239 *Ibid.*; Constitution of Thailand (1995), s. 162(2) (Fifth Amendment), with up to 5 Ombudsmen to be appointed by the King with advice from the Senate. An ombudsman bill was drafted.

240 McDorman and Young, *supra* note 196 at 95.

241 Constitution of Thailand (in force Oct. 11, 1997), ss. 26-65; *Status of Ratifications, supra* note 85 (except for the Convention Against Torture and the Protocols to the International Covenant on Civil and Political Rights).

Constitutional Court, National Human Rights Commission, National Counter Corruption Commission and the Ombudsman of Thailand.[242] An Organic Law on the Ombudsman was passed in 1999 and the institution began operations in 2000 after one Ombudsman was appointed on April 1, 2000.[243] Pursuant to the Constitution, a maximum of three Ombudsmen can be appointed for non-renewable six-year terms and while, initially, only one was appointed, a second was added subsequently.[244] The Ombudsmen are appointed by the King with the advice of the Senate, but the ombudsman legislation provides for the lower house of the legislature to choose a list of nominees, out of which the Senate chooses up to three candidates, with the King making the official appointment.[245]

The Ombudsman investigates complaints against public administration at the national and local levels of government where conduct is illegal, conduct has unjustly injured the complainant or the public, or the law warrants investigation.[246] The Ombudsman has been given strong powers of investigation.[247] After each investigation, a report with all facts, opinions and recommendations for corrective action is sent to the relevant public body – with the Ombudsman permitted to recommend changes to laws, regulations or Cabinet decisions – and if there is non-compliance the Ombudsman can refer the matter to relevant Cabinet Minister, the Prime Minister and, ultimately, the legislature.[248] The Ombudsman is to submit recommendations, opinions and reports to the legislature, and annual and special reports are submitted to both the House of Representatives and the Senate.[249]

When, in the course of an investigation, the Ombudsman is of the opinion that a law, regulation or action of a public official is in violation of the Constitution, the Ombudsman shall submit the case and an opinion to the Constitutional Court or the Administrative Court for decision.[250] The Constitutional Court or the Administrative Court are constitutionally required to decide the case without delay.[251] Thus, while the Thai

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242 Ombudsmen: Constitution of Thailand (1997), *ibid.*, ss. 196-198, 329-330; <www.ombudsman. go.th>. The National Human Rights Commission began operations in July 2001 and can *inter alia* investigate human rights breaches, Constitution of Thailand (1997), *ibid.*, ss. 199-200; National Counter Corruption Commission, Constitution of Thailand (1997), *ibid.*, ss. 297-302. See *Country Reports 2002*, *supra* note 28 at 1070.

243 *Ombudsman Act 1999*, B.E. 2542, Royal Gazette no. 116, ch. 81 (Sept. 14, 1999). See <www.ombudsman.go.th>.

244 Constitution of Thailand (1997), *supra* note 241, s. 196; *Ombudsman Act 1999, ibid.*, ss. 5, 9; P. Soontornpipit, "Is a Culture of Accountability Developing in Thailand?", paper presented at International Conference, Center for Democratic Institute, Canberra (April 23, 2002), <www.ombudsman.go.th> "Articles".

245 Constitution of Thailand (1997), *ibid.*; *Ombudsman Act 1999, ibid.*, ss. 6-8.

246 Constitution of Thailand (1997), *ibid.*, s. 197; *Ombudsman Act 1999, ibid.*, s. 16(1). In addition to direct individual complaints, members of the House of Representatives or the Senate can lodge complaints on behalf of the complainant, *Ombudsman Act 1999, ibid.*, ss. 19, 21.

247 *Ombudsman Act 1999, ibid.*, ss. 27, 3751-53.

248 *Ibid.*, s. 30.

249 Constitution of Thailand (1997), *supra* note 241, s. 197; *Ombudsman Act 1999, ibid.*, ss. 16(2), 33-34. The Ombudsman's budget proposals, however, go to Cabinet for inclusion in the annual budget bill, *Ombudsman Act 1999*, *ibid.*, s. 48.

250 Constitution of Thailand (1997), *ibid.*, s. 198; *Ombudsman Act 1999, ibid.*, s. 17.

251 Constitution of Thailand (1997), *ibid.*

Ombudsman primarily has a classical mandate, it is designed to be a monitor of constitutional rights, including human rights, which arise in its investigations, and can require the Constitutional Court to produce a judgment on the matter which, in turn, provides a binding decision for the complainant. The Ombudsman does not investigate corruption matters, and these are referred to the National Counter Corruption Commission.[252]

In just over three years of operation, the Ombudsman has received a growing number of complaints.[253] Typical complaints cover various areas of poor administration.[254] By late August 2003, the Ombudsman had made five submissions to the Senate for law reform, and had submitted fourteen constitutional cases to the Constitutional Court or Administrative Court.[255] Examples of human rights cases which the Ombudsman has brought to the Constitutional Court include: an action arguing that legislation requiring married women to use their husband's family name was contrary to Article 30 of the Constitution (equal rights between men and women), another which unsuccessfully argued that the judicial personnel law prohibiting disabled persons from becoming judges was contrary to Article 30 (prohibition of unjust discrimination on various grounds) and an action in which the Constitutional Court ruled that a law permitting a military court to pass judgments in cases which it does not hear was unconstitutional.[256]

Thailand has a consolidating democratic government. While human rights are respected generally, there are some continuing human rights problems in areas such as police violence, lengthy pretrial detention, poor prison conditions, trafficking in persons and mistreatment of migrant workers.[257] The judiciary is independent but is sometimes subject to corruption.[258] The Thai Ombudsman institution is in its formative years. The first Ombudsman has dedicated considerable efforts to educating the general public on the existence and role of the ombudsman.[259] The increasing workload of the institution will require more financial and human resources, and it is interesting to note that the 1997 Thai Constitution obligates the state to provide adequate budgets for specified state institutions including the Ombudsman.[260] While the main focus of the Ombudsman is on administrative justice, the institution does have a human rights protection role to play

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252 *Ombudsman Act 1999, supra* note 243, ss. 25(1), 26, 32. The agency to which the matter is referred to must report to the Ombudsman every three months.

253 In 2000, 312 complaints were received, 787 were received in 2001, 1,567 in 2002 and 1,340 to Aug. 2003, see <www.ombudsman.go.th> "Monthly Report".

254 See Soontornpipit, *supra* note 244; <www.ombudsman.go.th> "Selected Complaints and Resolutions" (e.g. complaints about educational institution, delay in compensation for expropriated land, constitutionality of food and drug administration practice).

255 See <www.ombudsman.go.th> "Statistics of Complaint Handling".

256 S. Susanpoolthong and W. Nanuam, "Army court must hear case before ruling", *Bangkok Post* (June 28, 2003); S. Susanpoolthong, "Wives will get right to maiden name: Axe poised to fall on husband's surname", *The Bangkok Post* (June 4, 2003); S. Susanpoolthong, "Court upholds ban on disabled: 8-3 ruling cites 'social values'", *The Bangkok Post* (May 1, 2002).

257 *Amnesty International: Report 2003*, *supra* note 136 at 246; *Amnesty International: Report 2002*, *supra* note 136 at 241-242; *Country Reports 2002*, *supra* note 28 at 1060; *Country Reports 2000*, *supra* note 82 at 1062.

258 *Country Reports 2002, ibid.*

259 Soontornpipit, *supra* note 244.

260 Constitution of Thailand (1997), *supra* note 241, s. 75.

in providing direct individual access to Constitutional Court hearings of human rights or other constitutional issues when the Ombudsman considers that a constitutional breach has occurred. Therefore, use of the Ombudsman potentially provides a faster and cheaper means of individual access to the Constitutional Court compared to the alternative of individual litigation in the courts.[261] Thus, the Thai Ombudsman serves as a non-judicial mechanism for the domestic protection of human rights, alongside the judiciary and the National Human Rights Commission.

Classical and Hybrid Ombudsmen in Africa, Asia and the Pacific Region

Ombudsmen have been established in Africa, Asia and the Pacific region since the 1960s and 1970s. However, many of the ombudsmen found in Africa and some of those located in Asia have been set up since the early 1990s. While the number of ombudsman and other national human rights institutions in the three regions is increasing, there are still a material number of countries that have not yet established ombudsmen or other institutions. However, some of these states are subject to civil strife and/or their governments are not democratic so that they do not have strong prospects for a viable ombudsman or other national human rights institution.

Countries in Africa, Asia and the Pacific region with ombudsman institutions have often adapted the ombudsman concept. Growing numbers of states in the three regions are establishing hybrid ombudsmen, whether they be human rights, good governance, anti-corruption and/or leadership code enforcement ombudsmen. Ombudsmen with anti-corruption and/or leadership code enforcement roles are located primarily in these three regions. Ombudsmen with three or more mandates are found most often in Africa, although some are appearing in Asia and the Pacific region. African and Asian ombudsmen are predominantly executive appointments, with the resulting independence issues, while the Pacific region is mixed in terms of its executive and legislative ombudsmen. The hybrid ombudsmen surveyed in the case studies illustrate how both good governance and human rights protection can be furthered at the domestic level. However, the case studies also demonstrate how special attention needs to be paid to the adequate funding of ombudsmen with numerous mandates.

There has been little interface between the African regional human rights system and domestic ombudsmen. While there is no regional human rights system for Asia and the Pacific region, the establishment of human rights ombudsmen and other national human rights institutions in some countries in these regions can be seen as a positive development. While most ombudsmen in these regions do not appear to directly use international human rights instruments in their work, some do rely on constitutional human rights provisions.

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[261] K. Thongthammachart, "Principle and Concept for Ombudsman Institution" presented at Annual Seminar on Ombudsman and the Expectation of Agencies and the People, Bangkok (April 23, 2001), <www.ombudsman.go.th> "Articles".

CHAPTER EIGHT

Post-Conflict Peace-Building: Establishment of the Human Rights Ombudsman

In the post Cold War period, armed conflict continues to proliferate. Inter-state conflict, however, is the exception. Civil conflict – based on ethnic, religious, political and other differences – is common.[1] War-torn societies suffer from a variety of domestic weaknesses, including state institutions that are flawed or have been destroyed, human rights abuses and breakdown in the rule of law. After the conflict ends, reconstruction of state and societal sectors needs to occur to prevent the state from slipping back into armed conflict. The concept of post-conflict peace-building developed in the 1990s, often associated with internationally-brokered peace agreements.[2]

This Chapter will discuss the concept of post-conflict peace-building as it is appearing in recent peace operations of the UN and regional organizations. The establishment and strengthening of national human rights institutions, in particular the human rights ombudsman, in a growing number of these post-conflict peace-building missions will be explored. National human rights institutions are sometimes established in countries that have used mainly internal processes to make the transition from civil conflict (e.g. South Africa)[3] and, although these forms of peace initiatives may be mentioned, the focus of this Chapter will be on international peace processes.

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[1] E.g. S.J. Stedman, D. Rothchild, and E.M. Cousens, eds., *Ending Civil Wars: The Implementation of Peace Agreements* (Boulder: Lynne Rienner Publishers, 2002) [hereinafter *Ending Civil Wars*].

[2] See e.g. *Ending Civil Wars, ibid.*; E.M. Cousens and C. Kumar, eds., *Peacebuilding as Politics: Cultivating Peace in Fragile Societies* (Boulder: Lynne Rienner Publishers, 2001) [hereinafter *Peacebuilding as Politics*]; L. Reychler and T. Paffenholz, eds., *Peace-Building: A Field Guide* (Boulder: Lynne Rienner Publishers, 2001); C. Bell, *Peace Agreements and Human Rights* (Oxford: Oxford University Press, 2000); H. Miall, O. Ramsbotham and T. Woodhouse, *Contemporary Conflict Resolution* (Cambridge: Polity Press, 1999); Symposium on *State Reconstruction After Civil Conflict* in (2001) 95 American J. Int'l Law 1; R. Paris, "Peacebuilding and the Limits of Liberal Internationalism" (1997) 22:2 Int'l Security 54; M. Nowak, "The New Trend Towards Re-Politicising Human Rights" in M. Castermans-Holleman, F. van Hoof and J. Smith, eds., *The Role of the Nation-State in the 21st Century: Human Rights, International Organisations and Foreign Policy* (The Hague: Kluwer Law International, 1998) at 151.

[3] See e.g. Bell, *ibid.* at 193-222.

Post-Conflict Peace-building Under United Nations Auspices – The Role of the Human Rights Ombudsman

DEVELOPMENT OF THE CONCEPT OF POST-CONFLICT PEACE-BUILDING

In the post Cold War era, the UN and regional organizations have regularly faced complex conflict situations, and many have led to the establishment of multi-faceted operations that combine peacekeeping and post-conflict peace-building elements. These complex peace operations often follow after the termination of civil conflict.

In the early 1990s, the UN turned its attention to the burgeoning functions of peace missions. In 1992, in *An Agenda for Peace*, the UN Secretary-General listed the various interrelated functions of these missions as preventive diplomacy, peacekeeping and peacemaking, and then added a new component: "post-conflict peace-building".[4] In *An Agenda for Peace*, post-conflict peace-building was defined as "action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict."[5] A sample of the elements of post-conflict peace-building was introduced in *An Agenda for Peace* and expanded in its 1995 *Supplement*, including disarming and reintegrating former combatants, repatriating refugees, election monitoring, promoting political participation, training civilian police, improving human rights protection, improving the judiciary, reforming or strengthening government institutions, and social and economic development.[6] Later, the 1995 *Supplement* recognized that UN peace-building operations would likely be gradually transferred to domestic actors.[7] It must also be emphasized that the entire peace-building process is contingent on the consent of the state or entities in which the peace-building activities are contemplated, and the participation of the local population in the peace-building process is essential.[8]

The UN Security Council has supported the inclusion of post-conflict peace-building

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[4] An Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January, 1992, UN Doc. A/47/277-S/24111 (1992), paras. 20-21, in B. Boutros-Ghali, *An Agenda for Peace 1995*, 2d ed. (New York: United Nations, 1995). The Security Council had asked the Secretary-General to prepare a report on the first three elements.

[5] An Agenda for Peace, *ibid.*, para. 21.

[6] *Ibid.*, para. 55; Supplement to An Agenda for Peace: Position paper of the Secretary-General on the occasion of the Fiftieth Anniversary of the United Nations, UN Doc. A/50/60-S/1995/1 (Jan. 3, 1995) in *An Agenda for Peace 1995, supra* note 4, para. 47. See V. Suanzes Pardo, "Military Aspects of Peacemaking and Peace Building" in T.S. Montgomery, ed., *Peacemaking and Democratization in the Western Hemisphere* (Miami: North-South Center Press, University of Miami, 2000) at 233; M. Lund, "A Toolbox for Responding to Conflicts and Building Peace" in *Peace-Building: A Field Guide, supra* note 2 at 16.

[7] Supplement to An Agenda for Peace, *ibid.*, paras. 50-55; Miall, Ramsbotham and Woodhouse, *supra* note 2 at 187.

[8] See L. Kapungu, "Peacekeeping, Peacebuilding, and the Lessons-Learned Process" in *Peace-Building: A Field Guide, supra* note 2, 435 at 440; S. Chesterton, "Passing the baton: the delegation of Security Council enforcement powers from Kuwait to Kosovo" in S. Lee and W. Tieya, eds., *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (London: Routledge, 2001) 148 at 154.

in multidimensional peace missions.[9] It has emphasized the important role of women in peace-building processes, and has called on all actors to adopt a gender perspective in negotiating and implementing peace agreements and peace-building mandates.[10] The Security Council has also called on states to ensure that the protection, rights and well-being of children are integrated into all phases of the peacemaking process, including the post-conflict reconstruction period.[11] In March 2000, the UN embarked upon a review and reform of its peace operations. A panel of experts was created to review and report on the matter. The report was issued on August 17, 2000, and is called the Report of the Panel on United Nations Peace Operations or the "Brahimi Report".[12] In the Brahimi Report, the Panel concluded that UN peace operations are composed of three main activities: 1) conflict prevention and peacemaking, 2) peacekeeping and 3) peace-building, with peace-building having both preventive and post-conflict aspects.[13] The Panel further defined peace-building as:

> activities undertaken on the far side of conflict to reassemble the foundations of peace and provide the tools for building on those foundations something that is more than just the absence of war. Thus, peace-building includes but is not limited to: reintegrating former combatants into civilian society; strengthening the rule of law (for example, through training and restructuring of local police, and judicial and penal reform); improving respect for human rights through the monitoring, education and investigation of past and existing abuses; providing technical assistance for democratic development (including electoral assistance and support for free media); and promoting conflict resolution and reconciliation techniques.[14]

The Panel further mentioned anti-corruption work as one of the important elements of effective peace-building.[15] The Panel also emphasized the critical importance of the human rights component of a peace operation in achieving effective peace-building.[16]

An Agenda for Peace also noted that the promotion of good governance was important in peace-building, particularly in building democratic practices.[17] Indeed, many of the components of peace-building listed in *An Agenda for Peace* and the Brahimi Report are very close to the core elements of good governance discussed earlier in Chapter 3. Peace-building advocates what is, essentially, the building of good governance in the war-torn state.

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[9] Kapungu, *ibid.* at 438-439; for various resolutions, see *infra* notes 10-11, 26.

[10] E.g. S.C. Res. 1325, UN Doc. S/RES/1325/00 (adopted Oct. 31, 2000); S.C. Res. 1366, *infra* note 27, para. 17. See B. Woroniuk, "Mainstreaming a Gender Perspective" in *Peace-Building: A Field Guide, supra* note 2 at 61.

[11] S.C. Res. 1460, UN Doc. S/RES/1460/03 (adopted Jan. 30, 2003), para. 12.

[12] Report of the Panel on United Nations Peace Operations, UN Doc. A/55/305, S/2000/809 (Aug. 17, 2000), (2001) 39 Int'l Legal Mat. 1432 [hereinafter Brahimi Report]. The Panel was convened on March 7, 2000 by the UN Secretary-General after the negative reports issued on the UN missions in Rwanda and in Bosnia.

[13] *Ibid.*, para. 10.

[14] *Ibid.*, para. 13.

[15] *Ibid.*, para. 14.

[16] *Ibid.*, para. 41.

[17] *An Agenda for* Peace, *supra* note 4, para. 59.

Commentators have examined the evolution of post-conflict peace-building. It has been defined by Miall, Ramsbotham and Woodhouse as being "(a) the 'negative' task of preventing a relapse into overt violence and (b) the 'positive' tasks of aiding national recovery and expediting the eventual removal of the underlying causes of internal war."[18] In this sense, the Brahimi Report addresses both the positive and negative tasks involved in peace-building. The *Agenda for Peace* conception of post-conflict peace-building has been criticized by Elizabeth Cousens as being too limited, as practical experience has highlighted the importance of issues such as: determining the needs of the recovering state, prioritizing peace-building activities, peace-building when there is no formal peace agreement, the political impact of the peace-building process on the state and having exit strategies for the international organizations involved.[19] There has also been scholarly critique of peace-building parallel to that raised against good governance. For example, Roland Paris has argued that peace-building inserts western notions of democratic governance and liberal economic and social organization into war torn states, and the competition inherent in these models may in fact contribute to destabilization or a slowdown in the peace-building effort.[20] Paris, however, argues that "liberal internationalism" as a peace-building strategy should be modified, but not abandoned.[21]

POST-CONFLICT PEACE-BUILDING AND NATIONAL HUMAN RIGHTS INSTITUTIONS

As described above, post-conflict peace-building comprises many activities, including the establishment or reform of governmental institutions and initiatives to strengthen human rights protection.[22] Research on peace-building operations has indicated that local capacity-building for human rights and reconciliation is a relatively inexpensive initiative that has "important potential longer-term payoffs".[23] The establishment or strengthening of national human rights institutions can also be considered to be one of the many elements of peace-building operations. Increasingly, provisions for the establishment or strengthening of national human rights institutions are being included in peace agreements. This initiative furthers the positive tasks of (re)building domestic governance institutions and protecting human rights in order to strengthen the rule of law and reduce conflict between the state and the public. The United Nations Development Programme (UNDP) has recognized that:

> [g]iven the severe human rights problems and pressures facing the judicial branch in most wartorn societies, human rights institutions are often essential in the transi-

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[18] Miall, Ramsbotham and Woodhouse, *supra* note 2 at 187-188.

[19] E.M. Cousens, "Introduction" in *Peacebuilding as Politics, supra* note 2, 1 at 5-9, 12.

[20] Paris, *supra* note 2.

[21] *Ibid.* Aspects of the notion of liberal internationalism, used in international relations theory, has similarities to the concept of good governance.

[22] See T.L. Putnam, "Human Rights and Sustainable Peace" in *Ending Civil Wars, supra* note 1 at 237.

[23] S.J. Stedman, "Introduction" in *Ending Civil Wars, ibid.*, 1 at 3.

> tion to democracy by promoting international human rights commitments and providing key administrative oversight – especially in the security sector . . . recent examples in East Timor, Guatemala and Kosovo underscore their importance to democratic peacebuilding in states emerging from civil and other complex conflicts.[24]

In looking at the possible contours of future peace missions including peace-building elements, one of the Brahimi Report's recommendations was that "a doctrinal shift in the use of civilian police, other rule of law elements and human rights experts in complex peace operations" be made in order to "reflect an increased focus on strengthening rule of law institutions and improving respect for human rights in post-conflict environments".[25] The Panel did not specifically mention national human rights institutions, but they do fall within the broader categories of rule of law institutions and human rights protection.

In November 2000, the Security Council adopted Resolution 1327 on the implementation of the report of the Panel on United Nations Peace Operations.[26] The Security Council indicated that the most effective means of avoiding violent conflict is addressing its root causes, such as promoting a democratic society based on a strong rule of law and civic institutions, and respect for all human rights.[27] With respect to national human rights institutions, the Security Council welcomed:

> the Secretary-General's intention to spell out more clearly, when presenting future concepts of operations, what the United Nations system can do to help strengthen local rule of law and human rights institutions, drawing on existing civilian police, human rights, gender and judicial expertise.[28]

As discussed in earlier chapters, national human rights institutions comprise human rights commissions, classical and human rights ombudsmen, and other variants such as the ombudsman for children. Truth commissions – as temporary bodies to uncover the true nature and extent of past human rights abuses – are separate institutions, although sometimes they are also established in the peace process.[29]

National human rights institutions established in the post-conflict peace-building context must be established according to the Paris Principles, although investigative powers should be mandatory.[30] The institution established must be structured to address the

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[24] United Nations Development Programme, *Human Development Report 2002: Deepening democracy in a fragmented world* (New York, Oxford: Oxford University Press, 2002) at 98.

[25] Brahimi Report, *supra* note 12, Recommendations 2(b), (d), Executive Summary. The Report also stated that individual experts in judicial, penal, human rights and policing matters must be available in sufficient numbers when required by peace-building missions, and the team approach must be used and given adequate resources, *ibid.*, paras. 39-40.

[26] S.C. Res. 1327, UN Doc. S/RES/1327/00 (adopted Nov. 13, 2000).

[27] *Ibid.*, Annex, Part V. See also S.C. Res., UN Doc. S/RES/1366/01 (adopted Aug. 30, 2001), para. 15, which stressed the importance of including peace-building components within peace-keeping operations as part of a conflict prevention strategy and to facilitate a smooth transition to the post-conflict peace-building phase of a peace mission.

[28] S.C. Res. 1327, *supra* note 26, Annex, Part VI.

[29] E.g. Sierra Leone, East Timor. See *supra* Chapter 1 for discussion of truth commissions.

[30] Principles Relating to the Status of National Institutions, U.N. G.A. Res. 48/134, UN GAOR, 48th Sess., 85th mtg., UN Doc. A/RES/48/134 (1993), rep. in United Nations Centre for Human Rights,

complaints of minority groups, especially if the past conflict involved clashes between different ethnic or religious groups. The national human rights institution must also have the powers and resources to effectively handle complaints about the human rights of women and children.[31]

Overview of Peace-Building Initiatives Containing Provisions for National Human Rights Institutions

Beginning in the late 1980s, a number of international peace processes, many with the assistance of the UN, have incorporated peace-building missions which include the construction or strengthening of democratic institutions and the protection of human rights within their mandates.[32] Some of these foundational peace accords and peace-building missions have also included provisions for the creation or strengthening of national human rights institutions in the elements addressing human rights protection. Human rights ombudsmen and human rights commissions have been called for, established or strengthened through the peace accords or Security Council mandated complex peace missions for: El Salvador, Guatemala, Bosnia and Herzegovina, Sierra Leone, Kosovo, East Timor and Afghanistan. Also, the 1998 Northern Ireland Peace Agreement included provisions for creating human rights commissions in Ireland and Northern Ireland.[33]

In Latin America, the UN sponsored peace agreements for El Salvador established the *Procurador para la Defensa de los Derechos Humanos* in 1992 and the 1996 Guatemala peace accords contained provisions to strengthen the existing *Procurador de los Derechos Humanos*.[34]

In Europe, the 1995 Dayton Peace Agreement for Bosnia and Herzegovina contained human rights guarantees and procedures, including the establishment of a Human Rights Ombudsman.[35] In the 1999 Kosovo conflict, after NATO intervention, the UN Security Council established an international civil presence in Kosovo (United Nations Interim Administration Mission in Kosovo or UNMIK) to provide a transitional administration, with UNMIK establishing a Kosovo Human Rights Ombudsperson in 2000.[36]

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, UN Doc. HR/P/PT/4 (1995). See *supra* Chapter 4 for discussion of the Paris Principles and *infra* Chapter 12 for discussion of ombudsman effectiveness factors.

31 *Supra* notes 10-11; Woroniuk, *supra* note 10 at 69. The state should also sign and ratify treaties supporting women's human rights. See *supra* Chapter 4, text accompanying notes 150 to 156, for further discussion on the ombudsman and women's rights.

32 See Putnam, *supra* note 22 at 261-262 for a list of peace processes, with the following including human rights in the settlement: Angola II (1998), Bosnia and Herzegovina (1995), Cambodia (1993), El Salvador (1992), Guatemala (1996), Nicaragua (1987) and Rwanda (1993).

33 (1998) 37 Int'l Legal Mat. 751, "Rights, Safeguards and Equality of Opportunity", paras. 5, 9. Both already had classical ombudsmen.

34 For further details on the Guatemala *Procurador* see *supra* Chapter 6 and *infra* this Chapter on El Salvador's *Procurador*.

35 For further details on the Bosnia and Herzegovina Human Rights Ombudsperson see *infra* this Chapter.

36 For further details on the Kosovo Human Rights Ombudsperson see *infra* this Chapter.

In Africa, in mid-1999 the parties to the conflict in Sierra Leone signed the Lomé Peace Agreement.[37] The Lomé Peace Agreement included provisions for the creation of a national Human Rights Commission.[38] UN Security Council Resolution 1270 created the United Nations Mission in Sierra Leone (UNAMSIL) to cooperate with the Peace Agreement parties in implementing its terms.[39] Sierra Leone had established a National Commission for Democracy and Human Rights (NCDHR) in 1996, although this office had difficulty operating due to the civil conflict.[40] After the Lomé Peace Agreement, there were differences of opinion in Sierra Leone over whether the NCDHR should be retained and strengthened, or replaced by a new human rights commission.[41] Legislation to establish a new Human Rights Commission was drafted by UNAMSIL and submitted to the government in September 2003.[42] In a move that was independent of the peace process, an Ombudsman, provided for in the 1991 Sierra Leone Constitution and 1997 legislation, started operations in 2002.[43]

In Asia, in 1999 the situation in East Timor resulted in a UN transitional administration which created an Ombudsperson office to monitor the transitional administration, followed by the provision for a domestic human rights ombudsman in the 2002 independence Constitution of East Timor.[44] Afghanistan, in the post-September 11, 2001 period, saw the intervention of a U.S. led force against the Al-Qaeda terrorist organization and Taliban government.[45] Subsequently, with the assistance of the international community, representatives of Afghan society concluded the Bonn Agreement in December 2001 as a basis for restructuring Afghan society, including the governance structure, legal system and human rights protection.[46] One of the institutions called for in the Bonn

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37 Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL) (in force July 7, 1999), <http://www.sierra-leone.gov.sl/peace_agreement.htm> [hereinafter Lomé Peace Agreement].

38 Lomé Peace Agreement, *ibid.*, art. XXV(1) (agreement to create, not later than 90 days after the signing of the Agreement, "an autonomous quasi-judicial national Human Rights Commission").

39 S.C. Res. 1270, UN Doc. S/RES/1270/99 (adopted Oct. 22, 1999), art. 17; S.C. Res. 1260, UN Doc. S/RES/1260/99 (adopted Aug. 20, 1999), art. 10. The mandate of UNAMSIL was later revised under Chapter VII to include security measures, S.C. Res. 1289, UN Doc. S/RES/1289/00 (adopted Feb. 7, 2000).

40 Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa* (New York: Human Rights Watch, 2001).

41 *Ibid.*

42 Twentieth report of the Secretary-General on the United Nations Mission in Sierra Leone (UNAMSIL), UN Doc. S/2003/1201 (Dec. 23, 2003), para. 31; National institutions for the promotion and protection of human rights, Report of the Secretary-General, UN Doc. A/56/255 (Aug. 1, 2001), para. 23.

43 See *supra* Chapter 7, note 45.

44 For further details on East Timor's ombudsman initiative see *infra* this Chapter.

45 See S.C. Res. 1368, UN Doc. S/RES/1368/01 (adopted Sept. 12, 2001); NATO North Atlantic Charter, art. 5.

46 Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (Dec. 5, 2001) [hereinafter Bonn Agreement]; S.C. Res. 1378, UN Doc. S/RES/1378/01 (adopted Nov. 14, 2001); S.C. Res. 1383, UN Doc. S/RES/1383/01 (adopted Dec. 6, 2001).

Agreement was a human rights commission.[47] The human rights commission was established and began operating in 2002.[48] With the U.S. intervention in Iraq in 2003, the post-conflict peace-building process is under U.S. and British authority, although the UN has become involved.[49] In June 2003, Human Rights Watch called on international donors to ensure that human rights protection is a major component of Iraq's reconstruction, and to support the establishment of an independent and effective monitoring system such as a human rights ombudsman or commission, structured in accordance with the Paris Principles, with a mandate covering the spectrum of human rights and the powers to "conduct investigations, make recommendations and make representations to both the occupying power and any transitional Iraqi authority."[50]

Selected Case Studies of Human Rights Ombudsmen Established in Post-Conflict Peace-Building Initiatives

This section examines in greater detail the human rights ombudsman institutions established in the post-conflict peace-building processes in El Salvador, Bosnia and Herzegovina, Kosovo and East Timor.[51]

EL SALVADOR

The *Procurador para la Defensa de los Derechos Humanos* (PDDH or Attorney for the Defence of Human Rights) was established in El Salvador as part of the peace process following the termination of the civil war between the government and the Farabundo Martí National Liberation Front (FMLN) that had lasted for twelve years.[52] The first

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[47] Bonn Agreement, *ibid.*, art. III.C(6), "The Interim Administration shall, with the assistance of the United Nations, establish an independent Human Rights Commission, whose responsibilities will include human rights monitoring, investigation of violations of human rights, and development of domestic human rights institutions. . . ." The Interim Administration and Interim Authority were replaced by a Transitional Authority in June 2002, which itself will be replaced by a representative government after free and fair elections in 2004, *ibid.*, art. I(4).

[48] Amnesty International, "Afghanistan: Human rights commission a great development", *Press Release*, ASA/11/010/2002 (June 6, 2002).

[49] S.C. Res. 1483, UN Doc. S/RES/1483/03 (adopted May 22, 2003), acting under ch. VII and, *inter alia*, requesting that the Secretary-General appoint a Special Representative for Iraq with responsibilities including helping to restore and establish institutions for representative governance and promoting human rights protection, *ibid.*, para. 8.

[50] Human Rights Watch, "Human Rights and Iraq's Reconstruction: Memorandum to June 24 International Donors Meeting", *Human Rights Watch Memorandum* (June 20, 2003); Paris Principles, *supra* note 30.

[51] The case studies of El Salvador and Bosnia and Herzegovina are expanded versions from L.C. Reif, "Building Democratic Institutions: The Role of Human Rights Institutions in Good Governance and Human Rights Protection" (2000) 13 Harvard H.R.J. 1, at 13-16, 45-50, 54-57.

[52] See generally C.T. Call, "Assessing El Salvador's Transition From Civil War to Peace" in *Ending Civil Wars, supra* note 1 at 383; R.C. Orr, "Building Peace in El Salvador: From Exception to Rule" in *Peacebuilding as Politics, supra* note 2 at 153; M. Gomez, "The Role of Intervention in Facilitating Violence and Peace in El Salvador, 1977-1998" (April-June 2001) 2:3 H.R. Rev. 76;

push for peace talks in El Salvador was made in the 1987 Esquipulas Peace Agreement between Central American states, with negotiations between the two sides starting in 1989 and the UN entering into the process in 1990.[53] A series of agreements were reached between the government of El Salvador and the FMLN, including the 1991 Mexico Agreement which contained a provision for a National Attorney 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".[54] The PDDH was included in the final 1992 Chapultepec Peace Accords, negotiated under UN auspices.[55] The Chapultepec Peace Agreement stated that the *Procurador* was to be appointed within ninety days after the entry into force of the constitutional reforms resulting from the Mexico Agreement, that the National Commission for the Consolidation of Peace (COPAZ) was to be entrusted with preparing the legislation creating the institution, and that the bill should contain means to eradicate specific human rights abuses.[56] The United Nations Observer Mission in El Salvador (ONUSAL) was given the duty to verify the protection of human rights in the period leading up to the signature of the Peace Accords, and thereafter verified and monitored the implementation of the peace agreements, including the human rights elements.[57]

D. Holiday and W. Stanley, "Under the Best of Circumstances: ONUSAL and the Challenges of Verification and Institution Building in El Salvador" in *Peacemaking and Democratization in the Western Hemisphere, supra* note 6 at 37; E. Torres-Rivas and M. González-Suárez, *Obstacles and Hopes: Perspectives for Democratic Development in El Salvador* (San José: International Centre for Human Rights and Democratic Development, 1994); I. Johnstone, *Rights and Reconciliation: UN Strategies in El Salvador* (Boulder: Lynne Rienner Publishers, 1995); A. de Soto and G. del Castillo, "Implementation of Comprehensive Peace Agreements: Staying the Course in El Salvador" (1995) 1 Global Governance 189; R. Brody, "The United Nations and Human Rights in El Salvador's Negotiated Revolution" (1995) 8 Harvard H.R.J. 153.

53 H. Hey, "Peace Operations: New Opportunities for the United Nations to Promote and Protect Human Rights in the 21st Century" in *The Role of the Nation-State in the 21st Century: Human Rights, International Organizations and Foreign Policy, supra* note 2, 307 at 311, 314.

54 Letter dated Oct. 8, 1991 from El Salvador transmitting the text of the Mexico Agreement and annexes signed on April 27, 1991 by the Government of El Salvador and the FMLN, UN Doc. A/46/553-S/23130 (Oct. 9, 1991), rep. in United Nations Blue Book Series, *The United Nations and El Salvador, 1990-1995*, vol. IV (New York: United Nations Department of Public Information, 1995) 167.

55 Peace Agreement between the Government of El Salvador and the FMLN, signed at Chapultepec castle, Mexico City, on Jan. 16, 1992, Annex to letter dated Jan. 27, 1992 from El Salvador, UN Doc. A/46/864-S/23501 (Jan. 30, 1992), *ibid.* at 193.

56 The 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." *Ibid.*, ch. III, 2.C. See also ss. A-B. COPAZ was created in the Peace Agreement as a mechanism to supervise the implementation of the Agreements. ONUSAL started operations in July 1991.

57 ONUSAL was established in S.C. Res. 693, UN Doc. S/RES/693/91 (adopted May 20, 1991), expanded in S.C. Res. 729, UN Doc. S/RES/729/92 (adopted Jan. 14, 1992); M. Dodson, D.W. Jackson, and L. O'Shaughnessy, "Political Will and Public Trust: El Salvador's Procurator for the

The Constitution of El Salvador was amended to include a provision on the PDDH,[58] the Law establishing the PDDH was drafted and entered into force in March 1992,[59] and the first *Procurador* was appointed in February 1992, beginning operations in July 1992.[60] The Constitution states that the PDDH is one of the entities comprising the Public Ministry, but the PDDH is elected by the legislature.[61] The PDDH is a hybrid human rights ombudsman. Although the major role of the PDDH is the protection and promotion of human rights, the office was also given the general power to supervise the conduct of public administration.[62]

The human rights mandate of the PDDH is extensive, including to: ensure respect for human rights; investigate (on receipt of a complaint or on own-motion) cases of violation of human rights; formulate conclusions, recommendations and public criticisms if recommendations are not implemented by government; promote judicial or administrative actions for the protection of human rights; monitor the situation of persons deprived of their liberty; carry out inspections of prisons and detention centres; propose reforms to state organs for the progress of human rights; present proposals for new human rights laws; issue opinions on draft laws affecting human rights, promote El Salvador's signature, ratification etc. of human rights treaties; propose measures to prevent violations of human rights; issue reports; and develop human rights education programs.[63] The PDDH Law defines the protected 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.[64] It has also been noted that the law governing the PDDH can be interpreted to allow the office to take complaints against both the public and private sectors.[65]

From the outset, the PDDH was weak in terms of its activities, financial and human resources, the approach of the first *Procurador* and the unreceptive attitude of the government to the PDDH's recommendations.[66] ONUSAL's Human Rights Division initially received more complaints than did the PDDH.[67] The first *Procurador* did not work closely with ONUSAL until the latter part of his term, whereupon ONUSAL provided

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Defense of Human Rights and the Dilemmas of Institution-Building" (April-June 2001) 2:3 H.R. Rev. 51 at 58.

58 Constitution of the Republic of El Salvador, am. by *Decree* No. 64, art. 194.

59 *Ley de la Procuraduría para la Defensa de los Derechos Humanos, Decree* No. 163 (Feb. 20, 1992, as am. 1998, 1999, 2001); "Comparative Analysis of Ombudsman Laws", Inter-American Institute of Human Rights, <www.iidh.ed.cr/comunidades/Ombudsnet/cuadro.aspx>.

60 Johnstone, *supra* note 52 at 66.

61 Constitution of El Salvador, *supra* note 58, art. 191; *Ley, supra* note 59, art. 4. The PDDH is appointed for a three-year period.

62 Constitution of El Salvador, *ibid.*, art. 194(7); *Ley, ibid.*, art. 11(7).

63 Constitution of El Salvador, *ibid.*, art. 194; *Ley, ibid.*, arts. 11, 12, 30, 32, 33, 37. See J.L. Maiorano, "The Defensor del Pueblo in Latin America" in R. Gregory and P. Giddings, eds., *Righting Wrongs: The Ombudsman in Six Continents* (Amsterdam: IOS Press, 2000) 263 at 264.

64 *Ley, ibid.*, art. 2.

65 Maiorano, *supra* note 63 at 264.

66 Johnstone, *supra* note 52 at 66; Brody, *supra* note 52 at 172-173; Dodson, Jackson and O'Shaughnessy, *supra* note 57 at 57-58.

67 Johnstone, *ibid.*; Dodson, Jackson and O'Shaughnessy, *ibid.* at 58.

technical and advisory assistance to strengthen the PDDH, with ONUSAL transferring the complaints it received in late 1994 to 1995 to the PDDH and engaging with it in joint investigations.[68] This collaboration ended when ONUSAL was disbanded in 1995.[69]

The ONUSAL mission illustrates the conflicts involved when a peace-building mission has both an institution building mandate (requiring a proactive, supportive attitude) and a human rights verification role (requiring a critical, "watchdog approach").[70] Institution building necessitates the development of close relationships with the new government which may be one of the former parties to the conflict, while human rights verification and protection needs impartial treatment of all former combatants.[71] ONUSAL knew of the problems involving the PDDH, but decided to provide criticism privately and increase its support for the institution.[72] ONUSAL was criticized for giving priority to institution building and not publicly criticizing the *Procurador*.[73] Holiday and Stanley have argued that badly timed public criticism could have hurt the institution, and that:

> [t]he only clear lesson is that the UN can expect some leaders of local institutions to act according to parochial interests at the expense of the best development of their institutions. International missions may gain greater access to the institutions they want to strengthen by strategizing around such parochial interests.[74]

After international involvement with the PDDH ended, the next *Procurador* was a strong and effective appointee.[75] During her tenure, public confidence in the PDDH increased, "to the point where it was seen by the general public as the institution that most deserved respect and trust."[76] However, the following *Procurador* brought the institution to a crisis point. He was unqualified in human rights protection, at the time of his appointment there were charges against him for corruption and poor judicial performance, and he mismanaged the institution, reduced human rights protection activities and then resigned in early 2000 when misconduct charges were brought against him.[77] After a delay of over a year, a new *Procurador* was appointed in July 2001. She has been a more active and human rights protection-oriented *Procurador*, with the result that she has received death threats and attacks from the executive branch, including for her office's role in mediating in a prison riot and criticizing the role of the police in the affair.[78]

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[68] Brody, *supra* note 52 at 172; Johnstone, *ibid.* at 66-67; Holiday and Stanley, *supra* note 52 at 53-54.

[69] ONUSAL was replaced by the more limited UN Mission in El Salvador (MINUSAL), Holiday and Stanley, *ibid.*

[70] *Ibid.* at 55-56.

[71] *Ibid.*

[72] Brody, *supra* note 52 at 172.

[73] Holiday and Stanley, *supra* note 52 at 56; Brody, *ibid.*

[74] Holiday and Stanley, *ibid.*

[75] Victoria Velásquez de Avilés was *Procurador* in 1995-1998. See Dodson, Jackson and O'Shaughnessy, *supra* note 57 at 60.

[76] Amnesty International, *Fear for Safety/Death Threats*, AMR 29/004/2002 (Dec. 20, 2002); Dodson, Jackson and O'Shaughnessy, *ibid.* at 60, 62-64.

[77] Dodson, Jackson and O'Shaughnessy, *ibid.* at 68-71; U.S. Department of State, *Country Reports for Human Rights Practices for 2000* (2001) at 2563, 2570 [hereinafter *Country Reports 2000*].

[78] *Fear for Safety/Death Threats*, *supra* note 76; U.S. Department of State, *Country Reports for Human Rights Practices for 2002* (2003) at 2577-2578 [hereinafter *Country Reports 2002*]. Complaints to

The PDDH has examined a wide range of human rights in its investigative activities. During the 1996 to 1998 period, investigations included those addressing the rights to liberty, personal integrity, work, health and property, and concerning judicial and administrative procedures.[79] In 1997 and 1998, most complaints alleging 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.[80] In 2000, the PDDH received a total of 2,572 complaints, with the highest number of complaints (724 complaints) pertaining to violation of the right to personal integrity – covering torture, degrading treatment, disproportionate use of force and improper treatment of detainees, with most complaints made against the police – and to problems with due process of law (566 complaints).[81] In 2002, the PDDH accepted 3,303 complaints, with the greatest number claiming breaches of personal integrity and due process of law.[82] The PDDH has also worked with other government institutions and NGOs on initiatives to reduce violence against women and improve the rights of children.[83] Recent PDDH investigations have involved impunity for human rights violations, the right to health, the rights of children, the right to a healthy environment and electoral irregularities.[84] In March 2002, a PDDH report recommended that the Archbishop Romero case be reopened.[85]

The human rights situation in El Salvador has improved to a certain degree, but is subject to continuing human rights violations in areas such as killings, kidnapping and use of excessive force by the police, impunity for past human rights violations, prison conditions, discrimination and violence against women, and the rights of children.[86] The late 1990s also saw an increase in common crime rates.[87] Although the judicial system is independent, it is slow and affected by corruption,[88] which places additional pressures on the PDDH in the human rights protection field.

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the PDDH increased considerably after her appointment, evidencing a renewed confidence in the office.

79 Procuraduría para la Defensa de los Derechos Humanos de El Salvador, *Informe de Labores* (June 1996 to May 1997) at 117; U.S. Department of State, *Country Reports on Human Rights Practices for 1998* (1999) at 615-629 [hereinafter *Country Reports 1998*].

80 *Country Reports 1998, ibid.*, at 617. There were 849 complaints on violation of the right to personal integrity in 1998 and 1,199 complaints in 1997. In the January 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.

81 *Country Reports 2000, supra* note 77 at 2570. The PDDH did not receive any complaints of forced disappearances during 2000, but received 87 complaints alleging killing by the police.

82 *Country Reports 2002, supra* note 78 at 2578.

83 *Country Reports 1998, supra* note 79 at 623-626. The PDDH has internal units addressing the rights of women, children and youth, the elderly and the environment.

84 See <www.pddh.gob.sv>; "Salvadoran Ombudsman bemoans poor voter turnout", *BBC Monitoring Service* (March 17, 2003).

85 Amnesty International, *Amnesty International: Report 2003* (London: Amnesty International Publications, 2003) at 96.

86 Amnesty International, *Amnesty International: Report 2002* (New York: Amnesty International Publications, 2002) at 94-95; *Country Reports 2000, supra* note 77 at 2563; *Country Reports 1998, supra* note 79 at 616-620, 623-626; *Country Reports 2002, supra* note 78 at 2568.

87 E.g. Holiday and Stanley, *supra* note 52 at 59; *Amnesty International: Report 2002, ibid.* at 94.

88 *Amnesty International: Report 2002, ibid. Country Reports 2000, supra* note 77 at 2563; *Country Reports 1998, supra* note 79 at 620-621; *Country Reports 2002, ibid.*

The PDDH has good constitutional and legislative provisions on independence, jurisdiction and powers, but it has been subjected to unfavourable political pressures. These have had a negative influence on the effectiveness of the PDDH for many of the years that it has been in operation. The institution has received insufficient funding which has hindered the conduct of investigations.[89] There have been mixed results in terms of the individuals appointed as *Procurador*.[90] The government has been unresponsive to the work of the institution, political polarization in the legislature has led to the appointment of several unqualified *Procuradors* and El Salvador is a country where "the very implementation of a liberal scheme of human rights protections is seen as part of a partisan political agenda".[91] In late 2002, in a report on Central America submitted to the General Assembly, the UN Secretary-General noted that El Salvador's PDDH is recovering its mandate as an independent institution to protect human rights, although problems, such as insufficient financial resources, continue.[92] Yet, despite the hurdles faced by the institution, Robert Orr has concluded that the PDDH "has become one of the lasting accomplishments of the peace process."[93]

The uneven performance of the PDDH of El Salvador illustrates starkly the importance of the character and qualifications of the appointee, the receptiveness of the government to the appointment of a qualified ombudsman and the work of the institution, and the provision of adequate financial resources for the effectiveness of the institution, especially in the peace-building process.[94] However, in the peace-building context, when a national human rights institution is from the outset (or is later on turned into) a domestic institution, these factors influencing the effectiveness of the ombudsman are, for better or worse, fully within the control of the domestic government. In contrast, the human rights ombudsmen in Bosnia and Herzegovina and in Kosovo were structured with international control over the ombudsman appointments until the domestic governments are seen to be ready to take over the operation of the institution.

BOSNIA AND HERZEGOVINA (BAH)

Dayton Agreement Human Rights Ombudsman

Bosnia and Herzegovina's declaration of independence from the former Yugoslavia on March 6, 1992 quickly led to protracted armed conflict and ethnic cleansing in Bosnia.[95]

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89 *Country Reports 1998, ibid.* at 622-623.

90 See *supra* text accompanying notes 75 to 78.

91 Dodson, Jackson and O'Shaughnessy, *supra* note 57 at 71. See also *Country Reports 2002, supra* note 78, with the *Procurador* indicating that in 2002 the government was neither complying with her requests for information nor with her recommendations.

92 UN News Service, "El Salvador a 'transformed country' facing future challenges, Annan says" (Dec. 30, 2002). See U.N. G.A. Res. 57/160 (Dec. 16, 2002), UN Doc. A/RES/57/160 (March 4, 2003), para. 1.

93 Orr, *supra* note 52 at 175.

94 See Holiday and Stanley, *supra* note 52 at 60.

95 See N. Malcolm, *Bosnia: A Short History* (N.Y.: N.Y. University Press, 1994).

The armed conflict 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.[96] The Republic of Bosnia and Herzegovina (BaH Republic or BaH) was divided into two Entities: the Federation of Bosnia and Herzegovina (BaH 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) and Annex 6 (Agreement on Human Rights). The BaH Constitution 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 BaH shall be a contracting party to the fifteen human rights treaties listed in Annex I to the Constitution.[97]

Mechanisms for the implementation of the international human rights referred to in the Constitution were created in the Constitution itself and in Annex 6. Annex 6 established the Commission on Human Rights, composed of two structures: the Office of the Human Rights Ombudsman and the Human Rights Chamber (i.e. court).[98] The Ombudsman and the Human Rights Chamber were to consider (1) "alleged or apparent violations of human rights" found in the European Convention and its Protocols and (2) cases of alleged discrimination on any ground arising in the enjoyment of the rights in the

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[96] General Framework Agreement for Peace in Bosnia and Herzegovina (1996) 35 Int'l Legal Mat. 89 (in force Dec. 14, 1995) [hereinafter Dayton Agreement]. See generally E.M. Cousens, "From Missed Opportunities to Overcompensation: Implementing the Dayton Agreement on Bosnia" in *Ending Civil Wars, supra* note 1 at 531; E.M. Cousens, "Building Peace in Bosnia" in *Peacebuilding as Politics, supra* note 2 at 113; L. Palmer and C. Posa, "The Best-Laid Plans: Implementation of the Dayton Peace Accords in the Courtroom and on the Ground" (1999) 12 Harvard H.R.J. 361; F. Ni Aolain, "The Fractures Soul of the Dayton Peace Agreement: A Legal Analysis" (1998) 19 Michigan J. Int'l Law 957; E.M. Cousens, "Making Peace in Bosnia Work" (1997) 30 Cornell Int'l Law J. 789; P.C. Szasz, "The Dayton Accord: The Balkan Peace Agreement" (1997) 30 Cornell Int'l Law J. 759; P.C. Szasz, "The Protection of Human Rights Through the Dayton/Paris Peace Agreement on Bosnia" (1996) 90 American J. Int'l Law 301; J. Sloan, "The Dayton Peace Agreement: Human Rights Guarantees and their Implementation" (1996) 7 European J. Int'l Law 207.

[97] Constitution of Bosnia and Herzegovina, Annex 4 of the Dayton Agreement, *ibid.*, art. II(1), (2) and (7). The 15 treaties in Annex I include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention Against Genocide, the UN Convention Against Torture, the European Convention Against Torture, the Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Discrimination Against Women, the Convention on the Elimination of Racial Discrimination, the Framework Convention for the Protection of National Minorities and the Refugee Convention and its Protocol.

[98] Agreement on Human Rights, Annex 6 of the Dayton Agreement, *supra* note 96, arts. II(1), IV-XII. See M.S. Gemalmaz, "Constitution, Ombudsperson and Human Rights Chamber in 'Bosnia and Herzegovina'" (1999) 17 Neth. Q.H.R. 277; M. Nowak, "Individual Complaints Before the Human Rights Commission for Bosnia and Herzegovina" in G. Alfredsson et al., eds., *International Human Rights Monitoring Mechanisms* (The Hague: Kluwer Law International, 2001) at 771. The roots of the Ombudsman in the Dayton Agreement can be found in the work of the International Conference on the Former Yugoslavia and in the Vance-Owen Plan, Szasz, "The Protection of Human Rights Through the Dayton/Paris Peace Agreement on Bosnia", *supra* note 96 at 309. This work was also used in the drafting of the Ombudsman provisions in the BaH Federation Constitution, *ibid.*

treaties listed in the Appendix to Annex 6 (which are also in the Annex to the BaH Constitution, with the addition of the European Convention) committed by the Republic or the two Entities after December 14, 1995.[99] The Human Rights Ombudsman was required to give "particular priority to allegations of especially severe or systematic violations and those founded on alleged discrimination on prohibited grounds."[100] Complaints could be made against the public authorities at all levels and all individuals acting under their authority.[101] Thus, the focus of the Ombudsman and the Chamber was on the protection of civil and political rights, plus discrimination in the enjoyment of all rights in the appended treaties, including economic, social and cultural rights. The Dayton Agreement Human Rights Ombudsman was oriented entirely toward the protection of human rights and did not have an express mandate over poor administration in general.

Under the Dayton Agreement, the Human Rights Ombudsman could not be a national of the BaH Republic or a neighbouring state and was appointed by the Chairman-in-Office of the OSCE for a non-renewable five-year term.[102] The Human Rights Ombudsman under the Dayton Agreement was selected by an international body and not by the domestic legislature or executive: a so-called "internal international actor".[103] The same form of appointment is used for the Kosovo Human Rights Ombudsperson, discussed below in this Chapter. The Dayton Human Rights Agreement envisaged that five years after its entry into force, the responsibility for the Commission would be transferred to the BaH Republic institutions unless the parties agreed otherwise.[104] This did not occur on schedule although, as discussed below, domestic legislation was put into place, and domestic ombudsmen were appointed to start in 2004.

The Human Rights Ombudsman was the first-stage investigatory mechanism of the Commission. The Ombudsman could start investigations on receipt of a complaint or on her own motion.[105] After an investigation, the Ombudsman had the power to issue a report, including findings, conclusions on whether there had been a breach of human rights obligations and recommendations.[106] If her recommendations were not complied

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99 Agreement on Human Rights, Annex 6 of the Dayton Agreement, *ibid.*, arts. II(2), V(2) and VIII(1). The complaints could be made not only against the Republic or Entity governments, but also against cantonal and municipal governments therein, and officials or organs of the governments or any individual acting under their authority, *ibid.*, art. II(2).

100 *Ibid.*, art. V(3).

101 Bosnia and Herzegovina Human Rights Ombudsperson, Rules of Procedure (1998), rep. in Bosnia and Herzegovina Human Rights Ombudsperson, *Third Annual Report* (May 1999), rule 9.

102 Agreement on Human Rights, Annex 6 of the Dayton Agreement, *supra* note 98, art. IV(2), (4). The first Ombudsman was a Swiss national, Gret Haller, and the second, appointed in 2000, is Frank Orton, a former Swedish Ombudsman Against Ethnic Administration.

103 Aolain, *supra* note 96 at 984, 987.

104 Agreement on Human Rights, Annex 6 of the Dayton Agreement *supra* note 98, art. XIV.

105 *Ibid.*, art. V(1)-(3). Complaints could be made by a party, a person, an NGO or a group of individuals. The complainant also had the option of specifying that her complaint be heard directly by the Chamber, bypassing the Ombudsman, *ibid.* art. V(1).

106 *Ibid.*, art. V(4); Rules of Procedure, *supra* note 101, rule 18. The first Human Rights Ombudsman used mediation between the parties during an investigation in order to try to find an amicable settlement between the parties in dispute, Rules of Procedure, *ibid.*, rule 14.

with within a specified period of time, the report was forwarded to the OSCE High Representative and the Presidency of the relevant government for further action, unless the Ombudsman decided to take the case to the Human Rights Chamber.[107] The Human Rights Ombudsman could take the case to the Human Rights Chamber at any time in the proceedings or if the recommendations in her report were not complied with.[108] The first Ombudsman did not normally refer cases to the Chamber before she had adopted a report on the complaint.[109] The Human Rights Ombudsman was also entitled to intervene in any proceedings before the Chamber.[110]

Given that the Commission mainly addressed breaches of the European Convention, and the Ombudsman was structured as the first-stage complaint institution, it was noted that the Dayton Agreement Commission was similar to the Council of Europe human rights machinery prior to the abolition of the European Commission of Human Rights, with the Human Rights Ombudsman and Chamber fulfilling the same roles as that of the European Commission and European Court of Human Rights respectively.[111] The approach of the first Ombudsman was said to be too slow and formal.[112] Since both the Human Rights Ombudsman and the Chamber usually required exhaustion of domestic remedies, the result was a lengthy and complex process for complainants, requiring many to go to the Entity courts before the Ombudsman would consider the case.[113]

While operating under the Dayton Agreement, the Human Rights Ombudsman received many complaints concerning property rights (i.e. return of housing, recognition of title to property), non-enforcement of court judgments, discrimination in employment, human rights abuses by the police and the right to a fair trial.[114] In 1999, a report on the conformity of the legal order of BaH with Council of Europe standards was prepared on the request of the Bureau of the Parliamentary Assembly of the Council of Europe.[115] The Report discussed the Dayton Agreement Human Rights Ombudsman,

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107 Agreement on Human Rights, Annex 6 of the Dayton Agreement, *ibid.*, art. V(4), (6), (7); Rules of Procedure, *ibid.*, rules 18(3), 20(3). See Agreement on Human Rights, *ibid.*, Annex 10, for the roles of the High Representative.

108 Agreement on Human Rights, Annex 6 of the Dayton Agreement, *ibid.*, art. V(5), (7).

109 E.g. *Third Annual Report, supra* note 101, "The Activities of the Office".

110 Agreement on Human Rights, Annex 6 of the Dayton Agreement, *supra* note 98, art. V(7); Rules of Procedure, *supra* note 101, rule 23, as a party if she took or referred the case to the Court and as *amica curiae* in other cases.

111 European Commission for Democracy Through Law (CDL), Strasbourg/Venice, "Opinion on the constitutional situation in Bosnia and Herzegovina with particular regard to human rights protection mechanisms" (Nov. 16, 1996) (1997) 28 H.R.L.J. 297 at 299.

112 J. Simor, "Tackling Human Rights Abuses in Bosnia and Herzegovina: The Convention Is Up To It, Are Its Institutions?" [1997] European H.R. Law Rev. 644 at 650-651; Agreement on Human Rights, Annex 6 of the Dayton Agreement, *supra* note 98, arts. V(3) ("[t]he Ombudsman shall determine which allegations warrant investigation"), art. VIII(2) (listing admissibility criteria for the Chamber); Rules of Procedure, *supra* note 101, rule 9 (Ombudsman can waive any of the admissibility criteria).

113 European Commission for Democracy Through Law, *supra* note 111 at 305.

114 Simor, *supra* note 112 at 653-661; Bosnia and Herzegovina Human Rights Ombudsperson, "Bosnia and Herzegovina" (June 1999) 18 European Omb. News. 3.

115 Parliamentary Assembly of the Council of Europe, Report on the conformity of the legal order of Bosnia and Herzegovina with Council of Europe standards, Doc. AS/Bur/BiH (Jan. 18, 1999), (1999) 20 H.R.L.J. 393.

stating that Annex 6 of the Agreement "would appear to assume that as a rule the State or the Entities ought to accept recommendations of the Ombudsperson", but that in practice there was a "pattern of failure to comply" with both the recommendations of the Ombudsperson and the binding decisions of the Chamber.[116] It was a critical report, concluding that human rights and the rule of law in BaH at the time did not conform with the standards required of Council of Europe member states.[117] The first Human Rights Ombudsman also raised concerns about the inaction of the BaH government both in developing domestic legislation to transform the Ombudsman into a domestic institution and in supporting the office financially.[118]

Domestic Legislation: Human Rights Ombudsman of BaH

The ombudsman provisions in the Dayton Agreement were scheduled to expire in mid-December 2000. On December 12, 2000, the OSCE High Representative for BaH, pursuant to his powers in Annex 10 of the Dayton Agreement, imposed a law for the establishment of a domestic Human Rights Ombudsman of BaH after its Presidency had not implemented the law by the deadlines established by the Dayton Agreement and the 1997 conclusions of the Bonn Peace Implementation Council.[119] On January 3, 2001, the Law on the Human Rights Ombudsman of Bosnia and Herzegovina replaced Annex 6 of the Dayton Agreement as the legal foundation for the institution.[120] On June 25 and July 3, 2002, the Houses of BaH's Parliamentary Assembly adopted the Law on the Human Rights Ombudsman of BaH.[121] The internationally appointed Human Rights Ombudsman (under the Dayton Agreement) continued on as the transitional Human Rights Ombudsman of BaH until the end of 2003, replaced by three domestic Ombudsmen who were appointed by the legislature following a joint proposal by the BaH Presidency.[122]

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116 *Ibid.* at 405; Bell, *supra* note 2 at 228.

117 Report on the conformity of the legal order of Bosnia and Herzegovina with Council of Europe standards, *ibid.* at 413. BaH became a Council of Europe member state in 2002 and ratified the European Convention on Human Rights on July 12, 2002.

118 *Third Annual Report, supra* note 101, "Preface", "Conclusions". In June 1999, the European Commission for Democracy Through Law (Venice Commission) completed a draft model organic law for the BaH Human Rights Ombudsman.

119 Dayton Agreement, *supra* note 96, Annex 10, art. V; "The Law on the Human Rights Ombudsman of Bosnia and Herzegovina Adopted by the State Parliament" (Oct. 2002) 28 European Omb. News. 5.

120 *Law on the Human Rights Ombudsman of Bosnia and Herzegovina*, BaH Official Gazette 32/00 and 19/02, art. 40. See <www.ohro.ba>.

121 "Bosnian assembly's lower chamber adopts eight laws imposed by High Representative", *BBC Monitoring Service* (July 3, 2002).

122 *Law on the Human Rights Ombudsman of Bosnia and Herzegovina, supra* note 120, arts. 41, 8(1), 9(1). The Law also specifies that although complaints may be investigated individually there cannot be distribution of work based on the ethnic origin of the complainant, and in suggestions, resolutions and reports the Ombudsmen act jointly, *ibid.*, art. 8(2). The institution is also given independence in its staffing and budget, *ibid.* arts. 37(1), 39(1).

The new Law on the Human Rights Ombudsman of BaH states that it is:

> an independent institution set up in order to promote good governance and the rule of law and to protect the rights and liberties of natural and legal persons, as enshrined in particular in the Constitution of Bosnia and Herzegovina and the international treaties appended thereto, monitoring to this end the activity of the institutions of Bosnia and Herzegovina, its entities, and the District of Brčko. . . .[123]

The Law states that the Ombudsman "shall consider cases involving the poor functioning of, or violations of human rights and liberties committed by, any government body."[124] Thus, with the aims of promoting good governance and the rule of law and protecting human rights, the new Law gives the Human Rights Ombudsman of BaH a hybrid mandate. As discussed earlier, the Constitution operates to make the European Convention on Human Rights directly effective in Bosnia, and there are fifteen treaties appended to the Constitution covering civil, political, economic, social and cultural rights.[125] One notable enlargement of the human rights jurisdiction of the Ombudsman in the domestic legislation is that, while under Annex 6 of the Dayton Agreement the Ombudsman was limited to investigating only discrimination complaints based on the fifteen treaties, there is no such limitation in the domestic legislation, so that the Ombudsman can now take complaints involving breaches of any of the rights in the appended treaties.

The Human Rights Ombudsman of BaH has jurisdiction over all public authorities, including human rights complaints against the military administration and complaints concerning "the poor functioning of the judicial system or the poor administration of an individual case", although the Ombudsman cannot interfere with the adjudicative functions of the courts.[126] The Law also attempts to resolve the respective jurisdictions of the Human Rights Ombudsman of the Republic and the two Entity Ombudsmen institutions by specifying the cases which fall within the exclusive competence of the Human Rights Ombudsman of BaH.[127]

The Human Rights Ombudsman of BaH can launch investigations on receipt of a complaint or on own motion, and general investigations may also be undertaken.[128] The Human Rights Ombudsman has the traditional powers of making recommendations on the conclusion of an investigation and making annual and special reports, and can also

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123 *Ibid.*, art. 1(1). In March 2000, the city of Brčko was given the status of a "self-governing neutral district".

124 *Ibid.*, art. 2(1).

125 See *supra* note 97.

126 *Law on the Human Rights Ombudsman of Bosnia and Herzegovina, supra* note 120, arts. 2(1), 3(1) (military), 4(1)-(2) (judicial process). The Ombudsman can only investigate complaints concerning decisions, facts or events taking place on or after Dec. 15, 1995, *ibid.*, art. 2(5).

127 *Ibid.*, art. 5. These cases are those: (1) concerning government bodies of the BaH Republic (art. 5(1)(a)), (2) concerning at the same time an Entity government body and a BaH Republic government body (art. 5(1)(b)), (3) concerning at the same time a government body of both Entities (art. 5(1)(c)), and (4) concerning a government body of an Entity where the outcome of the case is particularly relevant for the effective enjoyment of individual human rights in BaH as a whole (art. 5(2)). Art. 13 provides for cooperation and coordination among the various ombudsmen, *ibid.*

128 *Ibid.*, art. 2(2)-(3).

recommend the adoption of new measures, laws and regulations.[129] Furthermore, if a government official impedes an investigation and the government authority fails to take action, the Ombudsman may institute disciplinary proceedings against the official or, where appropriate, bring the case to a criminal court.[130] In addition, the new legislation permits the Human Rights Ombudsman to initiate or intervene in court proceedings when of the opinion that such action is necessary for the performance of the duties of the office.[131] In a separate provision, the Human Rights Ombudsman is also given the specific power to refer cases of alleged human rights violations to the highest judicial authority in BaH competent in human rights matters when the Ombudsman finds that this is necessary for the effective performance of the duties of the office.[132]

In 2001, 1,688 complaints were made to the Human Rights Ombudsman of BaH.[133] Complaints continue to include many property rights cases, and a recent special report deals with court delays.[134]

Entity-Level Ombudsmen

At the entity level, the Office of the BH Federation Ombudsmen was established in the 1994 Washington Agreement which created a Constitution for the BH Federation.[135] The first Federation Ombudsmen were appointed by the OSCE at the end of 1994 and commenced activities in January 1995. Later ombudsman appointments will be made by the Federation legislature.

The BH Federation Constitution contains human rights guarantees with an annex incorporating 21 human rights treaties and created three multiethnic Federation Ombudsmen to uphold these rights.[136] The Office of the BH Federation Ombudsmen is a hybrid human rights institution.[137] The Ombudsmen have the responsibility to protect human dignity, rights and liberties contained in the Federation Constitution (including the

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[129] *Ibid.*, arts. 4(2), 29(1) (recommendations to the government body party), art. 34 (annual and special reports), art. 32 (recommendations for legislative change).

[130] *Ibid.*, art. 31.

[131] *Ibid.*, art. 4(2).

[132] *Ibid.*, art. 6(1). Pursuant to art. 14(1), the Human Rights Ombudsman can also refer cases referred to him by the Entity Ombudsmen to the highest judicial authority for human rights.

[133] "Bosnia and Herzegovina Recommended for Membership of the Council of Europe in 2002 – Honour But Also Obligation" (April 2002) 26 European Omb. News. 5.

[134] *Ibid.*; "Case Handling and Compliance Examples" (Oct. 2001) 25 European Omb. News. 3; Human Rights Ombudsman of Bosnia and Herzegovina, *Special Report on Court Delays*, No. 1439/02 (Sept. 13, 2002).

[135] Constitution of the Federation of Bosnia and Herzegovina (March 18, 1994, approved March 30, 1994), (1994) 33 Int'l Legal Mat. 740, rep. in *National Ombudsmen: Collection* (Warsaw: Bureau of the Commissioner for Civil Rights Protection, Sept. 1998) at 31; BH Ombudsmen Regulations (1995).

[136] Constitution of the Federation of Bosnia and Herzegovina, *ibid.*, II (Human Rights and Fundamental Freedoms) and Annex. The three Ombudsmen are to be composed of one Bosniac, one Croat and one "Other", *ibid.*, II.B. art. 1(1). See also *Law on Ombudsmen of the Federation of Bosnia and Herzegovina.*

[137] <www.ohro.ba> "Policy Documents: Ombudsman Institutions in Bosnia and Herzegovina".

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".[138] The Ombudsmen 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".[139] They have the power to investigate, report, initiate proceedings in court and intervene in court proceedings, including the Federation Human Rights Court.[140] The Ombudsmen can also investigate the poor functioning of the judicial system.[141]

The Federation Ombudsmen have investigated many cases concerning property rights, discrimination, citizenship rights, rights in the criminal trial process, the right of refugees and displaced persons to return, the right to life, social rights (e.g. health care, education and social services) and government corruption.[142] In a 2000 report to the OSCE, the Federation Ombudsmen indicated that they seeing a more positive response from the Federation government to their recommendations, but there are still considerable human rights problems in the Federation, the authorities still resist implementing constitutional human rights, and there are problems with independence of the judiciary and lack of professionalism in public administration.[143]

An ombudsman institution for the Republika Srpska (RS) was eventually established, with the RS National Assembly adopting the Law on the Ombudsmen on February 8, 2000.[144] The Law creates a three-person multiethnic ombudsman structure, representing the Serb, Croat and Bosniak groups. The Law required the Human Rights Ombudsman of BaH to make the first appointments (for a twelve month period), with the RS National Assembly taking over the task of future appointments.[145] Like the BH Federation Ombudsmen, the RS Ombudsmen have the jurisdiction to investigate poor administration and human rights complaints made against any government authority in their Entity.[146] In 2002, the majority of complaints concerned administrative processing of applications for the return of property, with smaller numbers of complaints targeting the operation of the legal system, property rights and employment rights.[147]

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138 Constitution of the Federation of Bosnia and Herzegovina, *supra* note 135, II.B. art. 2(1).

139 *Ibid.*, II.B. art. 5.

140 *Ibid.*, II.B. arts. 6-8.

141 *Law on Ombudsmen of the Federation of Bosnia and Herzegovina*, art. 5; Ombudsmen of the Federation of Bosnia and Herzegovina, *Report on Human Rights Situation in the Federation of Bosnia and Herzegovina for 2000* (Sarajevo, March 2001) at 8-10.

142 Ombudsmen of the Federation of Bosnia and Herzegovina, *Annual Report* (1996); Report on the conformity of the legal order of Bosnia and Herzegovina with Council of Europe standards, *supra* note 115 at 407; "Appearance of the Federation Ombudsmen before the Permanent Council of the OSCE in Vienna: Long Way to State Based on Rule of Law" (Oct. 2000) 22 European Omb. News. 2 at 3-4; "Report for Year 2000 Issued" (June 2001) 24 European Omb. News. 5-12.

143 "Appearance of the Federation Ombudsmen", *ibid.* at 3-5; "Report for Year 2000 Issued", *ibid.* at 5-6.

144 "Law on the Republika Srpska Ombudsman has been passed and three ombudsmen of the Republika Srpska appointed" (June 2000) 21 European Omb. News. 4-5.

145 *Ibid.* The BaH Ombudsman had to make the appointment in consultation with various officials.

146 "Policy Documents: Ombudsman Institutions in Bosnia and Herzegovina", *supra* note 137.

147 "Bosnian Serb Ombudsman submits annual report for 2002", *BBC Monitoring Service* (May 15, 2003).

Future of BaH Ombudsman Institutions

BaH is an unusual case. Although the United Nations Mission in Bosnia and Herzegovina (UNMIBH) ended in 2002, NATO's Stabilization Force (SFOR) continued to have a presence in BaH in 2003. Over the past few years, human rights breaches committed by the governments continue, including police violence, arbitrary detentions, restrictions on freedom of speech, minority rights violations and discrimination on grounds of ethnicity and gender.[148] Also, the judiciaries in both Entities were not independent of influence by the executive branch and political parties.[149] However, in 2001, there was a substantial growth in the number of refugees and internally displaced persons returning to their pre-conflict municipalities, although access to their former homes was often unsuccessful and many were subjected to discrimination.[150]

When the Dayton Agreement governed the BaH Human Rights Ombudsman, there was at worst poor and at best uneven levels of cooperation of the local-level and Entity authorities with the institution, although this situation was seen to improve.[151] The Human Rights Ombudsman of BaH is now governed by domestic legislation which was imposed on the state and there are new domestic appointees. A major issue for the future is whether the BaH government will give full support to the Human Rights Ombudsman now that it is fully transformed into a domestic institution, such as by the appointment of credible and respected individuals to the positions of Ombudsmen, funding the office at a level which will enable it to exercise its functions effectively and being responsive to the work of the institution. An ongoing concern is improving the responsiveness of the BaH government to the recommendations of the Human Rights Ombudsman of BaH. There has been discussion on the establishment of a single, unified Human Rights Ombudsman at the national level which would integrate the Entity-level Ombudsmen to end the confusion of three separate ombudsman institutions in BaH.[152]

KOSOVO HUMAN RIGHTS OMBUDSPERSON

Kosovo is a province of Serbia and Montenegro (formerly the Federal Republic of Yugoslavia). The Kosovo Albanian majority population increasingly supported independence for the territory during the 1980s, and especially after Kosovo's autonomous status was

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148 *Amnesty International: Report 2002, supra* note 86 at 52-54; *Country Reports 1998, supra* note 79 at 1166-1181; *Country Reports 2000, supra* note 77 at 1201-1203; *Country Reports 2002, supra* note 78 at 1206. SFOR implements the military components of the Dayton Agreement, providing a secure environment for the implementation of the Agreement's civil components.

149 *Country Reports 2002, ibid.* at 1205.

150 *Amnesty International: Report 2002, supra* note 86 at 52-53; *Amnesty International: Report 2003, supra* note 85 at 53, 55.

151 *Third Annual Report, supra* note 101, "Co-operation with Authorities", "Conclusions".

152 "Bosnia and Herzegovina soon in the Council of Europe" (April 2002) 26 European Omb. News. 4; "Conditions for the establishment of a common ombudsman institution to be created by the end of the year", *South East Europe Online* (Oct. 15, 2003).

terminated in 1989 by the Milosevic government.[153] Increasing tensions and human rights breaches in Kosovo led to the Rambouillet negotiations during February and March 1999 between the Kosovar Albanian representatives and the government of the Federal Republic of Yugoslavia. The Rambouillet negotiations produced a draft peace agreement on February 23, 1999, which included provisions for a human rights ombudsman, but the negotiations broke down.[154] Shortly thereafter, the NATO air campaign against Yugoslavia began.[155]

With the conclusion of a political settlement in May 1999, the United Nations Security Council passed Resolution 1244 on June 10, 1999, deploying international security and civil presences in Kosovo under UN auspices, and instructing the UN Secretary-General 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.[156] The Resolution indicated that under UNMIK governance Kosovo would enjoy substantial autonomy, but underlined that Kosovo remained part of the Federal Republic of Yugoslavia (now Serbia and Montenegro) and that a political settlement concerning Kosovo would have to be concluded in the future.[157]

NATO provided the international security presence in Kosovo (KFOR), and other international organizations assisted the UN in creating an international civil presence under the UNMIK umbrella – with the UN providing civil administration, the UN High Commissioner for Refugees (UNHCR) providing the initial humanitarian assistance, the OSCE given responsibility for human rights and democratic institutions, and the European Union undertaking economic development matters.[158] In essence, the UN is governing Kosovo as an international protectorate for a period of unspecified duration.[159]

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153 See generally Office of the Commissioner for Human Rights of the Council of Europe, *Kosovo: The Human Rights Situation and the Fate of Persons Displaced From Their Homes*, CommDH (2002)11 (Strasbourg, Oct. 16, 2002), paras. 11-12.

154 Interim Agreement for Peace and Self-Government in Kosovo (Feb. 23, 1999), UN Doc. S/1999/648 (June 7, 1999). See P. Koring, "Serbs scorn Kosovo peace pact", *The Globe and Mail* (March 19, 1999) at A1.

155 On the controversial nature of the NATO action under international law see e.g. D. Kritsiotis, "The Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia" (2000) 49 Int'l & Comp. Law Q. 330; D.H. Joyner, "The Kosovo Intervention: Legal Analysis and a More Persuasive Paradigm" (2002) 13 European J. Int'l Law 597.

156 S.C. Res. 1244, UN Doc. S/RES/1244/99 (adopted June 10, 1999), arts. 5,10-11.

157 *Ibid.*, arts. 10-11. On the future of Kosovo see R.J. Goldstone, "Whither Kosovo? Whither Democracy?" (April-June 2002) 8 Global Governance 143.

158 C. Waters, "Human Rights in an International Protectorate: Kosovo's Ombudsman" (2000) 4 Int'l Omb. Yrbk. 141 at 143.

159 *Ibid.* at 142. See R. Wilde, "From Danzig to East Timor and Beyond: The Role of International Territorial Administration" (2001) 95 American J. Int'l Law 583; W.S. Betts, S.N. Carlson and G. Gisvold, "The Post-Conflict Transitional Administration of Kosovo and the Lessons-Learned in Efforts to Establish a Judiciary and a Rule of Law" (2001) 22 Michigan J. Int'l Law 371; M.J. Matheson, "United Nations Governance of Postconflict Societies" (2001) 95 American J. Int'l Law 76.

The Special Representative of the UN Secretary-General (SRSG) governs UNMIK with extensive legislative and executive powers, including administration of the judiciary.[160] Further, UNMIK Regulation 2000/47 gives UNMIK and KFOR immunity from any legal process and grants their personnel immunity for conduct in their official capacity.[161]

The law applicable in Kosovo is composed of UNMIK Regulations and the domestic law in force in Kosovo up until March 22, 1989 (with limited exceptions and unless UNMIK Regulations have changed this law).[162] Further, with respect to all persons holding public office or undertaking public duties, the Regulation on the Law Applicable in Kosovo states that in exercising their functions, they shall observe internationally recognized human rights standards as reflected in particular in a list of international instruments on human rights.[163] Also, all persons holding public office or undertaking public duties shall not discriminate against any person "on any ground such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or other status."[164]

Security Council Resolution 1244 stated that the responsibilities of the international civil presence included the promotion of self-government in Kosovo taking full account of the Rambouillet accords, and the protection and promotion of human rights.[165] In early July 1999, the Permanent Council of the OSCE agreed on the human rights and democratic institution building mandates of the OSCE Mission in Kosovo.[166] Among the 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 . . .".[167]

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160 S.C. Res. 1244, *supra* note 156, art. 6 (the SRSG is "to control the implementation of the international civil presence"); UNMIK/REG/1999/1 on the Authority of the Interim Administration in Kosovo (July 25, 1999), s. 1.1, as am. by UNMIK/REG/1999/25 (Dec. 12, 1999), UNMIK/REG/2000/54 (Sept. 27, 2000).

161 UNMIK/REG/2000/47 (Aug. 18, 2000). See critical special report by the Kosovo Human Rights Ombudsperson, On the compatibility with recognized international standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (Aug. 18, 2000) and on the Implementation of the above Regulation, Special Report No. 1 (April 26, 2001).

162 UNMIK/REG/1999/1, *supra* note 160, as am. by UNMIK REG/1999/24 (Dec. 12, 1999), UNMIK/REG/1999/25 (Dec.12, 1999, with effect from June 10, 1999), UNMIK/REG/2000/59 (Oct. 27, 2000). In the event of a conflict, international human rights norms prevail, UNMIK/ REG/2000/59 (Oct. 27, 2000). Initially, Regulation 1999/1 applied pre-March 1999 Serbian law, but the refusal of Albanian judges to apply this law led to UNMIK changing the applicable domestic law to that existing in Kosovo prior to the loss of its autonomous status.

163 UNMIK/REG/2000/59, *ibid.*, s. 1.3. The list comprises the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and its Protocols, the International Covenant on Civil and Political Rights and its Protocols, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and the International Convention on the Rights of the Child.

164 *Ibid.*, s. 1.4.

165 S.C. Res. 1244, *supra* note 156, art. 11(a) and (j).

166 OSCE, 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 (July 1, 1999).

167 *Ibid.*

The OSCE began work on the drafting of a regulation to establish a human rights ombudsman for Kosovo relatively quickly, although the finalization of the regulation was delayed because of the reluctance of NATO to have KFOR fall within the jurisdiction of the ombudsman.[168] The ombudsman provisions in the Rambouillet draft peace agreement were influential, and some of its concepts are included in the UNMIK regulation.[169] On March 28, 2000, the Interim Administrative Council for Kosovo passed Regulation 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo, which was signed by the SRSG and entered into force on June 30, 2000.[170] The first Kosovo Human Rights Ombudsperson was appointed on July 11, 2000 by the SRSG, and the office commenced operations on November 21, 2000.[171]

The Kosovo Human Rights Ombudsperson is a hybrid institution, with the dual mandate: (1) to promote and protect the human rights and freedoms of individuals and legal entities and ensure that all persons in Kosovo are able to exercise effectively the human rights and freedoms safeguarded by international human rights standards, in particular the European Convention on Human Rights, its Protocols and the International Covenant on Civil and Political Rights, and (2) to review and redress actions constituting an abuse of authority by the interim civil administration or any emerging central or local institution in Kosovo.[172] In the human rights protection function, the Ombudsperson is instructed to give "particular priority to allegations of especially severe or systematic violations and those founded on discrimination."[173] The human rights to be protected by the Ombudsperson are those contained in "international human rights standards" which will include not only civil and political rights, but also economic, social and cultural rights. However, the Regulation clearly puts an emphasis on the protection of civil and political rights, plus discrimination and severe or systematic violations in all spheres. In addition, the Ombudsperson has the task of applying international human rights standards when the actual legal status of these standards, particularly treaty law, in the domestic Kosovo legal system is uncertain – as Kosovo is still part of Serbia and Montenegro it cannot independently accede to human rights treaties.

With respect to administrative supervision generally, however, the Ombudsperson was given an ambiguous and potentially limited jurisdiction over matters constituting an "abuse of authority", rather than a more broadly defined jurisdiction over, for example, "improper" administration or the "poor functioning" of the public authorities.[174] Abuse of authority certainly will cover aspects of the classical ombudsman jurisdiction.[175] It is

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168 C. Trevena, "Firma de la Ordenanza por la que se crea la institución del Defensor del Pueblo in Kosovo" (julio/agosto 2000) VII:7/8 Boletín OSCE 8.

169 Waters, *supra* note 158 at 143; Rambouillet draft peace agreement, ch. 6, <www.monde-diplomatique.fr/dossiers/kosovo/rambouillet.html>.

170 UNMIK/REG/2000/38, s. 22 (June 30, 2000). See Waters, *ibid.*

171 Marek Nowicki, a Polish human rights lawyer, was the first appointee. See <www.ombudsperson-kosovo.org>.

172 UNMIK/REG/2000/38, *supra* note 170, s. 1.1-1.2.

173 *Ibid.*, s. 3.1.

174 See Waters, *supra* note 158 at 145. The early drafts of the Ombudsperson Regulation did contain references to maladministration, *ibid.*

175 *Ibid.*

possible for the Ombudsperson to construe "abuse of authority" broadly enough to cover both illegality and wider instances of unfair administrative conduct, but this will depend on the office-holder and the receptiveness of the UNMIK administration to such an interpretation. The investigations of the first Kosovo Ombudsperson demonstrated that the office is admitting complaints that cover the spectrum of maladministration.[176] Nonetheless, it is disappointing that the UN and OSCE – both organizations which put considerable emphasis on the application of good governance standards in their programs in states around the world – did not give the Kosovo Ombudsperson a clearer mandate to investigate poor administration by the UNMIK and domestic administrations. Further, the term "abuse of authority" has been carried over into the provisional constitutional framework for self-government.[177]

Similar to the Dayton Agreement Human Rights Ombudsman, the Kosovo Human Rights Ombudsperson must be an international figure – who cannot be a citizen of the Federal Republic of Yugoslavia (now Serbia and Montenegro), states that used to be part of the former Yugoslavia or Albania – and he is assisted by at least three Deputy Ombudspersons, one of whom must be international and two local.[178] The Kosovo Ombudsperson "shall act independently" and "no person or entity may interfere with his or her functions"; yet the Ombudsperson is an executive appointment who is appointed by and reports to the SRSG, and who can be removed by the SRSG without the SRSG having to consult any other body for listed reasons which include the rather broad "failure in the execution of his or her [i.e. the Ombudsperson's] functions".[179] The Ombudsperson criticized these aspects of the Regulation, recognizing the potential conflicts of interest and possible harm to the Ombudsperson's independence.[180]

The Ombudsperson can take complaints from any person or entity in Kosovo, and can start own-motion investigations.[181] The Ombudsperson can take complaints against UNMIK or any emerging domestic central or local government institution, so that all administrative departments and agencies – domestic or UNMIK – are within the jurisdiction of the Ombudsperson. On this basis, the actions of the UNMIK police, the Kosovo Police Service and the Kosovo Protection Corps also fall within the jurisdiction of the Ombudsperson.[182] The Regulation does not actually limit the Ombudsperson's jurisdiction to the administrative branch of governance. The SRSG has both legislative and executive/administrative authority and a domestic "institution" may be legislative,

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[176] Ombudsperson Institution in Kosovo, *Report* (Nov. 21, 2000-Feb. 28, 2001), "Annex: Summary of Cases 21 November 2000 to 28 February 2001".

[177] See *infra* text accompanying note 193.

[178] UNMIK/REG/2000/38, *supra* note 170, ss. 5, 6.1, 7.1. The domestic Deputies are represented by one ethnic Albanian and a person from one of the minority communities in Kosovo (e.g. Serb, Turk, Roma, Muslim Slav), Waters, *supra* note 158 at 144.

[179] UNMIK/REG/2000/38, *ibid.*, ss. 2.1, 8.2, 8.2(c).

[180] Ombudsperson Institution in Kosovo, *Report, supra* note 176.

[181] UNMIK REG/2000/38, *supra* note 170, ss. 3.1, 4.4.

[182] UNMIK/REG/1999/8 established the Kosovo Protection Corps (KPC) as a civilian emergency service agency; Waters, *supra* note 158, at 145. KPC leaders see themselves as the core of the armed forces of any future independent Kosovo, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2003/113 (Jan. 29, 2003), para. 58.

executive/administrative or judicial in nature. In practice, the Ombudsperson considers that the judicial branch falls within his jurisdiction and takes complaints which involve "fair hearing rights", such as length of proceedings, matters of criminal procedure and right of access to the courts.[183] However, KFOR was successfully excluded from the jurisdiction of the Ombudsperson.[184] Christopher Waters has indicated that this exclusion is regrettable in relation to the policing and other non-military administrative activities undertaken by KFOR in Kosovo, especially given the human rights protection concerns raised by NGOs against some KFOR conduct.[185] Disputes between the international administration and its staff are also excluded from Ombudsperson jurisdiction.[186]

Despite having a dual mandate, the Kosovo Human Rights Ombudsperson mainly has only classical ombudsman powers. Unlike the Human Rights Ombudsman of BaH and most of the other human rights ombudsmen in Central and East Europe, the Kosovo Ombudsperson does not have powers to launch cases in the courts to obtain a judicial decision on the conformity of domestic laws with international human rights standards. The Kosovo Human Rights Ombudsperson has the powers to investigate complaints, offer good offices, take preventive steps, make recommendations, advise on matters relating to his or her functions, promote reconciliation between ethnic groups, provide advice and make recommendations on the compatibility of domestic laws/regulations with international standards, issue public annual reports to the SRSG and make special reports.[187] However, unlike the classical ombudsman, the Ombudsperson is given ADR powers to take a proactive and preventive role in human rights protection and ethnic reconciliation.[188] Like the classical model, the Ombudsperson can only make recommendations on the conclusion of an investigation, including recommending that disciplinary or criminal proceedings be initiated against any person which, unlike the Swedish and Finnish ombudsmen who have the power to actually initiate criminal proceedings, may not be accepted by the authorities in a particular case.[189] If the authorities do not comply with a recommendation of the Ombudsperson within a reasonable time, or reasons for non-compliance acceptable to the Ombudsperson are not provided, the Ombudsperson can inform the SRSG and make a public statement.[190] It is regrettable that the UN did not

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183 Ombudsperson Institution in Kosovo, *Report, supra* note 176, Annex.

184 UNMIK/REG/2000/38, *supra* note 170, s. 3.4. A future agreement on jurisdiction to be reached between the Ombudsperson and the Commander of KFOR is a possibility, *ibid.* In the first few months of operations, the Ombudsperson was already receiving complaints against KFOR, which had to be rejected as inadmissible, Ombudsperson Institution in Kosovo, *Report, ibid.*

185 Waters, *supra* note 158 at 146-147. Some ombudsmen have jurisdiction over the military forces and in some other states there are separate legislative or executive military forces ombudsmen.

186 UNMIK/REG/2000/38, *supra* note 170, s. 3.5. International organizations have their own internal dispute settlement systems for employer-employee disputes, some of which include workplace ombudsmen. For further details see Chapter 10.

187 *Ibid.*, ss. 4.1-4.3, 4.9, 17. Section 4.3 limits the ability of the Ombudsperson in reviewing the compliance of laws with international standards, pursuant to UNMIK/REG/1999/24, *supra* note 162, s. 2. However, UNMIK Regulation 1999/24 has been amended in the interim, thus requiring an amendment to s. 4.3 of the Ombudsperson Regulation.

188 See Waters, *supra* note 158 at 147.

189 UNMIK/REG/2000/38, *supra* note 170, s. 4.10.

190 *Ibid.*, s. 4.11.

provide the Kosovo Human Rights Ombudsperson with the powers to launch cases before the courts to provide legally binding decisions on the conformity of UNMIK regulations and domestic laws with the international human rights standards referred to in Regulation 2000/38, similar to the powers given to a number of Central and Eastern European human rights ombudsmen.

UNMIK Regulation 2000/38 provides for the transfer of the responsibility of the Ombudsperson institution to the elected authorities in Kosovo once established, but without any specific time line like that specified in the Dayton Agreement for the BaH Human Rights Ombudsman.[191] On May 15, 2001, UNMIK Regulation 2001/9 on "A Constitutional Framework for Provisional Self-Government in Kosovo" was signed into force.[192] The Constitutional Framework is a provisional legal and institutional self-governance structure pending a final formulation. Chapter 10 of the Constitutional Framework contains the provisions for a domestic Kosovo Ombudsperson. Chapter 10 states that:

> 10.1 Natural and legal persons in Kosovo shall have the right, without threat of reprisal, to make complaints to an independent Office concerning human rights violations or actions constituting abuse of authority by any public authority in Kosovo.
>
> 10.2 The Office, in accordance with UNMIK legislation in force, shall have jurisdiction to receive and investigate complaints, monitor, take preventive steps, make recommendations and advise on any such matters.
>
> 10.3 The Ombudsperson shall give particular priority to allegations of especially severe or systematic violations, allegations founded on discrimination, including discrimination against Communities and their members, and allegations of violations of rights of Communities and their members.[193]

Chapter 3 of the Constitutional Framework contains human rights guarantees, and includes the duty of the provisional institutions of self-government to observe and ensure the human rights contained in a list of treaties and international instruments which substantially mirrors those listed in earlier Regulations.[194] By mid-2003, the Human Rights Ombudsperson continued to operate under the authority of UNMIK Regulation 2000/38. Starting in late 1999, provisional domestic institutions began to appear, with elections for municipal and national legislatures, and the gradual formation of a Kosovar executive government.[195] However, these new institutions have been given limited powers,

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191 *Ibid.*, s. 20.

192 UNMIK/REG/2001/9 (May 15, 2001) as am. by UNMIK/REG/2002/9 (May 3, 2002) [hereinafter Constitutional Framework]. See also UNMIK/REG/2001/19 (Sept. 13, 2001) (Executive Branch of the Provisional Institutions of Self-Government in Kosovo).

193 Constitutional Framework, *ibid.*

194 *Ibid.*, art. 3.2, which, unlike Regulation 2000/59, *supra* note 162, does not contain the ICESCR or Convention Against Torture, but does add the European Charter for Regional or Minority Languages and the Council of Europe Framework Convention for the Protection of National Minorities.

195 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, *supra* note 182, paras. 2-14, 19; Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2003/421 (April 14, 2003).

with Justice Richard Goldstone concluding that "Kosovo is effectively under colonial rule."[196]

Up until June 30, 2002, the Human Rights Ombudsperson had received 590 complaints, 55 percent of which were inadmissible, and opened twenty-four ex-officio investigations.[197] Most complaints were made against UNMIK and the emerging domestic municipal authorities.[198] Cases investigated by the Ombudsperson have addressed a variety of civil, political, social and economic rights, with the majority of cases involving property rights (e.g. access to property, government taking of or damage to property), minority rights, employment issues (recruitment practices and unfair dismissal), rights to a fair trial (e.g. lack of access to court, delay in civil proceedings) and impunity.[199] Special reports issued have included those on the immunities of UNMIK and KFOR, and UNMIK regulations on the review of detentions and on registration of contracts for the sale of real property.[200]

Waters has noted the larger problems confronting the Kosovo Human Rights Ombudsperson – such as the ethnic hostility between the Albanian community and minorities in Kosovo, the low level of democratization and the poor human rights culture in the territory.[201] Human rights protection in Kosovo over the past few years has been poor – the police and judiciary have not investigated and prosecuted human rights violators, international standards for a fair trial are not observed, property rights remain unresolved, hate speech has been printed in newspapers, minority groups are subjected to violence and other human rights abuses, and there is trafficking in and violence against women.[202]

UNMIK and KFOR have been criticized by Amnesty International for not fully protecting human rights in the province.[203] In October 2002, the Council of Europe Commissioner for Human Rights published an extremely negative report on the human rights conduct of UNMIK.[204] The Commissioner stated that, in the light of the Regulations on UNMIK's role in protecting human rights and the application of international human rights norms in Kosovo, "it is clear that the very structure of the international admin-

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196 Goldstone, *supra* note 157 at 145.

197 Ombudsperson Institution in Kosovo, *Second Annual Report 2001-2002* (July 10, 2002), "Overview of Cases".

198 *Ibid.* A number of complaints were made against KFOR which the Ombudsperson does not have jurisdiction to investigate.

199 *Ibid.*; "Kosovo ombudsman says human rights situation better, yet below minimum level", *BBC Monitoring Service* (April 23, 2003). See also *Amnesty International: Report 2003*, *supra* note 85 at 279.

200 *Second Annual Report 2001-2002, ibid.*

201 Waters, *supra* note 158 at 142, 150-151.

202 *Amnesty International: Report 2002, supra* note 86 at 270-271; *Country Reports 2000, supra* note 77 at 1797-1798; *Kosovo: The Human Rights Situation and the Fate of Persons Displaced From Their Homes, supra* note 153; *Amnesty International: Report 2003*, *supra* note 85 at 279.

203 *Amnesty International: Report 2002, ibid.*, at 270. But see the position of the U.S. State Department, *Country Reports 2000, ibid.* at 1797.

204 *Kosovo: The Human Rights Situation and the Fate of Persons Displaced From Their Homes, supra* note 153.

istration, as well as certain powers retained by its various branches, substantially deviate from international human rights norms and the accepted principles of the rule of law."[205] The Commissioner noted that, except for recourse to the Ombudsperson, the immunities given to UNMIK deprive Kosovars of judicial or other legal remedies against the executive and legislative acts of UNMIK and provide a bad example for developing Kosovo institutions.[206] The Kosovo Human Rights Ombudsperson has also been critical of the human rights situation in Kosovo, and has heavily criticized UNMIK, stating that "UNMIK is not structured according to democratic principles, does not function in accordance with the rule of law, and does not respect important international human rights norms."[207] The Ombudsperson also commented on the extensive executive control of the SRSG, attacking the practice of the SRSG in ignoring judicial orders.[208] More recently, he has argued that UNMIK has acted non-transparently.[209]

It was envisaged that, during the UNMIK administration of Kosovo, the international personnel and the emerging central government would support and be receptive to the Ombudsperson's investigations and recommendations, although compliance at the local level might be more problematic.[210] However, UNMIK and the SRSG have not responded to many of the Kosovo Human Rights Ombudsperson's recommendations and reports.[211] The powers of the Kosovo Human Rights Ombudsperson in the provisional constitutional framework are relatively limited, and consideration should be given to expanding them so that they are, for example, similar to those of the BaH Human Rights Ombudsman legislation. Also, if the underlying culture in Kosovo does not change materially in the coming years, if and when the institution is transformed into a domestic human rights ombudsman, the institution may subsequently face a domestic administration that is unreceptive to its work.

The fall of Milosevic and the establishment of a democratic government in Serbia and Montenegro in late 2000 added a new factor to the equation. Serbia and Montenegro quickly began to reform its legal and institutional structures, partly to move toward membership in the Council of Europe which was achieved in April 2003. Establishment of ombudsmen at the federal and the Serbia and Montenegro government levels are

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205 *Ibid.*, para. 3.

206 *Ibid.*, paras. 40-43.

207 *Second Annual Report 2001-2002, supra* note 197, "Introduction".

208 *Ibid.*; "Report says United Nations fails to implement respect for human rights in Kosovo", *The Associated Press* (July 11, 2002). See also *Kosovo: The Human Rights Situation and the Fate of Persons Displaced From Their Homes, supra* note 153, paras. 76-82, commenting negatively on the actions of the SRSG in bypassing judicial decisions (by international or Kosovar judges), such as passing executive orders to keep persons in detention despite a judicial order for their release. The Human Rights Ombudsperson has published a special reports on this conduct and on the Detention Review Commission for Extra-Judicial Detentions Based on Executive Orders that was established in response.

209 "Kosovo ombudsman accuses UNMIK of lack of transparency over rights reports", *BBC Monitoring Service* (April 12, 2003) (UNMIK's refusal to provide confirmation of receipt of Ombudsperson's human rights reports).

210 See Waters, *supra* note 158 at 150.

211 *Kosovo: The Human Rights Situation and the Fate of Persons Displaced From Their Homes, supra* note 153, para. 29; *Second Annual Report 2001-2002, supra* note 197 at 22-53.

among the reform activities. In early 2002, the first ombudsman laws were passed at the Serbian government level, enabling autonomous provinces and municipalities to establish their own Citizen's Defender institutions.[212] In mid-2002, the Serbian government introduced legislation for an ombudsman (People's Advocate) and in October 2003, the Republic of Montenegro elected its first human rights ombudsman. At some point, the thorny question of the international status of Kosovo will have to be determined, and with it the future of its governance institutions.

EAST TIMOR

East Timor was a Portuguese colony until 1974, with its bid for independence in 1975 quashed by Indonesia which annexed it in 1976.[213] East Timorese votes for independence led to the deteriorating situation in 1999, resulting in Security Council establishment of: (1) a multinational force to restore peace and security in East Timor, and to protect and support the United Nations Mission in East Timor (UNAMET) and, on October 25, 1999, (2) the United Nations Transitional Administration in East Timor (UNTAET) to exercise legislative and executive authority in East Timor and build a civil administration.[214] The mandate of UNTAET included the establishment of an effective administration, assistance in the development of civil and social services and support for capacity-building for self-government.[215] The establishment of local democratic institutions was provided for, "including an independent East Timorese human rights institution".[216] In May 2001, one and a half years after UNTAET commenced its work, an Office of the Ombudsperson of the East Timor Transitional Administration started operations.[217] The Ombudsperson had the mandate to protect the rights and interests of all persons living in East Timor against government abuses, injustices and denial of rights.[218] Complaints could be brought against the UNTAET transitional administration, the Cabinet, and agencies, programs and institutions collaborating with the government.[219] If a breach of human rights, discrimination, injustice or unfairness was uncov-

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212 *Special Law on Some Competencies of the Autonomous Province* (Feb. 7, 2002), art. 56; *Local Government Act* (Feb. 26, 2002), art. 126. The Serbian autonomous province of Vojvodina passed human rights ombudsman legislation in Dec. 2002 and elected an ombudsman in Sept. 2003. Some municipalities introduced laws to establish Citizen's Defenders.

213 See C. Bongiorno, "A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor" (2002) 33 Columbia H.R. Law Rev. 623 at 622-628.

214 The multinational force was created in S.C. Res. 1264, UN Doc. S/RES/1264/99 (adopted Sept. 15, 1999). UNTAET was created by S.C. Res. 1272, UN Doc. S/RES/1272/99 (adopted Oct. 25, 1999). UNTAET's mandate was extended to May 20, 2002 in S.C. Res. 1392, UN Doc. S/RES/1392/02 (adopted Jan. 31, 2002). See J.C. Beauvais, "Benevolent Despotism: A Critique of U.N. State-Building in East Timor" (2001) 33 N.Y.U. J. Int'l Law & Pol. 1101.

215 S.C. Res. 1272, *ibid.*, art. 2.

216 *Ibid.*, art. 8. A truth and reconciliation commission was established in July 2001, UNTAET/REG/2001/10 (July 13, 2001).

217 <www.un.org/peace/etimor/DB/Db010601.htm>; Bongiorno, *supra* note 213 at 685-686; Amnesty International, *East Timor: Justice past, present and future*, ASA 57/001/2001 (July 2001) at 29-30.

218 <www.un.org/peace/etimor/DB/Db010601.htm>, *ibid.*

219 *Ibid.* In June 2000, UNTAET established the East Timor Transitional Administration, with Ministries and a Cabinet, appointed by the Secretary-General's Special Representative.

ered by the Ombudsperson, he could make recommendations for changes to regulations, programs, policies, procedures and institutional decisions.[220] The Ombudsperson, however, operated without a formal legal foundation.[221] The East Timor Transitional Administration Ombudsperson was a hybrid ombudsman in terms of jurisdiction but had only classical ombudsman powers.

One year later, on May 20, 2002, East Timor officially gained its independence. A UN presence was maintained in East Timor after independence, and UNTAET was replaced by the United Nations Mission of Support in East Timor (UNMISET).[222] East Timor's new Constitution entered into force on May 20, 2002, and it includes provisions for a human rights ombudsman (called *Provedor de Direitos Humanos e Justiça* or Provider of Human Rights and Justice).[223]

Section 27 of the Constitution states that the *Provedor* is an independent organ with the duty to examine and seek to settle citizens' complaints against the conduct of public bodies to determine its conformity with the law and to remedy injustice.[224] The *Provedor* will be appointed by the legislature and will have the classical recommendatory powers, although public authorities and civil servants have the constitutional duty to collaborate with the *Provedor*.[225] Although Section 27 does not give the *Provedor* any express powers over human rights protection, it is located within the part of the Constitution that covers human rights.[226] In addition, along with certain other public officials, the *Provedor* is given the power to apply to East Timor's highest court (Supreme Court of Justice) to request a declaration of unconstitutionality of laws and to request a review of the unconstitutionality by omission of any legislative measures deemed necessary to enable the implementation of constitutional provisions.[227] Thus, given the combined constitutional functions of the *Provedor*, the institution will be able to take complaints of breaches of constitutional human rights obligations against public authorities, make recommendations and apply to the Supreme Court for legal determinations on constitutional matters, including human rights guarantees. The Constitution provides for the internal applicability of treaties after ratification or accession and publication, and this will include the human treaties that East Timor adheres to.[228]

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220 <www.un.org/peace/etimor/DB/Db010601.htm>, *ibid.*

221 See *East Timor: Justice past, present and future, supra* note 217 at 29-30, 32.

222 S.C. Res. 1410, UN Doc. S/RES/1410/02 (adopted May 17, 2002), (2002) 41 Int'l Legal Mat. 1011, established UNMISET with duties including support for core administrative structures. S.C. Res. 1480, UN Doc. S/RES/1480/03 (adopted May 19, 2003) extended UNMISET's mandate to May 20, 2004.

223 Constitution of the Democratic Republic of East Timor (May 20, 2002), s. 27; UNTAET/REG/2001/2 (March 16, 2001). The title of *Provedor* is influenced by the Portuguese heritage of East Timor.

224 Constitution of the Democratic Republic of East Timor, *ibid.*, s. 27(1), (3).

225 *Ibid.*, s. 27(3), (5).

226 *Ibid.*, Part II, Title I. See also Title II (civil and political rights/duties) and Title III (economic, social and cultural rights/duties).

227 *Ibid.*, ss. 150(f) (abstract review of unconstitutionality), 151 (unconstitutionality by omission). See also s. 124 (Supreme Court of Justice).

228 *Ibid.*, s. 9(2). All laws contrary to these treaties are invalid, *ibid.*, s. 9(3). East Timor became a party to a number of human rights treaties in late 2002.

In April 2003, the UN Secretary-General indicated that the *Provedor* "is likely to be given responsibility for safeguarding and promoting human rights, ensuring the transparency and accountability of public administration and fighting corruption" and, by fall 2003, draft legislation was being considered by Parliament.[229]

Review of Human Rights Ombudsman Provisions in Post-Conflict Peace-Building Initiatives

To date, all national human rights institutions created or strengthened by peace agreement or by UN executive authority have been human rights ombudsmen or human rights commissions. The classical ombudsman model with its administrative justice focus has not featured in any of these peace-building initiatives. Given the severe human rights problems in most war torn societies, it can be expected that national institutions with a strong human rights protection role will continue to be the most relevant for potential inclusion in peace agreements or as elements of civil reconstruction. Thus, it can be expected that human rights ombudsmen or human rights commissions will be the most common institutional model selected for these post-conflict peace-building initiatives. However, the classical ombudsman function should not be overlooked and should also be included in peace-building processes, whether as part of a hybrid institution or as a separate institution accompanying a human rights commission.

The sources of authority for establishing the national human rights institutions in post-conflict peace-building initiatives and the characteristics of the institutions in the El Salvador, Guatemala, BaH, Kosovo, Sierra Leone, East Timor and Afghanistan cases differ. In the El Salvador, Guatemala, BaH, Sierra Leone and Afghanistan situations, after armed conflict was brought to an end, peace-building elements were included in international peace accords, supported by the UN and by other regional organizations in varying degrees. In Kosovo and East Timor, the peace-building elements were addressed generally in Security Council Resolutions and then left to be fleshed out by international organizations on the ground.

In the El Salvador, Guatemala, Sierra Leone and Afghanistan agreements, domestic national human rights institutions operated by nationals pursuant to domestic law were immediately provided for or strengthened. In contrast stand BaH, Kosovo and East Timor. The inferior state of their governance structures, the ethnic or nationalist tensions and the relatively small geographic areas involved called for a different approach. In BaH, an internal international actor – the Human Rights Ombudsman – was created in an international peace agreement to operate until the foundation of the institution was changed to domestic law and nationals were ready to operate the institution. The Kosovo and East Timor peace-building missions were established by Security Council mandate and the peace-building elements included provisions for the creation of national human

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[229] Report of the Secretary-General on the United Nations Mission of Support in East Timor, UN Doc. S/2003/449 (April 21, 2003), para. 22; Report of the Secretary-General on the United Nations Mission of Support in East Timor, UN Doc. S/2003/944 (Oct. 6, 2003), para. 23.

rights institutions. The Kosovo and East Timor Security Council Resolutions placed the UN in the position of governing territories for a transition period until an indigenous governance structure replaces the "international territorial administration" of the UN. In the case of East Timor, UN transitional administration lasted less than three years and a UNTAET Ombudsperson operated for about one year before East Timor became an independent state – although it was a welcome development, there was not much time for the office to be formalized or developed. A domestic human rights ombudsman institution has been provided for in East Timor's Constitution and the appointee will be a national operating within a domestic law framework. However, in Kosovo like in BaH, the Human Rights Ombudsperson initially is an internal international actor but, unlike BaH, the office was established by UN administrative action. The UN transitional administration will be in place in Kosovo for some time and the Kosovo Human Rights Ombudsperson operates in a territory with both UN and emerging domestic governance structures. During this transitional period, the Kosovo Human Rights Ombudsman has jurisdiction over both the UN administrative authorities and the emerging domestic government administration, although this has not developed sufficiently in Kosovo in practice. Where the human rights ombudsman is appointed by an international authority, such as occurred in the past with the BaH Human Rights Ombudsman and by the UN Special Representative with the Kosovo Human Rights Ombudsperson, the result is an executive ombudsman which can raise independence concerns.

Looking to the future, it is probable that the UN and other international organizations will continue to become involved in peace-building processes in states emerging from civil and other complex conflicts. Further, the evolution of UN peace missions and the emphasis of UN human rights and development programs on good governance and national human rights institutions make it more likely that national human rights institutions will be established or strengthened in future peace agreements. This view is supported by the precedents of El Salvador, Guatemala, BaH, Kosovo, Sierra Leone, East Timor and Afghanistan. Indeed, in the case of Kosovo, the UN is directly implicated in issues of governance and good administration. As international organizations and states continue to devote more attention to good governance and domestic human rights protection matters, these concerns are also likely to be reflected in future peace accords, which may be more likely to encompass provisions on democratic institution building through, *inter alia*, the establishment or strengthening of national human rights institutions.

In all cases, it is essential that national human rights institutions should be structured based on the political, legal and institutional heritage of the state and should not duplicate western or other foreign models.[230] As the International Council on Human Rights Policy has stated:

> It is not clear that the external imposition of institutions, including human rights institutions, will work if there is no sense of local participation and ownership. There is a danger, in this sudden rash of national institutions created through peace agreements, that too little attention is being paid to the difficult questions of consulting

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[230] See International Council on Human Rights Policy, *Performance & legitimacy: national human rights institutions* (Versoix: International Council on Human Rights Policy, 2000) at 4.

> civil society in the creation of national human rights institutions and considering where they fit into the overall framework of new democratic structures in transitional societies.[231]

However, the establishment of a national human rights institution must be executed carefully to ensure that the institution has all of the characteristics to enable it to be an effective institution.[232] In this respect, the Paris Principles is an important source.[233] At the same time, the establishment or strengthening of other domestic rule of law and human rights institutions must occur – particularly the courts and other tribunals, the police and the legal profession – as national human rights institutions were originally designed to supplement the courts and other tribunals which provide legally binding remedies, especially in the case of violations of core human rights.

Past peace operations involving international organizations and NGOs have experienced problems which can also impact on the operation of national human rights institutions established by these peace missions. In particular, Nowak has indicated that field operations can: (1) be at risk of receiving inadequate funding as most rely on voluntary contributions and (2) suffer from coordination and competition problems between different UN departments, between the UN and other international organizations, and between the international organization, the state and NGOs.[234] Clearly, human rights ombudsmen or other institutions created in post-conflict peace-building initiatives need to receive a secure and adequate funding base in order to be in a position to operate effectively. In addition, coordination, competition and cooperation issues have arisen for newly created national institutions: for example, conflict between different organizations (OSCE and NATO) in the extent of the powers of the Kosovo Human Rights Ombudsperson which arose during the drafting of the governing law, and cooperation issues between the new domestic human rights ombudsman in El Salvador and ONUSAL. These issues will probably continue as long as the elements of complex peace operations are shared among different international organizations and, as is often the case, some issues of institution-building cannot be planned in detail in advance.

In addition, in peace-building missions such as in Kosovo where the UN is governing a territory for a transitional period, the UN must ensure that a UN transitional administration ombudsman is created with jurisdiction over the UN administration and any emerging local government during this transition stage.[235] As Christopher Waters has observed, "even well-intentioned international administrators and police may commit human rights violations."[236] Further, an institution to monitor the international administration should be place relatively quickly after the UN commences its international governance activities or otherwise the UN administration will operate for a period of time

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231 *Ibid.* at 60.

232 See discussion of the effectiveness factors for ombudsmen and other national human rights institutions, *infra* Chapter 12.

233 See *supra* note 30.

234 Nowak, *supra* note 2 at 159.

235 The same arguments can be made with an occupying power, such as the U.S. in Iraq, see Human Rights Watch, "Human Rights and Iraq's Reconstruction", *supra* note 50.

236 Waters, *supra* note 158 at 152.

without any independent monitoring.[237] The Kosovo Human Rights Ombudsperson was created about one year after UNMIK commenced operations and a rudimentary East Timor UNTAET transitional ombudsman was not established until about eighteen months had passed, and only one year before UN administration ended with the independence of East Timor. Furthermore, the poor performance of UNMIK in turning a blind eye to many Ombudsperson recommendations is a sobering picture. The criticism of UNMIK is even more deserved given the many statements of the UN in support of building good governance in states. Given the negative experience of the Kosovo Human Rights Ombudsperson, the UN should ensure that any future UN transitional administrations are reasonably receptive to the recommendations of a transitional administration ombudsman. The UN has to practice what it preaches when it involves itself in domestic governance.

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[237] *Ibid.*

CHAPTER NINE

The Ombudsman for Children: Human Rights Protection and Promotion

The single-sector ombudsman has been used to provide a monitoring, protective and accountability device for specific categories of individuals who come into contact with the administrative arm of the state. The single-sector ombudsman model was discussed in Chapter 2. The international community has promoted the establishment of national human rights institutions for children, primarily the ombudsman for children, since the 1990s, following domestic developments in Scandinavia in the 1970s and 1980s. However, the creation of domestic institutions for children has been haphazard, with a variety of institutions established with differing degrees of independence and powers. Some ombudsmen for children do not have the same levels of independence or powers of investigation compared to the legislative ombudsman. Others have additional mandates taken from the human rights commission or human rights ombudsman models. The advocate model has been adopted in some jurisdictions for child protection.

This Chapter will discuss the growing interest of the international community in the concept of the ombudsman for children in the context of evolving international human rights for children. It will explore the different domestic institutional mechanisms for the protection of minors: the classical or human rights ombudsman, specialized deputies for children inside ombudsman institutions, the ombudsman for children (sometimes called children's commissioner or defender of children), the children's advocate and governmental mechanisms for protecting minors. The different functions and powers of these institutions and their roles in implementing international children's rights domestically will be addressed. Ombudsmen for children and similar institutions usually have jurisdiction over children and young persons to the age of majority.[1]

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[1] E.g. in those countries with ombudsmen for children or similar institutions, the age of majority is often eighteen years of age. In this Chapter, when the words "child" or "children" are used, they will be defined to include young persons to the age of majority unless specified otherwise. The terms "children", "children and young persons", "children and youth", "minors", etc. will be used interchangeably.

International Law on Human Rights for Children

THE EVOLUTION OF INTERNATIONAL LAW

International attention to the needs and rights of children developed after the end of World War I, with international instruments addressing children also appearing during this period.[2] The earliest international law was protection-oriented, focussing on the needs and care of children, for example concerning employment and trafficking in children.[3]

The United Nations addressed children's rights as human rights in the 1959 Declaration of the Rights of the Child, a General Assembly resolution.[4] The Declaration primarily contains provisions on special protection of the child – including the standard of the "best interests of the child" – but it also recognizes minors as recipients of human rights and contains a non-discrimination provision. Over the past few decades, a variety of multilateral instruments on specific aspects of the rights and protection of minors have been adopted.[5] Regionally, there are also treaties and other instruments addressing the rights and protection of minors.[6]

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[2] See M.R. Saulle and F. Kojanec, *The Rights of the Child: International Instruments* (Irvington-on-Hudson: Transnational Publishers Inc., 1995) at 3.

[3] Of the numerous ILO treaties see e.g. I.L.O. Convention (No. 5) Fixing the Minimum Age for Admission of Children to Industrial Employment, 38 L.N.T.S. 81 (Nov. 28, 1919); I.L.O. Convention (No. 6) Concerning the Night Work of Young Persons Employed in Industry, 38 U.N.T.S. 93 (Nov. 28, 1919). See e.g. International Convention for the Suppression of the Traffic of Women and Children, 9 L.N.T.S. 416 (Sept. 30, 1921).

[4] Declaration of the Rights of the Child, U.N.G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. 16, UN Doc. A/4354 (Nov. 20, 1959), rep. in United Nations, *Human Rights: A Compilation of International Instruments*, vol. 1 (New York and Geneva: United Nations, 1994) 171.

[5] E.g. 1980 Hague Convention on the Civil Aspects of International Child Abduction, rep. in *The Rights of the Child: International Instruments, supra* note 2 at 201; 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Inter-Country Adoption, rep. in *The Rights of the Child: International Instruments, supra* note 2 at 255; ILO Convention (No. 182) on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, (2000) 39 Int'l Legal Mat. 1285; United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), U.N.G.A. Res. 40/33 (Nov. 29, 1985); Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally, U.N.G.A. Res. 41/85 (Dec. 3, 1986); United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), U.N.G.A. Res. 45/112 (Dec. 14, 1990); United Nations Rules for the Protection of Juveniles Deprived of their Liberty, U.N.G.A. Res. 45/113 (Dec. 14, 1990).

[6] E.g. 1990 African Charter on the Rights and Welfare of the Child, rep. in *The Rights of the Child: International Instruments, supra* note 2 at 759 (in force 1999); 1989 Inter-American Convention on the International Return of Children, rep. in *The Rights of the Child: International Instruments, supra* note 2 at 215; 1989 Inter-American Convention on the Return of Children, O.A.S.T.S. No. 70 (in force Nov. 4, 1994); 1994 Inter-American Convention on the International Traffic in Minors, O.A.S.T.S. No. 79 (in force Aug. 15, 1997); Inter-American Court of Human Rights, Advisory Opinion on the legal and human rights status of children, OC-17/02 Aug. 28, (2002, Inter-Am. Ct. H.R. (Ser. A) No. 17 (2002); European Convention on Child Adoption (in force 1996); 1996 European Convention on the Exercise of Children's Rights, E.T.S. No. 160 (in force 2000); Charter of Fundamental Rights of the European Union, 2000 O.J. C 364/1 (Dec. 7, 2000), arts. 24 (rights of the child), 32 (prohibition of child labour, protection of young people at work).

THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD AND ITS PROTOCOLS

The United Nations Convention on the Rights of the Child (CRC) was adopted on November 20, 1989 and entered into force on September 2, 1990.[7] Almost all the nations of the world – except Somalia and the U.S.A. – have become parties to the CRC and are bound by its terms.[8] No other human rights treaty has been so heavily adhered to by states.

The CRC covers not only the needs of children, i.e. their care and protection – matters that were addressed in the earlier international law on children – but also includes the spectrum of civil, political, economic, social and cultural rights applied specifically to minors.[9] Article 1 of the CRC makes the treaty generally applicable to children under eighteen years of age unless, under the law applicable to the child, majority is obtained earlier. The only other exception is found in Article 38(3) which permits parties to recruit persons into the armed forces who are at least fifteen years old, although there is now a Protocol to the CRC which changes this position for Protocol parties.[10]

The CRC includes civil and political rights such as the rights to: life (Article 6(1)); a name and nationality (Article 7(1)); freedom of expression (Article 13); freedom of thought, conscience and religion (Article 14); freedom of association and peaceful assembly (Article 15); privacy (Article 16); freedom from torture or other cruel, inhuman or degrading treatment or punishment (Article 37); and due process in the criminal trial process (Article 40). Economic, social and cultural rights in the CRC include the rights to: health (Article 24); social security (Article 26); living standards, housing, development (Article 27); and education (Articles 28, 29). The CRC includes the legislative and administrative authorities among those entities who are required to use the "best interests of the child" as their primary consideration in all actions concerning children.[11] The CRC also contains provisions to protect children in situations such as: separation of the child from parents (Articles 9, 10, 20); the illicit transfer and non-return of children

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[7] Convention on the Rights of the Child, rep. in *Human Rights: A Compilation of International Instruments*, vol. 1, *supra* note 4 at 174 [hereinafter CRC].

[8] By mid-2003 both had signed but not ratified the CRC.

[9] On the CRC see generally M. Freeman, ed., *Children's Rights: A Comparative Perspective* (Aldershot: Dartmouth, 1996); E. Verhellen, ed., *Monitoring Children's Rights* (The Hague: Martinus Nijhoff Pub., 1996); G. Van Bueren, *The International Law on the Rights of the Child* (Dordrecht: Martinus Nijhoff Pub., 1995); C. Price Cohen, "The Developing Jurisprudence of the Rights of the Child" (1993) 6 St. Thomas Law Rev. 1; W. Schabas, "Reservations to the Convention on the Rights of the Child" (1996) 18 H.R.Q. 472; C. Price Cohen and S. Kilbourne, "Jurisprudence of the Committee on the Rights of the Child: A Guide for Research and Analysis" (1998) 19 Mich. J. Int'l Law 633; J. Todres, "Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and its Early Case Law" (1998) 30 Columbia H.R. Law Rev. 159; C. Price Cohen, "Implementing the U.N. Convention on the Rights of the Child" (1999) 21 Whittier Law Rev. 95.

[10] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, (2000) 39 Int'l Legal Mat. (in force Feb. 12, 2002); M.J. Dennis, "Newly Adopted Protocols to the Convention on the Rights of the Child" (2000) 94 American J. Int'l Law 789.

[11] CRC, *supra* note 7, arts. 3(1), 20 and 21.

abroad (Article 11); violence, abuse and neglect (Article 19); adoption (Article 21); refugee status (Article 22); economic exploitation (Article 32); drugs (Article 33); and situations of armed conflict (Article 38). The sexual exploitation of children through their sale, prostitution and use in pornography is partially addressed in Articles 19, 34 and 35 of the CRC, and attempts to combat these practice have been strengthened in the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.[12]

The CRC is somewhat different from other human rights treaties because, although it primarily governs the state's treatment of minors, it also makes reference to the rights, duties and responsibilities of parents *vis-à-vis* their children. The CRC attempts to balance the rights of children both against the state and with respect to their relations with their parents. The CRC recognizes and supports the family unit and the rights, duties and responsibilities of parents or legal guardians in numerous provisions.[13] However, in limited situations, the CRC permits the state to intervene in the parent-child relationship, such as cases where parents have harmed the child, or the parent has been imprisoned or deported.[14] The evolving capacities of the growing child are also recognized, and certain rights in the CRC can be interpreted to give greater rights or responsibilities to children as they develop in age and capacity.[15] The CRC endows children with human rights that are opposable against the state and also, at least in certain circumstances, against their parents or legal guardians.[16] In practice, the balancing of the rights of the child against the state, the rights of the child against the rights and duties of parents, and the relationship between the state and the child's parents will depend on the particular issue in question and the forum in which the matter is being resolved, whether it be through the legislature, the courts, or national human rights institutions.

On the international level, state party progress in implementing their CRC obligations is monitored by the Committee on the Rights of the Child. The CRC obligates the state parties to submit periodic reports, which are examined and commented on by the Committee.[17] The Committee also issues General Comments that provide legal interpretations of the CRC provisions.

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[12] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, U.N. G.A. Res. A/RES/54/263 (May 25, 2000) (in force Jan. 18, 2002); Dennis, *supra* note 10.

[13] CRC, *supra* note 7, Preamble, arts. 3(2), 5, 10, 14(2), 18, 21, 23, 24(3), 26(2), 27(2)-(4), 29(1)(c) & (2), 30, 37(c), 40(2)(b)(iii).

[14] E.g. *ibid.*, arts. 9(1), 19(1), 20(1).

[15] E.g. *ibid.*, art. 12 (views of the child in all matter affecting the child), art. 40 (juvenile justice).

[16] See S.J. Toope, "The Convention on the Rights of the Child: Implications for Canada" in *Children's Rights: A Comparative Perspective, supra* note 9, 33 at 48, "[i]f children are independent rights-bearers, as the Convention clearly posits, then those rights must be opposable to the state, but also, it seems, to parents."; Price Cohen, "The Developing Jurisprudence of the Rights of the Child", *supra* note 9 at 19-20.

[17] CRC, *supra* note 7, arts. 43-44.

Variations on a Theme: Institutions for Child Protection

In addition to various ombudsman institutions, there are other public and private sector institutions that are designed to protect children and their human rights. These institutions include human rights commissions and NGOs working for children.

HUMAN RIGHTS COMMISSIONS

As discussed in Chapter 4, many human rights commissions have been established in nations around the world. The human rights of children fall within the jurisdiction of many of these commissions. The jurisdiction over children may be express, such as in the case of Australia's Commission on Human Rights and Equal Opportunity,[18] or may be implied from the functions and jurisdiction of the commission.[19] The Mexican National Commission for Human Rights is an example of a commission that includes the rights of children within its mandate. The Mexican National Commission has children's rights in its work program and, as part of its educational mandate, has provided children's rights teaching programs in schools.[20] Other human rights commissions with programs directed at minors include those in Northern Ireland, the Philippines and South Africa.[21]

NGO CHILDREN'S OMBUDSMAN SERVICES

There are numerous non-governmental organizations (NGOs) that support children and children's rights. It was an NGO which first created an ombudsman for children in the

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[18] B. Burdekin, "Human Rights Commissions" in K. Hossain et al., eds., *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (The Hague: Kluwer Law International, 2000) 801 at 806-807, 832-833 [hereinafter *Human Rights Commissions and Ombudsman Offices*].

[19] See e.g. S.N. Gwei, "The Cameroon Experience in Creating and Running a National Commission for the Promotion and Protection of Human Rights" in *Human Rights Commissions and Ombudsman Offices, ibid.*, 169 at 175, 180; V. Sripati, "A Critical Look at the Evolving Role of India's National Human Rights Commission in Promoting International Human Rights Law" (2001) 5 Int'l Omb. Yrbk. 163 at 168-170, 179. India is planning the establishment of a National Commission for Children, Sripati, *ibid.* at 179.

[20] M. Aguilar Alvarez, "The Teaching, Learning and Training Process for Human Rights Protection" in L. Reif, M. Marshall and C. Ferris, eds., *The Ombudsman: Diversity and Development* (Edmonton: International Ombudsman Institute, 1993) 171 at 174-178, 180, rep. in L.C. Reif, *The International Ombudsman Anthology: Selected Writings From the International Ombudsman Institute* (The Hague: Kluwer Law International, 1999) 695 at 698-702, 704-705 [hereinafter *International Ombudsman Anthology*]; Committee on the Rights of the Child, Concluding Observations: Mexico, UN Doc. CRC/C/15/Add.112 (Nov. 10, 1999), para. 4.

[21] UNICEF, *Independent Institutions: Protecting Children's Rights*, Innocenti Digest No. 8 (Florence: UNICEF, June 2001) at 21, 22, 24.

1970s – Sweden's *Rädda Barnen* (Save the Children) – and then lobbied for greater use of the institution during the 1979 International Year of the Child.[22]

Although an NGO ombudsman is not a state institution and has no statutory powers of investigation, the mechanism can provide helpful assistance for children and youth. For example, Finland's Mannerheim League for Child Welfare established an Ombudsman for Children in 1981.[23] The Mannerheim League's Ombudsman for Children delves into numerous cases where the conduct of the administrative authorities respecting a child is questioned, where the rights of a child have been infringed and where a child is left without protection under the law.[24] The Mannerheim League Ombudsman provides legal assistance in cases involving minors, increases public awareness of children's rights, highlights deficiencies in the laws protecting children and lobbies for changes in legislation and policy.[25] The Mannerheim League Ombudsman has provided advice to minors on making complaints to the Parliamentary Ombudsman of Finland, and has asked the Ombudsman to investigate cases involving violence against children in state institutions where the NGO ombuds mechanism was unable to obtain sufficient information or cooperation from the administrative authorities.[26] The latter situation illustrates the weaknesses of an NGO ombudsman, as it is always open to an administrative authority to refuse to cooperate – especially in cases with serious implications – whereas a legislative ombudsman can compel the production of documents and testimony.

Development of the Children's Ombudsman Concept: Children's Perspective

Ombudsman services for children makes sense given the complex bureaucracies affecting minors. As Brent Parfitt, former British Columbia Deputy Ombudsman for Children and Youth, recognized, "[c]hildren and youth who are affected fundamentally by government decisions are frequently without a choice in the process of that decision making and without a voice if the decision affects them adversely."[27]

Looking at the provision of government services from a child rights perspective, it has been noted that:

> Support for a children's commissioner stems from using a framework of children's rights rather than one of an adult duty to ensure adequate services for children. In

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[22] P. Newell, "The Place of Child Rights in a Human Rights and Ombudsman System" in *Human Rights Commissions and Ombudsman Offices, supra* note 18, 133 at 139. Professor Anders Bratholm had the original idea for a children's ombudsman, M. Borgen, "Developing the Role of an Ombudsman" in *Monitoring Children's Rights, supra* note 9, 541 at 543.

[23] H. Molander, "A Child Against the State: Tasks of the Children's Ombudsman" in *Monitoring Children's Rights, ibid.* at 575.

[24] *Ibid.*

[25] *Ibid.* at 577.

[26] *Ibid.* at 579, 581-582.

[27] B. Parfitt, "Public Education on the Role of the Ombudsman Office: Geographical Concerns, Targeting Vulnerable Groups" in *The Ombudsman: Diversity and Development, supra* note 20, 159 at

> the framework of rights, children are citizens rather than just receivers of services. They are considered a group uniquely in need of special measures to safeguard their rights due to their lack of power to assert their own rights, including the fact that they cannot vote.[28]

The increased attention paid to children's rights by the international community also led to the development of interest in the ombudsman (or commissioner) for children at the domestic level.[29]

The Children's Ombudsman as a Non-Judicial Mechanism to Monitor and Assist in the Domestic Implementation of the Rights of the Child: International Support

THE UNITED NATIONS SYSTEM AND SUPPORT FOR OMBUDSMEN FOR CHILDREN

The Convention on the Rights of the Child (CRC)

Article 4 of the CRC stipulates that:

> States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources. . . .[30]

Domestic implementation of the CRC must go beyond simple legislative enactments of CRC rights. During the CRC treaty negotiation process, the NGOs' Ad Hoc Working Group discussed the idea that states should be obligated expressly under the CRC to support national institutions which would implement the CRC, but the initiative was unsuccessful.[31] Although there is no express provision in the CRC calling for the establishment of ombudsmen for children or other national human rights institutions, the creation or strengthening of such institutions using appropriate criteria will assist the state in fulfilling its Article 4 obligations. A national human rights institution which can address the human rights and needs of children, and act as a mechanism to process complaints against government concerning the latter's treatment of children, is a practical mechanism for monitoring and assisting in the domestic implementation of CRC rights.

164, rep. in *International Ombudsman Anthology, supra* note 20, 683 at 688 [further references to *Anthology*].

28 Research Note, *A Children's Rights Commissioner*, RN 00/62 (rev.) (Edinburgh: The Scottish Parliament, The Information Centre, Feb. 14, 2001) at 1.

29 See e.g. C. Price Cohen, "Development of Ombudswork for Children Around the World" in H.A. Davidson, C. Price Cohen and L.K. Girdner, *Establishing Ombudsman Programs For Children and Youth: How Government's Responsiveness To It's Young Citizens Can Be Improved* (Washington D.C.: ABA Center on Children and the Law, 1993) at 29; H.A. Davidson, "Status of Ombudswork for Children in the United States and Other Nations" in *ibid.* at 89.

30 CRC, *supra* note 7.

31 Van Bueren, *supra* note 9 at 408.

The Committee on the Rights of the Child and National Human Rights Institutions

The observations and recommendations of the Committee on the Rights of the Child in response to periodic state reports include comments on domestic structures to monitor the CRC's implementation. According to Elisa Pozza Tasca:

> [t]he Committee believes that unless adequate structures are put into place that are able to oversee, in total independence, the implementation of the Convention in different countries, the rights of children will not be given the priority and attention that they must have.[32]

In the first few years of making concluding observations, the Committee occasionally recommended to states without specific national institutions for children that they establish an independent mechanism to implement the CRC domestically. These recommendations became more numerous and began to mention ombudsmen or commissioners for children starting in 1996.[33] Throughout, the Committee has given positive recognition to states that have established an ombudsman or equivalent institution for children and, when appropriate, has provided recommendations for strengthening the institution.[34]

Beginning in 2000, the concluding observations of the Committee became more structured and detailed, and began referring to the Paris Principles Relating to the Status of National Human Rights Institutions (Paris Principles). Those directed at states that have not yet established domestic institutions have recommended the establishment of an independent and effective national human rights institution structured according to the Paris Principles.[35] Although comments made by the Committee in various concluding

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[32] E. Pozza Tasca, "Human Rights and the Child: From the New York Convention to the Institution of the Ombudsman"in *Human Rights Commissions and Ombudsman Offices, supra* note 18, 147 at 149.

[33] E.g. Committee on the Rights of the Child – Concluding Observations: Ethiopia, UN Doc. CRC/C/15/Add.67 (Jan. 24, 1997), para. 25; Concluding Observations: Bulgaria, UN Doc. CRC/C/15/Add.66 (Jan. 24, 1997), para. 23; Concluding Observations: China, UN Doc. CRC/C/15/Add.56 (June 7, 1996), para. 26; Concluding Observations: Croatia, UN Doc. CRC/C/15/Add.52 (Feb. 13, 1996), para. 22; Concluding Observations: Republic of Korea, UN Doc. CRC/C/15/Add.51 (Feb. 13, 1996), para. 23; Concluding Observations: Nicaragua, UN Doc. CRC/C/15/Add.36 (June 20, 1995), para. 29; Concluding Observations: Canada, UN Doc. CRC/C/15/Add.37 (June 20, 1995), para. 9; Concluding Observations: Germany, UN Doc. CRC/C/15/Add.43 (Nov. 27, 1993), ss. D, E; Pozza Tasca, *ibid.*; Newell, *supra* note 22 at 140-141.

[34] E.g. Committee on the Rights of the Child – Concluding Observations: Honduras, UN Doc. CRC/C/15/Add.24 (Oct. 24, 1994), paras. 14, 21; Concluding Observations: Norway, UN Doc. CRC/C/15/Add.23 (April 25, 1994), para. 3; Concluding Observations: Namibia, UN Doc. CRC/C/15/Add.14 (Feb. 7, 1994), para. 14; Concluding Observations: Peru, UN Doc. CRC/C/15/Add.8 (Oct. 18, 1993), para. 4; Newell, *ibid.* at 140.

[35] U.N.G.A. Res. 48/134, UN Doc. A/RES/48/134 (1993), rep. in United Nations Centre for Human Rights, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, Professional Training Series No. 4, UN Doc. HR/P/PT 4 (1995) at 37-38 at 37-38 [hereinafter Paris Principles]. For further discussion of the Paris Principles see *supra* Chapter 4. See e.g. Committee on the Rights of the Child – Concluding Observations: Italy, UN Doc. CRC/C/15/Add.198 (March 18, 2003), para. 15; Concluding Observations: Lebanon, UN Doc. CRC/C/15/Add.169 (March 21, 2002), paras. 15-16; Concluding Observations: Chile, UN Doc. CRC/C/15/Add.173 (April 3, 2002), paras. 12-13;

observations are not identical, all call for an independent institution with the functions, powers and resources to render it effective, and the mandate to monitor the implementation of the CRC. Most also add that the institution should be easily accessible to children, able to receive and investigate complaints made by children in a child-sensitive manner, and provide remedies for breaches of the CRC. Where a state (often a developing state) already has a human rights commission or similar structure, the Committee has tended to recommend either that the existing commission be structured in accordance with the Paris Principles (and, since late 2002, the Committee's General Comment No. 2) to enable it to monitor CRC implementation and receive complaints about breaches of children's rights, or that a separate institution for children's rights be established.[36] For a developing state without a human rights institution, the Committee has recommended that either a separate body (e.g. a children's ombudsman) or a national human rights institution which includes a focus on children's rights be established.[37] For other states, both developed and developing, the Committee merely recommends that a national human rights institution be created according to the Paris Principles to handle CRC monitoring.[38]

In October 2002, the Committee on the Rights of the Child issued General Comment No. 2 on the role of national human rights institutions in the promotion and protection of the rights of the child.[39] The General Comment includes ombudsmen (or commissioners) for children and other human rights institutions within the ambit of the Comment.[40] The General Comment recognizes that independent national human rights

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Concluding Observations: Belgium, UN Doc. CRC/C/15/Add.178 (June 13, 2002), paras. 12-13; Concluding Observations: Tunisia, UN Doc. CRC/C/15/Add.181 (June 13, 2002), paras. 16-17; Concluding Observations: Argentina, UN Doc. CRC/C/15/Add.187 (Oct. 4, 2002), paras. 21-22; Concluding Observations: UK, UN Doc. CRC/C/15/Add.188 (Oct. 9, 2002), paras. 16-17); Concluding Observations: Sudan, UN Doc. CRC/C/15/Add.190 (Oct. 9, 2002), paras. 16-17; Concluding Observations: Seychelles, UN Doc. CRC/C/15/Add.189 (Oct. 9, 2002), paras. 11-12; Concluding Observations: Israel, UN Doc. CRC/C/15/Add.195 (Oct. 9, 2002), paras. 16-17; Concluding Observations: Mauritania, UN Doc. CRC/C/15/Add.159 (Nov. 6, 2001), paras. 15-16; Concluding Observations: Tajikistan, UN Doc. CRC/C/15/Add.136 (Oct. 23, 2000), paras. 16-17; Concluding Observations: Marshall Islands, UN Doc. CRC/C/15/Add.139 (Oct. 16, 2000), paras. 16-17; Concluding Observations: Malta, UN Doc. CRC/C/15/Add.129 (June 28, 2000), para. 12.

[36] E.g. Committee on the Rights of the Child – Concluding Observations: Czech Republic, UN Doc. CRC/C/15/Add.201 (March 18, 2002), para. 17; Concluding Observations: Burkina Faso, UN Doc. CRC/C/15/Add.193 (Oct. 9, 2002), paras. 13-14; Concluding Observations: Republic of Moldova, UN Doc. CRC/C/15/Add.192 (Oct. 31, 2002), paras. 12-13; Concluding Observations: Malawi, UN Doc. CRC/C/15/Add.174 (April 2, 2002), para. 13.

[37] E.g. Committee on the Rights of the Child, Concluding Observations: Belarus, UN Doc. CRC/C/15/Add.180 (June 13, 2002), paras. 16-17.

[38] E.g. Committee on the Rights of the Child – Concluding Observations: Netherlands Antilles, UN Doc. CRC/C/15/Add.186 (June 7, 2002), para. 16; Concluding Observations: Mozambique, UN Doc. CRC/C/15/Add.172 (April 3, 2002), para. 16; Concluding Observations: Switzerland, UN Doc. CRC/C/15/Add.182 (June 7, 2002), para. 16.

[39] Committee on the Rights of the Child, The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child, General Comment No. 2, UN Doc. CRC/GC/2002/2 (Oct. 4, 2002) [hereinafter General Comment No. 2].

[40] *Ibid.*, para. 1. The Committee, inaccurately in my view, separates ombudsmen for children from national human rights institutions in para. 1.

institutions are important vehicles for the implementation of CRC obligations in the domestic sphere pursuant to Article 4 of the CRC.[41] The Committee encourages all CRC parties to establish "an independent institution for the promotion and monitoring of implementation of the Convention", specifies the "essential elements" of such institutions and the activities which they should undertake.[42] The General Comment states that:

> It is the view of the Committee that every State needs an independent human rights institution with responsibility for promoting and protecting children's rights. The Committee's principal concern is that the institution, whatever its form is able to independently and effectively monitor, promote and protect children's rights. It is essential that promotion and protection of children's rights is "mainstreamed" and that all human rights institutions existing in a country work closely together to this end.[43]

The General Comment states that national human rights institutions should be established in compliance with and structured according to the Paris Principles.[44] The Comment, however, goes on to state that national human rights institutions covering children's rights must have the power to consider and investigate individual complaints, including those submitted by or on behalf of children.[45] The Paris Principles, however, consider the power of investigation to be an optional function and, in this respect, General Comment No. 2 confers a more stringent criterion for institutions handling children's rights compared to the Paris Principles.[46] The General Comment does recognize that it may be financially difficult for certain states to establish separate children's ombudsmen and general human rights institutions and grants that in these cases a general human rights institution could include a specific focus on the rights of minors.[47] This permits these states to use their human rights ombudsman, human rights commission or, potentially, their classical ombudsman to cover children's rights protection. In this event, however, the Committee cautions that an identifiable commissioner (or ombudsman) specifically responsible for children's rights or a specific division or section responsible for children's rights should be created in the general institutional structure.[48]

UN Riyadh Guidelines

As discussed at the outset of this Chapter, there are a variety of multilateral instruments for the protection of children. Among these, the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) contain a provision that states

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41 *Ibid.*
42 *Ibid.*, para. 2.
43 *Ibid.*, para. 7.
44 *Ibid.*, para. 4; Paris Principles, *supra* note 35.
45 General Comment No. 2, *ibid.*, para. 13.
46 Paris Principles, *supra* note 35, "Additional principles concerning the status of commissions with quasi-jurisdictional competence".
47 General Comment No. 2, *supra* note 39, para. 6.
48 *Ibid.*

should consider the establishment of an ombudsman or similar independent organ to ensure that the status, rights and interests of young persons are upheld, and to supervise the implementation of the Riyadh Guidelines, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.[49] The Riyadh Guidelines do not specify whether the ombudsman can be a general ombudsman or must be a children's ombudsman, which is not surprising given that the concept of a children's ombudsman was still in its infancy in 1990.

UN Conferences on Children

The UN also holds special conferences and meetings on children's issues. The first global meeting of independent human rights institutions for children was held in May 2002 under the auspices of the UN.[50] This was followed by the UN General Assembly's Special Session on Children, held from May 8 to 10, 2002. Attended by government, international organization and NGO representatives, the Session resulted in an outcome document entitled *A world fit for children*.[51] The participating heads of state and government made a number of commitments in the document, including a commitment to consider the establishment or strengthening of "national bodies, such as, inter alia, independent ombudspersons for children, where appropriate, or other institutions for the promotion and protection of the rights of the child".[52]

EUROPEAN ORGANIZATIONS AND SUPPORT FOR OMBUDSMEN FOR CHILDREN

Council of Europe

The Council of Europe Parliamentary Assembly has regularly addressed the rights of children and youth in its work. The Assembly has adopted a series of recommendations and resolutions on improving the rights and protection of minors that include references to the children's ombudsman.

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[49] United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), *supra* note 5, para. 57; United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), *supra* note 5; and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, *supra* note 5.

[50] United Nations Special Session on Children Press Release, "First Global Meeting of Independent Human Rights Institutions for Children" (May 7, 2002).

[51] *A world fit for children*, UN Doc. A/S-27/19/Rev.1 (May 10, 2002). See also Secretary-General of the United Nations, *We the Children: Meeting the promises of the World Summit for Children* (Sept. 2001), also stating that further assessments of existing national institutions should be undertaken and standards for national institutions for the protection of minors should be developed based on the Paris Principles, *ibid.* at 77. General Comment No. 2 of the Committee on the Rights of the Child was issued in Oct. 2002, *supra* note 39.

[52] *A world fit for children, ibid.*, para. 31(b).

In 1990, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1121 which recommended that the Council of Ministers invite member states "to envisage, if they have not yet done so, the appointment of a special ombudsman for children, who could inform them on their rights, counsel them, intervene and, possibly, take legal action on their behalf".[53]

In 1996, the Parliamentary Assembly adopted Recommendation 1286 on a European Strategy for Children which reiterated its recommendation for the appointment of ombudsmen (or commissioners) for children in member states.[54] Recommendation 1286, however, was less specific on the powers of such an ombudsman or other similar structure, indicating that it should offer guarantees of independence and the responsibilities required to improve the lives of children, and be accessible to the public.[55] However, in the same year, Resolution 1099 of the Parliamentary Assembly used the language of Recommendation 1121 and framed the establishment of children's ombudsmen as mechanisms for prevention and information on the issue of sexual exploitation.[56] Resolution 1099 also called for the establishment of a European children's ombudsman within the framework of the Council of Europe.[57]

In April 2000, the Parliamentary Assembly adopted Recommendation 1460.[58] The Assembly noted that the number of Council of Europe member states which had created children's ombudsmen was too low, and recommended that the Committee of Ministers ask member states without the institution to appoint a national children's ombudsman.[59] The Assembly also recommended that the Council of Ministers create the post of European Children's Ombudsman as an independent institution with powers of initiative under the Council of Europe, with the mandate to "champion the cause of children".[60] More specifically, the Assembly stipulated that the roles of the institution:

> would be to promote awareness and implementation of the various conventions on children's rights, to advise and support all involved in policies for children, to assess the impact on children of different policy options and to devise specific strategies, particularly for the promotion of education for peace and non-violence.[61]

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[53] Council of Europe Parliamentary Assembly, Rec. 1121 (1990) on the rights of children (adopted Feb. 1, 1990), para. 13(A)(ii).

[54] Council of Europe Parliamentary Assembly, Rec. 1286 (1996) on a European Strategy for Children (adopted Jan. 24, 1996), para. 7(iv).

[55] *Ibid.*

[56] Council of Europe Parliamentary Assembly, Res. 1099 (1996) on the sexual exploitation of children (adopted Sept. 25, 1996), para. 11(i), "The Assembly recalls the need, stated in its Recs. 1121 (1990) and 1286 (1996), to develop information programmes and preventive measures, and in particular: (i) to appoint a commissioner for children (ombudsman) or to create an appropriate structure in every country, at local or national level, to inform children their rights, counsel them and intervene on their behalf".

[57] Res. 1099, *ibid.*, para. 19.

[58] Council of Europe Parliamentary Assembly, Rec. 1460 (2000) (adopted April 7, 2000).

[59] *Ibid.*, paras. 4, 8(i).

[60] *Ibid.*, paras. 6, 8(ii).

[61] *Ibid.*, para. 7.

In 2002, Recommendation 1551 of the Parliamentary Assembly yet again reiterated the view that the Committee of Ministers recommend that national ombudsmen for children be established in member states and that a European Children's Ombudsman be established.[62] The Committee of Ministers adopted Recommendation (2001)16 on the protection of children against sexual exploitation on October 31, 2001.[63] The Recommendation recommended, *inter alia*, the appointment of an independent, competent and easily accessible individual or agency to promote the rights of all children.[64]

Article 12 of the 1996 European Convention on the Exercise of Children's Rights also calls on parties to encourage national bodies which promote the exercise of children's rights through activities such as law reform proposals, opinions on draft legislation and the provision of information to the public on children's rights.[65] Further, minors as well as adults enjoy the rights in the European Convention on Human Rights and can access the European Court of Human Rights machinery. However, it is often difficult in practice for minors to make use of this system. The Council of Europe's Commissioner for Human Rights includes children's rights within his broad jurisdiction, and plans to increase cooperation with European domestic ombudsmen for children.[66]

European Union

The European Union (EU) has also addressed the plight of children and youth. For example, the European Parliament has supported the establishment of domestic ombudsmen for children in its member states. The European Parliament adopted a resolution containing a Charter of Rights of the Child on July 8, 1992, calling on member states to appoint ombudsmen for children "qualified . . . to safeguard children's rights and interests, deal with their requests and complaints, monitor the application of laws protecting children, and inform and guide the public authorities in their work to uphold children's rights".[67] The European Parliament also called for a Community-level children's ombudsman with the same powers.[68] In late 1996, the European Parliament passed

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62 Council of Europe Parliamentary Assembly, Rec. 1551 (2002), Building a twenty-first century society with and for children: follow-up to the European strategy for children (Recommendation 1286 (1996)) (adopted March 25, 2002), paras. 4(vii), 5(i).

63 Council of Europe Committee of Ministers, Rec. (2001)16 on the protection of children against sexual exploitation (adopted Oct. 31, 2001).

64 *Ibid.*, para. 5.

65 *Supra* note 6.

66 Council of Europe Commissioner for Human Rights, *3rd Annual Report January to December 2002*, CommDH(2003)7 (Strasbourg, June 19, 2003) at 47-49. See *infra* Chapter 10.

67 Resolution on a European Charter of Rights of the Child, Res. A3-0172/92 (July 8, 1992), O.J. C 241/67 (Sept. 21, 1992), para. 6; J.M. Bandrés Molet, "Towards a European Law on Children: The European Charter of the Rights of the Child" in *Monitoring Children's Rights, supra* note 9, 159 at 162. See also Resolution on the problems of children in the European Community, Res. A3-314/91 (Dec. 13, 1991), O.J. C 13/534 (Jan. 20, 1992), para. 22 (calling for an "official children's legal officer" in each member state).

68 Resolution on a European Charter of Rights of the Child, *ibid.*, para. 7.

a resolution on measures to protect minors in the EU, which stated that the Parliament was considering appointing an EU Ombudsman for Children "to take responsibility for upholding children's rights in all areas of policy."[69]

Institutional Variations: Classical Ombudsmen, Human Rights Ombudsmen, Ombudsmen for Children, Child Advocates or Government Department Mechanisms

OVERVIEW

States have adopted different institutions to protect the rights and needs of minors. Some states have only their classical or human rights ombudsman which can address children's rights to the limits of their respective mandates. Where children's ombudsmen, commissioners or advocates have been established they have comparatively different functions, powers and independence. A growing number of institutions for children are being established by independent legislation with broad jurisdiction over matters affecting minors, while others are found in child welfare statutes and are confined to addressing government child welfare and related services. Some ombudsmen for children do not have powers of investigation into individual cases while other institutions for children have both investigatory and advocacy functions.

Domestic institutions addressing minors that have been established by national and sub-national governments can be classified into the following main variants:[70]

- classical and human rights ombudsmen take complaints concerning the treatment of minors by the administrative authorities, with no explicit legislative mandate to focus on children/youth. Some may informally designate a deputy for children and youth inside the institution;
- some classical or human rights ombudsmen may be given an express legislative mandate to address specific issues affecting children (e.g. cases of sexual abuse, CRC implementation);
- some human rights ombudsmen have been required by legislation to appoint a deputy ombudsman for children and youth;
- some countries have established an ombudsman for children (commissioner, defender, etc.) or a children's advocate, supported by a legislative framework (although appointment may be by the executive branch) with jurisdiction over either large areas of children's rights/issues or more limited sectors (e.g. government services such as child welfare, juvenile justice, adoption), and with varying degrees of independence and powers;

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[69] Resolution on measures to protect minors in the European Union, Res. A4-0393/96, O.J. C 020/170 (Jan. 20, 1997), para. 16.

[70] See UNICEF, *Ombudswork for Children*, Innocenti Digest No. 1 (Florence: UNICEF, 1997); *Independent Institutions: Protecting Children's Rights, supra* note 21.

- some jurisdictions use government department or executive mechanisms, usually confined to government services relating to minors.

The following sections in this Chapter provide examples from each of the categories described above.

CLASSICAL OR HUMAN RIGHTS OMBUDSMAN HANDLES COMPLAINTS BY AND ABOUT CHILDREN AS PART OF ITS GENERAL MANDATE

Classical and human rights ombudsmen can usually take complaints from or concerning children and young persons as part of their mandate: i.e., to investigate complaints of poor administration and in the case of human rights ombudsmen, and some classical ombudsmen, allegations of human rights infringements committed by the administrative authorities. For some offices, especially classical ombudsmen, complaints concerning children may comprise only a small percentage of their total complaints. However, egregious cases of mistreatment of children are not uncommon in ombudsman work. Human rights ombudsmen often have heavier caseloads relating to children's rights and, in addition, they undertake other initiatives to improve the situation of children and youth, such as educational programs and legislative drafting proposals.

Some classical ombudsmen have opposed the establishment of separate children's ombudsmen in their jurisdictions, arguing that they already take complaints from minors and that their institution could be weakened by the presence of another ombudsman.[71] This position can be questioned, given the express human rights protection role of a children's ombudsman and the additional activities that a dedicated children's ombudsman may be responsible for. However, it is more debatable whether a children's ombudsman is required in a country which has a human rights ombudsman or human rights commission with jurisdiction over the human rights of children and youth, especially when it is a developing state with limited resources. As noted above, the Committee on the Rights of the Child takes the position that a children's ombudsman or equivalent should be established unless the state does not have the resources to create a dedicated institution in addition to a general national human rights institution. This position prevents most developed states (and their ombudsmen) from arguing against the establishment of a children's ombudsman.

Many classical ombudsmen take complaints by and/or concerning children and children's rights typically fall within the mandate of human rights ombudsmen. The following case studies examine ombudsman institutions in Denmark, British Columbia (Canada), Finland, Slovenia and some Latin American states. Other examples are provided by the human rights ombudsmen in Portugal, Hungary, Georgia and Romania.[72]

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[71] E.g. the National Ombudsman of the Netherlands, *Annual Report 2001 summary* (The Hague: The National Ombudsman of the Netherlands, 2002) at 8.

[72] *Independent Institutions: Protecting Children's Rights, supra* note 21 at 19, 22 (Hungary, Portugal, Romania). In Georgia, the Public Defender established a Child Rights Center.

Denmark

The Ombudsman of Denmark, a classical ombudsman, has handled a number of investigations over the years involving children. These cases have addressed issues such as children in state care or confined in mental health care facilities, the right of children to express their own views as they mature, and child refugees/asylum seekers.[73] In a few cases, references to international human rights treaties, specifically the European Convention on Human Rights and the CRC, have been made.[74] The Committee on the Rights of the Child has stated that the Ombudsman may not be accessible to all children in Denmark and has – noting the reluctance of the state to establish a separate complaints mechanism for children – encouraged the government to establish a child's rights focal point inside the Ombudsman office or strengthen the mandate of the National Council for Children.[75]

British Columbia, Canada

Canada is a federal state, and the jurisdiction over matters affecting children is split between federal and provincial governments, with many falling within provincial competence. The result is a patchwork of differential provincial coverage.

There are classical ombudsman offices in most Canadian provinces and territories. A number of provinces also have varying types of governmental institutions for children.[76] The British Columbia Ombudsman is an example of a classical ombudsman that has had a proactive stance toward the protection of minors.[77] In 1987, the British Columbia Ombudsman informally designated a Deputy Ombudsman for Children and Youth inside the office.[78] The position of Deputy Ombudsman was terminated in 1990, but the office continued to pay particular attention to the rights of children and youth.

The duties of the Deputy Ombudsman for Children and Youth were the coordination of ombudsman investigations against government departments that involved minors, the development of outreach programs to make the Ombudsman office accessible to minors and liaison with the relevant provincial and municipal government authorities.[79] The

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[73] K. Larsen, "The Parliamentary Ombudsman" in H. Gammeltoft-Hansen and F. Axmark, eds., *The Danish Ombudsman* (Copenhagen: Danish Ombudsman and Ministry of Foreign Affairs Department of Information, 1995) 39 at 60-61; J. Olsen and J. Andersen, "Selected Ombudsman Cases" in *The Danish Ombudsman, ibid.*, 165 at 190-203, 213-217; J. Møller, "The Danish Ombudsman and the Protection of Human Rights" in F. Matscher, ed., *Ombudsman in Europe – The Institution* (Kehl: N.P. Engel, 1994) 37 at 40; Parliamentary Commssioner for Civil and Military Administration in Denmark, *Summary: Annual Report 2001* at 23-24.

[74] Larsen, *ibid.* Denmark ratified the CRC on Dec. 13, 1991.

[75] Committee on the Rights of the Child, Concluding Observations: Denmark, UN Doc. CRC/C/15/Add.151 (July 10, 2001), paras. 22-23; *infra* note 155.

[76] See *infra* text accompanying notes 243 to 262.

[77] E.g., the Nova Scotia Ombudsman also has a children's ombudsman section.

[78] Parfitt,, *supra* note 27 at 689; D. Phillips, "Administrative Fairness With Children and Youth: The B.C. Ombudsman Model" (1991) 6 J. Child & Youth Care 73.

[79] British Columbia, *Ombudsman 1988 Annual Report* at 20-26; Parfitt, *ibid.* at 689; L.C. Reif, "The Promotion of International Human Rights Law by the Office of the Ombudsman" in *The*

Ombudsman office assisted the British Columbia government in preparing the province's response to the federal government in support of the CRC.[80] The British Columbia Ombudsman publicized the CRC in some of its annual reports at the time, disseminated information about children's rights and undertook an outreach program for minors.[81] Some of the public reports during this period used the CRC in support of the protection of minors.[82]

A number of special reports issued during the 1990s have involved the rights and protection of children, and provisions of the CRC have been used in some of these reports.[83] In particular, the public report on *Righting the Wrong: The Confinement of the Sons of Freedom Doukhobor Children* dealt with the loss of civil liberties of children who were forcibly separated from their families by the provincial government because of their parents' religious beliefs and confined in institutions where they were physically and psychologically mistreated.[84] The report used the CRC extensively in support of its conclusions and the Ombudsman recommended, *inter alia*, a full public apology, compensation for the adult survivors and the use of standards consistent with the CRC by all places of confinement.[85]

Finland

The Parliamentary Ombudsman of Finland is a human rights ombudsman.[86] The Ombudsman of Finland receives some investigations concerning the rights of children, a duty that is handled by one of the Deputy Ombudsmen.[87] For example, one case concerned governmental supervision of a foster home used for placements after information was

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Ombudsman: Diversity and Development, supra note 20, 87 at 102, rep. in *International Ombudsman Anthology, supra* note 20, 271 at 287 [further references to *Anthology*].

80 Reif, *ibid.* at 287. Canada ratified the CRC on Dec. 13, 1991.

81 Parfitt, *supra* note 27 at 690-691; *Ombudsman 1988 Annual Report, supra* note 79 at 25; British Columbia, *Ombudsman 1989 Annual Report* at 20-23; British Columbia, *Ombudsman 1990 Annual Report* at 29-30; CRC, *supra* note 7, art. 42.

82 See British Columbia Ombudsman, *Public Services to Children, Youth and Their Families in British Columbia: The Need for Integration* (Public Report No. 22, Nov. 1990) (need consolidation of statutes, regulations and policies on the rights of special needs minors and their families into a Statement of Principles consistent with the UN Charter and the CRC, review of statutes and practice on special care and treatment facilities for youths to ensure consistency with the Charter and the CRC); British Columbia Ombudsman, *Public Response to Request for Suggestions for Legislative Change to Family and Child Service Act* (Public Report No. 24, Feb. 1991) (CRC principles supporting recommendations for statutory amendments).

83 See e.g. Ombudsman of British Columbia, *Abuse of Deaf Students at Jericho Hill School* (Public Report No. 32, Nov. 1993); Ombudsman of British Columbia, *Building Respect: A Review of Youth Custody Centres in British Columbia* (Public Report No. 34, June 1994); Ombudsman of British Columbia, *Righting the Wrong: The Confinement of the Sons of Freedom Doukhobor Children* (Public Report No. 38, April 1999).

84 *Righting the Wrong: The Confinement of the Sons of Freedom Doukhobor Children, ibid.*

85 *Ibid.* The government did not implement the recommendations and in April 2001 adult survivors commenced a court action.

86 For further information on the Ombudsman of Finland see *supra* Chapter 5.

87 See also the office of the Hungarian Parliamentary Human Rights Commissioner where the Deputy Commissioner handles cases involving children.

received alleging mistreatment of the children and neglect by the authorities in supervising the home.[88] An own-motion investigation resulted in findings that the governmental authorities had inadequately supervised the children and had not monitored their rights to basic education or to health care, with the Deputy Ombudsman stating that "on the basis of the Convention on the Rights of the Child and of the national legislation, it is for the public authorities to monitor and supervise the realisation, in practice, of the rights of children who have been taken into care and placed into child welfare institutions."[89] Other cases have involved failings in the protection of the rights of unaccompanied child refugees, with the Ombudsman stating that "family reunification is a child's human right, protected by numerous international instruments",[90] a child deemed to be stateless by the authorities, the unequal treatment of children and the involuntary committal of minors for treatment.[91]

Slovenia

The Human Rights Ombudsman of Slovenia provides another example of a hybrid institution which investigates and promotes the rights of children and youth.[92] The Human Rights Ombudsman has dealt with cases involving the failure of parents to provide child maintenance when legally bound to do so, the phenomenon of family violence, the violation of the rights of special needs children resulting from the delay of the government in implementing regulations to enforce protective legislation, and the participation of children in the counselling conducted under governmental auspices between post-divorce parents.[93] In the latter investigation, the Human Rights Ombudsman stated that when children are separated from a parent they must have the opportunity to participate and provide their opinion – in support, he cited Article 12 of the CRC which states that children with the capacity to form their own views must be given the right to express those views freely in all matters affecting them.[94] Similarly, in another investigation involving a fourteen year old girl who complained of physical and psychological violence, the Ombudsman recommended that the child welfare authorities take the girl's views into account to the greatest extent possible.[95]

A higher profile is being given to children's rights in the Human Rights Ombudsman office. The legislation permits the Ombudsman to appoint two to four deputies and, in

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[88] Parliamentary Ombudsman of Finland, *Annual Report 2000 English Summary* (Helsinki: Office of the Parliamentary Ombudsman, 2001) at 22.

[89] *Ibid.* at 23. Finland ratified the CRC on June 20, 1991.

[90] *Ibid.* at 23-24.

[91] Office of the Parliamentary Ombudsman, *Report of the Finnish Parliamentary Ombudsman 1997* (Helsinki: Office of the Parliamentary Ombudsman, 1998) at 55.

[92] For a detailed discussion of the Human Rights Ombudsman of Slovenia see *supra* Chapter 5.

[93] Human Rights Ombudsman of Slovenia, *Annual Report 2001* (Ljubljana: Human Rights Ombudsman, 2002) at 59-60; Human Rights Ombudsman of Slovenia, *Annual Report 2000* (Ljubljana: Human Rights Ombudsman, 2001) at 24, 64-65, 66.

[94] *Annual Report 2001, ibid.* at 60. Slovenia ratified the CRC on July 6, 1992.

[95] *Annual Report 2000, supra* note 93 at 66.

early 2003, the Ombudsman appointed a fourth deputy who will be responsible for social affairs and children's rights.[96]

Latin American States

Latin American countries have generally not established children's rights ombudsmen.[97] Instead, many of the human rights ombudsmen (e.g. *defensores, procuradores*) in the region have created internal units or departments dedicated to the protection and promotion of the rights of minors.[98] Some have even appointed deputies responsible for children's rights. This section looks at the institutions in Guatemala, Honduras, Nicaragua, El Salvador, Colombia and Peru. The Costa Rica human rights ombudsman is discussed in the following section.

Guatemala has a human rights ombudsman, the *Procurador de los Derechos Humanos* (PDH) and a unit was established inside the institution to address children's rights, with the responsible individual appointed internally by the *Procurador* and called the *Defensor de los Derechos de la Niñez* (Defender of the Rights of Childhood).[99] The National Commissioner for Human Rights in Honduras includes within his mandate the protection of the rights of children and youth, and maintains an internal section focussing on women, children and the family.[100] In Nicaragua, the human rights ombudsman (*Procurador para la Defensa de los Derechos Humanos*) legislation included a subsidiary office for children's rights.[101] El Salvador's human rights ombudsman (*Procurador para la Defensa de los Derechos Humanos*) has an adjunct ombudsman for the defence of the rights of children and youth.[102] In Colombia, the national *Defensor del Pueblo* has a unit for children and appoints internally a Delegate for Children, Women and Seniors.[103]

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[96] "Slovenia" (Feb. 2003) 29 European Omb. News. 16 at 17.

[97] Costa Rica had a children's ombudsman for a few years, see *infra* notes 117 to 118.

[98] E.g., Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, "Analysis of Ombudsman Laws", Inter-American Institute of Human Rights, <www.iidh.ed.cr/comunidades/Ombudsnet/cuadro.aspx>. The Dominican Republic law requires the *Defensor* to appoint a Deputy for minors. See also Mexico's National Commission on Human Rights programs, *supra* note 20. For further information on the human rights ombudsman in El Salvador see *supra* Chapter 8 and for the other institutions in Latin America *supra* Chapter 6.

[99] See Newell, *supra* note 22 at 143; for further details on Guatemala's PDH see *supra* Chapter 6; <www.ombudsnet.org/Ombudsmen/RestofWorld/LatinAmerica/LatinAmerica.htm>.

[100] See Comisionado Nacional de los Derechos Humanos, *Derechos Humanos: Dos años de Realidades y Retos 1998-1999* at 177-179, 237-239; <www.ombudsnet.org/Ombudsmen/ RestofWorld/LatinAmerica/LatinAmerica.htm>. See also municipal child defenders, Committee on the Rights of the Child, Concluding Observations: Honduras, UN Doc. CRC/C/15/Add.105 (Aug. 24, 1999), paras. 3, 5, 13.

[101] See Committee on the Rights of the Child, Concluding Observations: Nicaragua, UN Doc. CRC/C/15/Add.108 (Aug. 24, 1999), paras. 5,19 (prior to appointment of *Procurador*. See also National Commission for the Promotion and Defence of the Rights of Children.

[102] See <www.pddh.gob.sv>.

[103] See also the *Oidor del Niño*, Committee on the Rights of the Child, Concluding Observations: Colombia, UN Doc. CRC/C/15/Add.137 (Oct. 16, 2000), para. 4; <www.ombudsnet.org/Ombudsmen/RestofWorld/LatinAmerica/LatinAmerica.htm>.

In Peru, the *Defensor del Pueblo* includes the rights of minors within the work of the institution, although it is in a supplementary or complementary role given the existence of the *defensorías del niño y del adolescente* created pursuant to the Law on Children and Adolescents and supported by municipalities, UNICEF and NGOs.[104] The national *Defensor del Pueblo* has indicated that their office will handle exceptional cases that cannot be resolved at the level of the *defensorías del niño y del adolescente*.[105] As Peter Newell states, these local *defensorías* "provide individual casework – but not legal advocacy – on a local level of daily life where the judicial and law enforcement systems either do not or cannot act."[106] In 2000, the Committee on the Rights of the Child stated that these local *defensorías* have limited capacity and inadequate resources.[107]

CLASSICAL OR HUMAN RIGHTS OMBUDSMEN WITH A LEGISLATIVE MANDATE TO ADDRESS SPECIFIC ISSUES AFFECTING CHILDREN

Occasionally, a classical or human rights ombudsman is given an express legislative mandate – in its own statute or in legislation concerning children – to deal with specific issues concerning minors, such as sexual abuse cases, monitoring the domestic implementation of the CRC or supervising the treatment of minors by parents and public authorities. Case studies of the New South Wales Ombudsman and the Costa Rica *Defensor de los Habitantes* illustrate these trends.

New South Wales, Australia

Australia is another federal state, where many areas relating to minors fall within state and territorial jurisdiction. At the federal level, Australia's Commission for Human Rights and Equal Opportunity has jurisdiction over the human rights of children and youth.[108] There are children's ombudsmen in some Australian states, discussed later in this Chapter.[109] Australia has ombudsmen at the Commonwealth and state/territorial levels.

The Ombudsman of New South Wales is a classical ombudsman which has been given some additional functions.[110] In 1998, legislative amendments to the ombudsman legislation gave the office additional duties relating to child protection in the handling of child abuse allegations and convictions against employees of listed government and private agencies.[111] These agencies include government departments involved with minors,

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104 Defensoría del Pueblo, *Al Servicio de la Ciudadanía, Primer Informe del Defensor del Pueblo al Congreso de la República 1996-1998 Peru* (Lima: Defensoría del Pueblo, 1998) at 84.

105 *Ibid.*

106 Newell, *supra* note 22 at 143.

107 Committee on the Rights of the Child, Concluding Observations: Peru, UN Doc. CRC/C/15/Add.120 (Feb. 22, 2000), para. 13.

108 See Burdekin, *supra* note 18 at 806-807. Australia ratified the CRC on Dec. 17, 1990.

109 See *infra* notes 228-242.

110 <www.ombo.nsw.gov.au>; NSW Ombudsman, *Annual Report 2001-2002*.

111 *Ombudsman Act 1974* (NSW), am. by *Ombudsman Amendment (Child Protection and Community*

area health services, public and private schools, child care centres and agencies providing substitute residential care.[112] The definition of child abuse includes sexual abuse, physical abuse, psychological harm, ill-treatment or neglect.[113] Listed entities must refer all allegations of child abuse committed by an employee to the Ombudsman, the Ombudsman can monitor agency internal investigations into such allegations, investigate the manner in which the entity has handled a child abuse allegation and can even investigate the child abuse complaint directly.[114] The Ombudsman is also mandated to monitor the systems of the listed agencies that are in place to prevent, handle and respond to child abuse allegations or convictions against their employees.[115] To carry out these duties, the Ombudsman created a Child Protection Unit. In 2001 to 2002, the New South Wales Ombudsman received 1,758 written notifications and complaints of sexual abuse, with the largest number of allegations made against government school staff.[116]

Costa Rica

Initially, Costa Rica established a children's rights ombudsman, the second country in the world after Norway to do so. The *Defensorìa de la Infancia* (Defender of Childhood) of Costa Rica was established in 1987, prior to the adoption of the CRC, and housed under the jurisdiction of the Ministry of Justice.[117] However, in 1993, the children's ombudsman was disbanded and its functions collapsed into the national human rights ombudsman institution, the *Defensor de los Habitantes* (Defender of the Inhabitants).[118] The *Defensor de los Habitantes* created a section inside the institution for children and adolescents.[119]

The *Defensor* can investigate human rights cases concerning minors, make recommendations and bring *habeus corpus* and *amparo* actions.[120] In addition, the role of the *Defensor* with respect to minors is "to monitor and require the observance of the law . . .

Services) Act 1998 (NSW) [hereinafter *Ombudsman Act* (NSW)]; <www.ombo.nsw.gov.au>, "Child Protection"; K. Del Villar, "Who Guards the Guardians? Recent Developments Concerning the Jurisdiction and Accountability of Ombudsmen in Australia" (2002) 6 Int'l Omb. Yrbk. 3.

112 <www.ombo.nsw.gov.au>, "Child Protection".

113 *Ombudsman Act* (NSW), *supra* note 111, s. 25A(1).

114 *Ombudsman Act* (NSW), *ibid.*, ss. 25A-G; Del Villar, *supra* note 111. New South Wales case law holds that the Ombudsman has jurisdiction to investigate both the systems in the listed entities and the substantive aspects of the child abuse allegation, *ibid.*

115 <www.ombo.nsw.gov.au>, "Child Protection"; *Ombudsman Act* (NSW), *ibid.*, s. 25B(1).

116 NSW Ombudsman, *Annual Report 2001-2002* at 115; L. Doherty, "Private school child abuse reports up 33 per cent", *The Sydney Morning Herald* (Jan. 3, 2003).

117 Newell, *supra* note 22 at 139; Periodic reports of States Parties due in 1997: Costa Rica, UN Doc. CRC/C/65/Add.7 (Oct. 1, 1998), para. 11(d). Costa Rica ratified the CRC on Aug. 21, 1990.

118 Newell, *ibid.* at 139, 142; Periodic reports of States Parties due in 1997: Costa Rica, *ibid.*, para. 29; *Independent Institutions: Protecting Children's Rights, supra* note 21 at 17.

119 Committee on the Rights of the Child, Concluding Observations: Costa Rica, UN Doc. CRC/C/15/Add.117 (Feb. 24, 2000), para. 6; Newell, *ibid.* at 142.

120 See *supra* Chapter 6, note 116; *Independent Institutions: Protecting Children's Rights, supra* note 21 at 17.

assisting in the process of adaptation of the legislation and application of the fundamental principles of the Convention of the Rights of the Child . . . [and] to publicize and promote the Convention as a preventive measure and as a means of defending the rights of children and adolescents."[121] Legislation passed in 1998 – the *Children and Adolescents Code* – specified that the *Defensor de los Habitantes* is to monitor the effective implementation of the obligations of parents or guardians to provide for the integral development of minors and the obligations of state institutions to take the best interests of minors into account when making any decision affecting them.[122] In response, the *Defensor de los Habitantes* created a Permanent Forum for the Evaluation of the Implementation of the *Children and Adolescents Code* which includes civil society participation.[123]

LEGISLATION APPOINTING A DEPUTY CHILDREN'S OMBUDSMAN WITHIN AN EXISTING HUMAN RIGHTS OMBUDSMAN INSTITUTION

In some countries, legislation requires the human rights ombudsman to appoint a deputy ombudsman for minors within the institution to focus on the rights and protection of children and youth. The legislative direction may be placed in the ombudsman statute or in separate legislation on minors. The deputy ombudsman for minors is used, for example, in the Spanish autonomous communities of Andalusia and Catalonia, and in Greece.

Andalusia and Catalonia, Spain

In Spain, the national *Defensor del Pueblo* includes the protection of the rights of children within its general human rights mandate.[124] For example, in 2002, the *Defensor del Pueblo* issued a major report criticizing the application of the new Law regulating young offenders at the national and autonomous community levels.[125] Some of the autonomous communities in Spain also have human rights ombudsmen and all of them can handle children's issues to the extent of community jurisdiction over children's matters. However, the regional human rights ombudsmen in Andalusia and Catalonia have express legislative provisions directing them to appoint deputy *Defensores* for the pro-

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[121] Periodic reports of States Parties due in 1997: Costa Rica, *supra* note 117, paras. 29-31.

[122] *Children and Adolescents Code* (1998), art. 7, <www.ombudsnet.org/Ombudsmen/ RestofWorld/LatinAmerica/LatinAmerica.htm>.

[123] See Concluding Observations: Costa Rica, *supra* note 119.

[124] For a detailed discussion of the *Defensor del Pueblo* of Spain and the autonomous community *Defensores* see *supra* Chapter 5.

[125] *Ley Reguladora de la Responsibilidad Penal de los Menores*, Law 5/2000. See M. Altozano, "El Defensor del Pueblo denuncia múltiples anomalías en la aplicación de la Ley de los menores", *El País* (Oct. 1, 2002) at 26. The *Defensor* directed recommendations for change to some national government departments and eight of the seventeen autonomous community governments, *ibid.*

tection of the rights of minors. In addition, the Community of Madrid has an ombudsman for children which is discussed in the following section.[126]

a) Andalusia

Andalusia assumed legislative responsibilities for the protection of minors in 1988.[127] In 1998, the Andalusian government passed legislation on the rights and protection of minors.[128] This statute also created the position of *Defensor del Menor* (Defender of Minors) as a Deputy Ombudsman to the *Defensor del Pueblo* (Defender of the People), the human rights ombudsman of Andalusia.[129]

The legislation on minors specifies that Andalusia's public administration must ensure that minors enjoy all the rights and liberties under the Spanish Constitution, the CRC and other treaties ratified by Spain.[130] The statute also states that minors can personally or through their legal representative submit complaints to the *Defensor del Menor*, and the public authorities must cooperate with the *Defensor*.[131] The *Defensor del Menor* forms a specialized branch of the *Defensoría del Pueblo*, with the strong powers of investigation given to the *Defensor del Pueblo* to defend the human rights of minors and monitor the administration. Thus, in addition to the CRC, other treaties and Andalusian law, the *Defensor del Menor* protects the human rights of minors according to the civil, political, economic, social, cultural and collective rights contained in the Spanish Constitution.[132]

The investigations of complaints concerning children are investigated with the powers of investigation and recommendation of the Andalusian *Defensor del Pueblo*. This includes the power to launch own-motion investigations. However, unlike the national *Defensor del Pueblo* of Spain, autonomous community *Defensores* do not have the power to take cases to the Constitutional Court or other tribunals. Likewise, the *Defensor del Menor* has no power to go to court to protect the rights of children and

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126 These developments were welcomed by the Committee on the Rights of the Child, Concluding Observations: Spain, UN Doc. CRC/C/15/Add.185 (June 13, 2002), para. 7.

127 Defensor del Pueblo Andaluz, *El Sistema de Protección de Menores, Informe Especial al Parlamento*, vols. I-III (Sevilla: Defensor del Pueblo Andaluz, July 1999), vol. I at 15.

128 *Ley 1/1998 de los Derechos y la Atención al Menor* (April 20, 1998), rep. in *El Sistema de Protección de Menores, Informe Especial al Parlamento, ibid.*, vol. III at 173.

129 *Ley 1/1998, ibid.*, Disposiciones Adicionales, primera; *Ley 9/1983* of the *Defensor del Pueblo Andaluz*, B.O.J.A. no. 100, art. 8(1). See *supra* Chapter 5, text accompanying notes 160 to 170, for details on the *Defensor del Pueblo* of Andalusia. *Ley 1/1998* requires the *Defensor* to name one of his three deputies as *Defensor del Menor, ibid.*

130 *Ley 1/1998, ibid.*, art. 2. Spain ratified the CRC on Dec. 6, 1990.

131 *Ibid.*, art. 4.

132 On the human rights provisions in the Spanish Constitution see *supra* Chapter 5, text accompanying notes 125 to 127. Art. 10(2) of the Constitution provides for use of international law obligations to interpret constitutional human rights guarantees. Art. 39(4) states that "Children are entitled to the protection of international treaties safeguarding their rights", rep. in A. Blaustein and G. Flanz, eds., *Constitutions of the Countries of the World*, vol. XVIII (New York: Oceana Publications Inc., 1991). Treaties ratified by Spain form part of the domestic legal system after publication in the state's Official Bulletin, *Código Civil* of Spain, art. 5.1.

youth. Complaints are made by the children themselves, by parents or other relatives.[133] Complaints cover a wide variety of matters such as: maltreatment or neglect by a parent, inability to maintain contact with siblings in state care, children unable to contact an incarcerated parent, economic and social rights of children living in poverty, the treatment of children who have mental disability or development problems in public schools, discrimination against Roma children and the treatment of immigrant children.[134]

b) Catalonia

Catalonia is another region of Spain with a human rights ombudsman, the *Síndic de Greuges*, which includes protection of the rights of minors within its larger human rights protection function. The institution began operations in 1984 and, in 1989, the statute of the *Síndic de Greuges* was amended to provide for the position of a Deputy *Síndic* for Children's Rights.[135] However, a Deputy *Síndic* was not appointed until 1997.[136]

The *Síndic* undertakes investigations and makes recommendations on issues affecting minors, such as on the medical examination of children involved in litigation and the right to education for sick children.[137] The *Síndic* provides information to minors and training programs for professionals on children's rights.[138] For example, the *Síndic* has published a booklet for distribution to schoolchildren which contains a simplified description of the CRC rights and a list of contact phone numbers.[139] The *Síndic* also works to influence policy developments relating to minors at the regional and state levels, and collects data.[140]

Greece

In 2002, the Committee on the Rights of the Child issued concluding observations on Greece's periodic report.[141] The Committee was concerned about the lack of a clear division of labour on children's rights protection between several government bodies and the Ombudsman, and recommended that the state clearly define the responsibilities of

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133 Defensor del Pueblo Andaluz, *Informe al Parlamento 1999* at 886, 891. Information is distributed at schools on the rights of children and there is a telephone number for exclusive use by minors.

134 *Ibid.* at 885-954. See also *El Sistema de Protección de Menores, Informe Especial al Parlamento, supra* note 128.

135 *Ley 14/84* (March 20, 1984), B.O.G. no. 421 (March 30, 1984), am. by *Ley 12/1989* (Dec. 14, 1989); *Independent Institutions: Protecting Children's Rights, supra* note 21 at 24.

136 <www.ombudsnet.org/Ombudsmen/Catalonia/catalonia.htm>.

137 *Independent Institutions: Protecting Children's Rights, supra* note 21 at 24.

138 <www.ombudsnet.org/Ombudsmen/Catalonia/catalonia.htm>.

139 Síndic de Greuges de Catalunya, *Convenció sobre els drets de l'infant.*

140 <www.ombudsnet.org/Ombudsmen/Catalonia/catalonia.htm>.

141 Committee on the Rights of the Child, Concluding Observations:Greece, UN Doc. CRC/C/15/Add.170 (April 2, 2002), paras. 17-18.

each entity in accordance with the Paris Principles to ensure that the institutions are easily accessible to children and can deal with individual complaints in a child-sensitive manner.[142]

Rather than establish a children's ombudsman, in early 2003 the Greek Parliament changed the ombudsman legislation to expand the jurisdiction of the Greek Ombudsman to include the defence and promotion of children's rights.[143] Children's rights protected are those found in the Greek Constitution, European Union instruments and treaties ratified by Greece including the CRC.[144] A Deputy Ombudsman for children's rights is created in the legislation.[145] Ombudsman jurisdiction over children's matters covers both the public and private sectors.[146] The Ombudsman can take complaints from children, specified relatives and third parties with direct knowledge of the breach of children's rights.[147] The Ombudsman maintains the classical powers of investigation, recommendation and reporting in cases concerning children's rights.

THE OMBUDSMAN AND OTHER INSTITUTIONS FOR CHILDREN AND YOUTH

A number of states – to date predominantly in Europe, North America, Australia and New Zealand – have established children's human rights institutions such as ombudsmen (commissioners, defenders, etc.) or advocates through legislation. The foundational legislation may be a separate statute or child welfare legislation. The institution may be given broad jurisdiction over many areas or confined to government services relating to minors such as child welfare, adoption and juvenile justice. An increasing number of institutions, especially in Europe, have been given an express mandate to monitor and implement the state's obligations under the CRC. However, the functions and powers given to institutions vary, although most institutions have investigatory powers and a number have advocacy functions. Further, the distinction between ombudsman and advocate institutions may be difficult to make when specific children's institutions in Canada, the U.S.A. and Australia are examined.

In Europe, institutions for children tend to have wide jurisdiction over many issues affecting minors, and most are expressly directed to assist in monitoring and implementing the state's CRC obligations. As with the development of the ombudsman, Scandinavia was a leader in introducing the legislative children's ombudsman. Ombudsmen (commissioners, etc.) and other institutions for children have been established in Europe,

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142 *Ibid.*

143 *Law 3094/2003*, <www.synigoros.gr>; "Transformation and Enhancement of the Founding Law of the Greek Ombudsman" (Feb. 2003) 29 European Omb. News. 14. For discussion of the Ombudsman of Greece see *supra* Chapter 5.

144 "Transformation and Enhancement of the Founding Law of the Greek Ombudsman", *ibid.* Greece ratified the CRC on May 11, 1993.

145 *Law 3094/2003, supra* note 143, art. 1(2).

146 *Ibid.*, art. 3(1).

147 *Ibid.*, art. 4(1).

as follows: Norway; Sweden; Iceland; France; several sub-national governments in Belgium; the Community of Madrid in Spain; the Friuli Venezia Giulia region in Italy;[148] Wales,[149] Scotland[150] and Northern Ireland[151] in the United Kingdom; Ireland;[152] the *länder* in Austria;[153] Poland; and Lithuania.[154] Mechanisms that are more closely tied to govern-

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148 The Public Tutor for Children and Adolescents with a legislative base, first appointed in 2001 by the regional executive, to promote initiatives, train persons in a position to protect minors, provide opinions on draft laws and regulations, and notify authorities of minors in need of protection, *Independent Institutions: Protecting Children's Rights, supra* note 21 at 20.

149 A Children's Commissioner was established in Wales in 2001, in response to recommendations contained in the Waterhouse report on child abuse in Wales under the *Care Standards Act 2000*, c. 14, and the *Children's Commissioner for Wales Act 2001* (2001), ch. 18. In operation March 1, 2001, the principal aim of the Commissioner is the safeguarding and promotion of the rights and welfare of minors. The Commissioner reviews the effect on minors of the functioning of the Welsh Assembly, county councils, health authorities, educational institutions and other listed bodies. He reviews and monitors the conduct and complaints procedures of listed bodies, reviews proposed laws, makes representations in the Assembly and represents the views of individual minors, providing them with advice and support.

150 *The Commissioner for Children and Young People (Scotland) Act 2003* was passed by the Scottish Parliament on March 26, 2003 (Royal Assent May 1, 2003). The Commissioner will be appointed by the Queen on the nomination of the Parliament. The Commissioner is to promote and safeguard the rights of minors by: promoting awareness and understanding of their rights, reviewing law, policy and practice affecting minors, promoting best practice by service providers and undertaking research. The Commissioner must have regard to the CRC in her work. She can investigate service providers' conduct, makes recommendations and reports to Parliament. The UK ratified the CRC on Dec. 16, 1991.

151 A bill to create a commissioner for children was introduced in the Northern Ireland Assembly in June 2002, but died when the Assembly was suspended in Oct. 2002. Instead, the UK Parliament passed *The Commissioner for Children and Young People (Northern Ireland) Order 2003*, S.I. 2003 No. 439 (N.I. 11) (Feb. 27, 2003). The Commissioner is appointed by the First Minister and his Deputy. The Commissioner is to have regard to the CRC in safeguarding and promoting the rights of minors. The Commissioner will: promote understanding of minor's rights, review law and practice affecting minors, provide advice to government, provide research and education, issue guidance on best practice, investigate formally and make recommendations, review government complaint procedures, and bring, intervene or assist in court/tribunal proceedings involving minors.

152 Under the *Ombudsman for Children Act, 2002*, the Ombudsman is appointed by the President upon the recommendation of the legislature and will (1) promote the rights and welfare of children and (2) investigate complaints against public bodies, including government bodies, health authorities, voluntary hospitals and schools. The Ombudsman can *inter alia* advise Ministers, provide information and research, monitor legislation and promote public awareness of the CRC and other matters affecting children's rights. The Ombudsman can make recommendations and reports annually and in special cases to the legislature. An Ombudsman was appointed in late 2003. Ireland ratified the CRC on Sept. 28, 1992.

153 Youth welfare legislation (1989) called for children's ombudsmen in the *länder* (regions) and by 1995 all had legislated ombudsmen. The ombudsmen for children act together to comment on federal matters affecting minors. Austria also has a federal government department ombudsman for children (Ministry of Environment, Youth and the Family), *Independent Institutions: Protecting Children's Rights, supra* note 21 at 15; Newell, *supra* note 22 at 141-142.

154 Established in 2000, the Lithuanian Controller for the Protection of the Rights of the Child monitors the implementation of CRC rights and investigates complaints by individuals and NGOs that children's rights have been violated by national or local government authorities, Committee on the Rights of the Child, Concluding Observations: Lithuania, UN Doc. CRC/C/15/Add.146 (Feb. 21, 2001), paras. 3-5; <www.ombudsmnet.org/Ombudsmen/ Eastern Europe/Lithuania/Lithuania.htm>.

ment departments are located in Denmark,[155] Germany,[156] a few cities and regions in Russia[157] and Macedonia.[158] Government mechanisms are also located in Israel[159] and Tunisia[160] in the Middle East and Northern Africa.

In other parts of the world, the institutions for children are more variable. Some are more closely tied to government, some have advocacy roles, many have functions that are confined to the provision of government services in the child welfare, adoption and youth offender sectors, few have an express mandate to look to the CRC, and the powers of the offices vary. Institutions have been established in New Zealand, several places at the sub-national level in Japan, a few states in Australia, a number of Canadian provinces and some U.S. states.[161]

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155 The Danish government established the National Council for Children in 1994, becoming a permanent body by ministerial order in 1996. Under the authority of the Ministry of Social Affairs, three members of the Council, including its Chair, are appointed by the Minister and five are appointed by an NGO coalition. The Council assesses the situation of children in Denmark against the CRC. The Committee on the Rights of the Child has suggested that the mandate of the Council could be strengthened to include the investigation of individual complaints from children, Concluding Observations: Denmark, *supra* note 75, paras. 7, 23; Newell, *supra* note 22 at 142; *Independent Institutions: Protecting Children's Rights, supra* note 21 at 18.

156 A Children's Commission is maintained in the Ministry for Women, Youth, Family and Health in the *länd* of Northrhine-Westphalia, <www.ombudsnet.org>; Newell, *ibid.* at 143.

157 A joint UNICEF/government department pilot project, Commissioners for Children are established in five of the eighty-nine city regions: in Kaluga, St. Petersburg, Novgorod, Volgograd and Ekaterinburg, *Independent Institutions: Protecting Children's Rights, supra* note 21 at 23.

158 An independent institution established by the Constitution and the Law on the Public Attorney, *ibid.* at 20.

159 At the national level the Ministry of Education children's ombudsman provides students with a telephone line for information and advice. The CRC Committee on the Rights of the Child has expressed its concern over the lack of an independent mechanism to monitor the implementation of the CRC and called for the establishment of a national human rights institution, Committee on the Rights of the Child, Concluding Observations: Israel, UN Doc. CRC/C/15/Add.195 (Oct. 9, 2002), paras. 16-17; Newell, *supra* note 22 at 143; <www.ombudsnet.org>.

160 Tunisia has Child Protection Delegates (*Délégués à la Protection de l'Enfance*) under its 1995 child protection legislation, passed after the state ratified the CRC. The Delegates identify minors in need of protection, try to resolve the matter in the family, if necessary refers the matter to the courts and can put children into temporary care. The Delegates have some powers of investigation in the fulfilment of these duties. In 2002, the Committee on the Rights of the Child welcomed the establishment of the Delegate system but noted that an independent monitoring mechanism was needed and recommended the establishment of a national human rights institution, <www.ombudsnet.org>; *Child Protection Code* (Nov. 9, 1995, in force Jan. 11, 1996), *Decree No. 96-1134*; Concluding Observations: Tunisia, *supra* note 35.

161 In Japan see the Children's Human Rights Protection Committee of Saitama Prefecture and Kawanishi City's Children's Human Rights Ombudsperson. New Zealand created a Commissioner for Children in1989 child welfare legislation, the *Children, Young Persons and Their Families Act 1989*, ss. 411-412. Under the auspices of a government department, the Commissioner was mandated to *inter alia* encourage policy development, advise the Minister, engage in research and community awareness programs, and investigate administrative conduct, *Independent Institutions: Protecting Children's Rights, supra* note 21 at 20. In 1997, the Committee on the Rights of the Child recommended that the office be strengthened and given more independence, Concluding Observations: New Zealand, UN Doc. CRC/C/15/Add.71 (Jan. 24, 1997), para. 24. In 2001, a bill was introduced in Parliament to strengthen the Commissioner's mandate. New Zealand ratified the CRC on April 6, 1993.

Currently, more countries are considering or are in the process of establishing an ombudsman for children, e.g. Luxembourg, Finland, Malta, India and Pakistan.[162]

The human rights institutions for children in Norway, Sweden, Iceland, France, Belgium, the Community of Madrid, Poland, Australian states, Canadian provinces and U.S. states are described in further detail in the following sections.

Norway

Norway was the first country to establish an Ombudsman for Children (*Barneombudet*), in legislation which entered into force in September 1981.[163] While the notion of an ombudsman for children had been raised unsuccessfully in 1968, the 1979 International Year of the Child drew attention to the issue, leading to the subsequent establishment of the institution.[164] Although there is a legislative foundation for the office, the Ombudsman is an executive appointment, appointed by the King for a four year period.[165] Neither the legislature nor the executive can instruct the *Barneombudet* although, administratively, the institution is under the jurisdiction of the Ministry for Children and Family Affairs.[166]

The Norwegian *Barneombudet* became operational almost exactly nine years before the CRC entered into force so that, initially, there was no reference in the legislation to the CRC. However, in 1998, amendments to the law conferred an additional function on the *Barneombudet*, that of ensuring that Norwegian law and administration complies with Norway's CRC obligations.[167] The duties of the Ombudsman for Children are to:

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[162] <www.ombudsnet.org/Ombudsmen/CountryProfiles.htm> (Luxembourg); N. Grima, "Commissioner for Children to watch over children's rights", *The Malta Independent* (June 4, 2003); "Setting up of children's ombudsman planned", *DAWN* (April 2, 2002) (Pakistan); Sripati, *supra* note 19; "An ombudsman for children", *The Hindu* (April 30, 2003) (India).

[163] *The Act establishing the Barneombudet*, Act No. 5 (March 6, 1981, am. July 17, 1998), <www.ombudsnet.org/Ombudsmen/Norway/norway.htm>. See also *Instructions for the Ombudsman for Children (Royal Decree)* (Sept. 11, 1981, am. July 17, 1998), *ibid.* [hereinafter *Instructions*]. See generally M.G. Flekkøy, *A Voice for Children: Speaking Out as Their Ombudsman* (London: Jessica Kingsley Publishers, 1991); M.G. Flekkøy, *Working for the Rights of Children: The experience of the Norwegian Ombudsman for Children*, Innocenti Essays No. 1 (Florence: UNICEF International Child Development Centre, 1990); M.G. Flekkøy, "The Children's Ombudsman as an Implementor of Children's Rights" (1996) 6 Transnat'l Law & Contemp. Probs. 353; Borgen, *supra* note 22 at 541; M.G. Flekkøy, "Working for the Rights of Children in Norway" (1992) 2 Juridical Rev. 127; G.B. Melton, "Lessons From Norway: The Children's Ombudsman as a Voice for Children" (1991) 23 Case W. Res. J. Int'l Law 197; M.G. Flekkøy, "The Norwegian Commissioner ("Ombudsman") for Children: Practical Experiences and Future Goals" in E. Verhellen and F. Spiesschaert, eds., *Ombudswork for children: A way of improving the position of children in society* (Leuven: Acco, 1989) at 119 [hereinafter *Ombudswork for children*].

[164] Flekkøy, "The Norwegian Commissioner ("Ombudsman") for Children: Practical Experiences and Future Goals", *ibid.* at 129. The legislation was sponsored by the Gro Harlem Brundtland government, and was passed by Parliament by a slim majority, *ibid.*

[165] *Act Establishing the Barneombudet, supra* note 163, s. 2.

[166] <www.barneombudet.no>. The original legislation provided for an Advisory Board to assist the *Barneombudet*. The Advisory Board clause was repealed in 1998.

[167] *Act Establishing the Barneombudet, supra* note 163, s. 3(b). Norway ratified the CRC on Jan. 8, 1991. Parliament considered the implementation of the CRC into domestic law in 2002-2003.

> . . . promote the interests of children vis-à-vis public and private authorities and to follow up the development of conditions under which children grow up. In particular, the Ombudsman shall:
>
> (a) On own initiative or at a hearing instance protect the interests of children in connection with planning and study-reports in all fields,
> (b) Ensure that legislation relating to the protection of children's interests is observed, including if Norwegian law and administrative routines are in accordance with Norway's obligations according to the UN Convention on the Rights of the Child,
> (c) Propose measures that can strengthen children's safety under the law,
> (d) Put forward proposals for measures that can solve or prevent conflicts between children and society,
> (e) Ensure that sufficient information is given to the public and private sectors concerning children's rights and measures required for children.[168]

The Ombudsman for Children can act either at the request of others or on her own initiative.[169] The Ombudsman can receive complaints from both minors and adults concerning government authorities and private institutions connected to minors.[170] The legislation gives the Norwegian *Barneombudet* strong powers of investigation, giving her free access to all public and private institutions for children, and requiring government authorities and public and private institutions for children to give the Ombudsman the information she needs to carry out her statutory duties, including records and other documents.[171] For all admissible cases, the Ombudsman has the right to make statements about matters within her jurisdiction to whomever she decides, including the press.[172] The Ombudsman does not have the power to decide cases or set aside decisions of the administration.[173] It is also important to note that the Ombudsman for Children does not have the power to investigate individual cases of conflict inside the family unit, and cannot make statements in cases which the Parliamentary Ombudsman has investigated and cases which are being considered by the courts or where a judgment has been made.[174] Cases involving legal issues must be referred by the *Barneombudet* to Norway's Parliamentary Ombudsman.[175]

In 1995, a Norwegian government report reviewed the operations of the Ombudsman for Children.[176] The report indicated that the institution had performed well, but it did

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168 *Ibid.*, s. 3; *Instructions, supra* note 163, s. 1.

169 *Act Establishing the Barneombudet, ibid.; Instructions, ibid.*, s. 2.

170 Flekkøy, *Working for the Rights of Children: The experience of the Norwegian Ombudsman for Children, supra* note 163 at 129.

171 *Act Establishing the Barneombudet, supra* note 163, s. 4.

172 *Ibid.*, s. 5; *Instructions, supra* note 163, s. 7.

173 *Instructions, ibid.*, s. 1.

174 *Ibid.*, ss. 3, 7; Flekkøy, "The Norwegian Commissioner ("Ombudsman") for Children: Practical Experiences and Future Goals", *supra* note 163 at 123.

175 *Instructions, ibid.*, s. 4.

176 See Newell, *supra* note 22 at 144-145.

recommend that the Ombudsman focus less on individual cases and more on general matters.[177] This shift in emphasis has been put into practice.[178]

Sweden

The children's ombudsman concept was discussed by the Swedish parliament for a number of years, accompanied by lobbying from various organizations.[179] It was the adoption of the CRC, Sweden's involvement in its development and its desire to implement and promote CRC rights internally that led the Swedish parliament to pass a law for a children's ombudsman.[180] The 1993 Swedish Ombudsman for Children (*Barnombudsmannen*) legislation was the first statute to expressly connect the mandate of the children's ombudsman with the domestic implementation of the CRC.[181] In 1999, the Swedish government undertook a review, stating that the Children's Ombudsman has "a key proactive function" in the domestic implementation of the CRC, yet the Committee on the Rights of the Child also expressed its concern in 1999 about the autonomy and role of the Ombudsman.[182]

As a result, the statute was amended in 2002 to strengthen the ombudsman's independence from government and improve Sweden's implementation of its CRC obligations.[183] The current *Children's Ombudsman Act* states that:

1. The Children's Ombudsman has the task of representing the rights and interests of children and young people in the light of Sweden's undertakings under the UN Convention on the Rights of the Child.
2. The Children's Ombudsman shall assiduously encourage implementation of the Convention and monitor compliance with it. In this connection, the Children's Ombudsman shall give particular attention to ensuring that laws and other statutes and their application agree with the Convention on the Rights of the Child.[184]

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177 *Ibid.* at 144-145.

178 "An International Perspective", para. 6.3.9, <www.capacitybuilder.co.uk/reports/ccni/chapter6.htm>.

179 See M. Koren, "A children's ombudsman in Sweden" (1995) 3 Int'l J. Children's Rights 101 at 101, 108.

180 *Ibid.* at 108. Sweden Ministry of Health and Social Affairs, *Follow-up of the National Strategy to Realise the United Nations Convention on the Rights of the Child in Sweden*, Fact Sheet No. 10 (June 2001). Sweden ratified the CRC on June 29, 1990.

181 See Newell, *supra* note 22 at 143. Sweden takes a dualist approach to treaties but although unimplemented treaties are not part of the domestic legal system they can be used as interpretive guidelines.

182 *Follow-up of the National Strategy to Realise the United Nations Convention on the Rights of the Child in Sweden, supra* note 180; Committee on the Rights of the Child, Concluding Observations: Sweden, UN Doc. CRC/C/15/Add.101 (May 10, 1999), para. 8.

183 *The Children's Ombudsman Act*, No. 1993: 335, am. by *inter alia* No. 2002: 377; <www.bo.se>. In 1999 Parliament approved an initiative giving the Ombudsman a three-year mandate to work for CRC implementation, and this role was codified in the 2002 statutory amendments, *ibid.*, "Background".

184 *The Children's Ombudsman Act, ibid.* The Council to assist the Ombudsman created in the 1993 statute has been deleted.

The statute gives the Ombudsman the powers to: make proposals to the government for changes to laws or other measures needed to protect the rights and interests of minors; disseminate information, affect opinion and take initiatives for other suitable measures; represent the rights and interests of minors in public debate; compile knowledge and statistics on the living conditions of minors; follow international developments regarding the interpretation of the CRC and its application; and report annually to the government on the activities of the office and matters affecting minors which the Ombudsman thinks the government should be informed about.[185] Although the Swedish Ombudsman for Children does undertake own-motion investigations into general matters that appear to affect the rights and interests of minors, the Children's Ombudsman cannot investigate individual cases.[186] Thus, the Ombudsman does not have the power to determine whether administrative authorities have acted illegally – with the result that these types of complaints are referred to the Swedish Parliamentary Ombudsmen.[187]

Iceland

Iceland established an Ombudsman for Children with a legislative base in 1995.[188] The law expressly connects the institution with the domestic implementation of the CRC and other international agreements ratified by Iceland.[189]

Iceland's Ombudsman for Children is appointed by and reports annually to the Prime Minister, and has the role of improving the position of children and safeguarding their interests, needs and rights.[190] More specifically, the Ombudsman is mandated to: strive to ensure that the rights, needs and interests of children are given full consideration by public authorities, individuals and juridical entities; make proposals for the furtherance of children's interests (including the improvement of legal procedures and administrative instructions); promote policy discussions in the public sphere on matters relating to minors; seek to further Iceland's observance of international agreements on children that the state has ratified; advocate the ratification of other treaties; foster public awareness of laws related to minors; and promote research.[191] In addition, the Ombudsman shall take action when she considers that the rights, interests and needs of minors have been infringed by public or private entities and, in this respect, the Ombudsman may give a reasoned opinion and recommendations for a remedy to the entity concerned.[192] The Ombudsman, however, does not have jurisdiction to handle disputes between individuals or cases handled by Iceland's Parliamentary Ombudsman or the courts.[193] The legislation

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185 *Ibid.*, ss. 3-4.

186 See Koren, *supra* note 179 at 111; <www.bo.se>.

187 Koren, *ibid.* The Ombudsman must inform the social services committee if the office discovers that a child is being abused in the home, *The Children's Ombudsman Act*, *supra* note 183, s. 7.

188 *The Ombudsman for Children Act*, No. 83/1994, <www.barn.is>; Newell, *supra* note 22 at 143.

189 *The Ombudsman for Children Act, ibid.*, art. 3(c). Iceland ratified the CRC on Oct. 28, 1992.

190 *Ibid.*, arts. 1-2, 8.

191 *Ibid.*, art. 3.

192 *Ibid.*, arts. 3(d), 4.

193 *Ibid.*, art. 4.

enables the Ombudsman to obtain information and access to institutions, and permits her to go to court if such assistance is denied.[194]

France

A 1998 report presented to the National Assembly by a parliamentary commission of enquiry on the state of the rights of children in France indicated that, despite numerous laws designed to protect children, the CRC was not sufficiently applied inside France.[195] Subsequently, the *Défenseur des Enfants* (Defender of Children) was established by law on March 6, 2000.[196] The *Défenseur* is instituted as an independent authority and does not receive instruction from any authority.[197]

Appointed by the Council of Ministers, the *Défenseur* defends and promotes children's rights as defined by law or ratified or approved international agreements, including the CRC.[198] More specifically, the legislative framework confers four main functions on the *Défenseur*, to: (1) review and attempt to resolve individual cases where the rights of a child have not been upheld, where the matter has not been resolved by another mechanism; (2) identify systemic problems which have negative effects on children in both the public and private spheres (including the family, schools, hospitals, prisons and other state institutions); (3) propose and initiate reform of existing legislation and regulations to improve the rights of the child and the implementation of these rights; and (4) establish information and training programs to educate adults and minors on children's rights.[199]

Minors whose rights have been infringed, their parents or legal representatives, and children's NGOs who find that the rights of a minor have been infringed can submit complaints to the *Défenseur*.[200] In addition, the *Défenseur* can initiate own-motion investigations.[201] Complaints can be made directly to the *Défenseur* – important when children are complainants.[202] The *Défenseur des Enfants* has jurisdiction over disputes in both the public and private sectors, although cases of a serious character involving public administration must be referred by the *Défenseur* to the national ombudsman, the *Médiateur de la Republique*.[203] The *Défenseur* can make recommendations in those investigations which she is permitted to undertake.[204] The *Défenseur* submits an annual report to Parliament and the President.

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194 *Ibid.*, art. 5.

195 <www.defenseurdesenfants.fr/defens/texte3.htm>. France ratified the CRC on Aug. 7, 1990.

196 *Loi n° 2000-196* (March 6, 2000); <www.defenseurdesenfants.fr/defens/index.htm>; République Française Défenseur des Enfants, *The Ombudsman for Children in France*.

197 *Loi n° 2000-196, ibid.*, arts. 1, 10.

198 *Ibid.*, arts. 1-2; *The Ombudsman for Children in France, supra* note 196.

199 *Loi n° 2000-196, ibid.*, arts. 3, 5; *The Ombudsman for Children in France, ibid.*

200 *Loi n° 2000-196, ibid.*, art. 1; *The Ombudsman for Children in France, ibid.*

201 *The Ombudsman for Children in France, ibid.*

202 *Ibid.* In contrast, complaints to France's *Médiateur* must be made first to a legislator who passes the complaint on to the *Médiateur*.

203 *Loi n° 2000-196, supra* note 196, art. 3.

204 *Ibid.*

Belgium – French and Flemish Communities

The French Community legislature created the *Délégué Général aux Droits de l'Enfant* (General Delegate for Children's Rights) in 1991 in a decree concerning youth assistance.[205] The executive appoints the General Delegate, with the first Delegate appointed on July 10, 1991.[206] The General Delegate is empowered to: disseminate information on the rights of children and youth, monitor whether laws concerning children and youth have been correctly applied, monitor implementation of the CRC, submit proposals to the community government executive on law reform, and receive complaints or requests for mediation where it is alleged that the rights of minors have not been observed.[207] The General Delegate has jurisdiction over both the public and private sectors. Many complaints involve the situation of minors after their parents separate or divorce, violence and mistreatment of minors, the conduct of the government in taking minors from their family and placing them in state protection, and the treatment of child asylum-seekers.[208]

In the Flemish Community, the Flemish Parliament passed a decree in 1997 establishing a Children's Rights Commission (with a Commissioner), which became fully operational in 1999.[209] The Commissioner is appointed by and reports annually to the Flemish Parliament. With the roles of defending the rights of children and promoting their interests, the Commissioner has the following main functions, to: follow up on the implementation of the CRC; monitor the conformity of all laws, decrees and government decisions in the Flemish Community with the CRC; to inform the general public, and children in particular, about the contents of the CRC; analyse, evaluate and publicize the conditions of minors; and act as the spokesperson for the rights, needs and interests of children.[210] The Commissioner has the power to investigate complaints about the violation of the principles in the CRC or can refer a complaint to an institution with greater competence in the area.[211] The Commissioner can also make recommendations to Parliament for policy reform and perform studies (on her own-motion or on the direction of Parliament).[212] The annual report must also be given to the Belgian national government so that the latter can take the report into account in drafting the country's periodic report for the CRC Committee.[213]

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205 C. Lelièvre, "The General Delegate for Children's Rights and Youth Assistance: Evaluation of an Innovating Action in the French Community of Belgium" in *Monitoring Children's Rights, supra* note 9, 563 at 563; R. Bertaux, "Towards a Children's Rights Commissioner" in *Ombudswork for Children, supra* note 163 at 193; *Independent Institutions: Protecting Children's Rights, supra* note 21 at 16.

206 Leliévre, *ibid.* at 564. Belgium ratified the CRC on Dec. 16, 1991.

207 *Ibid.; Independent Institutions: Protecting Children's Rights, supra* note 21 at 16.

208 Leliévre, *ibid.* at 567-569.

209 *Independent Institutions: Protecting Children's Rights, supra* note 21 at 16.

210 *Vertaling Oprichtingsdecreet* (July 15, 1997), <www.ombudsnet.org/ ThematicProfiles/Legislation/lflemish.htm>.

211 *Ibid.* An investigation of the Commissioner is suspended while a judicial or administrative tribunal procedure is ongoing. The Commissioner has relatively strong investigatory powers.

212 *Ibid.*

213 *Ibid.*

In 2002, the Committee on the Rights of the Child expressed concern that there was no independent mechanism to monitor the implementation of the CRC and take complaints from minors in either the German-speaking Community or at the federal level, and recommended their establishment.[214]

Madrid, Spain

In contrast to the regional governments in Andalusia and Catalonia that have established Deputies to the general human rights ombudsman responsible for children's matters, the Community of Madrid established an independent legislative *Defensor del Menor* (Defender of Minors) in 1996.[215]

The *Defensor del Menor* is elected by the plenary of the Legislative Assembly of Madrid and has the position of High Commissioner of the Assembly. The *Defensor* is not subject to the authority of any person, does not receive instructions from any authority, carries out his functions with autonomy and reports annually to the Assembly.[216] The *Defensor del Menor* is mandated to protect and promote the rights of minors, and the Law establishing the institution confers the following functions on the *Defensor*, to: (1) supervise the conduct of the public administration and private entities providing services to minors to protect the rights and interests of minors; (2) receive and handle complaints submitted by any person, including minors, concerning situations that threaten or violate the rights of minors; (3) propose reforms of procedures, regulations or laws to improve the protection of the rights of minors; (4) spread knowledge of the rights of children and youth; and (5) develop actions that provide conditions in which minors can exercise their rights, adults respect these rights and the community become knowledgeable about these rights.[217] The *Defensor* cannot intervene in individual cases which are before the courts or in cases which require measures of protection regulated by civil legislation and conferred on the public administration.[218] The *Defensor* also monitors the implementation of the CRC.[219]

Poland

The 1997 Constitution of Poland provided for the establishment of a Commissioner for Children's Rights with a mandate to be defined by a statute, which was passed in

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214 Concluding Observations: Belgium, *supra* note 35, paras. 12-13.

215 *Ley del Defensor del Menor en la Comunidad de Madrid, Ley 5/1996* (July 8, 1996). See also *Ley de Garantías de los Derechos de la Infancia y Adolescenciade la Comunidad de Madrid, Ley 6/1995* (March 28, 1995); <www.dmenor-mad.es>; *Independent Institutions: Protecting Children's Rights*, *supra* note 21 at 24.

216 <www.dmenor-mad.es>.

217 <www.dmenor-mad.es/quepuede.htm>.

218 *Ibid.*

219 <www.ombudsnet.org/Ombudsmen/madrid/madrid.htm>.

2000.[220] The Commissioner is a legislative ombudsman – appointed by the *Sejm* (lower house of Parliament) and confirmed by the Senate. The institution is autonomous of government and is accountable only to Parliament.[221]

The Commissioner monitors the observance of the rights of children and youth in Poland. The legislation specifies that the Commissioner is to act to ensure the complete and harmonious development of children with respect for their dignity and status, and to work to protect minors against violence, cruelty, exploitation, depravity, neglect and other mistreatment.[222] The legislation directs the Commissioner to work with special focus in the areas of the rights to: life, health care, a family life, adequate social conditions and education.[223] The Commissioner can respond to individual complaints from adults and minors. The Commissioner may: request information, explanations and access to documents from public authorities, organizations and institutions; present reviews and motions to these entities with the objective of ensuring protection of the rights of children; make law reform proposals; and monitor the implementation of the CRC.[224] Combatting violence against and ill-treatment of children, and addressing the commercial and sexual exploitation of children are some of the Commissioner's current priority areas.[225]

Poland's general human rights ombudsman, the Commissioner for Civil Rights Protection, also handles cases involving minors. The law of the Commissioner for Children's Rights sets out the relationship between the two Commissioners, and the Commissioner for Children can request that the Commissioner for Civil Rights Protection take action to assist children within the scope of his jurisdiction.[226]

In 2002, in its concluding observations on Poland's periodic report, the Committee on the Rights of the Child welcomed the establishment of the Commissioner for Children's Rights, but expressed its concern at the insufficient resources allocated to the office and recommended that the office be provided with sufficient resources to enable it to fulfil its duties.

Australia

As discussed earlier in this Chapter, the New South Wales Ombudsman has jurisdiction over child abuse cases and the federal human rights commission addresses children's rights.[227] Also, a few Australian states have dedicated institutions for children.

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220 1997 Constitution of the Republic of Poland, art. 72(4); *Law on the Ombudsman for Children* (Jan. 6, 2000); <www.brpd.gov.pl>.

221 <www.brpd.gov.pl>; <www.ombudsnet.org/Ombudsmen/ Eastern Europe/ Poland/Poland.htm>.

222 *Law on the Ombudsman for Children, supra* note 220; <http://free.ngo.pl/fdn/ eng_biuletyn_1.html#r4>.

223 *Ibid.*

224 *Ibid.* Poland ratified the CRC on June 7, 1991.

225 Council of Europe Commissioner for Human Rights, Report on Visit to Poland, CommDH (2003) 4 (Strasbourg, March 19, 2003).

226 *Law on the Ombudsman for Children, supra* note 220.

227 *Supra* text accompanying notes 18, 108-116.

In 1996, the State of Queensland created the position of Children's Commissioner by statute which was replaced by the *Commission for Children and Young People Act 2000*, in force in early 2001.[228] The Commission for Children and Young People is appointed by the Governor in Council (Cabinet) and is under the administrative authority of the Department of Premier and Cabinet, although the legislation states that the Commissioner must act independently and is not under ministerial control or direction.[229] The Queensland Commissioner has both investigatory and advocacy functions. The Commissioner can investigate complaints about services provided to minors by service providers and complaints relating to certain action under child protection and juvenile justice legislation, with resulting recommendations and reports.[230] The Commissioner also advocates for the rights, interests and well being of minors.[231] In the 2001 to 2002 period, the largest number of complaints received by the Commission concerned lack of response by service providers, issues over placement of minors, and sexual and physical harm.[232] The Commissioner also inspects sites where minors are in detention centres, mental health facilities and out-of-home residential care through a community visitor program; monitors and reviews laws, policies and practices on the delivery of services to minors; conducts research; operates an employment screening program for persons in certain areas of child-related employment; and make recommendations and reports.[233]

In 1998 legislation, New South Wales established the Commissioner for Children and Young People, operational in 1999, who reports to Parliament.[234] The New South Wales Commissioner has the following functions: seeking the views of minors and making recommendations to Parliament, the government and NGOs on legislation, policies, practices and services affecting minors; conducting inquiries into important issues affecting minors; conducting research; providing advice and information to minors, parents, care givers and professionals; conducting, promoting and monitoring training for minors; public awareness activities; implementing and administering a voluntary accreditation scheme for counsellors of sex offenders; and acting as one of the screening agencies to determine the suitability of persons to work in child-related employment.[235] The New South Wales Commissioner has no power to investigate individual complaints which must be referred to the Ombudsman or other institutions.

In 1997 child welfare legislation, in force in 2000, Tasmania created a Commissioner

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228 *Commission for Children and Young People Act 2000* (Qld.) No. 60 (in force Feb. 2, 2001); <www.childcomm.qld.gov.au>.

229 *Commission for Children and Young People Act 2000, ibid.*, ss. 17(1), 21(1); Queensland Commission for Children and Young People, *Annual Report 2001-2002* at 14.

230 *Commission for Children and Young People Act 2000, ibid.*, ss. 15(a), 32-33, 58. Services include government services or private services that are wholly or partly funded or administered by government, *ibid.*, ss. 8-10.

231 *Ibid.*, s. 5, 15(c).

232 *Annual Report 2001-2002, supra* note 229 at 5, 33-34.

233 *Commission for Children and Young People Act 2000, supra* note 228, s. 15.

234 *Commission for Children and Young People Act 1998* (NSW); *Child Protection (Prohibited Employment) Act 1998* (NSW); <www.kids.nsw.gov.au>.

235 *Ibid.*

for Children.[236] The Tasmanian Commissioner is appointed by the Governor and operates under the umbrella of the Department of Health and Human Services, although the legislation states that the Commissioner shall act independently, impartially and in the public interest.[237] The Commissioner can only investigate administrative conduct relating to minors, or inquire into and report on matters, on the request of the Minister.[238] The Tasmanian Commissioner looks to the health, welfare, care, protection and development of children and in furtherance can encourage the development of departmental policies and services; increase public awareness; advise the Minister on the administration of the statute and the policies and practices of government departments; and advise the Minister on matters relating to children in custody or under guardianship.[239] In practice, the Commissioner does receive and address informal and formal concerns and inquiries.[240]

In 2003, Western Australia's Parliament began to discuss the establishment of a commissioner for children or similar institution.[241] South Australia has had an office for children that is more closely tied to the government.[242]

Canada

The ombudsmen in Canadian provinces and territories take complaints concerning children and youth, the activities of the Ombudsman of British Columbia were discussed earlier in this Chapter, and there are federal and provincial human rights commissions. Quebec had a *Commission de protection des droits de la jeunesse* (Commission for the Protection of the Rights of Children and Youth), established in 1975, which operated as an autonomous body under the Ministry of Justice with the mandate to uphold the rights of minors in the implementation of provincial youth protection and juvenile offender legislation.[243] In 1995, the Commission was merged with the provincial human rights

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236 *Children, Young Persons and Their Families Act 1997* (Tas.), No. 28 of 1997, Part 9, ss. 78-83, <www.childcomm.tas.gov.au>.

237 *Children, Young Persons and Their Families Act 1997*, *ibid.*, s. 79(3). The Commissioner's annual report is made to the Minister who must lay it before Parliament.

238 *Ibid.*, s. 79(1).

239 *Ibid.*

240 See Tasmania Office of the Commissioner for Children, *Value Children Now: Annual Report 2001-2002* at 8-14.

241 "Western Australia considers appointing full-time children's advocate", *ABC Online* (June 12, 2003).

242 South Australia established a Children's Interests Bureau under community welfare legislation in 1984. In 1995 the Bureau was merged with the Office for Families and the Domestic Violence Unit (Ministry of Social Affairs) to become the Office for Families and Children, with less independence, S. Castell-McGregor, "The South Australian Children's Interests Bureau. An Australian Initiative in Furthering Children's Rights" in *Ombudswork for children, supra* note 163 at 149, 151; Newell, *supra* note 22 at 142.

243 C. Giroux, "Commission de protection des droits de la jeunesse" in *Monitoring Children's Rights, supra* note 9 at 555-556; J.-F. Boulais, "The Youth Protection Committee: Ombudsman for Children in Problem Situations in Quebec: Origin and Practice" in *Ombudswork for children, ibid.* at 165.

commission, resulting in the *Commission des droits de la personne et des droits de la jeunesse*, which maintains the same mandate in the protection of minors.[244]

Some Canadian provinces also have children's advocates or other institutions for the protection of children. The children's advocate has been established in Alberta, Saskatchewan, Manitoba, Ontario and in Newfoundland and Labrador (NL), with New Brunswick and the Northwest Territories considering advocate institutions. While all are focussed on public services for minors, the advocate offices differ in their degrees of independence, with the Saskatchewan, Manitoba and NL Advocates being offices of the legislature and the others being executive mechanisms. Unlike the advocate offices, the new British Columbia institution for minors has very restricted advocacy and investigatory powers.

The Ontario and Alberta children's advocates operate under ministerial umbrellas.[245] The Alberta Children's Advocate provides one example. It is established in provincial child welfare legislation, appointed by the Cabinet (executive) and functions under the umbrella of the government department responsible for child welfare.[246] The functions of the Alberta Children's Advocate relate to the provision of government child welfare services and include: advising the Minister on the needs and welfare of children receiving services; investigating complaints about these minors and making recommendations; representing the rights, interests and viewpoints of these minors; and submitting annual reports to the Minister (which are also sent to the legislature).[247] The Advocate can communicate with and visit children and has access to information in the possession of government agencies and officials, but there are no statutory provisions to support these investigatory powers.[248] The Alberta Advocate can also represent children when major decisions affecting them are being made under the legislation and assist in appealing a decision to an administrative tribunal or the courts.[249]

The Saskatchewan, Manitoba and NL advocates have stronger levels of independence and powers of investigation. In Saskatchewan, the Children's Advocate shares its legislative framework with the Ombudsman and, like the Ombudsman, is an officer of the legislature.[250] The Saskatchewan Children's Advocate engages in public education; undertakes research; investigates matters concerning children receiving public services, attempts to resolve these disputes using ADR methods and makes recommendations; advises the relevant Minister; and reports annually to the legislature.[251] The Saskatchewan Advocate does not have the same statutory powers of investigation compared to the Ombudsman, but failure to comply with the work of either office is a statutory

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The Committee was renamed the Commission for the Protection of the Rights of Children and Youth in 1989.

244 See <www.cdpdj.qc.ca>.

245 The Ontario Office of Child and Family Service Advocacy was established in 1984 by child and family services legislation, *Ombudswork for Children, supra* note 163 at 5.

246 *Child Welfare Act*, R.S.A. 2000, c. C-12, ss. 1(g), 3; <www.gov.ab.ca/cs/ childrensadvocate/>.

247 *Ibid.*, s. 3(3)-(5).

248 *Ibid.*, s. 3(5).

249 *Ibid.*

250 *The Ombudsman and Children's Advocate Act*, R.S.S. 1978, c. O-4, as am., s. 12.1; <www.saskcao.ca>.

251 *Ibid.*, s. 12.6.

offence.[252] Likewise, NL's Office of the Child and Youth Advocate, inaugurated in May 2003, is an independent office of the legislature with its own legislation and the authority to represent the rights and interests of minors who are receiving or entitled to receive government services and programs.[253] Appointed by the Cabinet on a resolution of the legislature, the NL Advocate can: review matters whether or not a complaint is made; advocate, mediate or use another ADR method on behalf of minors; where ADR is ineffective, conduct investigations on behalf of minors whether or not a complaint has been made; undertake systemic reviews; initiate, participate in or assist minors in case conferences, administrative reviews, mediations or other procedures where decisions are made about services; engage in public awareness initiatives; make recommendations to government entities to improve services and programs for minors; and report annually to the legislature.[254] Statutory powers of investigation are provided and it is an offence to hinder or not comply with the Advocate's work.[255] The Manitoba Children's Advocate is established in child welfare legislation as an officer of the legislature, appointed by the Cabinet on the recommendation of a legislative committee.[256] The Manitoba Advocate, in the context of the welfare and interest of children receiving services: advises the Minister; conducts inquiries, investigates complaints and makes recommendations; represents the rights, interests and viewpoints of children in response to a request; and reports annually to the legislature.[257]

British Columbia has changed the format of its institution several times. In 2002, the new government shut down the children's advocate and children's commission and replaced them with one mechanism. The current incarnation is the Office for Children and Youth, established in September 2002.[258] The Officer for Children and Youth is appointed by the Cabinet (executive) and is accountable to the Attorney General.[259] The Officer monitors government child welfare, adoption, mental health, addiction and youth justice services; provides support for minors and their families in obtaining these services; provides advice to government and communities about these services; reports annually to the Attorney General and can make special reports to the Attorney General on systemic issues.[260] In extraordinary circumstances the Officer can advocate on behalf of individual children and youth to ensure that their views are heard and considered.[261] The

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252 *Ibid.*, s. 32.

253 *Child and Youth Advocate Act*, S.N.L. 2001, c. C-12.01, s. 5; <www. childandyouthadvocate.nf.ca>.

254 *Child and Youth Advocate Act, ibid.*, ss. 4,15, 28.

255 *Ibid.*, ss. 21. 23, 31.

256 *The Child and Family Services Act,* C.C.S.M., c. C80, ss. 8.1(1), (3); <www.childrensadvocate.mb.ca>.

257 *The Child and Family Services Act, ibid.*, ss. 8.2(1), 8.3. There are also statutory investigation powers and offence sections.

258 *Office for Children and Youth Act*, S.B.C. 2002, c. 50; <www.gov.bc.ca/ officeforchildrenandyouth/>. The new government eliminated the Children's Commission (established in 1996) and the Office of the Child, Youth and Family Advocate in 2002 with the passage of the new legislation.

259 *Office for Children and Youth Act, ibid.*, s. 2.

260 *Office for Children and Youth Act, ibid.*, ss. 3, 8. The Attorney General must lay annual reports before the legislature and the Officer can make special reports public, *ibid.*, s. 8(2), (4).

261 *Office for Children and Youth Act, ibid.*, s. 3(2)(c).

Officer can undertake an investigation only at the request of the Attorney General and then reports confidentially to him.[262]

U.S.A.

A number of states in the U.S.A. have established children's ombudsmen, advocates or other similar institutions limited to child welfare and other government services affecting minors.[263] These institutions vary considerably in their independence, structure, functions and powers. Some children's ombudsmen or advocates in U.S. states are created by legislation, although they are typically appointed by the governor. Children's ombudsmen or advocates established by legislation with autonomy are the: Rhode Island Office of the Child Advocate (1979); Tennessee Commission on Children and Youth Ombudsman (1988); Michigan Office of the Children's Ombudsman (1994); Connecticut Office of the Child Advocate (1995); Washington State Office of the Family and Children's Ombudsman (1996); and Delaware Office of the Child Advocate (1999).[264] Legislated children's institutions located within government departments or governors' offices include the: California Foster Care Ombudsperson, Department of Social Services (1998); Georgia Office of the Child Advocate (2001); Massachusetts Department of Social Services Ombudsman (1980); Oregon Children's Ombudsman (1993, 1996 statute), operated by Governor's Advocacy Office, Department of Human Services (since 1997); Oklahoma Department of Human Services Office of Client Advocacy (1982); South Carolina Governor's Office of Children's Affairs (1986); Texas Department of Protective and Regulatory Services Ombudsman Office (1991); and Utah Office of Child Protection Ombudsman (1996 by administrative order, now statute-based).[265] Other offices are created by executive order or internal administrative directive.[266] In addition, five U.S. states and two dependencies have general public-sector ombudsmen who can take complaints concerning administrative conduct affecting minors.[267]

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262 *Office for Children and Youth Act, ibid.*, s. 6. The Attorney General determines whether the report should be made public, *ibid.*, s. 6(2).

263 See L. D'Ambra, *Survery of Ombudsman Offices for Children in the United States* (rev. Sept. 2001) <www.child-advocate.state.ri.us/Ombudsman.htm>; H.A. Davidson and L. Katz, "Legislative Development of Ombudswork in the United States" in Davidson, Price Cohen and Girdner, *supra* note 29 at 61; Davidson, *supra* note 29; H.A. Davidson, "Applying an International Innovation to Help U.S. Children: The Child Welfare Ombudsman" (1994) 28 Family Law Q. 117.

264 D'Ambra, *ibid.*; Connecticut: <www.oca.state.ct.us>; Delaware: <courts.state.de.us/childadvocate/>; Washington: <www.governor.wa.gov/ofco/> (Washington Ombudsman threatened with elimination in 2003 due to state budget cuts).

265 See D'Ambra, *ibid.*

266 See e.g. Kentucky Cabinet for Families/Office of the Ombudsman; Kentucky Juvenile Justice Ombudsman (Department of Juvenile Justice); Missouri Children's Services Ombudsman; New Mexico Department of Children, Youth and Families Field Liaison Office, D'Ambra, *ibid.*; Davidson, "Applying an International Innovation to Help U.S. Children: The Child Welfare Ombudsman", *supra* note 263 at 129.

267 There are ombudsmen in Alaska, Arizona, Hawaii, Iowa, Nebraska, Puerto Rico and Guam. See e.g. the Arizona and Nebraska offices with special attention to or Deputy for minors, D'Ambra, *supra* note 263.

The Rhode Island Office of the Child Advocate and the Michigan Office of the Children's Ombudsman are examples of state institutions with legislative mandates. The Rhode Island Office of the Child Advocate was the first U.S. autonomous children's ombudsman, created by legislation in 1979 to address child welfare problems in the state.[268] The Child Advocate is appointed by the Governor, with Senate consent, from a list of nominees selected by a commission, and serves a five-year term (one year longer than the Governor's).[269] The legislation specifies that the Child Advocate acts independently of the Department of Children, Youth and Families (DCYF).[270] The Rhode Island Child Advocate has numerous functions, including to: insure that children in protective care, custody or treatment are apprised of their rights; review periodically DCYF procedures; investigate complaints against the DCYF; investigate complaints of institutional abuse; periodically review facilities of public and private institutions and residences where a juvenile has been placed by Family Court or the DCYF; take all possible action including formal legal action, legislative advocacy and public education to protect the rights of children involved with the DCYF; review Family Court orders relating to juveniles and request reviews as required by the best interests of the child; investigate child fatalities where the victim received DCYF services; and bring civil actions in the Superior Court on behalf of child crime victims in the care of the DCYF against the state for compensation.[271] The Child Advocate is given access to documents and can *subpoena* records.[272] The Advocate reports annually to the Governor and the legislature on her activities, including any recommendations resulting from her work.[273]

The Michigan Office of the Children's Ombudsman, established in 1994 legislation as an autonomous entity in the department of management and budget, is appointed by the Governor, serves at the pleasure of the Governor, and monitors the state's child welfare, foster care and adoption services administered by the Family Independence Agency (FIA).[274] The Michigan Children's Ombudsman investigates, on receipt of a complaint or *suo moto*, the conduct of the FIA (and private child placement agencies contracting with the FIA) and makes recommendations in a report to the FIA or agency involved.[275] The Children's Ombudsman also makes recommendations to the Governor and the legislature on the need for protective services, adoption or foster care legislation.[276] The Ombudsman reports annually to the Governor, legislature and the head of the FIA, including any recommendations on the need for legislation or for changes in rules or policies.[277] By mid-2003, a bill to amend the legislation, giving the Children's Ombudsman greater independence

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268 Rhode Island Statutes, Title 42, ch. 73; <www.child-advocate.state.ri.us>.

269 *Ibid.*, §42-73-2. The nominee must have been a member of the Rhode Island bar for at least three years, *ibid.*

270 *Ibid.*, §42-73-5.

271 *Ibid.*, §§42-73-7, 42-73-9.1, 40-11-1; Rhode Island Office of the Child Advocate, *Annual Report 2002* at 3-5; D'Ambra, *supra* note 263.

272 *Ibid.*, §§42-73-8, 42-73-9(2).

273 *Ibid.*, §42-73-6. See e.g. *Annual Report 2002, supra* note 271 at 23-24.

274 *The Children's Ombudsman Act*, Michigan P.A. 1994, No. 204 (in force Jan. 1, 1995), s. 3; <www.michigan.gov/oco>.

275 *The Children's Ombudsman Act, ibid.*, ss. 6, 10(1)-(4).

276 *Ibid.*, s. 6(e).

277 *Ibid.*, s. 10(5). See e.g. Michigan Office of Children's Ombudsman, *2001 Annual Report* at 18-31.

and powers, was winding its way through the state legislature.[278] The proposed legislation alters the appointments process, setting up a commission to recommend at least three nominees from whom the Governor will make the appointment with Senate consent, and will permit the Ombudsman to investigate whether there is a complaint against the FIA or other child placement agency, giving the Ombudsman *subpoena* powers in support.[279]

Characteristics and Functions of an Ombudsman for Children

An ombudsman for children must have a number of attributes and powers to ensure its effectiveness. Commentators and the Committee on the Rights of the Child have provided criteria which these and other institutions should implement in addressing the rights of children.

Ombudsmen for children and equivalent institutions are specialized forms of national human rights institutions and should be established in accordance with the Paris Principles.[280] A children's ombudsman must be independent of the executive/administrative branch of government and protected from government interference in its work.[281] Ideally, the office should be constitutionally entrenched and at least must be supported by legislation.[282] An ombudsman for children must have sufficiently broad jurisdiction and powers to support its work and the CRC should be incorporated into the mandate of the institution.[283] Unlike the typical classical or human rights ombudsman which has jurisdiction only over the public sector, the Committee on the Rights of the Child states that a children's ombudsman (or other national human rights institution responsible for children's issues) should have jurisdiction over both public and private sector entities.[284] An ombudsman for children should have the power to investigate individual complaints submitted by minors or others on their behalf and, in furtherance of effective investigations, the ombudsman must have powers to obtain documents, compel testimony and inspect institutions where minors are placed or detained.[285] Further, because children and youth are the beneficiaries of the work of the ombudsman for children, the ombudsman must be easily accessible, with minors being able to directly contact and speak with the ombudsman and her staff.[286] The creation of a children's council to assist the institution and facilitate the participation of children should also be considered.[287]

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278 Michigan, House Bill 4096. See A.F. Bailey, "Bill would alter abuse complaint procedure", *The Associated Press* (June 13, 2003); A. Mullins, "Child-protection bill resurrected, goes to Senate", *The Times Herald* (June 13, 2003).

279 *Ibid.* The appointments provision follows the Rhode Island approach.

280 See Paris Principles, *supra* note 35 and Chapter 4; General Comment No. 2, *supra* note 39, para. 4.

281 See Pozza Tasca, *supra* note 32 at 149; *Independent Institutions: Protecting Children's Rights, supra* note 21 at 7-8.

282 General Comment No. 2, *supra* note 39, para. 8.

283 *Ibid.; Independent Institutions: Protecting Children's Rights, supra* note 21 at 8-9.

284 General Comment No. 2, *ibid.*, para. 9.

285 *Ibid.*, para. 13.

286 *Ibid.*, para. 15; Pozza Tasca, *supra* note 32 at 149; *Independent Institutions: Protecting Children's Rights, supra* note 21 at 9.

287 General Comment No. 2, *ibid.*, para. 16.

Other duties should also be included in the mandate of the children's ombudsman such as advice to government and minors, education, research, public outreach, making law reform proposals, providing expertise on children's rights to the courts and taking legal proceedings to protect children's rights.[288] The Committee on the Rights of the Child has stated that national human rights institutions for children should have the power to assist minors in court actions such as by taking cases dealing with children's issues in the name of the institution and intervening in court cases to inform the court about the children's human rights involved in the action.[289] The institution should also be funded to the appropriate level to enable it to fulfil its duties effectively.[290] Other effectiveness factors discussed below in Chapter 12 are also relevant, such as the expertise and character of the ombudsman and the responsiveness of the government to the work of the institution.

The criteria for an effective children's ombudsman are numerous, and a number of the existing ombudsmen, commissioners or advocates for children discussed earlier in this Chapter do not satisfy all of them. For example, some lack sufficient independence, some do not have any (or unrestricted) power to investigate complaints, some do not have express direction to work in light of the CRC, and most do not have the power to bring or intervene in court actions. However, many of the children's ombudsmen in Europe have relatively strong mandates and powers, including express CRC roles, and some have jurisdiction over both the public and private sectors.

The Committee on the Rights of the Child accepts that countries with limited resources can establish one national human rights institution with a broad jurisdiction that includes the protection of children's rights.[291] This would encompass human rights commissions and human rights ombudsmen. However, most human rights ombudsmen do not have jurisdiction over the private sector, a situation also partly due to the limited resources of the state. Other than this limitation, most human rights commissions and human rights ombudsmen can be structured to meet most or all of the requirements for a well-functioning institution for children set down by the Committee on the Rights of the Child. Classical ombudsmen, however, while always having the power to investigate complaints concerning minors, will not be able to meet some of the criteria, as they do not have an express human rights protection role, are not usually given additional functions such as those of research and education, and usually have very limited or no jurisdiction over the private sector. Thus, while classical ombudsmen can play a valuable supplementary role in protecting the rights and needs of children, on their own they are insufficient. Rather the state should put a children's ombudsman (or equivalent) in place or, for states with limited resources, a human rights ombudsman or commission which includes a children's rights focus may suffice.

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288 See illustrative list in *ibid.*, para. 19.
289 *Ibid.*, para. 14.
290 *Ibid.*, para. 11.
291 *Ibid.*, para. 6.

CHAPTER TEN

The Ombudsman in the International Organization System: Small Steps

Introduction

Public international law is a system of law that governs relations between entities with international legal personality, mainly states and some international organizations which have more limited rights and duties.[1] Over more than a century and particularly since 1945, an increasing number of international organizations have been established by states to place intergovernmental cooperation on a more formal level. Today, there are numerous international organizations with purposes that range from the comprehensive and global scope of the UN to those with more specialized or regional mandates.[2]

The administrative activities of an international organization are carried out by employees of the secretariat of the organization. It is inevitable that the employer-employee relationship can lead to conflict and this is equally the case inside an international organization. International organizations have developed a variety of mechanisms to resolve disputes over employment matters and the internal ombudsman is one option that has been implemented by some organizations. As discussed further below, these ombudsman are not classical ombudsmen on the international level, but are analogous to the public or private sector "workplace" ombudsman.

In the context of the emergence of democratic governance norms in the international system and the increasingly influential voices of non-state actors in international civil society, international organizations are undergoing criticism similar to that which has been directed at state governments. Among these critiques are the perceived democratic deficits of international organizations, their inefficient bureaucracies, and their lack of accountability to member states and civil society actors who are impacted by their activities. Some international organizations are beginning to respond to these concerns. For example, the notion of good governance is beginning to appear on the international level as a standard for international organizations. Another initiative is the inspection

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[1] See I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Oxford University Press, 1998) at 59-62.

[2] See M.G. Schecter, *Historical Dictionary of International Organizations* (Lanham: Scarecrow Press, Inc., 1998).

panel and other equivalent mechanisms, first created by the World Bank and now used by other international financial institutions as an external accountability model. Further, equivalent to the classical ombudsman model on the international plane, the European Ombudsman of the supranational EU takes complaints from EU citizens and residents about maladministration in Community institutions and bodies. In a separate development, a few international organizations have established commissioners for human rights, officials who have softer human rights protection and promotion functions compared to the powers of a human rights ombudsman.

This chapter will examine the concept of good governance applied to the international level. It will also explore the developments in internal and external accountability models that are appearing in a growing number of international organizations, specifically the workplace ombudsman and the inspection panel (or equivalent).[3] This chapter will also examine the various international commissioners for human rights that have been established, looking at their work with domestic ombudsmen and other national human rights institutions. The European Ombudsman will be discussed in Chapter 11.

Overview of International Law on International Organizations

International law also regulates international organizations.[4] An international organization is created by states in a multilateral treaty, with the states becoming the members of the organization.[5] International organizations can be defined as "forms of cooperation founded on an international agreement creating at least one organ with a will of its own, established under international law."[6] The determination whether an international organization has international legal personality has legal and functional elements.[7]

International organizations have an internal body of institutional law composed of the multilateral treaty governing the objectives and powers of the organization together with the secondary rules and law created by the organs of the organization, both expressly and through practice.[8] The administrative activities of an international organization are carried out by an organ of the organization which is usually called the secretariat. The

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[3] Also see the citizen submission procedure in the environmental protection treaty associated with the North American Free Trade Agreement (NAFTA) permitting public complaints that the Canadian, Mexican or U.S. governments are not enforcing their respective domestic environmental laws, potentially resulting in a factual record. As at Aug. 12, 2003, out of 40 submissions, 8 factual records had been issued. See North American Agreement on Environmental Cooperation, (1993) 32 Int'l Legal Mat. 1480, arts. 14-15 (signed Dec. 17, 1992, in force Jan. 1, 1994); <www.cec.org/citizen/>; M. Fitzmaurice, "Public Participation in the North American Agreement on Environmental Cooperation" (2003) 52 Int'l & Comp. Law Q. 333.

[4] E.g. C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge: Cambridge University Press, 1996) [hereinafter *Principles*]; H.G. Schermers and N.M. Blokker, *International Institutional Law*, 3d rev.ed. (The Hague: Kluwer Law International, 1995).

[5] Amerasinghe, *ibid.* at 8.

[6] Schermers and Blokker, *supra* note 4 at 23.

[7] *Reparations Case*, Adv. Op. [1949] I.C.J. Rep. 174. See Amerasinghe, *Principles, supra* note 4 at 10.

[8] Schermers and Blokker, *supra* note 4 at 4.

secretariat staff is composed of international civil servants and the secretariat is headed by a secretary-general (or director-general, etc.).

Good Governance and International Organizations

The concept of good governance can also be applied to the conduct of international organizations.[9] In one sense, international organizations need to improve their accountability, transparency and levels of democratic participation *vis-à-vis* member states.[10] Thus, economically or politically weaker states, often developing nations, are the main beneficiaries of any internal improvements in good governance in an international organization. However, from another perspective, an international organization can improve its accountability, transparency and public participation in connection with its relationships with non-state third parties – the individuals, NGOs, corporations and other civil society actors who are affected by the conduct of the international organization.[11] In this sense, good governance of an international organization has an external orientation.

Good governance concepts in relation to the international plane are being articulated primarily by the UN. In recent years, the UN General Assembly has begun to acknowledge that good governance at the international level is also important, in addition to good governance at the national level of government.[12] The General Assembly has affirmed that a democratic and equitable international order requires, *inter alia*, the promotion of transparent, democratic, just and accountable international institutions in all areas of cooperation.[13] It has also recognized that "efficient, effective and transparent public administration, at both the national and international levels, has a pivotal role to play in the implementation of the key objectives of the UN Millennium Declaration".[14] In the Millennium Declaration, the General Assembly stated that success in achieving development and the eradication of poverty depends on good governance within each

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[9] N. Woods, "Good Governance in International Organizations" (1999) 5 Global Governance 39. For a detailed discussion of good governance at the state level of governance see *supra* Chapter 3.

[10] *Ibid.* at 41.

[11] See *ibid.* at 44-45.

[12] E.g. U.N.G.A. Res. 56/150 (Dec. 19, 2001), UN Doc. A/RES/56/150 (Feb. 8. 2002), Preamble: "*Underlining* the fact that meeting the objectives of good governance also depends on good governance at the international level . . .", para. 21(c): "*Recognizes*, while bearing in mind the existing efforts in this respect, that it is necessary to enhance efforts to consider and evaluate the impact on the enjoyment of human rights of international economic and financial issues, such as: . . ." (c) Good governance and equity at the international level; . . .; "Globalization and its impact on the full enjoyment of all human rights", U.N.G.A. Res. 56/165 (Dec. 19, 2001), UN Doc. A/RES/56/165 (Feb. 26, 2002), para. 3: "*Also reaffirms* the commitment to create an environment at both the national and the global level that is conducive to development and to the elimination of poverty through, inter alia, good governance within each country and at the international level, . . .".

[13] U.N.G.A. Res. 57/213 (Dec. 18, 2002), UN Doc. A/RES/57/213 (Feb. 25, 2003), para. 4(g); U.N.G.A. Res. 55/107 (Dec. 4, 2000), UN Doc. A/RES/55/107 (March 14, 2001), para. 3(g) (particularly full and equal participation in their decision making).

[14] U.N.G.A. Res. 56/213 (Dec. 21, 2001), UN Doc. A/RES/56/213 (Feb. 28, 2002), Preamble; Millennium Declaration, U.N.G.A. Res 55/2 (Sept. 8, 2000), UN Doc. A/RES/55/2 (Sept. 18, 2000). See also U.N.G.A. Res. 57/277 (Dec. 20, 2002), UN Doc. A/RES/57/277 (March 7, 2003), para. 2.

country and at the international level.[15] However, these statements do not expressly distinguish between good governance within the international organization and good governance of the international organization in relation to civil society.

As will be discussed further below, some international financial institutions have established inspection panel and other compliance review mechanisms to improve their external accountability to and transparency *vis-à-vis* non-state entities, i.e. people affected negatively by the development projects that they have financed. Also, as discussed in Chapter 11, the European Ombudsman has been established as an EU mechanism that provides both workplace and external accountability. These developments can also be categorized as good governance mechanisms.

Thus, the efforts of an international organization to improve its governance can be pictured as consisting of three concentric circles, with the inner circle representing an organization's attempts to improve its secretariat governance practices in the employer-employee context, with the middle circle representing an organization's attempts to improve relationships among member states (both concern internal good governance), and the outer circle representing an organization's efforts to improve its external relations with and accountability to non-state actors affected by the activities of the organization (external good governance). The ombudsman and inspection panel concepts are being adopted by some international organizations and the EU in matters arising in the inner and outer circles of international organization governance.

The International Organization Workplace Ombudsman

INTERNATIONAL LAW AND EMPLOYMENT IN INTERNATIONAL ORGANIZATIONS

One aspect of the internal operations of an international organization is the relationship between the employees of the secretariat and the employer organization.[16] Since international organizations operate under public international law, and the UN and related international organizations have by treaty obtained immunity from legal process in signatory states, employees of an international organization cannot take advantage of their national labour or employment law systems.[17] The employment relationship is governed by a unique mix of international law, including principles extracted from domestic legal systems. This international legal regime comprises the employment contract between the individual and the international organization, the organization's constituent treaty, its internal personnel regulations and rules, the practice of the organization and "general

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[15] Millennium Declaration, *ibid.*, para. 13.

[16] See e.g. Y. Beigbeder, *The Internal Management of United Nations Organizations: The Long Quest for Reform* (London: MacMillan Press Ltd., 1997) [hereinafter *Internal Management of United Nations Organizations*]; Amerasinghe, *Principles, supra* note 4, ch. 11; C.F. Amerasinghe, *The Law of the International Civil Service*, 2 vols. (Oxford: Clarendon Press, 1994).

[17] See Beigbeder, *Internal Management of United Nations Organizations, ibid.* at 181; UN Charter, art. 105; Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S. 15; Convention on the Privileges and Immunities of the Specialized Agencies, 33 U.N.T.S. 261.

principles of law", defined as including "the general principles of administrative law applied in the member states and in the case law of international tribunals."[18]

OVERVIEW OF THE DISPUTE RESOLUTION PROCESS

Like all other employment environments, disputes arise between an international organization and members of its staff. International organizations have created various forms of internal dispute resolution mechanisms to handle employer-employee conflicts. These mechanisms are sequential, typically ranging from informal methods of dispute resolution to formal adjudicative mechanisms for more serious conflicts which cannot be settled successfully through the informal means. Internal dispute resolution systems for international organization staff conflicts are a means of improving internal organizational governance.

The first, and usually optional, mechanism for the settlement of internal international organization employment disputes is some form of mediation, conciliation or internal ombudsman mechanism.[19] If informal settlement of the dispute is unsuccessful, the next step in the employment dispute settlement process involves a joint appeal board or committee whose members include representatives of both staff and the secretary-general.[20] These joint bodies typically have the jurisdiction to make reports and recommendations on an employment dispute, but the final decision on the matter is made by an executive officer or the secretary-general.[21] In a number of international organizations, the employee will have access to an administrative tribunal which has the power to make legally binding decisions.[22] The UN Administrative Tribunal, the World Bank Administrative Tribunal and the ILO Administrative Tribunal are examples.[23]

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[18] Schermers and Blokker, *supra* note 4 at 362; Amerasinghe, *Principles, supra* note 4 at 335-347.

[19] Staff associations or union representatives can also represent staff interests. See Beigbeder, *Internal Management of United Nations Organizations, supra* note 16 at 183; Y. Beigbeder, *Management Problems in United Nations Organizations* (London: Frances Pinter (Publishers) Ltd., 1987) at 110-114 [hereinafter *Management Problems*]; H. Ameri, *Politics of Staffing the U.N. Secretariat* (New York: Peter Lang, 1996) at 523.

[20] Amerasinghe, *Principles, supra* note 4 at 447. See e.g. the UN Joint Appeals Board and the World Bank Appeals Committee.

[21] Beigbeder, *Internal Management of United Nations Organizations, supra* note 16 at 183; Amerasinghe, *ibid.* at 446-447.

[22] Amerasinghe, *The Law of the International Civil Service*, vol. 1, *supra* note 16 at 31-63; Beigbeder, *Internal Management of United Nations Organizations, ibid.* at 187-196; Schermers and Blokker, *supra* note 4 at 364-366.

[23] See Amerasinghe, *ibid.* at 49-63 for a listing of other international organization administrative tribunals, and those other organizations which use the UN, ILO or World Bank tribunals. On the powers of the UN Administrative Tribunal see *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Adv. Op. [1954] I.C.J. Rep. 47.

THE OMBUDSMAN OR MEDIATOR AS AN INFORMAL DISPUTE SETTLEMENT MECHANISM INSIDE INTERNATIONAL ORGANIZATIONS

Some international organizations have established an internal ombudsman or mediator as an informal, voluntary mechanism to try to settle employment disputes within the secretariat when they first arise. Both are workplace dispute settlement mechanisms that use informal ADR techniques. Also as discussed further in Chapter 11, while the European Ombudsman has a much broader mandate, it can and does take maladministration complaints from Community staff against their employer institutions and bodies.

A workplace ombudsman tries to resolve employment problems to the mutual satisfaction of the disputants in a confidential, inexpensive and relatively speedy manner to avoid having to resort to the legalistic, slower and more expensive stages of the organization's formal dispute settlement system. In addition, secretariat staff in international organizations are drawn from a broad spectrum of countries and cultures, which may lead to increased or complicated workplace conflict and thereby heighten the utility of an ombudsman mechanism.[24] The workplace ombudsman is one means by which the internal governance of the organization and its employer-employee relations can be improved. However, as Yves Beigbeder has noted:

> the appointment of an ombudsman can be perceived as a sign of good will on the part of the head of the secretariat and of the administration, if they will ensure that the ombudsman's advice and recommendations will be effectively applied in good faith, whether they concern individual cases or general rules and directives. The ombudsman needs the full support of the secretariat head, since in his work the ombudsman interferes with the responsibilities and authority of administrators and supervisors.[25]

An international organization workplace ombudsman should be structured and appointed to ensure optimum independence for the office. The international organizations with ombudsman mechanisms follow a variety of practices with respect to appointments: very occasionally an external candidate will be appointed ombudsman, while most organizations either appoint a staff member who is nearing the end of her career or staff members who have had a certain number of years employment with the organization. Many international organization ombudsmen are appointed by and report to the secretary-general of the organization (or equivalent). The terms of reference for international organization ombudsmen vary in the powers of investigation and protection given to the ombudsman, whether it be specified appointment terms, the ability to obtain all documents relevant to a dispute or the protection of the ombudsman from being forced to appear as a witness in later, more formal appeal processes.

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[24] Schermers and Blokker, *supra* note 4 at 367; Beigbeder, *Management Problems, supra* note 19 at 114.

[25] Beigbeder, *ibid.* at 114.

INTERNATIONAL ORGANIZATIONS WITH WORKPLACE OMBUDSMEN OR MEDIATORS

Workplace ombudsmen or mediators are found in the following international organizations and their internal bodies: United Nations Development Programme (UNDP), also used by UN Population Fund (UNFPA), UN Office of Project Services (UNOPS), UN Development Fund for Women (UNIFEM), UN Volunteers (UNV);[26] UN Secretariat;[27] UN Office in Vienna and UN Office for Drug Control and Crime Prevention (UNODC);[28] UN Children's Fund (UNICEF);[29] United Nations Environment Programme (UNEP) and UNCHS (Habitat);[30] UN High Commissioner for Refugees (UNHCR);[31] World Health

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[26] The UN Development Programme Ombudsman Panel system was established in May 1973, and enlarged and revised in 1985. In its last incarnation, the Ombudsman Panel was composed of UNDP staff members (up to a maximum of twelve) appointed by the Staff Association in agreement with the Consultative Group on Staff Matters who attempted to resolve staff disputes on a part-time basis. The Ombudsman Panel dealt with the usual employment, working condition and interpersonal conflict complaints; however, it did not become involved in disciplinary matters (including sexual harassment complaints). In June 2002, in order to increase the independence of the mechanism, the UNDP replaced the Ombudsman Panel with one full-time Ombudsman. See Federation of International Civil Servants' Associations, Ombudsman Machinery in the United Nations System, Note by the UNDP/UNFPA Staff Association, FICSA/C/38/CRP.4 (Feb. 3, 1985) at 3; UNDP, "Responsibilities and Operation of the Ombudsman Panel", Administrative Circular, UNDP/ADM/HQTRS/1372, UNDP/ADM/FIELD/692 (Dec. 18, 1985); N. Nalavala, "Judgement Days at UNDP: Understanding UNDP staff justice system" (Jan. 2002) *UNDP News* 3; N. Nalavala, "Solving Staff Problems" (Jan. 2001) *UNDP News* 4.

[27] See *infra* this Chapter.

[28] "Ghanaian appointed first Ombudsman for the UN in Vienna", *The Ghanaian Chronicle* (April 14, 2003).

[29] The UNICEF ombudsman system started before 1983 when locally selected ombudsmen were used. The system has been revised and, currently, UNICEF uses a system where qualified local staff at each duty station are designated as Ombudspersons to provide confidential, impartial and informal workplace dispute resolution, except for disciplinary matters. The Ombudspersons consult with staff, facilitate the consideration of possible options, consult with all parties and if necessary engage in fact-finding (both only with permission of the complainant), serve as mediators where appropriate, and assist staff in the interpretation of policies and procedures. If the parties to a dispute cannot settle their differences amicably, the Ombudspersons can make recommendations to settle the conflict. The Ombudspersons have strict confidentiality requirements. Annual reports are submitted by the team of Ombudspersons in each office. See UNICEF, *Human Resources Manual*, Book I, ch. 16, s. 2, "UNICEF Informal Grievance Procedure and Ombudsperson System", CF/MN/P.I/16 Rev.1 (May 9, 2002); UNICEF, Administrative Instruction No. 362 (Nov. 21, 1983); Feasibility of establishing an office of Ombudsman in the United Nations, Report of the Secretary-General, UN Doc. A/C.5/40/38 (Nov. 5, 1985) at 1.

[30] In 1993, the Executive Director of UNEP established a Staff Ombudsman and Services Office for UNEP staff as a pilot scheme. During its 1995 session, the UNEP Governing Council agreed to place it on a more permanent basis, as the Ombudsman and Staff Counsellor's Unit (OSCU). More recently, the Ombudsman Unit has become a separate unit and its services were extended to UNCHS (Habitat) by the Executive Director in a 2000 inter-agency agreement. By 2000, the Ombudsman was handling an average of 1,000 cases annually, over 60% of which covered staff rights, entitlements and allowances. The total included an average of 230 briefings for staff members and interns on their rights under the UN Staff Rules and Regulations, and an average of 50 mediation cases. See UNEP Governing Council, Report of the Executive Director, 21st Sess., UNEP/GC.21/7 (Nov. 22, 2000).

[31] The UNHCR Mediator was established in 1983. After a two-year hiatus, the UNHCR reinstituted the mediator function in Jan. 2001. The Mediator is under the authority of the High Commissioner for Refugees and reports to the Deputy High Commissioner, with access to the High Commissioner

Organization (WHO);[32] World Bank Group;[33] International Monetary Fund (IMF);[34] International Civil Aviation Organization (ICAO);[35] International Labour Organization (ILO); UN Educational, Scientific and Cultural Organization (UNESCO);[36] International Telecommunication Union (ITU);[37] World Trade Organization (WTO);[38] European Bank

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when needed. The Mediator is a senior staff member nearing retirement. The Mediator tries to settle staff disputes over working conditions, terms of employment and relations between staff members, supervisors, etc. through consultations, advice and facilitating the development of options. Based on her findings, the Mediator can make proposals and recommendations on the improvement of human resources, management and administration. The Mediator has access to all relevant documents and can obtain advice from in-house and external sources. The Mediator submits an annual report to the High Commissioner (containing statistics, patterns, new issues and recommendations) which is also distributed to all staff members. See Feasibility of establishing an office of Ombudsman in the United Nations, Report of the Secretary-General, *supra* note 29 at 4.

32 See *infra* this Chapter.

33 The World Bank Group Ombudsman mechanism was established in 1981. See Feasibility of establishing an office of Ombudsman in the United Nations, Report of the Secretary-General, *supra* note 29 at 4.

34 See *infra* this Chapter.

35 The ICAO Ombudsman was established in Nov. 1991 following a request from the Staff Association, by *Staff Notice No. 3457*, SN 3457 22/07/91. The Ombudsman is appointed by the Secretary-General, in consultation with the Staff Association, and it is envisaged that the appointee will be an ICAO staff member. The Ombudsman provides a channel for informal dialogue and conciliation before ICAO's formal administrative machinery is accessed. The Ombudsman can assist any member of the Secretariat with complaints about employment terms, working conditions and relations with supervisors and colleagues. On a confidential basis, the Ombudsman attempts to obtain reconciliation between the parties through fact-finding, discussion and involvement of all interested parties. The Ombudsman has access to all relevant files. He can propose any solution that is consistent with ICAO internal regulations and rules, and can propose changes to rules and regulations if this can enhance the efficiency and fairness of the administrative process. If reconciliation is unsuccessful, the Ombudsman may report on the matter making recommendations to management on the most practical means of resolving the matter. An annual report is made to the Secretary-General and is made public. E.g. in 1999, the Ombudsman handled 30 cases, with most involving consultations/guidance, human relations, interpretation of rules, and selection and promotion. See *Fourth Report of the Ombudsman* (1 Jan. 1999-31 Dec. 1999).

36 The UNESCO mediator mechanism was created in 1976. Given the increase in internal appeals, a Task Force on Grievance Handling Mechanisms was set up and made recommendations in 2002, resulting in a strengthening of the mediator process and the establishment of a college of mediators selected from volunteer retired staff members. The mediators take complaints from staff members about problems with working conditions or interpersonal relations, and try to settle the conflicts informally using dialogue and conciliation, and providing advice, suggestions and recommendations to resolve disputes. All staff members have a duty to cooperate with mediators when requested. See UNESCO Director General, Recommendations of the Task Force on Grievance-Handling Mechanisms, DG/Note/02/17 (June 14, 2002); UNESCO, Task Force on Grievance-Handling Mechanisms, DG/Note/01/30 (Nov. 13, 2001); FICSA Council, Study on the Place and Function of the Ombudsman in Organizations of the United Nations System (UNESCO Staff Association), FICSA/C/48/LEGAL/CRP.3 (Jan. 12, Feb. 6, 1995) Feasibility of establishing an office of Ombudsman in the United Nations, Report of the Secretary-General, *supra* note 29 at 4; Beigbeder, *Management Problems, supra* note 19 at 112.

37 The first Mediator was appointed in March 2002 by the Secretary-General in cooperation with the Staff Council, after the Secretary-General initiated the process in 2001 on the recommendation of the Joint Advisory Committee and a 1998 decision of the ITU Council. The Mediator undertakes informal dispute resolution of staff member problems where there are no specific dispute resolution mechanisms in existence.

38 WTO Staff Rules contain provisions for one or more impartial mediators, designated by the

for Reconstruction and Development;[39] and Inter-American Development Bank.[40]

International organizations which do not have an internal workplace ombudsman include the Food and Agricultural Organization (FAO), International Maritime Organization (IMO), Universal Postal Union (UPU), UN Industrial Development Organization (UNIDO), UN Institute for Training and Research (UNITAR), World Food Programme (WFP), Asian Development Bank and Caribbean Development Bank.

CASE STUDIES OF INTERNATIONAL ORGANIZATION OMBUDSMEN

The ombudsman mechanisms in the WHO, IMF and UN Secretariat will be discussed in more detail below.

World Health Organization (WHO) Ombudsman

The WHO Ombudsman was established in 1974 on an experimental basis, and was retained permanently in 1976.[41] The WHO Ombudsman functions within existing WHO Staff Regulations, Rules and Manual provisions.[42] The Ombudsman is appointed by and reports to the Director-General of the WHO, but the Ombudsman's Terms of Reference do stipulate that the office of the Ombudsman is "functionally independent".[43] While earlier versions of the Terms of Reference specified a two-year term of appointment for the Ombudsman, that the appointee could be a current or former staff member and that the WHO would protect the Ombudsman against any legal action arising out of the exercise of her office, the current version is silent on all these matters.[44] The Ombudsman's

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Director-General, to help staff members with problems relating to their employment, working conditions and collegial relationships.

39 The European Bank for Reconstruction and Development created an ombudsman mechanism in 1997.

40 The Inter-American Development Bank Ombudsperson, an independent staff member, acts as an impartial mediator in the resolution of disputes related to conditions of employment or labour matters. The Ombudsperson has direct access to the President and other officers, managers, etc. and reports semi-annually to the President and Executive Vice President, with the report distributed to staff. The Ombudsperson can give advice, and make suggestions and recommendations for resolution of the conflict, taking into account *inter alia* the equities of the case. She can provide suggestions or recommendations on any aspect of personnel polices to the President. The Ombudsperson has unrestricted, confidential access to personnel and Bank files considered relevant by her to the discharge of her functions. The Ombudsperson cannot be called to give evidence (and all documents in her possession cannot be used as evidence) in any other proceedings.

41 Feasibility of establishing an office of Ombudsman in the United Nations, Report of the Secretary-General, *supra* note 29 at 4-5. The first Ombudsman was appointed in Feb. 1974.

42 World Health Organization, *Terms of Reference of the Ombudsman* (Jan. 2001).

43 *Ibid.*, para. 8.

44 See World Health Organization, *Terms of Reference of the Ombudsman* (Sept. 1996), paras. 8-9; *Terms of Reference of the Ombudsman*, Information Circular No. 100 (May 28, 1984), paras. 8-9. The current Ombudsman was appointed for a two-year period.

jurisdiction covers WHO headquarters and other WHO-administered entities.[45] The WHO also maintains workplace ombudsman offices in four of its six regional offices[46]

The mandate of the WHO Ombudsman is to: advise staff members with problems or grievances related to their employment, working conditions and/or their relations with colleagues; assist all parties to reach a fair solution through fact-finding, mediation, discussion and the involvement of all parties; act as a resource for best practices in relation to the ombudsman function across the WHO, and facilitate the exchange of information and experience; advise the Director-General and Staff Committee about issues and trends affecting staff as well as the overall performance of duties and responsibilities, and advise the Director-General on preventive action; and make recommendations to the Director-General on employment and working conditions.[47] The Ombudsman is instructed to act independently and impartially, and all dealings with the Ombudsman are confidential.[48] Confidentiality may be waived only with the consent of the staff member concerned.[49] The Ombudsman can call for the production of those files and documents considered pertinent.[50] In contentious cases where reconciliation is impossible, the Ombudsman may, subject to a waiver of confidentiality noted above, report with recommendations to the appropriate manager(s) and/or to the Director-General.[51] Management is instructed to reply with information on action taken or proposed.[52] If a complainant proceeds to more formal complaint processes, the Ombudsman may continue to intervene in a case after an appeal has been filed with the WHO Board of Appeal, but she may not represent the appellant before an appeal board and may not appear as a witness before an appeal board.[53] The Ombudsman is required to report annually to the Director-General and the Staff Committee on her activities and cases, making general comments on any aspect of her functions.[54]

The 2001-2002 *Annual Report* of the WHO Ombudsman illustrates the number and types of complaints.[55] Complaints to the Ombudsman evidence a general increase since 1997, with complaints almost evenly split between professional and general service staff members.[56] The largest numbers of issues arising out of complaints and other work

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45 *Terms of Reference of the Ombudsman* (2001), *supra* note 42, para. 2. Other entities include the Joint United Nations Programme on HIV/AIDS (UNAIDS) and the United Nations International Computing Centre (ICC).

46 In Africa, Europe, the Americas and Western Pacific. The WHO Ombudsman also has jurisdiction over the regional office in South-East Asia on an interim basis and the regional office for the Eastern Mediterranean is covered by the WHO Ombudsman.

47 *Terms of Reference of the Ombudsman* (2001), *supra* note 42, para. 1.

48 *Ibid.*, paras. 1, 3.

49 *Ibid.*, para. 3.

50 *Ibid.*, para. 6.

51 *Ibid.*, para. 5.

52 *Ibid.*

53 *Ibid.*, para. 4.

54 *Ibid.*, para. 7.

55 World Health Organization Office of the Ombudsman, *Annual Report of the Ombudsman, 1 March 2001 – 28 February 2002.*

56 In 1997, 107 cases were considered, 116 were addressed in 1998, 101 in 1999, 88 in 2000, 144 in 2001 and 197 in 2002. Increases were seen to be due to a number of factors, including the move to a full-time ombudsman and an increase in staff size, *ibid.* at 2-3.

undertaken by the Ombudsman concerned conflict, advice, post reclassification, management appraisals, application of staff rules, harassment and non-selection for a job post.[57] Approximately seventeen percent of persons contacting the Ombudsman wanted only to seek advice and preferred to resolve the matter themselves.[58] For the cases considered, the Ombudsman used a variety of strategies including coaching individual staff to improve managerial skills, facilitating workshops on conflict resolution, negotiating with supervisors to identify mutually acceptable solutions to stated problems, reviewing options for action and regular follow-up with some of the more complicated and long-standing cases.[59]

International Monetary Fund (IMF) Ombudsperson

The IMF created an ombudsman in 1979.[60] The current Terms of Reference for the Ombudsperson state that the position was established to:

> make available the services of an impartial and independent person to address the employment-related problems of individuals. The principal aim is to provide assistance in solving these problems in a manner that contributes to an improvement in the overall working environment in the International Monetary Fund (IMF), thus promoting better personnel management and greater organizational and operational efficiency.[61]

The Terms of Reference guarantee the independence of the Ombudsperson from all IMF officials and entities, and independence is also heightened by the requirement that the Ombudsman cannot have had a prior employment relationship with the IMF.[62] The Ombudsperson is appointed by the Managing Director of the IMF after consultation with staff representatives.[63] The term of appointment is designated as two years with a possibility of extension for a further three years.[64] The Ombudsperson's duties are to: review problems of an employment-related nature brought to her by current and former staff members and contractual employees; exercise judgment in seeking to resolve the conflict, using mediation and conciliation or other appropriate means; and make recommendations in a dispute that cannot be resolved by mutual agreement.[65]

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[57] Conflict (49), post reclassification (39), management (37), appraisals (22), application of staff rules (21), harassment (19), non-selection for post (11), others (8), long-term short-term staff (6) and conduct (5), *ibid.* at 4.

[58] *Ibid.*

[59] *Ibid.*

[60] Feasibility of establishing an office of Ombudsman in the United Nations, Report of the Secretary-General, *supra* note 29 at 4. See <www.imf.org>, "Ethics".

[61] International Monetary Fund, *IMF Ombudsperson's Terms of Reference* (June 30, 1999), Preamble.

[62] *Ibid.*, paras. 1-2.

[63] *Ibid.* para. 1.

[64] *Ibid.*

[65] *Ibid.*, paras. 5, 8. The Ombudsperson can decline to investigate allegations of misconduct. The services of the Ombudsperson are not available to Executive Directors and their Alternates, or to Advisors or Assistants to Executive Directors who are not staff members.

The Ombudsperson has direct access to all employees and to the Managing Director and his Deputies, and all staff members and employees are expected to cooperate with the Ombudsperson and make available all pertinent information.[66] The Ombudsperson has access to all records relevant to her work and, in the event of a dispute over access, the matter is referred to the Managing Director.[67] The Ombudsperson is required to keep all dealings with persons accessing her office strictly confidential except where the person consents to disclosure for the performance of her mandate (e.g. making recommendations) or where the physical safety of any person is threatened.[68] If a complaint is taken on to a formal grievance or to the Administrative Tribunal, the Ombudsperson cannot assist the complainant during the grievance or appeal process, except to the extent that she is of the opinion that she can assist in mediating the settlement of a case.[69] Also, the Ombudsperson cannot be called as a witness or otherwise be required to provide information in such proceedings or in any other administrative or judicial proceeding inside or outside the IMF.[70] The Ombudsperson issues an annual report on her work, including cases which raise broad issues of personnel management or administration, which is circulated to the Executive Board and all staff members and employees.[71] The Ombudsperson can also issue reports on the outcome of particular cases that she considers are of general importance and interest, and is directed to bring any systemic issues noticed in individual cases to the attention of the Managing Director.[72]

United Nations Secretariat Ombudsman

The establishment of a UN workplace ombudsman had been discussed inside the UN for several decades, involving staff representatives, the General Assembly and the Secretariat.[73] As noted above, a number of UN agencies established their own ombuds-

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66 *Ibid.*, para. 3.

67 *Ibid.*, para. 4.

68 *Ibid.*, para. 11. Reports of the Ombudsperson must also preserve the right to confidentiality of the complainants, and details of specific cases can only be disclosed with the consent of the complainant, *ibid.*, para. 12.

69 *Ibid.*, para. 10. The Ombudsperson can provide advice on the procedures prior to the filing of the grievance or appeal.

70 *Ibid.*

71 *Ibid.*, para. 6. The Executive Board is responsible for the daily business of the IMF with those powers delegated by the Board of Governors. The Board comprises 24 Directors, 5 of whom are appointed by the largest share-holder states and the remainder elected, with a Managing Director.

72 *Ibid.*, para. 7.

73 On the history of a UN workplace ombudsman see e.g. Beigbeder, *Internal Management of United Nations Organizations, supra* note 16 at 184-187; "Major Reform of UN Internal Justice System Would Create Arbitration Board and Ombudsman Panels" (June 19, 1995) Int'l Doc. Rev. 3 (discussing 1995 Report of the Secretary-General proposing the creation of "ombudsman panels"), UN Doc. A/C.5/49/60 (March 18, 1995); U.N.G.A. Res. 45/239, UN Doc. A/RES/45/239 (Dec. 21, 1990), paras. III(B)2-3; U.N.G.A. Res. 39/245, UN Doc. A/RES/39/245 (Dec. 18, 1984), para. 6(f); Establishment of an Office of Ombudsman in the Secretariat and streamlining of the appeals proceedings, Report of the Secretary-General, G.A. Fifth Committee, UN Doc. A/C.5/41/14 (Nov. 3, 1986); G.A. Res. 40/258A, UN Doc. A/RES/40/258A (Dec. 18, 1985), para. 7; Feasibility of estab-

man mechanisms beginning in the 1970s. As far back as 1985, the UN Secretary-General stated that "it appears feasible to establish an Ombudsman institution in the United Nations."[74] In 1995, the Secretary-General proposed the establishment of ombudsman panels.[75] However, it was not until late 2002 that Secretary-General Kofi Annan finally brought the idea of a UN Ombudsman to fruition. The Ombudsman, based on proposals of the Secretary-General and supported by the General Assembly, obtained its terms of reference from and was appointed by the Secretary-General in October 2002.[76] The Office of the Ombudsman is located in the Office of the Secretary-General:

> to make available the services of an impartial and independent person to address the employment-related problems of staff members. The Ombudsman shall be guided by the Charter, the Staff Regulations and the Staff Rules, as well as by the principles of justice and fairness.[77]

The UN Ombudsman is appointed by the Secretary-General, after consultation with the staff, for a non-renewable term of five years.[78] Also, the terms of reference stipulate that the Ombudsman is independent of any UN organ or official in the performance of his or her duties, and shall remain neutral and not become an advocate for any party.[79] The Ombudsman has the authority to "consider conflicts of any nature related to employment by the United Nations."[80] Further, "conflict" is to be construed "in its broadest sense" and a non-exhaustive list of its contents includes: "matters pertaining to conditions of employment, administration of benefits, managerial practices, as well as professional and staff relations matters."[81] The Ombudsman also may be consulted on policy issues where her views and experience may be useful.[82]

Use of the UN Ombudsman is voluntary for UN staff members and, if the staff member utilizes the office, the Ombudsman may hear any of the parties to the conflict or may, when necessary, refer the staff members to the other workplace methods of dispute

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lishing an office of Ombudsman in the United Nations, Report of the Secretary-General, *supra* note 29; Views of the staff representatives of the United Nations Secretariat, Note by the Secretary-General, UN Doc. A/C.5/39/23 (Oct. 16, 1984), paras. 36-45; Ombudsman Machinery in the United Nations System, Note by the UNDP/UNFPA Staff Association, *supra* note 26.

74 Feasibility of establishing an office of Ombudsman in the United Nations, Report of the Secretary-General, *ibid.* at 10.

75 1995 Report of the Secretary-General, *supra* note 73.

76 Secretary-General's Bulletin, Office of the Ombudsman – appointment and terms of reference of the Ombudsman, UN Doc. ST/SGB/200212 (Oct. 15, 2002, in force Oct. 25, 2002) [hereinafter Bulletin]; G.A. Res. 56/253, UN Doc. A/RES/56/253 (March 6, 2002), para. I(1)(79) ("*Decides* to establish the position of Ombudsman at the level of Assistant Secretary-General in the Office of the Secretary-General . . ."); U.N.G.A. Res. 55/258, UN Doc. A/RES/55/258 (June 27, 2001), para. XI(3). See <www.un.org/ombudsman>.

77 Bulletin, *ibid.*, s.1.

78 *Ibid.*, s. 2.1-2.2. The Ombudsman is ineligible for further UN appointment after the term expires, *ibid.*, s. 2.2.

79 *Ibid.*, ss. 3.2, 3.8.

80 *Ibid.*, s. 3.6.

81 *Ibid.*

82 *Ibid.*, s. 3.12.

resolution.[83] As needed, the Ombudsman has direct access to the Secretary-General for the performance of her functions, has access to most records concerning staff, cannot be compelled by any UN official to testify about matters brought to her attention and must maintain strict confidentiality concerning such matters.[84] The only exception to the confidentiality requirement is when there appears to be an imminent threat of serious harm.[85] When a complaint is lodged with the Ombudsman she shall advise staff members of their options and the various avenues they can pursue; facilitate conflict resolution; and provide advice, suggestions or recommendations for dispute settlement "taking into account the rights and obligations existing between the Organization and the staff member, and the equities of the situation".[86] The Ombudsman shall provide regular reports to the Secretary-General containing an overview of her activities and comments on policies, procedures and practices.[87]

The Inspection Panel and Similar Mechanisms Established by International Financial Institutions

Overview

Some international financial institutions (IFIs) have established mechanisms – called an inspection panel, independent investigation mechanism, compliance advisor/ombudsman or compliance review panel – to try to improve their accountability to external populations negatively affected by IFI-funded development projects. These mechanisms must be distinguished from the internal workplace ombudsman found in many of the IFIs, and discussed in the preceding section.

The UNDP 2002 *Human Development Report* examined the methods by which international institutions can be made more democratic.[88] Among the suggestions posed was that IFIs should become more accountable for their conduct, including to the people affected by their decisions.[89] Specifically, the *Human Development Report* suggested that more IFIs should establish international mechanisms analogous to the national ombudsperson.[90]

The inspection panel concept attempts to build the external good governance of an IFI in relation to people who are affected negatively by the organization's projects, by increasing public participation, and the transparency and accountability of the IFI. The inspection panel is a non-judicial mechanism which focuses on the IFI's accountability

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[83] *Ibid.*, s. 3.7.
[84] *Ibid.*, ss. 3.1, 3.3-3.5.
[85] *Ibid.*, s. 3.3.
[86] *Ibid.*, s. 3.8.
[87] *Ibid.*, s. 3.11.
[88] United Nations Development Programme, *Human Development Report 2002: Deepening democracy in a fragmented world* (N.Y., Oxford: Oxford University Press, 2002), ch. 5 [hereinafter *Human Development Report 2002*].
[89] *Ibid.* at 114-115.
[90] *Ibid.* at 116.

to members of the public rather than on its legal liability.[91] The 2002 *Human Development Report* calls the inspection panel mechanism a type of "judicial-style accountability" because it:

> is intended to ensure that organizations act within their powers – and in keeping with their operational rules. Specific actions or decisions are examined, and attention is drawn to any breach of rules. Judicial-style accountability does not correct bad decisions. But it can publicize wrong-doing and encourage organizations to reconsider decisions.[92]

Given the soft powers given to the inspection panels that have been created, it is inaccurate to term these mechanisms a form of "judicial-style accountability". Inspection panels and the like do not have the power to make decisions that are legally binding on the IFI. Similarly, some of these mechanisms cannot be considered to be ombudsman-like given their structure and powers. However, while the earlier inspection mechanisms cannot commence inspections without the permission of the executive and cannot make their own recommendations, as discussed further below, several of the more recent mechanisms have stronger powers and are closer to organizational ombudsman models. In general, these mechanisms can be classified as a new form of international organization horizontal accountability that is a type of "answerability accountability".[93]

The 2002 *Human Development Report* also indicated that there are limitations to the inspection panel type mechanism: (1) there may be an unequal ability of persons to use the procedures, and North NGOs may influence the complaints; (2) they may be used to terminate generally good decisions that have only minor irregularities; (3) they address whether an IFI has followed its operational rules and policies but not the quality or objectives of the rules; and (4) they do not address issues surrounding non-democratic or poor decision-making.[94]

Despite some of their limitations, inspection panels are a welcome development in improving the external good governance of IFIs in relation to persons who are negatively affected by the projects they have funded. The inspection panel allows for greater public participation through the right of complaint, some increase in transparency through a review and often the publication of the resulting reports, and an increase in the answerability accountability of the international organization to members of the public through feedback on its deficiencies.

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[91] See S. Schlemmer-Schulte, "The World Bank, its Operations, and its Inspection Panel" (1999) R.I.W. 175 at 180.

[92] *Ibid.*

[93] See the analysis of horizontal accountability developed in A. Schedler, "Conceptualizing Accountability" in A. Schedler, L. Diamond and M.F. Plattner, eds., *The Self-Restraining State: Power and Accountability in New Democracies* (Boulder: Lynne Rienner Publishers, 1999) 13 at 14-18, 22-23, with more detailed discussion *supra* Chapter 3.

[94] *Human Development Report 2002, supra* note 88 at 117.

CASE STUDIES OF INSPECTION PANELS

Inspection panels and equivalent mechanisms have been set up in the following IFIs, including several regional development banks: World Bank and International Development Association (IDA) Inspection Panel,[95] International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) Compliance Advisor/Ombudsman,[96] Inter-American Development Bank Independent Investigation Mechanism[97] and Asian Development Bank (ADB) Compliance Review Panel.[98] The European Bank for Reconstruction and Development (EBRD) has an Office of the Chief Compliance Officer to promote good governance and ensure that all EBRD activities are conducted with integrity, investigating complaints against EBRD staff and consultants concerning misconduct, fraud, corruption, conflicts of interest, confidentiality issues and money laundering.[99] In April 2003, the EBRD Board of Directors approved the establishment of an Independent Recourse Mechanism.[100] The IMF has an Independent Evaluation Office, established in 2001.[101] The Board of Directors of the African Development Bank rejected an inspection panel proposal in 1994, although consideration of such a mechanism was restarted in 2002.[102] The Caribbean Development Bank does not yet have an external accountability mechanism.

The World Bank/IDA, IFC/MIGA and Asian Development Bank mechanisms will be examined in more detail below.

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95 See *infra* this Chapter.

96 See *infra* this Chapter.

97 The Inter-American Development Bank (IADB) Independent Investigation Mechanism was established in 1994 to take complaints about the IADB's failure to follow its operational policies or norms in relation to proposed or ongoing operations, when material adverse effects have resulted, or might reasonably be expected to result. The Mechanism does not have a standing body, instead using a roster of independent experts when needed. A request is made to the IADB Board of Executive Directors, and a Mechanism Coordinator and a member of the roster examines its eligibility. The Board decides whether a formal investigation is warranted and, if so, a panel of at least three persons from the roster is convened. The panel investigates and reports to the Board and IADB President with its findings and recommendations. The Board considers the report and management's response to decide what action, if any, should be taken. As at April 2003, the Mechanism had only been used twice. See IADB, *The IDB Independent Investigation Mechanism, Rules and Procedures* (2000), <www.iadb.org/cont/poli/ investig/brochure.htm>; Asian Development Bank, *Review of the Inspection Function: Establishment of a New ADB Accountability Mechanism* (2003), <www.adb.org/Documents/ Policies/ADB Accountability Mechanism/default.asp>, App. 1 at 41-42 [hereinafter *Review of the Inspection Function*].

98 *Review of the Inspection Function, ibid.* See *infra* this Chapter.

99 See <www.ebrd.com/about/compl/main.htm>.

100 *Review of the Inspection Function, supra* note 97, App. 1 at 42.

101 *Ibid.*, App. 2 at 44; <www.imf.org/external/np/ieo/index.htm>.

102 *Review of the Inspection Function, ibid.*, App. 1 at 43.

The World Bank/International Development Association Inspection Panel

The World Bank Inspection Panel was the first international organization external accountability mechanism.[103] In preparatory discussions, a suggestion was made for a World Bank Ombudsman.[104] However, the Inspection Panel was the final product, a mechanism with more limited functions, powers and independence compared to those of an ombudsman. The Inspection Panel was established in 1993 by identical resolutions of the Executive Directors of the World Bank and the International Development Association (IDA).[105] The Panel is an independent entity, composed of three members nominated by the Bank President and appointed by the Board of Executive Directors (the Board).[106]

The Panel takes requests from groups of individuals whose rights or interests have been or are likely to be subject to material adverse effects by the failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a Bank-financed project.[107] After a request is received, Bank management is informed and must respond on: its compliance with Bank policies and procedures, its serious failure to comply although it intends to comply, or failure

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[103] See e.g. G. Alfredsson and R. Ring, eds., *The Inspection Panel of the World Bank: A Different Complaints Procedure* (The Hague: Kluwer Law International, 2001); I.F.I. Shihata, *The World Bank Inspection Panel: In Practice*, 2d ed. (New York: Oxford University Press, 2000); I.F.I. Shihata, *The World Bank Inspection Panel* (New York: Oxford University Press, 1994); L. Boisson de Chazournes, "Access to Justice: The World Bank Inspection Panel" in G. Alfredsson et al., eds., *International Human Rights Monitoring Mechanisms* (The Hague: Kluwer Law International, 2001) at 513; B. Kingsbury, "Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples" in G.S. Goodwin-Gill and S. Talmon, eds., *The Reality of International Law: Essays in Honor of Ian Brownlie* (Oxford: Clarendon Press, 1999) at 323; Schlemmer-Schulte, "The World Bank, its Operations, and its Inspection Panel", *supra* note 91; S. Schlemmer-Schulte, "The World Bank's Experience With Its Inspection Panel" (1998) 58 ZaöRV 353; R.E. Bissell, "Recent Practice of the Inspection Panel of the World Bank" (1997) 91 Am. J. Int'l Law 741; D.D. Bradlow and S. Schlemmer-Schulte, "The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order" (1994) 54 ZaöRV 392; D. Bradlow, "A Test Case for the World Bank" (1996) 11 Am. U. J. Int'l Law & Pol'y 247; D. Bradlow, "International Organizations and Private Complaints: The Case of the World Bank Inspection Panel" (1994) 34 Virginia J. Int'l Law 553. The Board of Executive Directors comprises 24 members, 5 of whom are appointed by the five largest shareholder states and the remainder elected by other members. The Board conducts the daily operations of the Bank, exercising those powers delegated by the Board of Governors.

[104] The ombudsman proposal was made by Professor Daniel D. Bradlow, Shihata, *The World Bank Inspection Panel: In Practice, ibid.* at 18-19; Bradlow, "International Organizations and Private Complaints: The Case of the World Bank Inspection Panel", *ibid.* at 568-569.

[105] Res. No. IBRD 93-10, Res. No. IDA 93-6, with 1996 and 1999 Clarifications by the Board, see <www.worldbank.org/inspectionpanel>; Shihata, *ibid.* at 271. The 1999 Clarifications *inter alia* reaffirmed the Resolution, the importance of the Panel's function, its independence and integrity. See also Operating Procedures of the Inspection Panel (adopted Aug. 19, 1994), Shihata, *ibid.* at 278. Further references are to the Bank only.

[106] Res. No. IBRD 93-10, *ibid.*, paras. 1-2.

[107] *Ibid.*, para. 12. The 1996 Clarifications stated that the requesters must be "any two or more persons who share some common interests or concerns", *supra* note 105.

due to other parties.[108] The Panel determines whether management has taken adequate steps to comply and whether the request satisfies admissibility requirements, and recommends to the Board whether or not a full inspection should take place.[109] It is the Board which has the power to decide whether the Panel proceeds with a full inspection, but 1999 Clarifications do state that if the Panel makes such a recommendation the Board will authorize an inspection without making a judgment on the merits of the complaint.[110] If an inspection does take place, the Panel submits its report on the facts and containing its findings to the Board and the Bank President.[111] The Board describes the Panel as "a fact-finding body" acting on behalf of the Board.[112] However, in practice, Panel inspection reports do contain some views of the Panel which are recommendatory in substance.[113] Bank management responds to the Panel report by submitting its recommendations in response to the findings, including possible remedial measures, to the Board.[114] The Board then decides what action, if any, will be taken as a result of the inspection.[115] All complaints and reports are made public.[116]

In operation in September 1994, twenty-seven requests for inspections had been made by April 30, 2003.[117] Most complaints have involved environmental and social policies and procedures, including those concerning indigenous peoples and involuntary settlement.[118] In the first few years, management often proposed remedial measures during the admissibility phase which, when endorsed by the Board, had the effect of stopping the Panel from proceeding to an inspection, resulting in the Panel reviewing remedial plans on the request of the Board but undertaking few actual inspections.[119] This practice was terminated in 1999 after Board review.[120]

The Inspection Panel cannot be called an ombudsman mechanism as, *inter alia*, it is not formally given the independent powers either to decide on inspection of admissible complaints or make recommendations in its final reports. These powers have been retained by the Bank Board and management. The early years of Panel operations illustrated the interference of management and the Board in the Panel process, although this has changed since the 1999 Board review. The Panel mechanism as it stands now is, as the Board states, closer to a fact-finding mechanism.

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108 Res. No. IBRD 93-10, *ibid.*, para. 13; 1999 Clarifications, *supra* note 105. The 1999 Clarifications also state that management will follow the Resolution strictly at this stage.

109 Res. No. IBRD 93-10, *ibid.*, paras. 13-15, 18-19; 1999 Clarifications, *ibid.*

110 Res. No. IBRD 93-10, *ibid.*, para. 20; 1999 Clarifications, *ibid.*

111 Res. No. IBRD 93-10, *ibid.*, para. 22; 1999 Clarifications, *ibid.*

112 1999 Clarifications, *ibid.*

113 See <www.worldbank.org/inspectionpanel>.

114 Res. No. IBRD 93-10, *supra* note 105, para. 23; 1999 Clarifications, *supra* note 105.

115 Res. No. IBRD 93-10, *ibid.*

116 *Ibid.*, paras. 25-26.

117 See <www.worldbank.org/inspectionpanel>, "Summary of Requests for Inspection as of April 30, 2003". Of these only 9 have resulted, or will result in, full investigations with investigation reports. In several other cases, the Board asked the Panel to review certain matters. The Panel found that 12 requests were inadmissible or ineligible.

118 Boisson de Chazournes, *supra* note 103 at 517.

119 *Ibid.* at 515; Kingsbury, *supra* note 103 at 332.

120 1999 Clarifications, *supra* note 105.

International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) Compliance Advisor/Ombudsman (CAO)

The International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) are also part of the World Bank Group. The IFC promotes equity investment in developing nations, while MIGA provides investment insurance for political risks to encourage private investment in developing states.[121]

Discussions on an accountability mechanism commenced in 1996, complicated in part because the IFC and MIGA cover private sector activity.[122] The IFC/MIGA Compliance Advisor/Ombudsman's Office (CAO) was created in 1999.[123] The CAO is appointed by and reports directly to the President of the World Bank Group, but is given independence including from line management.[124] The CAO has three main functions: 1) acting as an ombudsman, taking complaints from persons who are negatively affected by IFC/MIGA-funded projects and "attempting to resolve the issues raised using a flexible, problem solving approach" that does not focus on finding fault; 2) providing independent advice to the World Bank President and IFC/MIGA management on particular projects and on broader environmental and social policies, guidelines, procedures, resources and systems; and 3) overseeing audits of the social and environmental performance of IFC and MIGA in general and with respect to sensitive projects to ensure compliance with internal policies, etc.[125] Of the ombudsman, advisory and compliance, and audit functions, the ombudsman function takes precedence when it is activated, and the advisory function cannot cut across the ombudsman function.[126]

Pursuant to the ombudsman function, individuals, groups and other entities affected or likely to be affected by the environmental and/or social aspects of an IFC or MIGA project can complain to the CAO.[127] The CAO determines the admissibility of a complaint herself and, if admissible, the complaint is subject to an assessment, with the CAO still able to decide at this point whether or not to proceed.[128] If the CAO proceeds with the case, she will make suggestions for action to the complainant in an assessment report, generally proposing dialogue facilitation between the relevant parties, negotiation,

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121 See generally I.F.I. Shihata, *Multilateral Investment Guarantee Agency and Foreign Investment* (Dordrecht: Martinus Nijhoff Pub., 1988); J. Voss, "The Multilateral Investment Guarantee Agency: Status, Mandate, Concept, Features, Implications" (1987) 21 J. World Trade Law 5.

122 *Review of the Inspection Function, supra* note 97, App. 1 at 38.

123 See <www.cao-ombudsman.org>; *Operational Guidelines for the Office of the IFC/MIGA Compliance Advisor/Ombudsman* (2000) [hereinafter *CAO Operational Guidelines*]; *Review of the Inspection Function, ibid.; Human Development Report 2002, supra* note 88 at 116-117. The *CAO Operational Guidelines* were undergoing a review in 2003.

124 *CAO Operational Guidelines, ibid.*, paras. 1.1.1, 1.3.1-1.3.2; *Review of the Inspection Function, ibid.*; Shihata, *The World Bank Inspection Panel: In Practice, supra* note 103 at 159.

125 *CAO Operational Guidelines, ibid.*, para. 1.1.2; IFC/MIGA CAO, *2001-02 Annual Report* at 2; *Review of the Inspection Function, ibid.*, App. 1 at 38-39.

126 *2001-02 Annual Report, ibid.* at 2-3.

127 *CAO Operational Guidelines, supra* note 123, paras. 2.2.1-2.2.2; *Review of the Inspection Function, supra* note 97 at 39.

128 *CAO Operational Guidelines, ibid.*, paras. 2.2.1, 3.2.1-3.2.4, 3.3.1, 3.3.4; *Review of the Inspection Function, ibid.*

mediation or conciliation.[129] Thus, the CAO focuses on informal ADR methods to try to get the parties to reach their own mutually agreeable resolution to the dispute. If a mutually agreeable resolution is found, a settlement agreement is concluded and reported to the President.[130] If the CAO finds that problem-solving approaches have not worked, she may decide to conduct a further investigation either to look for ways to continue to use ADR methods or to make recommendations to the President.[131] The CAO will close a complaint whenever there has been a satisfactory settlement or when she determines that further investigation or ADR would not be useful or productive, followed by a report to the President which may contain her recommendations for future action on the complaint.[132] If an investigation unearths non-compliance concerns and/or policy issues, the CAO may conduct a compliance audit and/or provide advice on policy, but only after the termination of the complaint process.[133] There are also provisions for monitoring and follow-up on settlement agreements and CAO recommendations.[134] The CAO started receiving complaints in August 2000, and had received thirteen complaints by April 2003.[135]

Compared to the World Bank Inspection Panel, the CAO has considerably more independence of action – the CAO makes decisions on whether to investigate and, if warranted, makes recommendations on the conclusion of an investigation or complaint. The CAO reports directly to the President and not to the Board of Directors as is the case with the Inspection Panel.[136] However, in contrast to Inspection Panel reports, because IFC/MIGA CAO investigations are more likely to contain private sector information, there are some limitations on publication of CAO reports, although CAO investigation reports are made public.[137] The MIGA/IFC CAO Ombudsman function is like that of an organizational ombudsman with an external orientation.[138]

Asian Development Bank Compliance Review Panel (CRP)

An inspection mechanism was put into operation in the Asian Development Bank (ADB) in 1996 which was similar to the Inter-American Development Bank mechanism, but

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129 *CAO Operational Guidelines, ibid.*, paras. 3.3.5-3.3.7, 4.1.1-4.1.4; *Review of the Inspection Function, ibid.; 2001-02 Annual Report, supra* note 125 at 7-8.

130 *CAO Operational Guidelines, ibid.*, paras. 4.1.5-4.1.6, 4.2.2.

131 *Ibid.*, paras. 4.1.1, 4.1.8-4.1.9; *Review of the Inspection Function, supra* note 97 at 40.

132 *CAO Operational Guidelines, ibid.*, paras. 4.2.1, 4.2.3.

133 *Ibid.*, para. 4.2.5; *Review of the Inspection Function, supra* note 97 at 40.

134 *CAO Operational Guidelines, ibid.*, paras. 4.3.1-4.3.2.

135 *Review of the Inspection Function, supra* note 97 at 40; *2001-02 Annual Report, supra* note 125 at 7. Of the 13 complaints, 11 were accepted.

136 See Shihata, *The World Bank Inspection Panel: In Practice, supra* note 103 at 160.

137 *Ibid.; CAO Operational Guidelines, supra* note 123, paras. 1.5.1-1.5.5, 4.2.4. After public leaks of CAO assessment reports by some complainants, the CAO Guidelines were modified, resulting in publication of an assessment report on party consent, *2001-02 Annual Report, supra* note 125 at 8-9.

138 For further information on the organizational ombudsman see *supra* Chapter 2.

which proved to be unsatisfactory in terms of independence, transparency, clarity of procedure and effectiveness.[139]

In 2003, the ADB Board of Directors (Board) approved its replacement by a new and more independent accountability mechanism composed of two separate components: a Special Project Facilitator (SPF) and a Compliance Review Panel (CRP).[140] Complaints about ADB-funded projects will go first to the SPF, who provides a consultation function and informal ADR methods to try to resolve the matter.[141] The complainant can go to the CRP either when the SPF finds the complaint ineligible or when the complainant receives the SPF's findings and decides not to proceed with the consultations suggested.[142] The CRP is composed of three members, approved by the Board upon the recommendation of the ADB President, who report directly to the Board except in specific areas where they report to the Board Compliance Review Committee.[143] The CRP will investigate allegations by groups that the ADB has violated its operational policies and procedures in ADB-assisted projects resulting, or likely to result, in direct, adverse and material harm to project-affected people.[144] The CRP will make its own determinations on the eligibility of requests, undertake objective and thorough compliance reviews of eligible requests, consult with management, the requester and other relevant parties on its preliminary findings and recommendations, issue draft reports to management and requesters with its findings and recommendations, and issue final reports to the Board containing its findings and recommendations.[145] It is for the Board to decide on the action, if any, to be taken on the report, but the CRP is empowered to monitor the implementation of decisions made by the Board.[146] The CRP will also issue annual reports that include advice based on lessons learned from past cases.[147]

The new ADB accountability mechanism should be in operation by the end of 2003. It clearly borrows elements from the IFC/MIGA Compliance Advisor/Ombudsman mechanism. It also improves on the latter by breaking apart the ADR and formal investigation components into separate mechanisms, and keeping the ADR function outside of the panel review process. The CRP has independence in terms of reporting directly to the Board and having the power to make both its own admissibility determinations and its own recommendations on the conclusion of an investigation. Of the IFI external accountability mechanisms established by 2003, the ADB CRP is the strongest in terms of powers and independence and is also analogous to an organizational ombudsman.

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139 *Review of the Inspection Function, supra* note 97, paras. 1-5, 11-16. Out of 8 requests for inspection received by early 2003, 6 were found ineligible, one underwent a full inspection and, in the last request, a full inspection was authorized in 2003, *ibid.*, para. 17.

140 *Ibid.*, para. 34.

141 *Ibid.*, paras. 34, 38-39.

142 *Ibid.*, para. 40. Information obtained by the SPF will be given to the CRP if the complainant proceeds to a compliance review, *ibid.*

143 *Ibid.*, paras. 36, 95-97, 98, 102.

144 *Ibid.*, paras. 34, 99, 103.

145 *Ibid.*, paras. 34, 99-100.

146 *Ibid.*, para. 100.

147 *Ibid.*

International Commissioners for Human Rights

OVERVIEW

Since the early 1990s, a few international organizations have established commissioners for human rights to promote and protect human rights internationally and in the territories of their member states. The extant international commissioners do not have the powers to investigate individual complaints of human rights breaches. Most of these commissioners have relationships with domestic ombudsman and other national human rights institutions.

CASE STUDIES OF INTERNATIONAL COMMISSIONERS

The international commissioners for human rights discussed below are the UN High Commissioner for Human Rights, the Council of Europe Commissioner for Human Rights, the Council of the Baltic Sea States (CBSS) Commissioner on Democratic Development (whose mandate was terminated at the end of 2003) and the OSCE High Commissioner on National Minorities.

The United Nations High Commissioner for Human Rights

a) History

Although ideas and initiatives for a commissioner (or attorney-general) for human rights in the UN system started in 1947, coming from human rights experts and UN organs and bodies, the lobbying prior to the 1993 UN World Conference on Human Rights, especially by NGOs such as Amnesty International, was more successful.[148] The question of the establishment of a High Commissioner for Human Rights was placed on the 1993 Conference agenda – a matter which was controversial both during the preparatory meetings and the World Conference itself given its potential for changing the nature of the international human rights system.[149] The only consensus of the World Conference was a call for the General Assembly to give priority to the matter of a High Commissioner and, in a surprising move, the General Assembly established the position in late 1993 by resolution.[150] The High Commissioner is the UN official "with principal

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[148] A. Clapham, "Creating the High Commissioner for Human Rights: The Outside Story" (1994) 5 European J. Int'l Law 556; J. Lord, "The United Nations High Commissioner for Human Rights: Challenges and Opportunities" (1995) 17 Loyola L.A. Int'l & Comp. Law J. 329 at 330-338; H. Cook, "The Role of the High Commissioner for Human Rights: One Step Forward or Two Steps Back?" (1995) *A.S.I.L. Annual Meeting Proceedings* 235 at 236.

[149] J. Ayala Lasso, "The International Promotion and Protection of Human Rights: The Challenges Ahead?" in *Héctor Gros Espiell, Amicorum Liber*, 2 vols. (Brussels: Bruylant, 1997) 37 at 48.

[150] U.N.G.A. Res. 48/141, UN Doc. A/RES/48/141 (Dec. 20, 1993). See Clapham, *supra* note 148 at 560-564; B.G. Ramcharan, *The United Nations High Commissioner for Human Rights: The*

responsibility for United Nations human rights activities under the direction and authority of the Secretary-General", appointed by the Secretary-General with the approval of the General Assembly.[151]

b) Functions and Powers

The consensus to establish the position can be connected to the relatively weak powers given to the UN High Commissioner for Human Rights. The responsibilities of the High Commissioner include:

- promoting and protecting the effective enjoyment by all of all civil, political, social, economic and cultural rights;
- promoting and protecting the realization of the right to development;
- carrying out the tasks assigned to her by UN human rights bodies and making recommendations to them with a view of improving human rights protection and promotion;
- providing advisory services and technical and financial assistance at the request of the state concerned to support human rights actions and programs;
- coordinating UN human rights education and public information programs;
- playing an active role in removing current obstacles to the full realization of human rights and preventing the continuation of human rights violations throughout the world;
- engaging in dialogue with all governments in the implementation of her mandate;
- enhancing international cooperation for the promotion and protection of all human rights; and
- administering and strengthening the UN human rights protection and promotion system.[152]

Notably, the power to investigate individual complaints or communications was not included within the functions of the UN High Commissioner for Human Rights. Also, while fact-finding was not expressly included in the mandate, in practice the High Commissioner's office engages in various fact-finding activities.[153]

Challenges of International Protection (The Hague: Martinus Nijhoff Pub., 2002); B. Mukherjee, "United Nations High Commissioner for Human Rights: Challenges and Opportunities" in *International Human Rights Monitoring Mechanisms, supra* note 103 at 391; P. Alston, "Neither Fish nor Fowl: The Quest to Define the Role of the United Nations High Commissioner for Human Rights" (1997) 2 European J. Int'l Law 321; Lord, *supra* note 148; C.M. Cerna, "A Small Step Forward for Human Rights: The Creation of the Post of United Nations High Commissioner for Human Rights" (1995) 10 American U.J. Int'l Law & Pol'y 1265; Cook, *supra* note 148.

151 U.N.G.A. Res. 48/141, *ibid.*, paras. 4, 2(b). The High Commissioner has the rank of Under-Secretary-General, *ibid.*, para. 2(c), and the Office of the High Commissioner is located in Geneva (formerly the UN Centre for Human Rights). The High Commissioners appointed by 2003 were José Ayala Lasso, Mary Robinson and Sergio Vieira de Mello.

152 *Ibid.*, para. 4; Ramcharan, *supra* note 150 at 29-33.

153 See Ramcharan, *ibid.* at 57-59; Cook, *supra* note 148 at 237.

The Office of the High Commissioner engages in a broad array of important human rights activities including: preventive human rights strategies and early warnings; responding to human rights emergencies; human rights protection in peace-making, peace-keeping and peace-building; advisory services and technical assistance in improving domestic human rights protection and promotion; and the operation of the UN human rights protection machinery (e.g. treaty bodies, special procedures).[154] An important component of the work of the UN High Commissioner in giving assistance to improve domestic human rights protection is in the establishment and strengthening of ombudsmen and other national human rights institutions, as discussed further in Chapter 4.[155]

Council of Europe Commissioner for Human Rights

a) History

The Council of Europe (COE) is primarily responsible for the European international human rights system.[156] The idea for an international official to oversee human rights in the COE region dates back to 1972.[157] In 1972, members of the COE Consultative (now Parliamentary) Assembly moved that a recommendation be drafted on the need for an Ombudsman or Commissioner of Human Rights at the European level (the Wiklund motion).[158] The idea only encompassed an official who would bring human rights complaints before the now defunct European Commission of Human Rights on behalf of individuals who were incapable of lodging their own complaints due to illiteracy or indigency.[159] In 1973, the Assembly decided to examine the Wiklund motion and convened a meeting of European national ombudsmen and COE representatives in 1974.[160] The meeting produced conflicting views, and recommended that the Assembly take no further action.[161]

A few calls for the creation of a European High Commissioner for Human Rights were made at COE conferences and meetings during the 1980s.[162] Another initiative to

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154 <www.unhchr.ch>; Ramcharan, *ibid.* at 37-40, 45-202; Mukherjee, *supra* note 150 at 394-400. On the work of UN treaty committees related to national human rights institutions including the ombudsman see *supra* Chapter 4.

155 See also Ramcharan, *ibid.* at 174-177.

156 For further information on the Council of Europe and its human rights system see *supra* Chapters 4 and 5.

157 P. van Dijk, "A European Ombudsman for Human Rights: Reopening a Discussion" (1977) 10 Rev. des droits de l'homme 187 at 193.

158 *Ibid.*

159 *Ibid.*

160 *Ibid.*, Council of Europe, Consultative Assembly Res. 549 (1973), paras. 7-8.

161 Council of Europe, Doc. 3516 (Dec. 2, 1974) at 27; Conclusions of the meeting with the Ombudsmen and Parliamentary Commissioners in Council of Europe Member States (Paris, April 1974); *ibid.* at 194-196, 206. See Council of Europe, Parliamentary Assembly, Rec. 757 (adopted Jan. 29, 1975), (1975) 18 Yrbk. European Conv. H.R. 60.

162 F. Matscher, "L'Ombudsman et la protection des droits de l'homme" in F. Matscher, ed., *Ombudsman in Europe – The Institution* (Kehl: N.P. Engel, Pub., 1994) 15 at 32.

establish a Commissioner for Human Rights was started in 1996 by the government of Finland, and a seminar was organized in May 1997.[163] The changed European human rights context was a factor underlying renewed interest, including a larger COE population and the great increase in cases sent to the European human rights system.[164] Some participants cautioned against a Commissioner for Human Rights (CHR) being given an ombudsman function, as:

> it was hardly realistic to assume that the CHR could be directly accessible for 770 million Europeans or that he would take up all complaints with national authorities. It was stressed that the prime role of national Ombudsmen should remain intact. The CHR's role in dealing with complaints should be subsidiary in relation to that of national Ombudsmen; the CHR should rely on national Ombudsmen whenever possible.[165]

The Summit of Heads of State and Government, held in Strasbourg in October 1997, formally approved the establishment of a COE Commissioner for Human Rights.[166] Over the next two years the terms of reference were drafted. After being debated by the Parliamentary Assembly, Resolution (99)50 containing the functions and powers of the Commissioner was adopted by the Committee of Ministers on May 7, 1999 and the first Commissioner was elected in September 1999.[167]

b) Functions and Powers

The COE Commissioner for Human Rights is a "a non-judicial institution to promote education in, awareness of and respect for human rights, as embodied in the human rights instruments of the Council of Europe."[168] The appointee is elected by the Parliamentary Assembly from a list of three candidates supplied by the Committee of Ministers.[169] The Commissioner is given independence of action and is instructed to act impartially.[170] However, the Commissioner is not empowered to take individual complaints.[171] The

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163 Council of Europe Committee of Ministers, Seminar on the Proposal to Create a Council of Europe Commissioner for Human Rights (organized by Permanent Representation of Finland), Strasbourg (May 30, 1997), Summary of the Discussions, GH-H(97)4 (June 17, 1997) [hereinafter Seminar]; Council of Europe Committee of Ministers, Proposal to Create a Council of Europe Commissioner for Human Rights, Rapporteur Group on Human Rights, GR-H(97)5 (July 3, 1997); Second Summit of the Council of Europe, *Commissioner for Human Rights* (Oct. 10-11, 1997).

164 Seminar, *ibid.* at 2.

165 *Ibid.* at 7.

166 See <www.commissioner.coe.int> "Introduction".

167 Council of Europe, Committee of Ministers, Res. (99)50 On the Council of Europe Commissioner for Human Rights, 104th sess. (adopted May 7, 1999), see <www.commissioner.coe.int> "Documents". The first Commissioner is Alvaro Gil-Robles, a former *Defensor del Pueblo* of Spain.

168 Res. (99)50, *ibid.*, art. 1(1).

169 *Ibid.*, arts. 9-10. Also, candidates must meet a list of qualifications. The Commissioner is elected for one non-renewable term of six years, *ibid.*, art. 11.

170 *Ibid.*, art. 2.

171 *Ibid.*, art. 1(2).

functions of the Commissioner cover an extensive range of activities across the full spectrum of human rights:

- promoting education in and awareness of human rights in member states;
- making a contribution to the promotion of the effective observance and full enjoyment of human rights in member states;
- identifying possible shortcomings in the law and practice of member states concerning compliance with COE human rights instruments, promoting the effective implementation of these standards by member states and assisting them, with their consent, in their work to remedy shortcomings;
- providing advice and information on the protection of human rights and prevention of human rights violations;
- where national human rights structures do not exist in member states, encouraging their establishment;
- facilitating the activities of national ombudsmen or similar institutions in the field of human rights;
- responding to requests from the Parliamentary Assembly and the Committee of Ministers in their efforts to ensure compliance with COE human rights standards; and
- cooperating with other international institutions for the protection and promotion of human rights.[172]

The Commissioner can issue recommendations, reports and opinions.[173] The Commissioner organizes seminars, makes official visits to member states resulting in human rights reports with recommendations addressed to the governments, and also targets larger scale situations, e.g. Chechnya and Kosovo.[174] More recently, the Commissioner has begun to issue non-binding legal opinions.[175] While the opinions given to date have been requested by domestic state actors, it is argued that the Commissioner can issue own-motion opinions based on Resolution (99)50.[176] The Commissioner has broad dis-

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[172] *Ibid.*, art. 3.

[173] *Ibid.*, art. 8(1), <www.commissioner.coe.int>.

[174] Council of Europe Commissioner for Human Rights, *3rd Annual Report January to December 2002*, CommDH(2003)7 (Strasbourg, June 19, 2003) at 11-12 [hereinafter *3rd Annual Report*]. The Commissioner now follows up on whether states have implemented his recommendations, *ibid.*, s. III. See also Council of Europe Commissioner for Human Rights, *2nd Annual Report, April 2001 to December 2001*, CommDH(2002)2 (Strasbourg, May 15, 2002) at 15-17, 95-98 [hereinafter *2nd Annual Report*].

[175] See Opinion 1/2002, CommDH(2002)8 (Aug. 28, 2002) on certain aspects of the United Kingdom 2001 derogation from Article 5 par. 1 of the European Convention on Human Rights (requested by UK parliamentary committee); Opinion 1/2002, CommDH(2002)16 (Nov. 13, 2002) on certain aspects of the review of powers of the Northern Ireland Human Rights Commission (requested by Commission); <www.commissioner.coe.int>; *3rd Annual Report, ibid.* at 12-13. Opinion 1/2002 was noted by the UK Court of Appeal in its Oct. 25, 2002 decision in *A. et al.* v. *Secretary of State for the Home Department* [2003] 1 All E.R. 816, paras. 60-63 (per Woolf, C.J.), which challenged the lawfulness of the anti-terrorism, crime and security legislation and a derogation order to the 1998 human rights legislation.

[176] Res. (99)50, *supra* note 167, art. 8(1); *3rd Annual Report, ibid.* at 13.

cretion to act on any information relevant to his functions addressed to him by governments, national legislatures, national ombudsmen (or similar human rights institutions), organizations and individuals.[177] The Commissioner can act *ex officio* and examine general issues that fall within his mandate of promoting human rights in the member states, including matters based on information he receives from the sources listed above.[178] Although he cannot investigate individual complaints, "he can draw conclusions and take initiatives of a general nature which are based on individual complaints."[179] The Commissioner can directly contact member state governments who are required to "facilitate the independent and effective performance by the Commissioner of his or her functions".[180] The Commissioner makes annual and special reports to the Parliamentary Assembly and the Committee of Ministers.[181]

In his 2002 annual report, the Commissioner suggested that his office could be given additional powers, such as the possibility of acting as an *amicus curiae* before the European Court of Human Rights (ECHR) or the right to bring "certain cases of public interest" before the ECHR.[182] The COE is also considering expanding the mandate of the Commissioner to fact-finding in situations that involve a threat, or allegations of, serious and massive human rights violations.[183]

c) Cooperation With Domestic Ombudsmen

The COE Commissioner for Human Rights has a number of roles in connection with ombudsmen and other national human rights institutions in member states. Indeed, Resolution (99)50 envisages a two-way relationship between the Commissioner and national ombudsmen.[184]

The Commissioner is to facilitate the activities of national ombudsmen in the field of human rights.[185] The Commissioner is also called on to make use of and cooperate with national human rights structures in member states when providing advice and information on human rights to the public.[186] As discussed in Chapter 4, even classical ombudsmen undertake investigations involving human rights issues, with the result that the Commissioner for Human Rights cooperates with both classical and human rights ombudsmen throughout the COE region. The Commissioner has also begun to work with ombudsmen at the sub-national level and with other national human rights institutions in member states.[187]

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177 Res. (99)50, *ibid.*, art. 5(1).

178 <www.commissioner.coe.int>, "Introduction, Roles and Activities", B.1, "The activities of the Commissioner for Human Rights".

179 *Ibid.*, A.2, "Objectives and principles".

180 Res. (99)50, *supra* note 167, arts. 6(1), 7.

181 *Ibid.*, art. 3(h).

182 *3rd Annual Report, supra* note 174 at 7.

183 *Ibid.* at 23-24.

184 Res. 99(50), *supra* note 167, art. 3. See *supra* Chapter 5 for a detailed discussion of classical and human rights ombudsmen in COE states.

185 Res. (99)50, *ibid.*, art. 3(d).

186 *Ibid.*, art. 3(c).

187 *3rd Annual Report, supra* note 174 at 7, 16.

The Commissioner organizes periodic conferences of national ombudsmen in member states and, at the end of 2002, he was given the responsibility to organize the periodic COE meetings with ombudsmen and national human rights institutions.[188]

The Commissioner receives a number of individual complaints annually and, since he has no jurisdiction, as many as possible are referred to ombudsmen in member states.[189] If an individual complaint corroborates information on the general human rights situation in a member state, the Commissioner considers that he can use this information, based on his power to act on any information relevant to his functions.[190] Ombudsmen and other national human rights institutions can supply the Commissioner with any relevant information and the Commissioner can act on that information.[191] The provision expressly applies to all types of ombudsmen and presumably also includes sub-national ombudsmen in member states. The Commissioner's country visits to states that have an ombudsman includes studying ombudsman reports and, during the trip, meeting with the ombudsman.[192]

The Commissioner shall also encourage the establishment of domestic human rights structures in member states where such structures do not exist,[193] and this includes ombudsmen and other national human rights institutions at both the national and sub-national levels.[194] If an ombudsman does not yet exist in the member state visited, the Commissioner calls for its prompt establishment, such as in his reports on Armenia, Bulgaria and Turkey.[195] The Commissioner also works to strengthen ombudsman institutions, such as the regional ombudsman system in Russia.[196]

Commissioner of the Council of the Baltic Sea States on Democratic Development

a) History

With the new configuration of European states after the collapse of the Soviet Union, the Council of the Baltic Sea States (CBSS) was set up in 1992 to fortify existing cooperation between its members and build common ground in a number of areas including

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[188] *Ibid.* at 7. See e.g. Office of the Commissioner for Human Rights, Conclusions of the European Ombudsmen Conference (Vilnius, April 5-6, 2002), CommDH(2002)3 (Strasbourg, April 15, 2002); Conclusions of the Meeting Between the Ombudsmen of Central & Eastern Europe and Mr. Alvaro Gil-Robles, Commissioner for Human Rights (Warsaw, May 28-29, 2001), *2nd Annual Report, supra* note 174 at 151; Conclusions of the Meeting Between the Ombudsmen and the Roma/Gypsy Community of Central & Eastern Europe (Strasbourg, Nov. 19-20, 2001), *2nd Annual Report, ibid.* at 155.

[189] *2nd Annual Report, ibid.* at 27.

[190] *Ibid.* at 27; Res. (99)50, *supra* note 167, art. 5.

[191] Res. (99)50, *ibid.*, art. 5(1).

[192] *2nd Annual Report, supra* note 174 at 13-14, 22.

[193] Res. (99)50, *supra* note 167, art. 3(c).

[194] *3rd Annual Report, supra* note 174 at 7.

[195] *Ibid.* at 308; *2nd Annual Report, supra* note 174 at 14, 90-91.

[196] *3rd Annual Report, ibid.* at 7; *2nd Annual Report, ibid.* at 23.

democratic stability, development and trade.[197] In May 1994, the CBSS established the position of Commissioner on Democratic Institutions and Human Rights, Including the Rights of Persons Belonging to Minorities, initially for a three-year period which was extended periodically until the Commissioner's mandate was terminated permanently at the end of 2003.[198] While the institution existed its mandate was revised in 1997 and 2000, and it was renamed Commissioner of the Council of the Baltic Sea States on Democratic Development in 2000.[199]

b) Functions and Powers

The first mandate of the Commissioner covered: promotion of democratic development and the protection of human rights (including the rights of persons belonging to minorities) in member states in order to promote the implementation of international human rights standards; cooperation with other international bodies and with national human rights institutions and NGOs in CBSS member states, including ombudsmen.[200] The work of the Commissioner was composed of three main aspects: (1) studying and reporting on issues and making recommendations thereon to members, (2) providing expert opinion on human rights in member states, and (3) receiving and examining communications from individuals, groups and organizations in response to which the Commissioner could decide to make recommendations to CBSS governments.[201] Based on the right of individual petition it was argued that "the Commissioner functions as a kind of regional ombudsman, and that based on his treatment of complaints he may submit unbinding [sic] recommendations to member states in the same manner as national ombudsman."[202]

The Commissioner was appointed by and accountable to the Council.[203] Pursuant to the final mandate, the Commissioner acted independently and promoted and consolidated democratic development in CBSS states, based upon respect for human rights.[204] The Commissioner continued to support the "functioning and development of democratic institutions, including human rights institutions" in member states but was instructed to concentrate her efforts on issues such as "democracy at national, regional and local level, good governance and administration, good law-making, local self-government, strengthening of civil society and promotion of human rights, including the rights of persons

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197 <www.cbss.st>; O. Espersen, "The Commissioner of the Council of the Baltic Sea States" in *International Human Rights Monitoring Mechanisms, supra* note 103, 657 at 658-659. Members are Denmark, Estonia, Finland, Germany, Iceland, Latvia, Lithuania, Norway, Poland, Russia, Sweden and the European Commission.

198 Espersen, *ibid.* at 659; Council of Baltic Sea States, *Communiqué*, 12th Ministerial Session (Pori, Finland, June 10-11, 2003).

199 *Ibid.* at 665.

200 Espersen, *ibid.* at 660-662.

201 *Ibid.* at 661. The Commissioner will not take up a case if court proceedings on the matter are pending.

202 *Ibid.*

203 CBSS Commissioner on Democratic Development, *Mandate*, paras. 1.1, 2.2 [hereinafter *Mandate*].

204 *Ibid.*, para. 1.1.

belonging to minorities".[205] The Commissioner was guided by the UN Charter, COE and OSCE standards, CBSS documents and "other international standards relevant for democracy and human rights".[206] The duties of the Commissioner included: organizing seminars and meetings; studying and reporting to the Council on issues relevant to her mandate and providing the Council with advice on these issues; and establishing and maintaining cooperation with national institutions relevant to her mandate, in particular with national ombudsmen, chancellors of justices and NGOs.[207]

The Commissioner retained the power to receive communications from individuals, groups and organizations concerning human rights issues and the functioning of democratic institutions.[208] The Commissioner reviewed these communications confidentially and could report on them confidentially to the Council, although the Council could decide to publish all or part of any report.[209] If communications indicated that there was a need for technical assistance, the Commissioner could make proposals to CBSS members to this effect.[210] The final mandate, however, did not contain strong investigatory powers or provisions permitting her to make recommendations to member states (other than in the area of technical assistance) after reviewing the communication. Also, the last two reports of the Commissioner showed that only a small number of communications were being received annually, with the function given a very low profile in the reports.[211] The numbers of complaints dropped over the final years of the Commissioner's mandate, probably due partly to the existence of ombudsmen or other national human rights institutions in all CBSS states.[212]

OSCE High Commissioner on National Minorities

a) History

The Organization for Security and Cooperation in Europe (OSCE, formerly CSCE), the informal association of European states, Canada and the U.S.A., recognized the threats to minority groups in Europe after the end of the Cold War.[213] Provisions for minority

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205 *Ibid.*, para. 1.3; Espersen, *supra* note 197 at 665.

206 *Mandate, ibid.*, para. 1.2.

207 *Ibid.*, paras. 1.4, 1.7-1.9. Annual reports are made public unless there is a consensus against publication.

208 *Ibid.*, para. 1.6. Weak provisions on obtaining information are found in paras. 3.1-3.3, *ibid.*

209 *Ibid.*

210 *Ibid.*

211 In the 2002-2003 period, 24 communications were received, with the highest areas of complaint concerning aliens, lawyers who in defending clients are accused of offences, maladministration and minority discrimination, CBSS Commissioner on Democratic Development, *Annual Report 1 February 2002 – 1 May 2003* at 46-47. In the 2001-2002 period, 70 communications were addressed, with 51% of these concerning family unification issues, followed by issues of aliens and minority discrimination, CBSS Commissioner on Democratic Development, *Annual Report May 2001 – February 2002* at 40.

212 *Annual Report 1 February 2002 – 1 May 2003, ibid.* at 47.

213 For further information on the OSCE see *supra* Chapters 4 to 5.

rights protection are found in various CSCE/OSCE documents, primarily from 1989 onwards.[214] At their Helsinki Meeting in 1992, the OSCE decided to establish the position of High Commissioner on National Minorities (HCNM).[215]

b) Functions and Powers

While the HCNM is a security mechanism with a mandate that focuses on conflict prevention and is not located within the OSCE's human dimension (human rights) component, in practice the HCNM does have a connection with human rights protection.[216] The HCNM provides:

> 'early warning' and, as appropriate, 'early action' at the earliest possible stage in regard to tensions involving national minority issues which have not yet developed beyond an early warning stage but, in the judgment of the High Commissioner, have the potential to develop into a conflict within the CSCE [OSCE] area, affecting peace, stability or relations between participating States. . . .[217]

While the mandate looks to relations between participating states, the work of the HCNM is essentially directed at preventing minority conflict within a participating state.[218]

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214 See e.g. CSCE, Helsinki Final Act (1975) 14 Int'l Legal Mat. 1292, Basket I, pr. VII, para. 4; CSCE, Concluding Document of the Vienna Meeting (1989) 28 Int'l Legal Mat. 531, prs. 18-19; CSCE, Document of the Copenhagen Meeting of the Conference on the Human Dimension (1990) 29 Int'l Legal Mat. 1305, ch. IV; CSCE, Charter of Paris for a New Europe (1991) 30 Int'l Legal Mat. 190 at 199; CSCE Meeting of Experts on National Minorities and its Concluding Document (Geneva) (1991) 30 Int'l Legal Mat. 1692; CSCE, Document of the Moscow Meeting on the Human Dimension (1991) 30 Int'l Legal Mat. 1670, ch. III(37); CSCE, *The Challenges of Change*, Declarations and Decisions From Helsinki Summit II (1992) 31 Int'l Legal Mat. 1385, paras. I(23), II(1)-(37), VI(23)-(28) [hereinafter Helsinki Summit II Decisions]. See P. Cumper and S. Wheatley, eds., *Minority Rights in the 'New' Europe* (The Hague: Martinus Nijhoff Pub., 1999); J. Wright, "The OSCE and the Protection of Minority Rights" (1996) 18 H.R.Q. 190; A. Constantinides, "The Involvement of the Organization for Security and Cooperation in Europe in Matters of Minority Protection" (1996) 9 Leiden J. Int'l Law 373; J. Helgesen, "Protecting Minorities in the Conference on Security and Co-operation in Europe (CSCE) Process" in A. Rosas and J. Hegesen, eds., *The Strength of Diversity: Human Rights and Pluralistic Democracy* (Dordrecht: Martinus Nijhoff Pub., 1992) at 159. See also the COE Framework Convention for the Protection of National Minorities.

215 Helsinki Summit II Decisions, *ibid.*; <www.osce.org/hcnm/>. See H.G. Scheltema, "Monitoring Minority Conflicts: The Role of the OSCE High Commissioner on National Minorities" in L. Reychler and T. Paffenholz, eds., *Peace-Building: A Field Guide* (Boulder: Lynne Rienner Publishers, Inc., 2001) at 229; J. Packer, "The OSCE High Commissioner on National Minorities" in *International Human Rights Monitoring Mechanisms, supra* note 103 at 641; Wright, *ibid.* at 200-205; A. Bloed, "Monitoring the CSCE Human Dimension: In Search of its Effectiveness" in A. Bloed et al., eds., *Monitoring Human Rights in Europe – Comparing International Procedures and Mechanisms* (Dordrecht: Martinus Nijhoff Pub., 1993) at 45.

216 Packer, *ibid.* at 649; Constantinides, *supra* note 214 at 390; Bloed, *ibid.* at 67.

217 Helsinki Summit II Decisions, *supra* note 214, para. II(3). The HCNM draws on the facilities of the Office for Democratic Institutions and Human Rights (ODIHR) in Warsaw, *ibid.*, para. I(23).

218 Wright, *supra* note 214 at 204.

The HCNM, appointed by the Ministerial Council, works confidentially and independently of all parties involved in the tensions.[219] The HCNM cannot consider OSCE commitment violations involving individuals belonging to national minorities and, instead, addresses the larger picture of tensions involving the minority as a collective.[220] Also, the HCNM cannot intervene in minority conflicts which involve "organized acts of terrorism".[221] When a national minority tension arises, the HCNM intervenes at the earliest possible stage, collects and receives information from any source, visits representatives of government and the minority in the relevant participating state, promotes dialogue, confidence and cooperation between the parties in dispute, makes written recommendations and reports to the government which are sent to the Chairman-in-Office and the Permanent Council.[222] The HCNM relies frequently on OSCE and other participating state human rights commitments in the course of his work.[223] Although rarely used, if a minority situation deteriorates to the point where there is a *prima facie* risk of potential conflict, the HCNM may issue an early warning which will be communicated by the Chairman-in-Office to the Senior Council.[224] The HCNM is not considered to be an ombudsman and is described as a "facilitator-cum-mediator".[225]

The Future of the Ombudsman at the International Level

In looking to the future of the ombudsman at the international level, the configuration of ombudsman and ombudsman-like institutions in three concentric circles, discussed earlier in this Chapter, can be examined again.

The international organization workplace ombudsman (or mediator), representing the inner circle of activity, has been used in an increasing number of organizations, illustrated most recently with the establishment of an Ombudsman in the UN Secretariat. Analogous to an internal workplace ombudsman on the domestic level, this type of ombudsman mechanism should not be overly controversial or threatening to either international organization or member state interests. Rather, the model is designed to settle secretariat

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219 Helsinki Summit II Decisions, *supra* note 214, paras. I(23), II(4). The Ministerial Council, composed of participating state heads of state/government or foreign ministers and meeting annually, is the central decision making and governing body.

220 *Ibid.*, para. II(5c).

221 *Ibid.*, para. II(5)(b); Scheltema, *supra* note 215 at 231.

222 Helsinki Summit II Decisions, *ibid.*, paras. II(11)-(12), (16)-(19), (23); <www.osce.org/hcnm/>; Scheltema, *ibid.* at 230-232; Wright, *supra* note 214 at 204-205. For recommendations which have been made public see <www.osce.org/hcnm/documents/>. The Chairman-in-Office is the foreign affairs minister of a participating state, rotating annually, acting as a form of chief executive. The Permanent Council, comprising participating state representatives, handles daily operational decision making, and is the HCNM's primary body for political support. In exceptional cases, the report is sent to the Senior Council. Formerly the Council of Senior Officials, the Senior Council convenes semi-annually and makes policy and budget decisions between Ministerial Council meetings.

223 See Packer, *supra* note 215 at 649; Constantinides, *supra* note 214 at 391.

224 Helsinki Summit II Decisions, *supra* note 214, para. II(13); Packer, *ibid.* at 650 (the provision was used with Macedonia). See *supra* note 222 on the Senior Council.

225 Packer, *ibid.* at 647. See also Constantinides, *supra* note 214 at 390; Bloed, *supra* note 215 at 67.

employment disputes informally, avoid the more legalistic and expensive formal dispute settlement alternatives and thereby improve both staff morale and organizational efficiency.

The middle circle, representing an organization's attempts to improve the relationship among member states has not been the site of the development of the ombudsman as an accountability mechanism. Rather, other institutional reforms appear more appropriate.

The establishment of the EU's European Ombudsman and the creation of inspection panels and other similar bodies by some IFIs represent the outer circle of activity, wherein the international organization has attempted to provide an external accountability mechanism for non-state actors affected by its activities. To date, the European Ombudsman is the only true classical ombudsman on the international or supranational level, taking complaints from EU citizens and residents about maladministration by Community institutions and bodies (including workplace complaints from Community employees). Such a development was possible because of the extensive reach of the EU and its institutions over individuals and juridical bodies in member states and an extensive body of EU law covering EU citizenship rights, administrative law norms and human rights principles. IFIs have also attempted to create external accountability mechanisms with their inspection and compliance review mechanisms to take complaints by groups of persons negatively impacted by development projects. Only several of the recent IFI mechanisms have organizational ombudsman functions. Further, all of the mechanisms are limited to an examination of the organization's policies and procedures and do not have the freedom to look at other legal norms or fairness considerations. The vast majority of international organizations do not have any form of external accountability mechanisms at all.

Some commentators have addressed the possibility of increasing the number of international organizations with external accountability mechanisms. I.F.I. Shihata stated that the growth in IFI mechanisms:

> is likely to add demands on other organizations to follow suit. Once accountability to the affected public is postulated as an efficient complementary element in the overall accountability system of an international organization, it is difficult to see why such an element should be restricted to the World Bank or to multilateral development institutions. Obviously, this would not be the case if the function were to contradict or dilute existing systems of governance and accountability in the organization involved or otherwise hinder its efficient operation.[226]

Other IFIs have begun to establish external accountability mechanisms, and the most recent have been given slightly greater independence and powers compared to the World Bank Inspection Panel. This is likely to continue with most of the other IFIs. Shihata recognizes that international organizations outside the development area may also want, or be pressured, to consider the establishment of an external accountability mechanism, in particular where their activities have an impact on non-state actors. However, he also

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[226] Shihata, *The World Bank Inspection Panel: In Practice, supra* note 103 at 264.

hints at the barriers that are likely to be raised against the establishment of accountability mechanisms in other organizations.

Eric Stein has recommended that international organizations establish an inspection panel and an ombudsman to take citizen complaints of maladministration to improve the democracy and legitimacy of the organization.[227] Stein indicates that the EU ombudsman concept might be usable in other international organizations, although he recognizes that "[i]n principle, however, the transfer of any feature of one organization to another succeeds only if the basic contexts of both are roughly comparable."[228] The problem is that the structure of international organizations are not even roughly comparable to that of the EU at this point in time. In addition, the concerns raised by Shihata are likely to be raised by many international organizations and their member states. For example, they may balk at the institutional changes necessary, or fear receiving a flood of complaints and complaints that are politically motivated.

But it is important to keep in mind that a classical ombudsman is a non-judicial, soft mechanism having only the sanctions of recommendation and public reporting. The inspection panel model has even more limited functions and powers. Thus, a classical ombudsman as an external accountability mechanism should not pose a threat to an international organization which is serious about improving its external accountability and good governance *vis-à-vis* members of the public who are negatively affected by the organization's activities. It is more likely, however, that an international organization considering an external accountability mechanism will prefer the more tightly circumscribed inspection panel rather than the ombudsman model.

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[227] E. Stein, "International Integration and Democracy: No Love at First Sight" (2001) 95 American J. Int'l Law 489 at 532.

[228] *Ibid.* at 532-533.

CHAPTER ELEVEN

The European Ombudsman: Good Governance, Human Rights and the European Union

The European Ombudsman was established by the European Union's (EU) Maastricht Treaty to oversee the conduct of European Community (EC) institutions and bodies, excluding only the Courts when acting in their judicial role. As noted in Chapter 10, the European Ombudsman can be categorized generally as one of the external accountability mechanisms of the supranational EU. In particular, the European Ombudsman is the only example of a fully-fledged, classical ombudsman at the international level. It was created in an attempt to reduce the democratic deficit in the EC, by improving the channels for persons living in EU member states to voice their complaints over EC governance, and by increasing the EU's transparency and accountability. The European Ombudsman addresses instances of Community maladministration, thereby improving good governance on the part of the Community institutions and bodies. Also, human rights matters fall within the jurisdiction of the European Ombudsman and, thus, the office can and does contribute to the EU's observance of human rights.

This Chapter will survey the evolution of the European Ombudsman, its powers, functions and activities. The role of the European Ombudsman in improving good governance and human rights protection in the EU will also be explored. The role of the European Ombudsman under a new Union Constitution will also be addressed.

The Evolution of the European Union

The EU is the product of the economic integration of Western European states starting in the post World War II period.[1] The three European Communities – the European Coal

[1] See generally J. Monar and W. Wessels, eds., *The European Union After the Treaty of Amsterdam* (London, N.Y.: Continuum, 2001); D. Galloway, *The Treaty of Nice and Beyond: Realities and Illusions of Power in the EU* (Sheffield: Sheffield Academic Press, 2001); A. Arnull et al., *Wyatt and Dashwood's European Union Law*, 4th ed. (London: Sweet & Maxwell, 2000); P. Craig and G. de Búrca, *The Evolution of EU Law* (Oxford: Oxford University Press, 1999); D. Dinan, *Ever Closer Union: An Introduction to European Integration*, 2d ed. (Houndmills: MacMillan Press Ltd., 1999); T. Heukels, N. Blokker and M. Brus, eds., *The European Union after Amsterdam: A Legal Analysis*

and Steel Community (ECSC), the European Atomic Energy Community (Euratom) and the European Economic Community (EEC) – were created in the 1950s.[2] The European Communities moved in an uneven evolutionary manner towards the goal of a common market during the next three decades.[3]

The Treaty on European Union (Maastricht Treaty) entered into force on November 1, 1993, and was amended by the Treaty of Amsterdam, in force on May 1, 1999, and the Treaty of Nice, in force on February 1, 2003.[4] The European Union represents a considerable step forward in European integration. It includes economic and monetary union, a single currency, EU citizenship, the evolution of a common foreign, defence and security policy, closer cooperation on justice and home affairs, and a variety of other developments in the political, economic and social spheres.[5] As at mid-2003, there were fifteen EU member states: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom. Ten more European nations have signed an accession treaty and are expected to become EU members in May 2004.[6]

In June 2003, an EU constitutional convention concluded with the adoption of a first draft of a Constitution to replace the existing treaties and make institutional and other changes.[7] The draft will be sent for inter-governmental review where amendments are permitted and then each of the current and prospective 2004 EU members must ratify the final draft.[8] A final version is not expected to enter into force until 2006.

(The Hague: Kluwer Law International, 1998); D. Chalmers, *European Union Law*, 2 vols. (Aldershot: Dartmouth Pub. Co. Ltd., 1998); T.C. Hartley, *The Foundations of European Community Law*, 4th ed. (Oxford: Clarendon Press, 1998); C. Archer and F. Butler, *The European Union: Structure and Process*, 2d ed. (New York: St. Martin's Press, 1996); A. Duff et al., eds., *Maastricht and Beyond: Building the European Union* (London: Routledge, 1994); <www.europa.eu.int>.

2 ECSC Treaty (signed April 18, 1951, in force July 25, 1952); Euratom Treaty and EEC Treaty (now EC Treaty) (both signed March 25, 1957, in force Jan. 1, 1958). See *infra* note 4.

3 See Archer and Butler, *supra* note 1 at 26-30.

4 Maastricht Treaty: Treaty on European Union [hereinafter TEU] and Treaty Establishing the European Community [hereinafter EC Treaty] (signed Feb. 7, 1992, in force, Nov. 1, 1993); Treaty of Amsterdam (signed Oct. 2, 1997, in force May 1, 1999), which also renumbered the Maastricht and EC Treaties; Treaty of Nice (signed Feb. 26, 2001, in force Feb. 1, 2003). For the consolidated treaties, see European Union, Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, O.J. C 325/01 (Dec. 24, 2002), <www.europa.eu.int>.

5 TEU, *ibid.*, e.g. Title I, art. 2.

6 Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic and Slovenia signed the Treaty of Accession with EU members in Athens on April 16, 2003 which will enter into force on May 1, 2004 after the 25 states have ratified the treaty. Bulgaria and Romania are likely candidates for accession in 2007.

7 The European Convention Secretariat, *Draft Treaty Establishing a Constitution for Europe*, CONV 850/03 (Brussels, July 18, 2003), see <www.europa.eu.int>.

8 *Draft Treaty Establishing a Constitution for Europe*, *ibid.*, art. IV-8(1).

Organizational Structure and Institutions of the European Union

EUROPEAN UNION ORGANIZATIONAL STRUCTURE

The Maastricht Treaty created a three-pillar structure. The former European Economic Community (EEC) was renamed the European Community (EC) and it, together with the ECSC and Euratom, comprise the first pillar.[9] Two new forms of cooperative activity were created in the Maastricht Treaty – foreign and security policy, and justice and home affairs (the latter now covers police and judicial cooperation in criminal matters) – to form the second and third pillars.[10] These are areas in which the EU states are cooperating on an intergovernmental basis under the Union umbrella but mainly outside the formal Community structure (the EC, ECSC and Euratom collectively will hereafter be called the "Community") – although the Treaty of Amsterdam amended the Maastricht Treaty, moving visa, asylum, immigration and movement of persons matters from the third pillar into the Community structure.[11] The EU is still composed of the three formal legal entities (the EC, ECSC and Euratom), governed by one set of institutions.[12]

The draft EU Constitution will replace the separate treaty structures and the three-pillar structure with a single treaty and organizational design, and the Union will have a common foreign and security policy.[13]

EUROPEAN UNION INSTITUTIONS

The current EU institutions are the Commission, the Council of Ministers, the European Parliament, the Court of Justice (with its Court of First Instance) and the Court of Auditors.

The European Commission is the guardian of the Community treaties, with the important duty to "ensure the proper functioning and development of the common market" by *inter alia* proposing legislation and, later, ensuring that Community law is applied.[14]

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[9] TEU, *supra* note 4, Titles II to IV.

[10] TEU, *ibid.*, Title V, arts. 11-28, contain the foreign and security policy provisions and Title VI, arts. 29-42, cover Police and Judicial Cooperation in Criminal Matters (formerly Justice and Home Affairs).

[11] TEU, Title I, *ibid.*, art. 1, "The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty." EC Treaty, *supra* note 4, Part 3, Title IV, covers visas, asylum, immigration and other policies related to free movement of persons. TEU, *ibid.* See J.-C. Piris and G. Maganza, "The Amsterdam Treaty: Overview and Institutional Aspects" (1999) 22 Fordham Int'l L.J. S32 at S37.

[12] See EC Treaty, *ibid.*, art. 7; TEU, *ibid.*, Title I, art. 3.

[13] *Draft Treaty Establishing a Constitution for Europe, supra* note 7, arts. 15, 18(1). The common foreign and security policy includes the progressive framing of a common defence policy. Areas of shared competence include "freedom, security and justice", *ibid.*, art. 13(2).

[14] EC Treaty, *supra* note 4, art. 211; *Serving the European Union: A Citizen's Guide to the Institutions of the European Union* (Luxembourg: Office for Official Publications of the European Communities, 1996) at 13. The Commissioners act independently of their national governments and only in the interests of the EU. The Commission is the largest Community institution, *ibid.* at 14-15.

The Council of Ministers is composed of representatives of each of the member state governments who "legislate for the Union, set its political objectives, coordinate their national policies and resolve differences between themselves and with other institutions."[15] The European Parliament represents the citizens of the Community and it has been given increased powers in the legislative process over time.[16] At the end of the legislative process, Parliament now has the power of co-decision with the Council in many areas.[17] In general terms, the Community legislative process is shared between the Commission, the Council and the European Parliament, whereas the executive power is exercised by the Council and the Commission.[18] The Court of Justice is the judicial organ of the Community system, with the duty to ensure that the law is observed in the interpretation and application of the Treaties.[19] In addition, there is a Court of First Instance attached to the Court of Justice and the Treaty of Nice established the use of judicial panels in specific areas.[20] The Court of Auditors monitors the financial conduct of the Community.

The draft Constitution retains these institutions, but makes a number of changes. For example, the European Council is added as an institution, there will be a Union Minister for Foreign Affairs, the European Parliament is given greater legislative powers along with the Council of Ministers, and the Court of Justice will include the European Court of Justice, a High Court and specialized courts.[21]

History of the European Ombudsman

The concept of a European Ombudsman had been discussed by several entities within the European Community over a number of years. The European Parliament addressed

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[15] *Serving the European Union, ibid.* at 9. The Council of Ministers is a different entity from the European Council. The European Council is composed of the heads of state or government and the foreign ministers of the member states who "provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof.", TEU, *supra* note 4, art. 4.

[16] See M. Shackleton, "The European Parliament" in J. Peterson and M. Shackleton, eds., *The Institutions of the European Union* (Oxford: Oxford University Press, 2002) 95-117; R. Corbett, F. Jacobs and M. Shackleton, *The European Parliament*, 4th ed. (London: John Harper Pub., 2000); R.S. Katz and B. Wessels, eds., *The European Parliament, the National Parliaments, and European Integration* (N.Y.: Oxford University Press, 1999). Members of Parliament are directly elected by citizens of EU member states. Parliament participates in the legislative process with powers of consultation and co-decision on legislation, including the right to amend and veto legislative proposals. The Parliament has budgetary powers, monitors the executive bodies, promotes rights of EU citizens through its petitions committee and its relationship with the European Ombudsman, approves the nomination of the President and members of the Commission, and can dismiss the Commission by a vote of censure.

[17] Shackleton, *ibid.* at 99; Corbett, Jacobs and Shackleton, *ibid.* at 5.

[18] *Serving the European Union, supra* note 14 at 6-7.

[19] E.g. EC Treaty, *supra* note 4, arts. 220, 221-223. See Protocol (adopted at Nice) on the Statute of the Court of Justice, *supra* note 4.

[20] EC Treaty, *ibid.*, arts. 220, 224-225a; Hartley, *supra* note 1 at 57, 62.

[21] *Draft Treaty Establishing a Constitution for Europe, supra* note 7, arts. 18(1)-(2), 19(1), 20, 22, 27, 28. On the European Council see *supra* note 15.

the concept in 1979 when it adopted a resolution on the appointment of a "Community Ombudsman".[22] Even then the European Parliament had started to recognize the increasing impact of Community laws on individuals and the need to monitor the power of Community institutions. It decided "that as a matter of principle it is desirable to institute a Parliamentary Commissioner with the task of examining complaints on behalf of the Community citizen and advising him on the means of redress available".[23] However, the European Parliament, recognizing that a time-consuming process to amend the Community treaties would be required, stepped back from the initiative. Starting in the next decade, the European Parliament developed a negative attitude toward the establishment of a European Ombudsman – it was perceived that an Ombudsman would draw complaints away from its own evolving parliamentary petition procedure.[24]

The matter continued to be discussed during the 1980s. The Adonnino Committee (Ad Hoc Committee for a People's Europe) was established by the European Council in 1984, and submitted its final report in June 1985, suggesting that the European Parliament could investigate the viability of a European Ombudsman appointed by Parliament.[25] In September 1990, during the Intergovernmental Conference on Political Union, the Spanish government submitted proposals for the introduction of the concept of Union citizenship and for the creation of an Ombudsman who would have powers to protect the rights adhering to citizenship and jurisdiction at the Community and national levels of government.[26] In October 1990, the Danish government submitted its own proposals for an Ombudsman whose main role would be to monitor Community institutions and bodies.[27] In December 1990, the European Council asked the Intergovernmental Conference to consider the possible establishment of an ombudsman mechanism.[28] In February 1991, the Spanish government refined its proposal to focus on an EU ombudsman inside each member state with alternative ideas put forward for a Community-level Ombudsman,

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[22] European Parliament Res., "Resolution on the appointment of a Community Ombudsman by the European Parliament", O.J. C 140/153 (1979).

[23] *Ibid.*, art. 1.

[24] A customary petitions system developed in the 1950s, followed by more recognition in the 1970s and 1980s, with the Petitions Committee created in 1987, European Parliament Res. On the granting of special rights to the citizens of the European Community, O.J. C 299/26 (Nov. 16, 1977); European Parliament Res., A2-41/85, O.J. C 175/273 (June 14,1985). See E.A. Marias, "The European Ombudsman: Competences and Relations With Other Community Institutions and Bodies" in E.A. Marias, ed., *The European Ombudsman* (Maastricht: European Institute of Public Administration, 1994) 71 at 74 [hereinafter "European Ombudsman: Competences and Relations"].

[25] W. Hummer, *The Position and Duties of the Ombudsman of the European Parliament* (Innsbruck: European Ombudsman Institute, 1995).

[26] See also letter of Prime Minister Felipe Gonzalez to the European Council, dated May 4, 1990, European Union, *The European Ombudsman Annual Report 1995* (1996) at 8 [hereinafter *Annual Report 1995*]; K. Magliveras, "Best intentions but empty words: The European Ombudsman" (1995) 20 European Law Rev. 401 at 401; Marias, "European Ombudsman: Competences and Relations", *supra* note 24 at 73.

[27] E.A. Marias, "Mechanisms of Protection of Union Citizens' Rights" in A. Rosas and E. Antola, eds., *A Citizens' Europe: In Search of a New Order* (London: Sage Publications, 1995) 207 at 213-214; J. Söderman, "The Maastricht Treaty and the Citizens of Europe" in *Ombudsman and the Law of the European Union* (Ljubljana: Seminar Proceedings, June 6-8, 1999) 2 at 4.

[28] Marias, "European Ombudsman: Competences and Relations", *supra* note 24 at 73.

and in March 1991 a consensus was reached based on the Danish proposal.[29] In June 1991, a draft Treaty on Political Union was submitted by the presiding Luxembourg government which contained provisions for one Ombudsman with jurisdiction only at the Community level.[30] It was this particular design which was included in the final version of the Maastricht Treaty. The Maastricht Treaty also enshrined Parliament's Petitions Committee and the right to use it.[31]

The European Ombudsman

CLASSICAL OMBUDSMAN AT THE SUPRANATIONAL LEVEL: LEGAL FRAMEWORK

In line with the initial proposals made by the Spanish government, the European Ombudsman is connected to the concept of European Union citizenship. However, the major characteristics of the European Ombudsman follow the classical Danish Ombudsman model.[32] The EC Treaty provisions on the European Ombudsman are Articles 21 and 195.[33] Article 21 states that "[e]very citizen of the Union may apply to the Ombudsman established in accordance with Article 195" and Article 195(1) provides the basic contours and jurisdiction of the European Ombudsman, as follows:

> The European Parliament shall appoint an Ombudsman empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role. . . .[34]

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[29] J. Söderman, "A Thousand and One Complaints: The European Ombudsman *en Route*" (1997) 3 European Public Law 351 at 359 [hereinafter "A Thousand and One Complaints"]; *Annual Report 1995, supra* note 26 at 8; Marias, *ibid.* at 74.

[30] Marias, *ibid.* at 75.

[31] EC Treaty, *supra* note 4, arts. 21, 194. See also *supra* note 24.

[32] Speech by the European Ombudsman, Mr Jacob Söderman, Ceremony for the award of the Alexis de Toqueville Prize 2001 (Maastricht, Nov. 21, 2001), <www.euro-ombudsman.eu.int/speeches/> at 3. See generally <www.euro-ombudsman.eu.int>; R. Gregory and P. Giddings, "Citizenship Rights and the EU Ombudsman" in R. Bellamy and A. Warleigh, eds., *Citizenship and Governance in the European Union* (London, N.Y.: Continuum, 2001) 73; K. Heede, *European Ombudsman: redress and control at Union level* (The Hague: Kluwer Law International, 2000); P. Gjerloeff Bonnor, The European Ombudsman: a novel source of soft law in the European Union" (2000) 25 European Law Rev. 39; R. Gregory, "The European Union Ombudsman" in R. Gregory and P. Giddings, eds., *Righting Wrongs: The Ombudsman in Six Continents* (Amsterdam: IOS Press, 2000) at 155 [hereinafter *Righting Wrongs*]; Söderman, "A Thousand and One Complaints", *supra* note 29; K. Heede, "Enhancing the Accountability of Community Institutions and Bodies: The Role of the European Ombudsman" (1997) 3 European Public Law 587; House of Lords Select Committee on the European Communities, *The European Ombudsman*, 1997-98 Session, 4th Report (July 22, 1997); M. Hertogh, "The European Ombudsman: Different Roles in a Demanding Context" (1996) III European Yrbk. Comp. Gov't & Public Admin. 337; R. Gregory, *The European Union Ombudsman* (Reading: Reading Centre for Ombudsman Studies, Feb. 1995); Hummer, *supra* note 25; *The European Ombudsman, supra* note 24; M. Hedemann-Robinson, "The individual and the EC Ombudsman" (May 6, 1994) New Law J. 609.

[33] EC Treaty, *supra* note 4, arts. 21 (ex art. 8d), 195 (ex art. 138e).

[34] *Ibid.*, art. 195(1).

After internal debate and compromise with the Council and Commission, the European Parliament adopted a decision on March 9, 1994 containing the definitive regulations and general conditions governing the performance of the Ombudsman's duties, popularly called the "Statute of the European Ombudsman" (EO Statute).[35]

The European Ombudsman is both appointed by and reports annually to the European Parliament.[36] The Ombudsman must be a Union citizen, able to "offer every guarantee of independence".[37] The Ombudsman is appointed after each parliamentary election for the duration of its term, and can be reappointed.[38] The first Ombudsman commenced his duties in September 1995 after differences between the parliamentary groupings delayed the appointment of the first Ombudsman for almost two years.[39] The office of the European Ombudsman is located in Strasbourg.[40]

Since the Parliament is only one component of the legislative structure of the Community, the European Ombudsman can be called a variant of the classical ombudsman model, based on the unique structure of the EU. The draft EU Constitution gives greater law-making powers to the Parliament which will only enhance the notion of the European Ombudsman as a classical legislative ombudsman at the supranational level of governance.[41]

JURISDICTION OF THE EUROPEAN OMBUDSMAN

The European Ombudsman can take complaints from any EU citizen or "any natural or legal person residing or having its registered office in a member state."[42] The concept of Union citizenship is established in the Maastricht Treaty, providing that every person holding the nationality of an EU member state shall be an EU citizen with rights and duties under the Treaty.[43] Article 195(1) also enables the European Ombudsman to take complaints from individuals who are resident in a member state and "legal persons" such as corporations, etc. which have their registered office in a member state.

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35 Decision of the European Parliament of March 9, 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, E.P. Decision 94/262, O.J. L 113/15 (1994) (in force May 4, 1995) [hereinafter EO Statute]. See also *Decision of the European Ombudsman adopting implementing provisions* (from Jan. 1, 2003), <www.euro-ombudsman.eu.int> [hereinafter *implementing provisions*].

36 EC Treaty, *supra* note 4, art. 195(1).

37 EO Statute, *supra* note 35, art. 6(2). The Ombudsman must also have full civil and political rights, and be eligible for appointment to the highest judicial office in her/his national state or have demonstrated competence and experience to serve as Ombudsman.

38 EC Treaty, *supra* note 4, art. 195(2).

39 Dinan, *supra* note 1 at 289. Jacob Söderman, a former Ombudsman of Finland, was the first European Ombudsman, reappointed in 1999. In 2003, Nikiforos Diamandouros, the first Ombudsman of Greece, was appointed Ombudsman.

40 EO Statute, *supra* note 35, art. 13. The European Parliament is located in Strasbourg. The Ombudsman also has an office in Brussels – the seat of the Commission which is the target of the largest number of complaints.

41 *Draft Treaty Establishing a Constitution for Europe, supra* note 7, arts. 19(1), 22, 25(2).

42 EC Treaty, *supra* note 4, art. 195(1); EO Statute, *supra* note 35, art. 2(2).

43 EC Treaty, *ibid.*, art. 17), maintained in *Draft Treaty Establishing a Constitution for Europe, supra* note 7, art. 8.

Individuals who are not EU citizens or residents, and legal entities not registered in a member state are not entitled to complain to the European Ombudsman, even though they may be affected by the actions of the administrative bodies of the Community. However, the European Ombudsman has interpreted residency liberally and has also used the own-initiative inquiry alternative where there appeared to be maladministration but the complainant did not have standing because of lack of EU citizenship or residence.[44]

The mandate of the European Ombudsman is that of a classical ombudsman: to scrutinize the administrative activities of the Community in order to improve fairness, efficiency and accountability in its administration. Although the Community Courts have jurisdiction to hear various categories of cases brought by private persons, including actions against Community institutions, many instances of maladministration may not be justiciable or, where there is a litigious case, there are admissibility and other barriers to use of the Courts.[45] These problems can be redressed to a certain extent by the European Ombudsman. As Bradley and Sutton state, the ombudsman mechanism "partially fills the gap which existed until now where individuals or companies felt aggrieved by officials in any of the institutions (particularly the Commission) and yet were effectively denied redress before the Court of Justice."[46]

The European Ombudsman has jurisdiction to investigate maladministration in the activities of the "first-pillar" Community institutions or bodies with the exception of the Court of Justice and the Court of First Instance when acting in their judicial role, but he does not have the jurisdiction to investigate action by any other authority or person.[47] Although the judicial activities of the Court of Justice and the Court of First Instance are excluded from jurisdiction, when the Courts are acting *outside* their judicial role, i.e. when the *administrative* conduct of the Courts is the subject of a complaint, the European Ombudsman can take jurisdiction over the matter.[48]

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[44] See e.g. complaint where physical presence of the complainant in the territory was considered sufficient for EU residency requirements, although the complaint was found non-jurisdictional on other grounds, Complaint 972/24.10.96/FMO/DE/DT, European Ombudsman, *The European Ombudsman Annual Report for 1996* (1997) at 15 [hereinafter *Annual Report 1996*]; J. Söderman, "The Effectiveness of the Ombudsman in the Oversight of the Administrative Conduct of Government" in *Balancing the Exercise of Governmental Power And Its Accountability – The Role of the Ombudsman*, VIIth International Ombudsman Institute Conference, Durban (Oct. 30 to Nov. 2, 2000) 69 at 71 [hereinafter "The Effectiveness of the Ombudsman"].

[45] See EC Treaty, *supra* note 4, art. 230 annulment actions to review the legality of binding Community acts (persons can only bring actions against Community decisions addressed to that person or against regulations or decisions addressed to another person "of direct and individual concern to the former"); art. 232 review of the failure of an institution to act (a person can complain that a Community institution has failed to address a legally binding Community act to that person); art. 235 non-contractual liability actions for compensation for damage caused by an institution or its servants; art. 236 employment disputes between the Community and its servants.

[46] K. Bradley and A. Sutton, "European Union and the Rule of Law" in *Maastricht and Beyond: Building the European Union, supra* note 1, 229 at 265.

[47] EC Treaty, *supra* note 4, art. 195(1); EO Statute, *supra* note 35, art. 2(1). Covered institutions are the Commission, Council of Ministers, European Parliament, Court of Auditors, and the Court of Justice (and Court of First Instance) except in their judicial role. Covered bodies include the European Investment Bank, Committee of the Regions, Economic and Social Committee, European Central Bank, Europol and many decentralized bodies.

[48] However, a 1998 complaint concerned the refusal of the Registrars of the Courts to give a plain-

The European Ombudsman does not have jurisdiction over complaints against the national or subnational governments of EU member states, whether these relate to purely domestic matters or the application of Community law by the member state. If appropriate, the European Ombudsman refers these complaints to a national ombudsman in a member state.[49] Also, the European Ombudsman does not have the jurisdiction to take complaints made against international organizations or associations, whether based in Europe or elsewhere (e.g. Council of Europe, OSCE).

The European Ombudsman is somewhat different from a national ombudsman model in the extent of its jurisdiction over bodies with a legislative role. The typical national or subnational ombudsman does not have the authority to investigate poor administration in the legislative branch of government. In contrast, the European Ombudsman can investigate maladministration complaints against all the Community institutions which participate in the legislative process – the Commission, the Council and the European Parliament. Although the Community law making process is unique, and the exclusion of three of the five Community institutions from Ombudsman scrutiny would have handicapped the ombudsman mechanism severely, it is still a novel aspect of the European Ombudsman. However, it must be emphasized that the Ombudsman investigates the administrative conduct of these institutions and not their legislative activities.[50]

The jurisdiction of the European Ombudsman was extended in the Treaty of Amsterdam. First, the jurisdiction of the Ombudsman over Community institutions was automatically enlarged by the movement of the third pillar subjects of visas, asylum, immigration and other policies on the free movement of persons into the EC Treaty. Second, the Treaty of Amsterdam amended the Maastricht Treaty to give the Ombudsman express jurisdiction over Community institutions and bodies engaged in third pillar activities concerning police and judicial cooperation in criminal matters.[51]

INDEPENDENCE OF THE EUROPEAN OMBUDSMAN

The independence of an ombudsman is an essential effectiveness factor.[52] The Maastricht Treaty recognizes this, giving the Ombudsman complete independence in the performance of his duties and stating that the Ombudsman shall neither seek nor take instructions from any body.[53] This is supported by other provisions such as those which specify that the European Ombudsman shall be appointed after each election of the Parliament

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tiff access to the files of the action he had initiated. The Presidents of the Courts responded that the Courts act in their judicial role in handling requests for access to case files. The Ombudsman closed the case, either agreeing with or acquiescing in this view, European Ombudsman, *Annual Report for 1998* (1999) at 17-18 [hereinafter *Annual Report 1998*].

49 See *supra* Chapter 5 for discussion of classical and human rights ombudsmen in EU states. The European Ombudsman has also developed a liaison relationship with these national ombudsmen.

50 Söderman, "A Thousand and One Complaints", *supra* note 29 at 353-354.

51 TEU, *supra* note 4, Title VI, art. 41(1).

52 See *infra* Chapter 12.

53 EC Treaty, *supra* note 4, art. 195(3). See also EO Statute, *supra* note 35, art. 9.

for the duration of its term, limit the grounds for dismissal and permit only the Court of Justice at the request of the Parliament to dismiss the Ombudsman.[54]

With the classical legislative ombudsman model, the ombudsman is appointed by the legislature and has jurisdiction over the administrative branch but not over the legislature itself. The European Ombudsman has jurisdiction over the administrative activities of the European Parliament, and it is the Parliament which can initiate dismissal proceedings against him. The Ombudsman has been given a wide field of jurisdiction over maladministration by Community institutions, including most of the law making organs. It would have been almost impossible for the drafters to create a dismissal process that did not involve one of these institutions. Use of a dismissal process which is a combination of Parliament and the Court of Justice, together with the limited grounds on which the Ombudsman can be dismissed, are relatively good guarantees of the effective independence of the office.

Admissibility of Complaints

Unlike some domestic ombudsman schemes, a complainant does not need to be directly affected by the alleged maladministration in order to complain to the European Ombudsman.[55] A complaint does have to be made within two years of the date when the facts on which it is based came to the attention of the complainant and the complainant must first have made the "appropriate administrative approaches" to the target institution/body before the European Ombudsman can take the complaint.[56]

Some complaints made to the European Ombudsman may be justiciable and this right is protected by the provision that a complaint to the Ombudsman "shall not affect time limits for appeals in administrative or judicial proceedings."[57] Thus, a complainant can still take the matter to the Court of Justice or other tribunals as long as this route is taken after the complaint is heard by the Ombudsman and not beforehand.[58] There is a clear barrier erected between the European Ombudsman and the judicial process of the Community. Not only is the office excluded from examining the judicial role of the Courts, it is also prohibited from intervening in cases before the courts and cannot question the soundness of a court ruling.[59]

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[54] EC Treaty, *ibid.*, art. 195(2). "The Ombudsman may be dismissed by the Court of Justice at the request of the European Parliament if he no longer fulfils the conditions required for the performance of his duties or if he is guilty of serious misconduct", *ibid*; EO Statute, *ibid.*, art. 8. The Ombudsman also has a separate budget.

[55] Söderman, "A Thousand and One Complaints", *supra* note 29 at 352.

[56] EO Statute, *supra* note 35, art. 2(4). Likewise, complaints over employment matters made by Community employees cannot be made to the Ombudsman until stipulated internal administrative procedures have been exhausted, *ibid.*, art. 2(8).

[57] *Ibid.*, art. 2(6).

[58] EC Treaty, *supra* note 4, art. 195(1), states that complaints are inadmissible when "the alleged facts are or have been the subject of legal proceedings."

[59] EO Statute, *supra* note 35, art. 1(3).

THE INVESTIGATIVE PROCESS AND REMEDIES AVAILABLE TO THE EUROPEAN OMBUDSMAN

The European Ombudsman can launch an inquiry based on a complaint, or on his own initiative.[60] A complainant can lodge a complaint either directly with the Ombudsman or through a Member of the European Parliament (MEP). If a complaint is admissible, an inquiry into the matter will be conducted and if the institution/body is found to have committed maladministration the Ombudsman has the authority to seek a friendly solution, or make critical remarks or recommendations with the objective of ending the maladministration. Following the classical ombudsman model, the European Ombudsman has no power to make decisions that are binding on the entity concerned. Instead, the power of persuasion must be used, backed by the thoroughness of the investigative findings and the personal authority of the Ombudsman. If the institution/body does not accept a recommendation, the European Ombudsman can make a special report to the European Parliament.[61] The Ombudsman also issues annual reports.

The Ombudsman Statute contains detailed provisions on the inquiry into the alleged maladministration. It provides considerable powers of investigation balanced by administrative fairness for both the complainant and the target institution/body.[62] When a complaint is received, the Ombudsman must initially determine its admissibility. If the complaint is deemed inadmissible, the complainant is informed of the determination and, if relevant, is given information on contacting other entities who may be able to take the complaint.[63] For admissible complaints, a formal inquiry is started by the Ombudsman who informs the Community institution/body concerned and asks it to give a preliminary opinion on the matter.[64] When an opinion is received, a copy is usually given to the complainant who can make comments thereon. Based on the opinion and comments, the Ombudsman decides either to continue with the investigation because there is preliminary evidence of maladministration or close the inquiry because he considers that no further inquiries are required or because the authority has acted to resolve the problem.[65] The European Ombudsman has developed the practice of encouraging the institution/body to try to reach a settlement directly with the complainant.[66]

If there has been no informal resolution and maladministration is found, the Ombudsman tries to find a friendly solution with the institution/body to end the maladministration and satisfy the complainant.[67] The Ombudsman may submit proposals for a friendly settlement to the institution/body, which in practice are often accepted.[68] If a friendly settlement cannot be obtained, the case is either closed with a reasoned decision that may include a critical remark (when there is no feasible manner of correcting the maladministration and the maladministration has no general implications) or the Ombudsman

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60 EC Treaty, *supra* note 4, art. 195(1); EO Statute, *ibid.*, art. 3(1).
61 EC Treaty, *ibid.*, art. 195(1); EO Statute, *ibid.*, art. 3(7), (8).
62 E.g. EO Statute, *ibid.*, art. 3(2)-(4).
63 *Implementing provisions, supra* note 35, art. 3.
64 EO Statute, *supra* note 35, art. 3(1).
65 *Annual Report 1995, supra* note 26 at 14.
66 Söderman, "The Effectiveness of the Ombudsman", *supra* note 44 at 69.
67 *Implementing provisions, supra* note 35, art. 6.
68 Söderman, "The Effectiveness of the Ombudsman", *supra* note 44 at 69.

makes a report with draft recommendations (where the maladministration is capable of correction or the maladministration has general implications).[69] The institution/body is required to respond within three months with a detailed opinion.[70] If the Ombudsman is of the opinion that the entity has not acted appropriately to resolve the matter, the Ombudsman may send a special report which may contain recommendations to the European Parliament, the institution/body and the complainant.[71] In this latter situation, it would be left to Parliament to follow up on the matter. However, most cases are resolved through friendly settlement or closing a case with a critical remark, and special reports are used infrequently.[72] Since 2002, institutions and bodies subject to a critical remark are requested to inform the Ombudsman how they have taken the remarks into account in their operations.[73]

Maladministration and the Law of the European Union

MALADMINISTRATION AND THE EUROPEAN OMBUDSMAN

The origin of the term "maladministration" can be found in the legislation of the United Kingdom Parliamentary Commissioner for Administration where it is expressly used, but not defined.[74] The European Ombudsman can investigate complaints alleging there has been "maladministration". The term was not defined in either the Maastricht Treaty or the EO Statute and was left open for interpretation by the Ombudsman.

Formulating a definition of maladministration acceptable to the European Parliament was an important achievement of the Ombudsman. There were some in the Community institutions who were of the opinion that the Ombudsman should not be able to consider the legality of the conduct in question when deciding whether maladministration had occurred.[75] After an initial definition provided by the Ombudsman, the European Parliament called for a more precise formulation – and in his *1997 Annual Report* the European Ombudsman provided a definition of maladministration as follows: "[m]aladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it."[76] Thus, legality was made the focus of the definition.[77]

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[69] EO Statute, *supra* note 35, art. 3(5), (6); *Annual Report 1995, supra* note 26 at 14; *implementing provisions, supra* note 35, arts. 7-8.

[70] EO Statute, *ibid.*, art. 3(6).

[71] *Ibid.*, art. 3(7); *implementing provisions, supra* note 35, art. 8.4.

[72] See Söderman, "A Thousand and One Complaints", *supra* note 29 at 357; Söderman, "The Effectiveness of the Ombudsman", *supra* note 44. See *infra* note 114.

[73] Speech by the European Ombudsman to the Committee on Petitions concerning the presentation to the European Parliament of his Annual Report for 2002, Brussels (March 24, 2003), <www.euro-ombudsman.eu.int/speeches/>.

[74] *Parliamentary Commissioner Act 1967*, U.K.S., c. 13, s.5(1)(a), "... injustice in consequence of maladministration". No definition was given in order to permit each Parliamentary Commissioner to determine its meaning.

[75] Söderman, Ceremony for the award of the Alexis de Toqueville Prize 2001, *supra* note 32 at 3.

[76] European Ombudsman, *The European Ombudsman Annual Report for 1997* (1998) at 23 [hereinafter *Annual Report 1997*].

[77] *Ibid.* at 24.

The Community law which the institutions/bodies must comply with is composed of the Treaties, Community legislation that is legally binding on the institution/body in question, and the interpretation of Community law made in Court judgements.[78] Court jurisprudence covers both interpretation of specific provisions of Community law and the elaboration of more general principles of law found in the Community legal system. Two areas relevant to European Ombudsman investigations where general principles of Community law have been delineated by the Court are administrative law and human rights law. The Ombudsman has stated that the case law of the Court of Justice is an important source for the applicable law, and the Court's jurisprudence has placed limits on the legal authority of Community institutions/bodies based on administrative law and human rights principles.[79] More recently, the Ombudsman considers that maladministration includes the right to good administration as found in the Charter of Fundamental Rights, discussed further below.[80] Also, the Parliament has asked the Ombudsman to use *The European Code of Good Administrative Behaviour* in determining whether maladministration has occurred.[81] The definition of maladministration also covers matters such as unfairness, lack of courtesy, lack or refusal of information, abuse of power and unnecessary delay.[82]

COMMUNITY ADMINISTRATIVE LAW PRINCIPLES

Principles of Community administrative law are of great importance to the European Ombudsman as many complaints will involve allegations that principles or rules of Community administrative law have been violated by a Community institution/body.[83]

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78 *Annual Report 1995*, *supra* note 26 at 17.

79 *Ibid.* at 26; Söderman, Ceremony for the award of the Alexis de Toqueville Prize 2001, *supra* note 32 at 3.

80 J. Söderman, European Ombudsman, "Transparency as a Fundamental Principle of the European Union", speech delivered at Walter Hallstein Institute, Humboldt University, Berlin (June 19, 2001), <www.euro-ombudsman.eu.int/speeches/> at 3.

81 Speech by the European Ombudsman to the Committee on Petitions concerning the presentation to the European Parliament of his Annual Report for 2002, *supra* note 73.

82 See The European Ombudsman, *What can the European Ombudsman do for you?* (Luxembourg: Office for Official Publications of the European Communities, 2002) at 8; The European Ombudsman, *The European Code of Good Administrative Behaviour* (Luxembourg: Office for Official Publications of the European Communities).

83 On Community administrative law see H.P. Nehl, *Principles of Administrative Procedure in EC Law* (Oxford: Hart Publishing, 1999); T. Tridimas, *The General Principles of EC Law* (Oxford: Oxford University Press, 1999); Hartley, *supra* note 1 at 142-154; J. Schwarze, *European Administrative Law* (London: Sweet and Maxwell, 1992); K. Lenaerts and J. Vanhamme, "Procedural Rights of Private Parties in the Community Administrative Process" (1997) 34 Common Market Law Rev. 531; R. Thomas, "Reason-giving in English and European Community Administrative Law" (1997) 3 European Public Law 213; M.P. Chiti, "Are There Universal Principles of Good Governance?" (1995) 1 European Public Law 241; I. Ward, "Fairness, Effectiveness and Fundamental Rights: The Case for a Unified Administrative Law Within the European Community" (1994) 5 Touro Int'l Law Rev. 279; J. Schwarze, "Tendencies towards a Common Administrative Law in Europe" (1991) 16 European Law Rev. 3.

The Treaties themselves contain relatively little in this regard, although the EC treaty provides some administrative procedures for specific subject areas.[84] The Court of Justice has developed the bulk of Community administrative law as one component of the general principles of law of the Community, based on principles of administrative law found in the member states. These norms have been applied both to Community institutions and to administrative bodies of member states. Principles of Community administrative law that are relevant in European Ombudsman inquiries include: the right to be heard by an administrative body and other due process rights, the duty of administrative bodies to give reasons for their decisions, legal certainty (which is applied *inter alia* through the principle which restricts retroactive application of Community law, the principle that Community measures cannot violate the legitimate expectations of affected persons, and the requirement that rules imposing charges must be clear and precise), proportionality and the rights to formal and substantive equality.[85]

Principles of administrative law can also be classified as procedural human rights, providing guarantees of procedural fairness and administrative justice.[86] Fundamental human rights principles, discussed below, on matters such as the right to freedom from discrimination are also relevant to administrative procedures. In this respect, commentators have noted that the Court of Justice has increasingly integrated administrative law and human rights principles in their decisions.[87] More recently, the EU's Charter of Fundamental Rights, discussed below, also includes a right to good administration.

COMMUNITY HUMAN RIGHTS PRINCIPLES

In the area of human rights, prior to the Maastricht Treaty and the Treaty of Amsterdam, the Court of Justice elaborated Community law on human rights despite the silence of the Community Treaties.[88] The Court developed a jurisprudence that fundamental (human) rights are general principles of Community law. In 1970, in the *Internationale Handelsgesellschaft* case, the Court of Justice decided that:

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[84] E.g. EC Treaty, *supra* note 4, art. 253; Lenaerts and Vanhamme, *ibid.* at 533, 553.

[85] See e.g. EC Treaty, *supra* note 4, art. 5 (proportionality obligation); *The European Code of Good Administrative Behaviour, supra* note 82; Nehl, *supra* note 83 at 70-99; Hartley, *supra* note 1 at 142-147; Lenaerts and Vanhamme, *ibid.* 83 at 533-551; Tridimas, *supra* note 83 at 40-88, 89-123, 163-201, 244-275. For substantive equality, i.e. law must not be discriminatory see *infra* text accompanying notes 91 to 95.

[86] See e.g. A.W. Bradley, "Administrative Justice: A Developing Human Right?" (1995) 1 European Public Law 347.

[87] Ward, *supra* note 83 at 311-312; Schwarze, "Tendencies towards a Common Administrative Law in Europe", *supra* note 83 at 17.

[88] See e.g. K. Lenaerts, "Respect for Fundamental Rights as a Constitutional Principle of the European Union" (2000) 6 Columbia J. European Law 1; P. Alston, ed., *The EU and Human Rights* (Oxford: Oxford University Press, 1999); N.A. Neuwahl and A. Rosas, eds., *The European Union and Human Rights* (The Hague: Martinus Nijhoff Pub., 1995); B. de Witte, "The Past and Future Role of the European Court of Justice in the Protection of Human Rights" in *The EU and Human Rights, ibid.* at 859; P. Alston and J.H.H. Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy" (1998) 9 European J. Int'l Law 658; J.H.H. Weiler and N.J.S. Lockhart, "Taking Rights Seriously:

> respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.[89]

In the 1974 *Nold* case, the Court stated that in safeguarding these fundamental rights:

> the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.
>
> Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.[90]

In subsequent decisions, the Court of Justice recognized various fundamental rights as comprising part of Community law, looking mainly to the European Convention for the Protection of Human Rights and Freedoms and its Protocols (European Convention on Human Rights), but also referring to other European and UN human rights treaties.[91] The fundamental human rights recognized by the Court as falling within the general principles of Community law are binding on the Community institutions and bodies.

Human rights were expressly enshrined as general principles of Community law in the Maastricht Treaty, and enlarged by the Treaty of Amsterdam, in Article 6(1) and (2), as follows:

The European Court and its Fundamental Rights Jurisprudence", Parts I & II (1995) 32 Common Mkt. Law Rev. 51, 579; G. Gaja, "The Protection of Human Rights Under the Maastricht Treaty" in D. Curtin and T. Heukels, eds., *Institutional Dynamics of European Integration (Essays in Honour of Henry G. Schermers)* (Dordrecht: Martinus Nijhoff Pub., 1994), vol. II at 549; K. St. Clair Bradley, "Fundamental Rights and the European Union: a Selective Overview" (1994) 21 Polish Yrbk. Int'l Law 187.

89 Case11/70, *Internationale Handelsgesellschaft mbH* v. *Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1970] E.C.R. 1125 at 1134. See also Case 29/69, *Stauder* v. *City of Ulm* [1969] E.C.R. 419 at 425.

90 Case 4/73, *J. Nold* v. *Commission of the European Communities* [1974] E.C.R. 491 at 507.

91 European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, <www.coe.int>. See e.g. Case 29/69, *Stauder* v. *City of Ulm, supra* note 89; Case 175/73, *Union Syndicale Massa and Kortner* v. *Council* [1974] E.C.R. 917; Case 36/75, *Rutili* v. *Minister for the Interior* [1975] E.C.R. 1219; Case 130/75, *Prais* v. *Council* [1976] E.C.R. 1589; Case 149/77, *Defrenne no. 3* v. *Sabena* [1978] E.C.R. 1365; Case 44/79, *Hauer* v. *Land Rheinland-Pfaltz* [1979] E.C.R.3727; Case 154/78, *Valsabbia* v. *Commission* [1980] E.C.R. 907; Case 136/79, *National Panasonic* v. *Commission* [1980] E.C.R. 2033; Cases 100-3/80, *Musique Diffusion Française* v. *Commission* [1983] E.C.R. 1825; Cases 46/87 and 227/88, *Hoechst* v. *Commission* [1989] E.C.R. 2859; Case 85/87, *Dow Benelux* v. *Commission* [1989] E.C.R. 3137; Cases 97-9/87, *Dow Chemical Ibérica* v. *Commission* [1989] E.C.R. 3165; Case C-100/88, *Oyowe and Traore* v. *Commission* [1989] E.C.R. 4285; Case 260/89, *Elliniki Radiophonia Tileorassi AE* v. *Dimotiki Etairia Pliroforissis* [1991] E.C.R. I-2925; Case C-404/92 P, *X.* v. *Commission* [1994] E.C.R. I-4737 at 4789; Case 347/87, *Orkem* v. *Commission* [1989] E.C.R. 3283; Cases C-297/88 and C-197/89, *Dzodzi* [1990] I-E.C.R. 3763; Case T-10/93, *A.* v. *Commission* [1994] E.C.R. II-179; Case C-76/93 P, *Scaramuza* v. *Commission* [1994] E.C.R. I-5173; Case T-203/95 R, *Connolly* v. *Commission* [1995] E.C.R. II-2919; Case C-415/93, *Union Royale Belge des Sociétés de Football Association and Others* v. *Jean-Marc Bosman and Others* [1995] E.C.R. I-4921.

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . and as they result from the constitutional traditions common to the Member States, as general principles of Community law.[92]

The rights in Article 6(2) cover all European Convention rights, not just those recognized by the Court of Justice prior to the Maastricht Treaty. The Treaty of Amsterdam also gave the Court of Justice the power to determine whether the action of Community institutions conforms with Article 6(2).[93] In addition, Article 3(2) of the EC Treaty aims to eliminate inequalities and promotes gender equality in Community activities, Article 12 prohibits discrimination on the grounds of nationality in Community matters and Article 13(1) permits appropriate action to be taken to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".[94]

In December 2000, a Charter of Fundamental Rights of the European Union was solemnly proclaimed by the European Council.[95] The Charter contains a broad range of political, civil, social, economic and cultural rights, plus several more contemporary norms. Article 41 of the Charter contains a right to good administration, including extensive procedural fairness rights and Article 42 provides for a right of access to documents of the Council, Commission and Parliament.[96] The right to good administration

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92 TEU, *supra* note 4, Title I, art. 6(1)-(2). See *Draft Treaty Establishing a Constitution for Europe, supra* note 7, arts. 2, 7(3).

93 TEU, *ibid.*, art. 46(d). See M. Colvin and P. Noorlander, "Human Rights and Accountability after the Treaty of Amsterdam" [1998] E.H.R.L.R. 191.

94 EC Treaty, *supra* note 4. In art. 13, the Council must act unanimously on a proposal from the Commission and after consulting the Parliament. Art. 141(1) requires member states to ensure no gender discrimination with respect to pay, EC Treaty, *ibid.* See *Draft Treaty Establishing a Constitution for Europe, supra* note 7, arts. 4(2), III-2-III-3, III-7-III-8.

95 Charter of Fundamental Rights of the European Union, O.J. C 364/01 (Dec. 7, 2000), (2001) 40 Int'l Legal Mat. 266 [hereinafter Charter of Fundamental Rights]. See e.g. G. Sacerdoti, 'The European Charter of Fundamental Rights: From a Nation-State to a Citizens' Europe" (2002) 8 Columbia J. European Law 37; R.W. Davis, "Citizenship of the Union . . . rights for all?" (2002) 27 European Law Rev. 121; F.G. Jacobs, "The EU Charter of Fundamental Rights" in A. Arnull and D. Wincott, eds., *Accountability and Legitimacy in the European Union* (Oxford: Oxford University Press, 2002) 275.

96 Charter of Fundamental Rights, *ibid.*, art. 41 states that:

"1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes:
   - the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
   - the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
   - the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

in Article 41 is the first example of such a right being included in an international human rights instrument.[97] Article 43 enshrines a right to complain to the ombudsman.[98] Article 41 of the Charter will be an important resource for the European Ombudsman. Pursuant to Article 51, the Charter applies to "the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law."[99]

Currently, Charter rights are soft law as the Charter is not a treaty or other form of legally binding instrument.[100] Yet it is already being referred to in decisions of the Court of First Instance, by advocates-general in Court proceedings, and by the European Court of Human Rights.[101] Further, as discussed in more detail below, the European Ombudsman is using the Charter as a source of obligation for Community institutions/bodies in cases involving human rights. Also, the Charter is included as Part II of the draft Constitution and called "The Charter of Fundamental Rights of the Union".[102] If the draft Constitution is enacted in this form, Charter rights will become legally binding treaty law of the Union applicable as such by the European Ombudsman. The draft includes the protection of human rights as one of the objectives of the Union.[103] Also, although in slightly different language, the draft Constitution includes the human rights provisions already contained in the current treaties.[104]

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4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language."

See *Draft Treaty Establishing a Constitution for Europe, supra* note 7, arts. II-41-II-42.

97 J. Söderman, European Ombudsman, "The Convention, the Charter and the Remedies", speech delivered at EPC Dialogue: The Convention and the Charter of Fundamental Rights, The European Policy Centre, Brussels (Feb. 25, 2003), <www.euro-ombudsman.eu.int/speeches/> at 2.

98 Charter of Fundamental Rights, *supra* note 95, art. 43 states that:

"Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role."

See *Draft Treaty Establishing a Constitution for Europe, supra* note 7, art. II-43.

99 Charter of Fundamental Rights, *ibid.* See *Draft Treaty Establishing a Constitution for Europe, ibid.*, art. II-51.

100 Sacerdoti, *supra* note 95 at 49-50.

101 *Ibid.*; Söderman, "The Convention, the Charter and the Remedies", *supra* note 97 at 2; Davis, *supra* note 95 at 127-128. See e.g. Case T-54/99, *max.mobil Telekommunikation Service GmbH* v. *Commission* [2002] E.C.R. II-00313, paras. 48, 57; Case T-177/01, *Jégo-Quéré et Cie SA* v. *Commission* [2002] E.C.R. II-02365, paras. 42, 47; Case T-211/02, *Tideland Signal Limited* v. *Commission*, Judgment of Sept. 27, 2002, para. 37; Joined Cases T-377/00, T-379/00, T-380/00, T-260/01, T-272/01, *Philip Morris International, Inc. et al.* v. *Commission*, Judgment of Jan. 15, 2003, para. 122; *Goodwin* v. *United Kingdom*, Judgment of July 11, 2002, para. 100 (E.C.H.R.); *I.* v. *United Kingdom*, Judgment of July 11, 2002, para. 80 (E.C.H.R.).

102 *Draft Treaty Establishing a Constitution for Europe, supra* note 7, Part II. See *supra* notes 96, 98-99. Art. 7(1), *ibid.*, states that "The Union shall recognize the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II of the Constitution."

103 *Ibid.*, art. 3(4).

104 *Supra* note 94. The Draft Treaty also states that the Union shall seek to accede to the European Convention, *ibid.*, art. 7(2).

The European Ombudsman Under a New EU Constitution

While the final contours of the European Ombudsman under the proposed EU Constitution are not completely clear given the possibility of amendments to the draft Constitution, it does appear that the Ombudsman will be maintained in its present form but with an even closer relationship to the human rights component of the Constitution.[105] Article 48 of the draft Treaty on a new Constitution states:

> A European Ombudsman appointed by the European Parliament shall receive, investigate and report on complaints about maladministration within the Union Institutions, bodies or agencies. The European Ombudsman shall be completely independent in the performance of his or her duties.[106]

More detailed provisions on the appointment of the Ombudsman and on the Ombudsman's procedure are also contained in the draft, which essentially replicate existing law.[107] As discussed above, the Charter of Fundamental Rights is included in the draft Constitution and, accordingly, the right to complain to the Ombudsman is enshrined as one of the constitutional human rights of the Union.[108]

The European Ombudsman: Human Rights Protection as a Component of Maladministration

OVERVIEW

By the end of 2002, over more than seven years of operation, the European Ombudsman had received more than 11,000 complaints, with the most common issues being late payment, contractual disputes, discrimination and lack of information.[109] Also, many complaints have concerned lack of transparency in Community institutional procedures, covering primarily access to documents, recruitment competitions for Community personnel and the Commission's role in processing complaints from individuals that a member states has not applied Community law correctly.[110]

The Ombudsman continues to receive a high proportion of inadmissible complaints, many of which involve complaints against the administrations in EU member states about

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105 *Ibid.*

106 *Ibid.*, art. 48.

107 *Ibid.*, art. III-237.

108 *Ibid.*, art. II-43, with the same wording as art. 43 of the Charter of Fundamental Rights of the European Union, *supra* note 98, except for minor changes to account for the new structure of the proposed Union.

109 The European Ombudsman, *Annual Report 2002* (2003) at 11; *What can the European Ombudsman do for you?, supra* note 82 at 11.

110 Söderman, "Transparency as a Fundamental Principle of the European Union", *supra* note 80 at 3-15. On transparency and the ombudsman see *supra* Chapter 3. See also P. Kunzlik, "The Enforcement of EU Environmental Law: Article 169, the Ombudsman and the Parliament" (Feb. 1997) European Env. Rev. 46.

the application of Community law at the domestic level.[111] The Commission is the target of most complaints, which is not unexpected given it is the institution with the greatest administrative impact on the lives of Union citizens.[112] In 1995-2002, the Ombudsman had conducted almost 1,500 investigations, including nineteen own-initiative inquiries, and a critical remark had been made in over 200 cases.[113] By mid-2003, the European Ombudsman had submitted eight special reports to the European Parliament, including a report in 2000 following his own-initiative inquiry into the existence of and public accessibility of a code of good administrative behaviour in Community institutions/bodies, a 1999 report following an own-initiative inquiry on secrecy in the recruitment procedures of the Commission, and a 1997 report following an own-initiative inquiry into public access to documents.[114] Following the special report on a code of conduct, the European Parliament approved *The European Code of Good Administrative Behaviour* on September 6, 2001.[115] The European Ombudsman has indicated that "[i]n only a handful of cases have the institutions rejected what the Ombudsman proposed."[116]

CASES INVOLVING HUMAN RIGHTS

Overview

As discussed above, the definition of maladministration used by the European Ombudsman focuses on legality. As human rights protection as a component of EU law has expanded, the European Ombudsman has increasingly looked at human rights protection as part of the mandate of the institution. Even in 1995, the European Ombudsman stated that Community institutions/bodies must respect the fundamental rights contained in Article 6(2) of the Maastricht Treaty.[117] More recently, the Ombudsman has stated that a violation of the rights in the Charter of Fundamental Rights constitutes maladministration.[118] After the proclamation of the Charter, the Ombudsman "has been active in ensuring that the charter is taken seriously by the institutions that proclaimed it" and "he applies pressure so that the institutions prove in practice that they respect the charter

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111 Over 7 years, about 70% of total complaints were outside the Ombudsman's mandate, *Annual Report 2002, supra* note 109 at 11.

112 E.g. in 2002, 75% of admissible complaints concerned the Commission and in 2001 77% targeted the Commission, *Annual Report 2002, ibid.* at 263; The European Ombudsman, *Annual Report 2001* (2002) at 271.

113 *Annual Report 2002, ibid.* at 11-12.

114 See <www.euro-ombudsman.eu.int/special/en/default.htm>. The own-initiative inquiry looked at 15 Community institutions and bodies and the Ombudsman made recommendations to 14 of them that they should adopt rules on public access to their documents.

115 *The European Code of Good Administrative Behaviour, supra* note 82.

116 *Annual Report 2002, supra* note 109 at 12.

117 *Annual Report 1995, supra* note 26 at 17; *supra* note 92.

118 J. Söderman, "El Defensor del Pueblo Europeo y la Defensa de los Derechos Humanos", paper presented at the Political and Constitutional Studies Centre, Madrid (Oct. 8, 2001).

in their daily work."[119] The European Ombudsman considers the safeguarding of fundamental human rights to be an essential area of operations.[120]

Complaints of maladministration comprising a breach of Community human rights law by Community institutions/bodies are within the jurisdiction of the European Ombudsman. Human rights complaints against the governments of EU member states are outside the jurisdiction of the European Ombudsman and must be referred to domestic institutions such as the courts, ombudsmen or other national human rights institutions.

The European Ombudsman can be seen as a classical ombudsman at the supranational level of governance who uses the human rights norms that are part of the applicable legal system and applies them in human-rights related cases. Discrimination is one of the most frequent causes of complaint, although a number of cases deal with nationality, language, employment and professional accreditation matters, in addition to the gender, age and other discrimination cases discussed below.[121] The major human rights cases that have arisen typically involve Community staff or applicants for employment with the Community.

Major Human Rights Cases

a) Age Discrimination

In reaction to a number of complaints, the Ombudsman started an own-initiative inquiry in 1997 on the matter of maximum age limits excluding individuals from employment with Community institutions.[122] At the time, all Community institutions applied various age limits without a common justification.[123] Based on Community and European Convention human rights principles, the Ombudsman argued that the practice could constitute age discrimination.[124] The Commission decided, on policy principle, to end the use of age limits in recruiting and the Ombudsman ended the inquiry, calling for an inter-institutional agreement on the issue.[125]

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119 *What can the European Ombudsman do for you?, supra* note 82 at 11.

120 *Ibid.*; Söderman, "El Defensor del Pueblo Europeo y la Defensa de los Derechos Humanos", *supra* note 118.

121 E.g. *What can the European Ombudsman do for you?, supra* note 82 at 11; *Annual Report 2002, supra* note 109 at 59; *Annual Report 2001, supra* note 112 at 181; The European Ombudsman, *Annual Report 2000* (2001) at 172, 185; The European Ombudsman, *Annual Report for 1999* (2000) at 113; *Annual Report 1998, supra* note 48 at 109, 135, 244; *Annual Report 1997, supra* note 76 at 175.

122 *Annual Report 1997, ibid.* at 40; *Annual Report 1998, ibid.* at 259. See also Gregory and Giddings, "Citizenship, Rights and the EU Ombudsman", *supra* note 32 at 85.

123 *Annual Report 1998, ibid.* at 264, 267.

124 Art. 6(2) of the Maastricht Treaty, art. 13 of the then draft Treaty of Amsterdam, art. 14 of the European Convention on Human Rights, art. 2 of the International Covenant on Civil and Political Rights, and European Court of Justice and European Court of Human Rights case law, *Annual Report 1998, ibid.* at 262-264, 267.

125 *Annual Report 1998, ibid.* at 268.

In 2001, another own-initiative inquiry was launched by the Ombudsman into continuing age discrimination in hiring practices, initially looking at all Community institutions, bodies and agencies, and ultimately narrowing the inquiry to four entities.[126] In contrast to the 1997 inquiry, by this point the Ombudsman could use the Charter of Fundamental Rights and took the position that failure by the institutions/bodies to respect Charter rights would amount to maladministration.[127] Specifically, Charter Articles 15 (right to engage in work and pursue freely chosen occupation) and 21 (prohibition of age discrimination), the European Convention on Human Rights, and decisions of the European Court of Human Rights and European Court of Justice were relied on by the Ombudsman.[128] On the basis of the relevant legal principles the Ombudsman concluded that unless an objective justification could be provided for the practice of age limits in hiring, "their use would constitute a discriminatory limitation of the citizen's right to work."[129] It was expected that the remaining age limits would be abolished on an inter-institutional basis under a new European Recruitment Office, resulting in the termination of the inquiry, although the Ombudsman stated he would continue to investigate individual complaints of age discrimination.[130]

b) Gender Discrimination

In 2000, the Ombudsman investigated the complaint of a British civil servant – a woman raising a young child who had applied for secondment as a national expert with the Commission and who wished to work part-time.[131] She complained about a Commission rule that required her to work on a full-time basis, and she argued that this was discrimination against women on the basis that the prohibition against part-time work disadvantaged women to a greater degree compared to men because child care duties were more likely to be carried out by women.[132] The Ombudsman investigation culminated in a special report to Parliament.[133] The Ombudsman found that the Commission had engaged in sex discrimination constituting maladministration, finding that a ban on part-time

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126 OI/2/2001/(BB)OV, *Annual Report 2002, supra* note 109 at 207. The institutions using an age limit of 45 years were the Court of Justice (and Court of First Instance), Council, Court of Auditors and Economic and Social Committee. The Parliament and Commission formally ended the use of age limits in 2002. See Söderman, "El Defensor del Pueblo Europeo y la Defensa de los Derechos Humanos", *supra* note 118; The European Ombudsman, "Commission and Parliament End Age Discrimination in Recruitment", *Press Release No. 12/2002* (May 18, 2002).

127 *Annual Report 2002, ibid.* at 208.

128 *Ibid.* at 208, 213; Söderman, "El Defensor del Pueblo Europeo y la Defensa de los Derechos Humanos", *supra* note 118.

129 *Annual Report 2002, ibid.*

130 *Ibid.* at 213-214.

131 Complaint 242/2000/GG; *Annual Report 2001, supra* note 112 at 224.

132 *What can the European Ombudsman do for you?, supra* note 82 at 12; Söderman, "El Defensor del Pueblo Europeo y la Defensa de los Derechos Humanos", *supra* note 118.

133 Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the European Commission in Complaint 242/2000/GG (Nov. 15, 2001), <www.euro.ombudsman.eu.int>, "Special Reports"[hereinafter Special Report, Complaint 242/2000/GG].

work negatively affected a higher percentage of women and that the Commission had not provided objective reasons to justify the discriminatory practice.[134] The Ombudsman relied on decisions of the European Court of Justice and Article 21 of the Charter of Fundamental Rights which prohibits discrimination on grounds including sex.[135] The Ombudsman recommended that the Commission abolish the practice and called on the Parliament to consider adopting the recommendation as a resolution.[136] In response, the Commission terminated the full-time rule in April 2002.[137]

c) Racial and Ethnic Minority Discrimination

In 2001, the Ombudsman received a complaint about possible racism in Community recruitment procedures.[138] A Dutch citizen complained that although more than thirty million EU citizens or residents are members of ethnic minorities few are employed by the Community, resulting in an under-representation of ethnic minorities among Community personnel.[139] Relevant provisions of the Charter of Fundamental Rights are Articles 15 (right to choose an occupation and to engage in work) and 21 (prohibition of discrimination on grounds including race, colour or ethnic origin).[140] Further, Community guidelines and a Council Directive to member states showed that steps had been made to combat discrimination on the basis of ethnic minority status and race at both the supranational and domestic levels.[141]

The Ombudsman was critical of the Commission's response, and asked it to consider obtaining statistics on members of ethnic minorities in the Community recruitment process.[142] Later in 2002, the Commission stated it was preparing an action plan to promote equal opportunities including positive measures to promote job applications from members of ethnic minorities.[143]

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134 Söderman, "El Defensor del Pueblo Europeo y la Defensa de los Derechos Humanos", *supra* note 118; Special Report, Complaint 242/2000/GG, *ibid.* at 5-7.

135 Charter of Fundamental Rights, *supra* note 95, art. 21(1); Special Report, Complaint 242/2000/GG, *ibid.* at 6-7.

136 Special Report, Complaint 242/2000/GG, *ibid.* at 8.

137 *Annual Report 2002, supra* note 109 at 194-195. On Dec. 17, 2002, Parliament passed a resolution endorsing the Ombudsman's special report and welcoming the abolition of the rule, *ibid.*

138 Complaint 777/2001/IJH. See also a complaint alleging racial discrimination in the rejection of the complainant's application for a position in a doctoral program at the European University Institute (EUI), in which the Ombudsman did not exclude the conclusion that the EUI was a Community body but found no maladministration, *Annual Report 2000, supra* note 121 at 99.

139 Söderman, "El Defensor del Pueblo Europeo y la Defensa de los Derechos Humanos", *supra* note 118.

140 *Ibid.*

141 EC Employment Guidelines 2000; Council Directive, 2000/43/EC, O.J. L 180/22 (June 29, 2000); The European Ombudsman, "Ombudsman Criticizes Commission's Passive Attitude Towards Possible Racism in Recruitment", *Press Release No. 4/2002* (Feb. 20, 2002).

142 *Press Release No. 4/2002, ibid.*

143 The European Ombudsman, "Ombudsman Accepts Commission Proposals to Promote Equal Opportunities", *Press Release No. 15/2002* (June 25, 2002); Söderman, "The Convention, the Charter and the Remedies", *supra* note 97.

d) Freedom of Expression

Several complaints and own initiative inquiries have concerned the parameters of the right to freedom of expression of Community personnel in the light of staff regulations requiring the Community's authorization before a staff member can make public statements or issue written publications concerning the work of the Community.

In 1996, a Swedish citizen complained to the Ombudsman about a letter written by a Commission official to a staff member reminding the latter of his employment duty not to make any public statements that could reflect on his work position after the staff member was critical of the Commission in a newspaper publication.[144] The Commission's response was that no disciplinary action had been taken.[145] The Ombudsman cited provisions in the Maastricht Treaty, Article 10 of the European Convention on Human Rights and decisions of the European Court of Justice and European Court of Human Rights on freedom of expression, concluding that duties in the staff regulations could not be interpreted in a manner that conflicts with freedom of expression.[146] Ultimately, however, since there was no disciplinary action involved, the Ombudsman found that there was no interference with freedom of expression, no intent not to balance freedom of expression with the duties of officials and, consequently, no maladministration.[147] However, the Ombudsman's decision included further remarks, suggesting that the Commission could provide more specific guidance to its staff on a fair balance between their individual rights to freedom of expression and their staff duties, and that this could also satisfy Article 10(2) of the European Convention on Human Rights which permits restrictions on freedom of expression that are "prescribed by law" and necessary for listed reasons.[148]

In 1999, another complaint was made by a Community official who was reprimanded and transferred to another job after he passed internal Commission documents to the European Parliament and published a book on his work with the Commission.[149] The Ombudsman found that there was no maladministration involved based on Court of Justice case law and the conduct of both the official and the Commission.[150] However, the Ombudsman again made further remarks about the slowness of the Commission in issuing guidelines for staff, citing the right to freedom of expression of Community officials based on European Court of Human Rights and Court of Justice jurisprudence, and indicating that the recent proclamation of the Charter of Fundamental Rights could lead to the commencement of an own-initiative inquiry.[151]

The own-initiative inquiry was launched in 2001.[152] The inquiry focussed on the proper balance that should be reached between freedom of expression and staff members' duties

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144 Complaint 794/5.8.1996/EAW/SW/VK, *Annual Report 1997, supra* note 76 at 129.
145 *Annual Report 1997, ibid.* at 130.
146 *Ibid.* at 131-132.
147 *Ibid.* at 132.
148 *Ibid.* at 133; European Convention on Human Rights, *supra* note 91.
149 Complaint 1219/99/ME, *Annual Report 2000, supra* note 121 at 90.
150 *Ibid.* at 91-93.
151 *Ibid.* at 94.
152 OI/1/2001/GG, *Annual Report 2002, supra* note 109 at 196.

to their employer.[153] The Ombudsman noted that no criteria for the interpretation of these rules existed.[154] The Ombudsman cited Article 11 of the Charter of Fundamental Rights, Article 10(1) of the European Convention on Human Rights and the jurisprudence on freedom of expression.[155] The Ombudsman ended the inquiry after the Commission proposed the publication of an administrative guide for staff and agreed to modify, although not abolish, the staff rules requiring prior authorization for public statements.[156] In mid-2002, the Ombudsman called for the abolition of these staff rules on the grounds that this would promote openness and demonstrate respect for Charter rights.[157]

e) Right to Parental Leave

In 2001, the Ombudsman commenced an own-initiative inquiry into potential inadequacies of the Commission's parental leave policies for its staff.[158] The Ombudsman noted the existence of a 1996 Council Directive on parental leave following the birth or adoption of a child which all EU member states appeared to have implemented domestically and Article 33(2) of the Charter of Fundamental Rights, applicable to Community institutions/bodies, which seeks to reconcile family and professional life, and recognizes a right to parental leave for both parents.[159] The Ombudsman called on the Commission to establish rules to guarantee the right to parental leave for Community officials and staff based on respect for Community law.[160] The Commission stated that it had begun the process of reforming its parental leave rules in conformity with the Charter and the Directive and, in response, the Ombudsman ended his inquiry, stating that the matter would be monitored by his office.[161]

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153 *Ibid.* at 198, 200.

154 Söderman, "El Defensor del Pueblo Europeo y la Defensa de los Derechos Humanos", *supra* note 118.

155 *Annual Report 2002, supra* note 109 at 196-197, 200; *What can the European Ombudsman do for you?, supra* note 82 at 12.

156 *Annual Report 2002, ibid.* at 200-201; The European Ombudsman, "European Ombudsman Will Continue to Monitor Commission on Freedom of Expression", *Press Release No. 3/2002* (Jan. 28, 2002).

157 The European Ombudsman, "Ombudsman Says It's Time for the European Administration to Open Up and Trust Its Staff", *Press Release No. 19/2002* (July 15, 2002).

158 *Annual Report 2002, supra* note 109 at 201, 203.

159 *Ibid.*; Council Directive 96/34/EC, O.J. L 145/4 (June 3, 1996); Charter of Fundamental Rights, *supra* note 95, art. 33(2) states:

> "To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child."

160 *Annual Report 2002, ibid.* at 202-203.

161 *Ibid.* at 204.

The European Ombudsman: Horizontal and External Accountability, Improving Good Governance and Protecting Human Rights at the Supranational Level

The creation of the European Ombudsman was a response to the concerns that Community institutions are non-democratic, bureaucratic, opaque and remote from EU citizens.[162] The European Ombudsman is a form of classical ombudsman created by the supranational EU to improve the accountability of Community institutions/bodies to members of the public and Community staff. The use of the Ombudsman enables EU citizens and residents to lodge complaints about Community maladministration and have their complaints investigated impartially. If upheld, recommendations for changes in law and policy can be made. The European Ombudsman is one development in the evolving "democratization" of the Union and, ultimately, it is hoped that the Ombudsman will enhance the legitimacy of Community and EU institutions.[163] The European Ombudsman provides a mechanism that builds both the external and internal accountability of the EU, used by EU citizens and residents and Community staff who are subject to maladministration by Community institutions/bodies. The Ombudsman can also be conceptualized as a form of horizontal accountability, whereby the EU itself has established an entity to monitor and provide feedback on the quality of its administration.[164] Since the European Ombudsman is a classical ombudsman it can be considered to have "answerability accountability".[165] The European Ombudsman also helps to improve administrative justice and good governance of the Community institutions and bodies by increasing their transparency and accountability.

The European Ombudsman can also be classified as a non-judicial mechanism for the enforcement of Community human rights law. The Ombudsman has proactively used the EU's Charter of Fundamental Rights, other sources of Community human rights law, and other international human rights norms as sources of obligation for Community institutions and bodies. The European Ombudsman is another example of a classical ombudsman who can and does use human rights norms in the resolution of some cases.

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[162] See e.g. E. Stein, "International Integration and Democracy: No Love at First Sight" (2001) 95 American J. Int'l Law 489 at 515-530.

[163] See R. Koslowski, "EU Citizenship: Implications for Identity and Legitimacy" in T. Barchoff and M.P. Smith, eds., *Legitimacy and the European Union* (London: Routledge, 1999) at 155; Gregory, "The European Union Ombudsman", *supra* note 32 at 156-157.

[164] For discussion on horizontal accountability mechanisms and the ombudsman see *supra* Chapter 3.

[165] See *supra* Chapter 3. See also Gjerloeff Bonnor, *supra* note 32.

CHAPTER TWELVE

Conclusion

The Reality of the Contemporary Ombudsman

The number of classical and hybrid ombudsmen in the world has increased substantially over the past twenty-five years. A hallmark of this development is the large number of hybrid and multiple mandate ombudsmen which have been established, especially in Europe, Latin America and parts of Africa, Asia and the Pacific region. These hybrid ombudsmen are mainly human rights ombudsmen, although a number have anti-corruption, leadership code enforcement, good governance and/or environmental protection functions. Even classical ombudsmen are being given extra duties, whether it be freedom of information monitoring, health services ombudsman work or child abuse protection responsibilities. As Chapter 3 has illustrated, public sector ombudsmen in all their variations can be used as mechanisms to build good governance, and the international community and states are beginning to recognize this feature of the ombudsman mechanism.

The exploration in Chapters 4 to 8 of the approximately 110 national classical and hybrid ombudsmen in operation throughout the world by early 2004 indicates that about sixty percent of them are hybrid ombudsmen. Most of these hybrids have human rights protection mandates – comprising about fifty percent of all national ombudsmen. Also, there are more human rights ombudsmen at sub-national levels of government and single-sector human rights ombudsmen at all levels of government. This book has further sought to demonstrate that some classical ombudsmen (and hybrid ombudsmen without an express human rights mandate) can and do address human rights matters in their activities. Examples provided are the ombudsmen in Norway, Denmark, Iceland, the Netherlands, France, Antigua and Barbuda, Saint Lucia, the Canadian provinces of British Columbia, Quebec and Saskatchewan, South Africa, New Zealand, Hong Kong (China) and Taiwan. Even the EU's European Ombudsman, which is moulded on the classical ombudsman concept, deals with some human rights cases.

The reality of contemporary ombudsman work is that human rights protection and promotion is an express function for many and is a part of the work of a number of classical ombudsmen based on their functions of monitoring legality and fairness in public administration. As a result, the perception of the ombudsman as being purely a monitor of administrative justice is inaccurate when the legal structure and work of classical,

human rights and other hybrid ombudsmen are examined more closely. However, there are still areas of the world where there are not many ombudsman institutions, often due to the economic resources of the state and/or the lack of or shallowness of democratic governance. Thus, compared to other regions, fewer ombudsman institutions are found in the Middle East, and in parts of Asia, the Pacific and the Caribbean.

The large number of hybrid ombudsmen and the human rights work of some classical ombudsmen have implications for those who work with or come into contact with ombudsman institutions. The needs and interests of a substantial number of ombudsmen in matters such as training, education and support relate not just to classical ombudsman functions but also extend to the other functions of hybrid institutions, such as human rights protection and promotion. As Chapters 4 to 8 have indicated, the international human rights community has begun to recognize that classical and human rights ombudsmen fall within the definition of national human rights institutions. However, as discussed in Chapter 4, the Paris Principles – containing the core international standards for national human rights institutions – were drafted based on the human rights commission as the paradigm institution. Also, although the Paris Principles contain the important standards required for an effective national human rights institution (albeit based on a commission format), arguably the Paris Principles are lacking because the investigation of public complaints is not considered to be a mandatory function of national human rights institutions. The material number of human rights ombudsmen, classical ombudsmen with human rights work and the various single-sector human rights ombudsmen should be increasingly recognized for the roles that they play in the protection and promotion of human rights at the domestic level, including complaints investigation and the implementation of international human rights norms.

Illustrated in Chapters 4, 5, 6 and 10, there is also a growing relationship between ombudsmen and international human rights mechanisms, especially the UN human rights system and its High Commissioner for Human Rights, the Inter-American human rights system, and the Council of Europe human rights system and its Commissioner for Human Rights. For example, the UN human rights treaty bodies are increasingly referring to ombudsmen and other national human rights institutions in their Concluding Observations on periodic state reports and in their General Comments. Classical and human rights ombudsmen in European Convention states are applying European Convention provisions and other relevant international human rights documents in their investigations based on the criteria outlined in Chapter 4. The Council of Europe's Commissioner for Human Rights promotes the ombudsman institution and has developed strong relationships with national ombudsmen in member states. In addition, the EU's European Ombudsman is applying European Union human rights provisions (including the EU Charter of Fundamental Rights), European Convention provisions and decisions of the European Court of Human Rights in maladministration cases that involve human rights issues. In the Inter-American human rights system, national human rights ombudsmen have petitioned the Inter-American Commission of Human Rights to further complainants' cases at the international level. Human rights ombudsmen have also presented *amicus curiae* briefs before the Commission and Inter-American Court of Human Rights, and the Inter-American Court has begun to use testimony and written reports of

human rights ombudsmen in some proceedings and judgments. The various functions of ombudsmen in Latin America and some of those in the Caribbean lead to the domestic application of international and regional human rights norms in their work.

As discussed in Chapters 1 and 4, numerous human rights ombudsmen and other hybrid ombudsmen have been established for a variety of economic, political, and other reasons. For example, it is argued that there are efficiencies involved in establishing a hybrid ombudsman and simplicities of access for complainants. However, while there may be many advantages to a hybrid ombudsman, the adaptations of the ombudsman must be scrutinized carefully. It can be argued that giving two or more mandates to an ombudsman is not a good strategy because a hybrid ombudsman institution may not be able to address all its functions equally well. The question should be asked in each case whether a hybrid institution has been given sufficient legal, financial and/or political support by the government given the number of mandates involved. Examples of hybrid ombudsmen with insufficient resources and support can be found in some of the case studies addressed in this book. For example, human rights ombudsmen in some Latin American states have suffered from insufficient financial resources, political resentment or marginalization, and even physical threats. Ombudsmen of all varieties in Africa are provided with inadequate financial and human resources to accomplish their tasks properly and most are executive appointments. It can also be argued that separate structures should be established for functions that are qualitatively different or which require different levels of enforcement. Following this line of argument, classical ombudsman, human rights protection and anti-corruption functions should be located in separate institutions with the appropriate powers to fulfil their mandates. However, it has been argued in this book that even the classical ombudsman function includes coverage of human rights matters as a component of the inspection of the legality and fairness of public administration. Accordingly, a human rights ombudsman is a pragmatic and workable concept. However its overall effectiveness will depend on the factors discussed below.

The Effectiveness of a Classical or Hybrid Ombudsman

The fact that a classical or hybrid ombudsman has been established does not mean that it will automatically be effective in improving government administration, building good governance and protecting human rights.[1] The institution may be established by government with good intentions, such as when a state is making the transition to democratic government, consolidating its democratic structure or when established democracies wish to improve institutional structures. However, ombudsmen and other national human rights institutions can be established by governments which are not democratic or by states wishing 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 the

[1] For a critique of the effectiveness of human rights commissions in Africa see Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa* (New York: Human Rights Watch, 2001) [hereinafter *Protectors or Pretenders?*].

government is not serious about reform and there is little improvement after the institution starts operations. Also, government disinterest in or suspicion of an ombudsman can lead to its marginalization.

While the specific contours of a classical or hybrid ombudsman are within the purview of the state establishing the institution, every institution should be established and supported so that it can operate effectively within the particular domestic context. The success an ombudsman will have in improving public administration and protecting human rights is contingent on the realization of interrelated legal, political, financial and social factors.[2] They are applicable to all ombudsman institutions, both newly and long established, in developed and developing nations. Weaknesses in any of these factors detract from the effectiveness of the institution.

The UN High Commission for Human Rights has provided the following "effectiveness factors" which are generally applicable to all national human rights institutions, including classical, hybrid and single-sector ombudsmen: independence, defined jurisdiction and adequate powers, accessibility, cooperation, operational efficiency, and accountability.[3] There are additional indicators which are also relevant. Altogether, the following should be addressed:

- democratic governance in the state;
- the independence of the institution from government;
- the jurisdiction of the institution;
- the extent and adequacy of the powers given to the institution;
- the accessibility of the office to members of the public;
- the level of cooperation of the institution with other bodies;
- operational efficiency (level of financial and human resources);
- the accountability and transparency of the institution;
- the personal character and expertise of the person(s) appointed to head the institution;

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[2] This section is based on L.C. Reif, "Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection" (2000) 13 Harvard H.R. J. 1 at 23-28. 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, UN Doc. HR/P/PT/4 (1995) at 10 [hereinafter *National Human Rights Institutions: A Handbook*]; Amnesty International, *National Human Rights Institutions: Amnesty International's recommendations for effective protection and promotion of human rights*, IOR 40/007/2001 (Oct. 2001) [hereinafter *Amnesty International's recommendations*]; R. Gregory, "Building an Ombudsman Scheme: Provisions and Operating Practices" (1994) 12 Omb. J. 83, rep. in L.C. Reif, ed., *The International Ombudsman Anthology: Selected Writings From The International Ombudsman Institute* (The Hague: Kluwer Law International, 1999) at 132 [hereinafter *International Ombudsman Anthology*] [further references to *Anthology*]; World Bank, "Using an ombudsman to oversee public officials", *PREMnotes* No. 19 (April 1999).

[3] *National Human Rights Institutions: A Handbook, ibid.* Some of these factors are present in the "Paris Principles" (Principles Relating to the Status of National Institutions), U.N.G.A. Res. 134, UN GAOR, 48th Sess., 85th mtg., UN Doc. A/RES/48/134 (1993), rep. in *ibid.* at 37-38. See *supra* Chapter 4 on the Paris Principles. These factors have been applied to the work of ombudsmen in protecting economic, social and cultural rights in B. von Tigerstrom, "The Role of the Ombudsman in Protecting Economic, Social and Cultural Rights" (1998) 2 Int'l Omb. Yrbk. 3 at 33-36. See also B. von Tigerstrom, "Implementing Economic, Social, and Cultural Rights: The Role of National

- the behaviour of government in not politicizing the institution and having a receptive attitude toward its activities; and
- the credibility of the office in the eyes of the populace.

Since weaknesses in these areas can develop in institutions in both established democracies and democratizing states, both the ombudsman and the government should review the operation of the institution periodically to ensure that it is operating as effectively as possible in light of these factors. Weaknesses need to be remedied in order to strengthen the institution or enable it to continue operating effectively. Also, the international organizations (e.g. UN High Commissioner for Human Rights, UNDP, Council of Europe, OSCE) and donor states which support the establishment and strengthening of national human rights institutions through technical and other assistance should not only keep these indicators in mind when helping a state to establish an institution but also should review the operation of newer institutions to monitor their compliance with these indicators.[4] The indicators are discussed in more detail below.

DEMOCRATIC GOVERNMENT

Ombudsmen and hybrid institutions usually cannot fulfil their functions effectively in states that do not have some level of democratic governance.[5] As an accountability mechanism, a classical or hybrid ombudsman will find it extremely difficult to function in a state without a democratic system with controls on the exercise of power and where there is no real independence from the ruling power. Furthermore, any ombudsman in a non-democratic state may be used by the state as a facade to mask the human rights and administrative fairness problems.[6] Marten Oosting, former National Ombudsman of the Netherlands, has stated that:

> one of the essential characteristics of this institution is that it functions as one element in a system of checks and balances. This means that in my view it is inconceivable for an ombudsman to exist, and perform his task properly, within any system other than a democracy governed by the rule of law. To put it differently, the ombudsman presupposes a political and administrative system that is and wants

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Human Rights Institutions" in I. Merali and V. Oosterveld, eds., Giving Meaning to Economic, Social, and Cultural Rights (Philadelphia: University of Pennsylvania Press, 2001) at 139.

4 E.g. Human Rights Watch has criticized the conduct of the international community in neglecting to monitor the operation of human rights commissions in Africa they have helped to establish, *Protectors or Pretenders?, supra* note 1.

5 States can be classified as liberal democracies, non-liberal electoral democracies, pseudo-democracies and authoritarian regimes, L. Diamond, *Developing Democracy: Toward Consolidation* (Baltimore: The Johns Hopkins University Press, 1999) at 279-80; *Protecting Human Rights: The Role of National Human Rights Institutions*, Commonwealth Conference of National Human Rights Institutions, Cambridge Conference Communiqué, July 4-6, 2000 (London: Commonwealth Secretariat, 2000) at 7 [hereinafter *Protecting Human Rights: The Role of National Institutions*].

6 M. Oosting, "The Ombudsman and His Environment: A Global View" (1995) 13 Int'l Omb. J. 1 at 6-7.

> to be and to remain a democracy governed by the rule of law, with all the appropriate mechanisms of external accountability this entails.[7]

Also, some states undergo internal conflict which erodes the democratic process and the rule of law. In this situation, it has been argued that national human rights institutions in these states "should exhibit moral courage and integrity and continue to work to promote and protect human rights and the peace process."[8] However, even with the best efforts of the institution, the negative effects of civil strife may hinder its ability to operate effectively.

As discussed in Chapter 3, only a relatively small number of countries considered to be "not free" – encompassing *de jure* or *de facto* non-democratic states – have put classical or hybrid ombudsman institutions into operation.[9] Some of these states are fledgling democracies which are establishing new institutions including the classical or hybrid ombudsman, e.g. Haiti and Rwanda. In these cases, the viability of the ombudsman will depend not only on its own structure and operations but also on whether these states can strengthen their democratic structures in the future. Other states have reverted to or continue under autocratic governments, which may be accompanied by internal conflict or instability, and the preexisting ombudsman is negatively affected by this state of affairs, for example in Pakistan, Zimbabwe and Sudan. As another example, in non-democratic Swaziland, the ombudsman institution was shut down after a few years. Political and other factors may also delay the activation of an ombudsman for a number of years after it has been included in a state's constitution and/or legislation, such as in some Central and Eastern European states, Paraguay, the Dominican Republic and Ethiopia.

In the exceptional case, an ombudsman or other national human rights institution established in a state which 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 to democracy and engenders greater respect for law and human rights. For example, the Polish Commissioner for Civil Rights Protection was established in the waning years of Communist rule in Poland, and was carried over into and has thrived in the consolidating democracy.[10] When an ombudsman institution has been established by a new democratic government, or by a new government in a consolidating democracy, the ombudsman should attempt to obtain strong legal protection for the institution if it does not already exist (e.g. inclusion in the constitution) and widespread support from all political parties and the public.[11] If these guarantees are not in place,

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[7] M. Oosting, "Protecting the Integrity and Independence of the Ombudsman Institution: The Global Perspective" (2001) 5 Int'l Omb. Yrbk. 13 at 23. See also M. Oosting, "The Independent Ombudsman in a Democracy, Governed by the Rule of Law", *I.O.I. Occasional Paper* No. 66 (Edmonton: International Ombudsman Institute, Sept. 1998) at 5.

[8] *Protecting Human Rights: The Role of National Institutions, supra* note 5 at 7-8 (with reference to Commonwealth institutions).

[9] Kazakhstan, Kyrgyzstan and Uzbekistan in Eurasia, Pakistan in Asia, Haiti in the Americas and Rwanda, Sudan, Tunisia and Zimbabwe in Africa, *supra* Chapter 3 text accompanying notes 13-14.

[10] See also the activities of Indonesia's Human Rights Commission.

[11] Oosting, "The Ombudsman and His Environment: A Global View", *supra* note 6 at 8.

a future change in the government can result in a weakening, marginalization or even abolition of the ombudsman.[12]

Under certain circumstances, an ombudsman can be relatively effective in a state with a weak democratic structure. For example, Peru's *Defensor del Pueblo*, established after President Fujimori's self-coup, acted as an effective human rights ombudsman during the Fujimori regime, based on the institution's broad legal powers and jurisdiction, the strong appointee and staff, and its extensive human rights activities that included tapping into the Inter-American human rights system. Also, Guatemala's *Procurador de Derechos Humanos*, put into operation during the civil conflict, was seen to have a generally positive influence on the human rights situation during that period. Indeed, the human rights ombudsman at the time of Serrano's failed self-coup was the popular choice as the replacement President.

Classical and hybrid ombudsmen in newly democratic states which are attempting to consolidate their democratic structures can contribute to this process. Also, as democratic governance in a state matures, an ombudsman should experience a more conducive environment for operational effectiveness. Examples of successful human rights and other hybrid ombudsmen established in new democracies which have contributed to and have been supported by a consolidating democracy include those in Spain, Poland, Slovenia, Hungary, Ghana, Namibia and South Africa.

INDEPENDENCE

Maximizing the independence of the ombudsman from government, especially the executive branch, is crucial for its effectiveness. Independence can be subdivided into *institutional, personal* and *functional* independence.[13]

Institutional independence can be achieved through various means. The ombudsman must be appointed in an a manner that gives her independence from influence or control by the arm of government the office is designed to investigate – the executive/administrative branch. The ombudsman should be appointed by the legislature and not the executive (and preferably appointment by a qualified majority of the legislature), the framework law should be a statute rather than an executive decree, and extra protection is given by enshrining the office in the constitution.[14] However, there are some countries where the head of state has no substantive executive powers, and appointment of the ombudsman may be made by the head of state on the direction of or in consultation with the legislative branch.[15] Independence is also enhanced by giving the institution

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[12] *Ibid.*

[13] Oosting, "Protecting the Integrity and Independence of the Ombudsman Institution", *supra* note 7 at 19-20. See also *Protecting Human Rights: The Role of National Institutions, supra* note 5 at 7; OSCE Human Dimension Seminar on Ombudsman and National Human Rights Protection Institutions, Consolidated Summary (Warsaw, May 25-28, 1998), Recommendations.

[14] *National Human Rights Institutions: A Handbook, supra* note 2 at 10; Paris Principles, *supra* note 3, Annex ("Composition and guarantees of independence and pluralism"); Gregory, *supra* note 2 at 132; *Amnesty International's recommendations, supra* note 2 at 2-3.

[15] See e.g. the United Kingdom and some states with a British heritage such as in the Caribbean and Pacific regions.

freedom in matters such as the budget and the hiring of personnel, and by providing for a term of office for the ombudsman that does not coincide with the term of the legislature.[16] Personal independence is increased by giving the ombudsman security of tenure – the law must provide that the ombudsman is appointed for a specified number of years and that an ombudsman cannot be removed from office early unless specified exceptional circumstances exist.[17] Ombudsmen should have immunity from criminal and civil actions for conduct undertaken in the proper exercise of official functions.[18] Functional independence is achieved by ensuring that the ombudsman is not subjected to any external pressures. Thus, the ombudsman must not be subject to instruction from any body, must be empowered to interpret her own competence, and must be free to conduct investigations and reach her own conclusions and recommendations.[19] During her term of office the ombudsman must be required to abstain from any political affiliation or professional or other activity that is incompatible with the office.[20]

Differences in formal and actual independence can be seen on a regional basis. For example, most of the national classical and human rights ombudsmen established throughout Europe are legislative ombudsmen, and over fifty percent of national ombudsmen in Europe, especially those recently established in democratizing states, are enshrined in their country's constitution.[21] All of the human rights ombudsmen established in Latin America are elected by the legislature and supported by legislation, and most are also protected by constitutional provision. However, Colombia's *Defensor del Pueblo* is in a more vulnerable position as the nominees' names are provided by the President and the institution is housed in the Ministry of Justice under the authority of the Attorney-General. This vulnerability was illustrated when attempts to weaken the institution were made by the Uribe government. Most Caribbean ombudsmen are appointed by the head of state, but with differing degrees of involvement of the legislative branch, and in the Pacific region there is a mix of legislative and head of state appointments. However, in Africa and Asia the great majority of classical and hybrid ombudsmen are executive appointments, although most are supported by legislation, and about fifty percent of African and Asian national ombudsmen are protected by constitutional provisions. As discussed in Chapter 8 in the post-conflict peace-building context, the initial human rights ombudsmen in Bosnia and Herzegovina and in Kosovo have been appointed by the international organization monitoring or governing the ter-

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[16] *National Human Rights Institutions: A Handbook, supra* note 2 at 10-12; Paris Principles, *supra* note 3, Annex, s. 2; Gregory, *supra* note 2 at 132-136; OSCE Human Dimension Seminar, *supra* note 13; *Protecting Human Rights: The Role of National Institutions, supra* note 5 at 7.

[17] Oosting, "Protecting the Integrity and Independence of the Ombudsman Institution", *supra* note 7 at 20.

[18] *Amnesty International's recommendations, supra* note 2 at 6.

[19] Oosting, "Protecting the Integrity and Independence of the Ombudsman Institution", *supra* note 7 at 19-20.

[20] OSCE Human Dimension Seminar, *supra* note 13. See also how some international organization workplace ombudsmen cannot be former employees of, or cannot be subsequently employed by, the organization, *supra* Chapter 10.

[21] But see some ombudsmen appointed by the head of state or executive with varying control or input by the legislature, e.g. UK, France, Ireland, Malta, Cyprus, Slovenia, Bosnia and Herzegovina.

ritory in question as executive ombudsmen, with concomitant independence issues. While Bosnia's Human Rights Ombudsman is now appointed domestically and the jurisdiction covers domestic public administration, in Kosovo the Human Rights Ombudsperson also has jurisdiction over the UN transitional administration. The low receptiveness of Kosovo's UN transitional administration to the work of the Human Rights Ombudsperson can be traced in part to the executive appointment and to the non-democratic nature of the UN governance structure.

For ombudsmen appointed by the executive branch, questions of independence cannot be avoided. It is possible for these institutions to achieve *de facto* independence if other criteria for building independence are in place, and other effectiveness factors discussed in this Chapter are satisfied. However, even with constitutional protection and a legislative base, the attitudes of the executive and/or legislature towards an ombudsman institution can become more conservative with a new government and, as a result, the ombudsman's powers can be circumscribed. Some examples are changes to the Russian human rights ombudsman legislation allowing criminal action against the ombudsman, the revised Vanuatu ombudsman legislation which takes away staff appointment powers from the Ombudsman, and the ultimately unsuccessful attempts by the Uribe government in Colombia to weaken the functions of the *Defensor del Pueblo*.

JURISDICTION

A classical or hybrid ombudsman should be given a broad jurisdiction to enable it to accomplish its mandate effectively.[22] It is also important that the jurisdiction of the ombudsman be defined precisely in order to avoid jurisdictional conflicts with other state institutions.[23] The police, security and defence forces, prisons and other places of detention – which are often the sources of human rights problems – should be included within the jurisdiction of the institution. Some consideration should be given to the feasibility of including the judiciary within its jurisdiction, which will usually be more realistic in limited terms such as where there has been unreasonable delay in rendering decisions or with respect to the administration of the court system.[24] While the classical ombudsman model covers public sector conduct only, thought should be given to the utility of extending a hybrid ombudsman's jurisdiction to the private sector. For example, some human rights breaches against women and children occur in the private sector, such as in the home, educational facilities or the workplace. Further, the privatization of public services by many governments around the world leads to the concept of classical and

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[22] See Paris Principles, *supra* note 3, Annex ("Competence and responsibilities", s. 2); Gregory, *supra* note 2 at 138-142.

[23] *National Human Rights Institutions: A Handbook, supra* note 2 at 12-13; Paris Principles, *ibid.*, Annex ("Competence and responsibilities" and "Additional principles concerning the status of commissions with quasi-jurisdictional competence") lists the functions that national human rights institutions must and may be granted.

[24] See the discussion on the ombudsman and the judiciary, *supra* Chapter 1, text accompanying notes 56 to 68.

hybrid ombudsman jurisdiction over these privatized services. In practice, however, only a small number of hybrid ombudsmen have been given jurisdiction over both public and private sector conduct, usually covering human rights matters or privatized public services.[25] One factor militating against such an expansion of jurisdiction is the higher level of resources required to monitor the relevant area of private sector activity adequately.

The mandates of human rights ombudsmen should not be limited to protecting constitutional human rights, and should extend to include international human rights instruments.[26] Certainly this should comprise international human rights law binding on the state. However, it is unlikely that a state will also include treaties that it has not signed and ratified.[27] A human rights ombudsman should be given jurisdiction over the full spectrum of rights, including economic, social and cultural rights.[28] They should also be directed to protect the rights of the most vulnerable, e.g. minorities, women, migrant workers, children, and the disabled.[29] A children's ombudsman should be established in states which have the resource levels to support more than one national human rights institution.[30]

Some of the classical and many of the human rights ombudsmen do have broad jurisdiction over areas such as the police, military forces and prisons, and anti-corruption and leadership code enforcement ombudsmen generally have jurisdiction over senior elected and appointed public officials. The jurisdiction of a few classical ombudsmen have been extended when the institution has been turned into or replaced by a human rights or multiple mandate ombudsman, i.e. in Finland, Jamaica, Ghana and Tanzania. However, in some cases an ombudsman's jurisdiction is subsequently circumscribed, such as with Russia's Plenipotentiary for Human Rights. Only a small minority of ombudsmen have been given jurisdiction over the judiciary, and to different degrees, such as the ombudsmen in Finland, Sweden, Slovenia, Albania, Kosovo, Costa Rica and Uganda. A number of human rights ombudsmen do address economic, social, cultural and third-generation rights in their work, such as those in Finland, Spain, Poland, Slovenia, Hungary, Romania, Ukraine, Bosnia and Herzegovina, Kosovo, Uzbekistan, El Salvador, Guatemala, Argentina, Peru and Ghana. As discussed in Chapter 9, in addition to children's ombudsmen established in a growing number of countries, various classical and human rights ombudsmen either have express mandates to protect children's rights and needs either generally or in discrete areas – such as the ombudsmen in Greece, Andalusia and Catalonia in Spain, Cost Rica, and New South Wales, Australia (the latter handles child abuse mattters) – or in practice offer specialized units for children's issues and/or take complaints involving children.

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[25] See Portugal (human rights), Greece (children's matters only), Namibia (human rights), Ghana (human rights), Tanzania (human rights and maladministration), Papua New Guinea (discrimination), Guatemala (human rights), El Salvador (human rights), Honduras (human rights), Argentina (privatized public services), Dominican Republic (privatized public services) and Rwanda.

[26] *Amnesty International's recommendations, supra* note 2 at 7.

[27] But see the view of Amnesty International, *ibid.*

[28] *Ibid.* at 4, 7.

[29] *Ibid.* at 8.

[30] See *supra* Chapter 9.

OMBUDSMAN POWERS

All classical and hybrid ombudsmen are given powers of investigation, which should be as strong as possible. The institution should be given such powers in its legal framework to cover the investigatory process, the implementation stage and the other roles that hybrid institutions undertake, such as advice and education.[31] Investigatory powers should include those to obtain documents, compel the attendance and testimony of witnesses, and inspect government premises. In order to enforce these powers, an ombudsman should also have powers of search and seizure, *subpoena* and citations for contempt.[32] The ombudsman must also ensure that the procedures used by her own office are procedurally fair – for complainants and for the administrative authorities under scrutiny.[33] All ombudsmen should also have the power to launch own-motion investigations.[34] The power to launch own-motion investigations also facilitates the investigation of economic, social and cultural rights violations which are often systemic problems and the investigation of matters affecting vulnerable groups.[35] While a comprehensive survey was not undertaken, numerous classical, hybrid and specialized ombudsmen discussed in this book do have own-motion powers of investigation.[36]

Human rights ombudsmen and other hybrids should be given stronger enforcement powers appropriate to their additional responsibilities. Beyond the first two ombudsman institutions in Sweden and Finland which were given the power to prosecute public officials, this prosecution power has been given to a number of hybrid ombudsmen such those in Spain, Bosnia and Herzegovina, Uganda, and the Philippines. A growing number of ombudsmen have been given powers to apply to constitutional and other courts to bring protective actions or ask for clarification of constitutional and human rights issues. This phenomenon is most pronounced in Europe and Latin America, with some

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31 *National Human Rights Institutions: A Handbook*, *supra* note 2 at 13; Paris Principles, *supra* note 3, Annex ("Methods of operation" and "Additional principles concerning the status of commissions with quasi-jurisdictional competence"); Gregory, *supra* note 2 at 142-143.

32 *Protecting Human Rights: The Role of National Institutions, supra* note 5 at 7.

33 M. Zacks, "Administrative Fairness in the Investigative Process" in L. Reif, M. Marshall and C. Ferris, eds., *The Ombudsman: Diversity and Development* (Edmonton: International Ombudsman Institute, 1992) 229 at 234-235, rep. in *International Ombudsman Anthology, supra* note 2, 553 at 58-559.

34 See *Amnesty International's recommendations, supra* note 2 at 4.

35 von Tigerstrom, *supra* note 3 at 35.

36 E.g. Argentina, Austria, Barbados, Bosnia and Herzegovina, Bulgaria, Denmark, El Salvador, Ethiopia, European Ombudsman, Finland, Greece, Honduras, Hong Kong (China), Hungary, Jamaica (excluding constitutional rights issues), Kosovo, Mauritius, Namibia, Papua New Guinea, Peru, Philippines, Poland, Russia, Slovenia, South Africa, Spain at the national and sub-national levels, Sweden, Tanzania, Tonga, Uganda, Vanuatu, and Ghana in practice. In a 1991 survey of national, sub-national and specialized ombudsmen (mainly classical, a few hybrid) with 76 responses, 68.4% (52) had own-motion powers, including classical ombudsmen in Australia, New Zealand, Canada, the U.S. and Europe, U. Kempf and M. Mille, "The Role and the Function of the Ombudsman: Personalised Parliamentary Control in Forty-Eight Different States" (1993) 11 Omb. J. 37 at 54, 59, rep. in *International Ombudsman Anthology, supra* note 2, 195 at 213, 219 [further references to *Anthology*].

examples in Africa, Asia and the Caribbean.[37] In particular, as noted in Chapter 3, anti-corruption and leadership code ombudsmen need strong enforcement powers. However, not all ombudsmen with these mandates can prosecute, although some have intermediary powers including referring individuals for prosecution by a tribunal and impeachment.[38] At the extreme end of ombudsman powers, Ghana's Commission on Human Rights and Administrative Justice and Tanzania's Commission on Human Rights and Good Governance, both multiple mandate ombudsmen, are empowered to go to court to enforce their own recommendations. The enforcement powers of each hybrid ombudsman should be calibrated to enable it to fulfil all its functions effectively. However, ombudsman effectiveness does not always follow automatically from having stronger enforcement powers. As discussed in Chapter 1, the non-coercive soft powers of an ombudsman can constitute a strength and one source of its effectiveness, connected with other factors such as the character and authority of the ombudsman and the government's positive support.

Human rights ombudsmen should also be given a range of human rights protection functions, such as advisory and law reform services, research and education.[39] For the most part, the human rights ombudsmen discussed in this book have a variety of additional functions. However, the Greek Ombudsman and Kosovo's Human Rights Ombudsperson, both with express human rights mandates, have been granted mainly classical ombudsman powers.

ACCESSIBILITY

Classical and hybrid ombudsman institutions must be accessible to the population that the office is designed to protect, looking at matters such as public knowledge of the institution and its mandate(s), physical location and diversity of personnel.[40] Institutions can improve accessibility through various devices, such as: advertising the office through radio, TV and brochures; providing toll-free telephone access; and maintaining regional offices or local representation (e.g. France's *Médiateur* has volunteer district and overseas delegates). A number of ombudsmen in geographically large territories make regular visits to rural areas, making use of local media to inform the public of their presence and their powers.[41] Newly established ombudsmen need to educate the public on the existence of their institution and what services it can provide. The new Thai Ombudsman, for example, has undertaken such activities in its first years of operation.

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[37] See e.g. Portugal, Spain, Austria, Lithuania, Poland, Slovenia, Hungary, Albania (*amicus curiae*), Russia, Ukraine, Bosnia and Herzegovina, Argentina, Bolivia, Colombia, Ecuador, Paraguay, Peru, Venezuela, Costa Rica, El Salvador, Guatemala, Nicaragua, Panama, Jamaica (use of a specially funded litigator), Thailand, East Timor, Namibia, Seychelles, Ghana, Tanzania.

[38] E.g. Papua New Guinea Ombudsman Commission (referral to prosecutors for leadership tribunal action), Taiwan (impeachment), *supra* Chapter 7.

[39] *Amnesty International's recommendations, supra* note 2 at 8-10, 18.

[40] *National Human Rights Institutions: A Handbook, supra* note 2 at 13-14; *Protecting Human Rights: The Role of National Institutions, supra* note 5 at 7.

[41] See Gregory, *supra* note 2 at 149.

The institution must 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.[42] The special access requirements of disabled, confined and other disadvantaged complainants must be taken into account.[43] The ombudsman must be able to receive complaints from and visit persons confined in prisons, youth offender centres, health care facilities and elder care facilities.[44] Complaint procedures should be flexible to enable those who cannot get to the ombudsman office to lodge a complaint by telephone or mail.

Accessibility can also be defined in terms of permitting the broadest spectrum of persons to make complaints to the ombudsman. For example, lack of citizenship or residency status should not be barriers to access, and children should be permitted to complain to the ombudsman.[45] Some ombudsman legislation, however, does require that the complainant be directly affected by the administrative conduct in issue. The own-motion investigation power, discussed earlier in this Chapter, also gives an ombudsman the ability to expand access in some cases where a complaint is otherwise inadmissible. For example, the European Ombudsman has used the own-motion investigation in a case where the person wishing to make a complaint did not meet the EU citizenship or residency requirements.

Ombudsmen should undertake initiatives to protect vulnerable and other disadvantaged groups in the territory. Thus, Namibia's Ombudsman has attempted to get more women to make complaints, Ghana's Commission on Human Rights and Administrative Justice has investigated traditional practices that are harmful to women and girls and Ethiopia's prospective Ombudsman will have a department for women and children. Many Latin American human rights ombudsmen have deputies and/or departments addressing particularly vulnerable groups such as women, children, the elderly, indigenous peoples and ethnic minorities. The staff of an ombudsman office should also reflect the diversity of the society it serves, in terms of gender, ethnicity, race, etc.

COOPERATION

It is accepted that national human rights institutions should develop relationships and cooperate with non-governmental organizations (NGOs), other national human rights institutions and international organizations.[46] Certainly this applies to human rights ombudsmen.

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[42] See e.g. the French *Médiateur* and the UK Parliamentary Commissioner for Administration who cannot receive complaints directly from persons, but only through a member of the legislative branch.

[43] See B. Parfitt, "Public Education on the Role of the Ombudsman Office: Geographical Concerns, Targetting Vulnerable Groups" in *The Ombudsman: Diversity and Development, supra* note 33, 159 at 162-163, rep. in *International Ombudsman Anthology, supra* note 2 at 683 [further references to *Anthology*]; *Amnesty International's recommendations, supra* note 2 at 15.

[44] Parfitt, *ibid.* at 686-687.

[45] See *supra* Chapter 9 on classical and human rights ombudsman work covering minors.

[46] *National Human Rights Institutions: A Handbook, supra* note 2 at 14-15; Paris Principles, *supra* note 3, Annex ("Competence and responsibilities", s. 3(d) and (e), "Methods of operation", (f) and (g)); *Amnesty International's recommendations, supra* note 2 at 3-4.

For example, developing good relationships with human rights NGOs provides the institution with information, feedback on their own work and partners for joint activities. Cooperation with other national human right institutions provides a forum for mutual education, training and support. However, classical and other hybrid ombudsmen should also develop similar relationships, as exchanging views and information with relevant NGOs should enhance the activities of an ombudsman. Classical and hybrid ombudsmen cooperate through the International Ombudsman Institute and regional associations for information, education, training and support services.

As discussed primarily in Chapters 4 and 10, international organizations have developed their relationships with national human rights institutions, including human rights and classical ombudsmen, and other hybrid ombudsmen since the early 1990s. Notable examples are the UN High Commissioner for Human Rights, the Council of Europe's Commissioner for Human Rights, the OAS (such as through its Network of National Human Rights Institutions in the Americas) and the Commonwealth Secretariat.

OPERATIONAL EFFICIENCY (FINANCIAL AND HUMAN RESOURCES)

Operational efficiency requires that the institution's operations are given adequate financial and human resources.[47] Adequate financial resources are essential – the ombudsman must have a sufficiently large budget to enable her to perform her functions properly with a sufficient number of qualified staff given the annual complaint volume.[48] The institution must be 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 a civil service body should not do the hiring for the ombudsman.[49] Also, the institution must have appropriate internal working and evaluation procedures.[50] In some cases, national human rights institutions have had their budgets cut as punishment for being too critical of the executive branch.[51] Others are materially underfunded, for reasons that include neglect, government downsizing and suspicion of any form of external accountability.

Insufficient financial and human resources support is a major problem for a number of classical and hybrid ombudsmen in both established and new democracies around the world. Budget-cutting in many states has had a negative effect on the budgets of ombudsmen. For example, down-sizing by provincial and state governments in Canada and the U.S. has led to budget reductions for a number of ombudsmen in the region. Most of the hybrid ombudsmen in Africa and Latin America discussed in this book are provided with insufficient financial and human resources to fully perform their mandates. Some governments have taken away ombudsman powers in this area, which also neg-

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[47] *National Human Rights Institutions: A Handbook, ibid.* at 15-16; "Using an ombudsman to oversee public officials", *supra* note 2 at 4; *Amnesty International's recommendations, ibid.* at 7.

[48] Oosting, "Protecting the Integrity and Independence of the Ombudsman Institution", *supra* note 7 at 20.

[49] *National Human Rights Institutions: A Handbook, supra* note 2 at 15-16.

[50] *Ibid.*

[51] *Amnesty International's recommendations, supra* note 2 at 23.

atively affects the institution's independence. For example, the 1998 amendments to the Vanuatu Ombudsman legislation give the Public Services Commission the power to appoint the ombudsman's staff.

ACCOUNTABILITY AND TRANSPARENCY

The effectiveness of the ombudsman should be enhanced if it has an accountability system and an optimum level of transparency, usually implemented through the reporting requirements imposed on ombudsmen in the form of annual and special public reports to the legislature and/or the executive.[52] Just as ombudsman independence is heightened through appointment by the legislature, accountability and transparency are optimized if the ombudsman also reports to the legislature.

The institution should also be accountable to the members of the public who it is mandated to protect.[53] Accountability to the public and transparency can be enhanced through actions such as making sure 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. Public dissemination of an annual report should not be contingent on the legislature or executive examining it first, given the extreme delay in some countries before the relevant state body takes up the report.[54] For example, legislative delay in reviewing and responding to annual reports has been a problem for Slovenia's Human Rights Ombudsman in the past. Developing a relationship with the media also results in the provision of public information and transparency of operations.[55] Many ombudsmen use press releases to inform the public about important cases and developments.

CHARACTER AND EXPERTISE OF THE OMBUDSMAN

It is extremely important to appoint as ombudsman (commissioner, etc.) an individual who has expertise and competence in the subject matter of the institution and in office administration.[56] The ombudsman must have credibility, both in the eyes of the government

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[52] *National Human Rights Institutions: A Handbook, supra* note 2 at 17; Gregory, *supra* note 2 at 145-147.

[53] *National Human Rights Institutions: A Handbook, ibid.*; Paris Principles, *supra* note 3, Annex ("Competence and responsibilities", s. 3, "Additional principles concerning the status of commissions with quasi-jurisdictional competence").

[54] *Amnesty International's recommendations, supra* note 2 at 21.

[55] See D. Jacoby, "Comments on Relations Between Ombudsmen and the Media" (1995) 13 Int'l Ombudsman J. 29, rep. in *International Ombudsman Anthology, supra* note 2 at 711.

[56] See *Protecting Human Rights: The Role of National Institutions, supra* note 5 at 6; *Amnesty International's recommendations, supra* note 2 at 5. In a 1991 survey of national, sub-national and specialized ombudsmen with 76 responses, 42.1% of ombudsmen were lawyers (14.5% of whom had been appointed to the country's supreme court), 39.5% came from a variety of careers, 14.5% had previously held political office and 3.9% had been members of human rights organizations, Kempf and Mille, *supra* note 36 at 210-211.

and the populace. The strength of character and, occasionally, the courage needed be an effective classical, human rights or other hybrid ombudsman should not be underestimated. There is also the risk that the office will become politicized if the legislature or executive appoints a person as ombudsman who is too closely connected with the government and who may be perceived to be aligning herself with government positions.[57] In both democratizing states and established democracies a strong, competent and credible ombudsman can be the determining factor in the effectiveness of the institution.

The case studies in this book illustrate that the character and expertise of the individual appointed as ombudsman is a very important factor in determining the effectiveness of a classical or hybrid ombudsman. It is especially important for the first ombudsman in a new institution to be a strong appointee. A series of strong appointments also strengthens an ombudsman institution for the longer-term, especially in states that are developing democracies. Thus, positive examples are the series of human rights ombudsmen in Spain and Poland during their first decades of operation, and the first appointees in Peru, Honduras and Ghana. The El Salvador *Procurador para la Defensa de los Derechos Humanos* (PDDH) provides an example of a human rights ombudsman institution that has a mixed record, with alternating weak and stronger appointments, with corresponding impacts on the work of the institution and the attitudes of the public and NGOs towards the PDDH. Some peace-building processes have used international actors as the first ombudsmen in the new human rights institutions, e.g. in Bosnia and Herzegovina and Kosovo. While the international actors have generally been strong appointees, this approach to creating new national human rights institutions postpones the issue whether domestic authorities will appoint similarly strong individuals to the position when the institution's law is turned over to domestic operation.

A Responsive, Supportive Government

Political and governmental support must be given to the institution, its work and recommendations. A responsive government in the positive sense is very important for the effectiveness of a classical or hybrid ombudsman. For some, the level of positive response by ministers and government administration to an ombudsman's recommendations is the "key indicator" of the institution's effectiveness.[58] If the work and recommendations of the institution are ignored or unreasonably criticized by the executive branch and public administration, the effectiveness of the institution will suffer. A supportive legislative branch is also important, as the appointing and reporting authority for legislative ombudsmen. Government responsiveness is also connected to a factors such as the character and credibility of the ombudsman, the public reputation of the institution and the historical moment.[59]

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[57] The Kempf and Mille study did not specify whether the 14.5% of ombudsmen who had formerly held political office were of the same political affiliation as the majority party in the legislature which made the appointment, *ibid.*

[58] "Using an ombudsman to oversee public officials", *supra* note 2 at 4.

[59] *Ibid.*

There are some governments which are ideologically against external monitors of their administrative fairness and human rights records and thus are resistant to ombudsman recommendations regardless of other indicators. In addition, this ideological resistance can affect other effectiveness factors negatively, such as the budgetary and human resources of the institution, and even its legal framework if the government attempts to circumscribe the powers and jurisdiction of the ombudsman. For example, the experiences of the El Salvador PDDH illustrate that a legislature ideologically opposed to human rights protection initiatives can appoint a weak individual as ombudsman, with consequential negative effects on the operation of the institution, its reception by the public and its overall effectiveness. Lack of consensus in the legislature can also negatively affect the operation of an ombudsman. For example, for over two years Peru's legislature has been unable to reach the consensus required to muster sufficient votes to elect a second *Defensor* and, while there is an acting *Defensor* in place, the institution is not best served by such a situation.

In many cases, the responsiveness of the executive, public administration and the legislature to a classical or hybrid ombudsman's work can be hard to judge because the relevant statistics or empirical research is not available.[60] However, among the institutions discussed in the case studies it is seen that governments are generally responsive in countries such as those in Scandinavia, the Netherlands, Spain and Poland. Some of the newer human rights ombudsmen in Central and Eastern Europe have experienced problems, such as in Romania where the ombudsman's resolutions are not accepted by government, in Slovenia with legislative delay in taking up the ombudsman's annual reports and in Russia where the powers of the institution have been narrowed. Also, most of the human rights ombudsmen created in post-conflict peace-building processes have had experienced poor or mixed receptiveness by the public authorities to the ombudsman's work. For example, in El Salvador, the public administration and legislature have shown opposition to the human rights work of the ombudsman and to appointing strong individuals to the office. In Bosnia and Herzegovina, there was initially low responsiveness to the Human Rights Ombudsman's recommendations from the state's government and the passage of domestic ombudsman legislation to replace the Dayton Accords provisions had to be imposed by the OSCE High Representative on the Bosnian national authorities. Kosovo's Human Rights Ombudsperson has complained that the UN's mission in Kosovo (UNMIK) and the Secretary-General's Special Representative have not been responsive to many of the Ombudsperson's reports and recommendations.

PUBLIC PERCEPTION OF THE OMBUDSMAN

The populace served by the classical or hybrid ombudsman must perceive that the office can and does provide them with real benefits: through their right to complain about poor

[60] But see 1991 ombudsman survey with 76 responses where 82.9% of ombudsmen stated that their cooperation with the administration was "good", 15.8% indicated it was "fair", and 1.3% thought it was "poor", Kempf and Mille, *supra* note 36 at 207.

administration or human rights breaches, to obtain an impartial 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 ombudsman 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 be disinclined to use the institution in the future.

From another perspective, an ombudsman or other 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 image, the new government needs to ensure that the institution is structured with due attention to all the effectiveness factors and the institution needs to develop public confidence through its activities.

As with gauging the responsiveness of government to an ombudsman, it is difficult to determine the public's views about the ombudsman in many cases due to the lack of research and statistics on the issue. However, research on some of the ombudsmen discussed in the case studies shows that human rights ombudsmen in successfully consolidated or consolidating democracies are generally seen in a very positive light by the populace, such as in Spain and Poland. Even in weaker democracies, an ombudsman can have a positive effect on people's lives and thus engender strong public support, as with Peru's first *Defensor del Pueblo* during the latter half of the 1990s. However, in El Salvador, fluctuating public support for the PDDH is in part a reflection of the mixed quality of the appointees, as noted earlier.

Limitations of Classical and Hybrid Ombudsmen

Nonetheless, whether a state adopts a classical or hybrid ombudsman, the structural limitations of the ombudsman as a public sector institution must be taken into account. As discussed in Chapter 1, the classical ombudsman was designed to operate in addition to courts and other public sector institutions, and not as a replacement or substitute for them. Accordingly, despite the developments in hybrid ombudsman structures, an ombudsman is circumscribed in its role and its integral limitations must be appreciated. The vast majority of classical and hybrid ombudsmen still can only make recommendations at the conclusion of an investigation. While a number of hybrid ombudsmen have additional, stronger powers such as the bringing of court actions to obtain judgments on constitutional matters and the prosecution of public officials, only several human rights ombudsmen can go to court to enforce their own recommendations. Similarly, only a few ombudsmen have been given jurisdiction over areas of private sector activity. Judicial enforcement of ombudsman recommendations and private sector jurisdiction change foundational components of the ombudsman concept, and are exceptional given the number of ombudsman institutions around the world.

Despite the adaptations of the ombudsman idea, classical and hybrid ombudsmen should not be considered to be the sole or even the primary domestic vehicle for improving administrative justice and the protection of human rights. Classical, human rights and other hybrid ombudsmen, human rights commissions and specialized institutions

should form part of a larger network of state and non-state institutions – including a strong legislature, independent and well-functioning courts and administrative tribunals, state auditors, electoral commissions, a free press and a vibrant civil society – which work together to build good governance and protect human rights. Whatever the context – government programs to establish or reform their institutional structures, post-conflict peace-building missions or technical assistance provided by the international community – initiatives to strengthen the entire range of democratic institutions should be undertaken including classical or hybrid ombudsmen, other national human rights institutions and the courts.[61]

Yet in newer democracies, classical and hybrid ombudsmen may have a stronger role to play in administrative oversight and the protection of human rights compared to ombudsmen in established democracies. In newer democracies, the legislative branch may be relatively weak and the courts may be politicized, corrupt or inefficient, so that a well-functioning ombudsman institution can serve as a more reliable complaint-handling mechanism despite its structural limitations. Further, in both established and developing democracies, the ombudsman is an important and sometimes necessary mechanism to provide administrative fairness and human rights protection where judicial remedies are either unavailable or unrealistic, such as where complaints are not justiciable, for example those involving economic or social human rights, or there are other judicial access barriers.

In all these ways, an effective ombudsman can promote good governance by increasing the accountability of public administration, and both classical and human rights ombudsmen can act as domestic mechanisms for human rights protection.

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[61] On the judiciary see e.g. M. Ungar, *Elusive Reform: Democracy and the Rule of Law in Latin America* (Boulder: Lynne Rienner Publishers, 2002) at 122-168; H. Strohmeyer, "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor" (2001) 95 American J. Int'l Law 46; J. Widner, "Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case" (2001) 95 American J. Int'l Law 64; J. Buchanan, *Judicial Reform in the Americas* (Ottawa: Canadian Foundation for the Americas, Nov. 2001).

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