



FACULTY OF LAW

Lund University

Domenico Zipoli

“Think Global, Act Local” : Refocusing Priorities for NHRI Evaluation in the context of the Iberoamerican Defensor del Pueblo.

JAMM04 Master Thesis

International Human Rights Law

30 higher education credits

Supervisor: Prof. Miriam Estrada

Term: Spring 2014

This work is the result of approximately one year of research and has benefited from the support and knowledge of a number of extraordinary professionals in the field of human rights law.

I would first of all like to express my most sincere gratitude to Prof. Miriam Estrada-Castillo, who during this whole stretch of time has been guiding me with her great experience, invaluable advice and infinite patience. The three-month internship at the office of the Defensor del Pueblo of Ecuador, essential not only in terms of substantive research but also with regards to the first-hand experience which allowed me to grasp the reality of the subject matter, would not have been possible without her introduction to the country and institution. It is her striking passion and dedication for human rights that fuelled my year-long project, for which I am absolutely grateful.

It is also with great recognition that I would like to thank both Prof. Karol Nowak and Dr. Jason Naum for their constant encouragement and availability throughout the Master's programme. My interest in NHRI research sparked from their brilliant teachings and the numerous meetings which I had the pleasure to have with them.

My heartfelt thankfulness to the staff of the office of the Defensor del Pueblo of Ecuador in Quito, who welcomed me with open arms and allowed me to study their institution and enjoy their beautiful country with great hosting qualities. Even though it has not been mentioned elsewhere in the work ahead, I would also like to thank the staff of the Mongolian Human Rights Commission, with whom I had the pleasure to work for two months during the summer of 2012, my very first experience in a NHRI.

Lastly, but only chronologically so, I would like to thank the staff of the Office of the High Commissioner for Human Rights in Geneva, where I worked for six exciting months and where I finalized the last draft of this thesis. Out of all the outstanding people I had the pleasure to interact with at the OHCHR, I would like to offer a special thank you to Dr. Bradford Smith (Secretary of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families) and Dr. Jakob Schneider (Secretary of the Committee on the Elimination of Discrimination against Women), whose professionalism and commitment for human rights has been a great example for me to follow.

Lund, 28th May 2014

Index

1. Introduction

1.1 Purpose and Research Question

1.2 Sources

1.3 Outline

PART I

2. Limitation of State Power by the Rule of Law

3. Common Historical Heritage of the Ombudsman

4. The Swedish Ombudsman

5. Theoretical Explanation of NHRI's Global Expansion

5.1. Neo-realist Theory

5.2. World Polity Institutionalism Theory

5.3. Strategic Calculation

5.4. Normative Commitment

6. National Human Rights Institutions: Characteristics and Identification

6.1. Evolution of the NHRI Concept

6.2. Categorization of NHRIs

6.2.1 Origin and name

6.2.2 Formal characteristics

6.3. International and Regional Mechanisms of NHRI Coordination

6.3.1. The International Coordinating Committee (ICC)

6.3.2. The International Ombudsman Institute (IOI)

6.3.3. Regional Coordinative Bodies

6.4. NHRIs and the International Human Rights System

6.4.1 Treaty Monitoring Committees

6.4.2 Universal Periodic Review

6.4.3 Special procedures

6.4.4 Human Rights Council

6.4.5 Standard Setting

PART II

7. The Importance of the Social and Cultural Background to NHRIs

7.1. Latin American Multicultural Heritage

7.2. Colonial Rule

7.3. Newly Found Latin American Identity

7.4. The “Lost Decades”

7.5. Bolivarian States

7.6. The Principle of Sumac Kawsay/Buen Vivir

7.7. Dysfunctions of the Democratic State in Latin America

7.8. State Administration in Latin America

8. The Defensor del Pueblo

8.1. The Defensor del Pueblo within the Latin American Context

8.2. Common Features of the various Defensor Del Pueblo

8.2.1. Independence

- Independence of the person
- Independence of the institution

8.2.2. Sole membership

8.2.3. Time of Tenure

8.2.4. Complaint-Handling Mechanism

8.2.5. Non-Binding Character of its Resolutions

8.2.6. Informality

9. A Mandate Peculiar to the Defensor del Pueblo

9.1. An Express Mandate to Promote and Protect Human Rights

9.2. Mandate over the Judicial Power

9.3. Mandate over the Military

9.4. Mandate over Individuals

9.5. Limits on NHRI Mandates – Separation of Powers and Mandate Universality

9.6. Protection of Economic, Social and Cultural Rights by the Defensor del Pueblo

PART III

10. A Critique of the Current NHRI Project

- 10.1. The Procuraduría para la Defensa de los Derechos Humanos (PDDH)
of El Salvador
- 10.2. African counterparts
- 10.3. The root of the problem
- 10.4. A critique to the Paris Principles
- 10.5. A critique to the international community's approach to NHRI development

11. Recommendations and Conclusions for an Increased “Localization” of NHRIs

Annexes

Bibliography

Introduction

1.1 Purpose and Research Question

In the recent worldwide expansion and exponential growth of National Human Rights Institutions (NHRIs) one can, in a way, notice the sense of the human rights regime finally coming full circle.

In fact, human rights began as an essentially localized phenomenon whereby local communities were the lead actors in promoting ethical codes of conduct for the recognition and protection of the dignity of their members. With the start of the 20th century, the field of human rights gradually underwent a process of internationalization, with the introduction of a series of international treaties directed at the protection of religious and ethnic minorities. Following World War I, these efforts were included within the first international framework of human rights protection championed by the League of Nations. With the realization that this approach did not prevent the barbarities of World War II, the focus soon shifted from group rights to individual rights and a strong commitment from the international community was devoted to the universalization of human rights guarantees. The ratification of both the UN Charter and the Universal Declaration of Human Rights was followed by a proliferation of human rights conferences, treaties and declarations which paved the way for the current international human rights standards regime. Throughout the 1970s and 1980s new actors started to play leading roles in the standard-setting agenda, with international and intergovernmental bodies effectively holding the reigns of such developments. Human rights enforcement efforts were, at this historical stage, above all concentrated on the establishment of a truly universal mechanism, somehow relegating local efforts at human rights protection to a lesser role. Bearing in mind that states have always been regarded as bearing the primary onus of human rights protection, there seemed to be a substantial gap between the international and the local.

The sense of renewed urgency for human rights promotion and protection at the local level that soon started to surface amongst human rights advocates and governments alike led to the introduction of NHRIs on a global scale, whose numbers quickly spread throughout the 1980s. In 1991 the Paris Principles were adopted, consisting of a set of guidelines regulating the establishment and functioning of NHRIs. Shortly thereafter came the official endorsement from the international community, when the 1993 Vienna Declaration¹ explicitly “encourage[ed] the establishment and strengthening of national [human rights] institutions”.² The United Nations efforts in favor of the “NHRI project” culminated in the creation of a NHRI-specific post, the Special Adviser on National Institutions, Regional Arrangements and Preventive Strategies, which obviously allowed for greater recognition of NHRI activism the world over. The final

¹ The authoritative document adopted by the 1993 United Nations Vienna World Conference on Human Rights.

² United Nations World Conference on Human Rights, *Vienna Declaration*, pt.I, ch. III.

development, which pushed NHRI activism and institutionalization even further, was the establishment of the International Coordinating Committee of National Human Rights Institutions (ICC) in 1994, the purpose of which was to coordinate the activities of NHRIs internationally, acting as connector between NHRIs and the international human rights law regime . The ICC soon began registering members based on their compliance with the Paris Principles, without which no NHRI would be considered a reliable partner by the international community as a whole.

To a superficial observer these recent developments might represent a closing of the previously mentioned circle: national human rights are finally brought back to the fore of institutionalization processes and the gap that was dividing “the international” from “the local” has finally been bridged. I would contend differently, adding a layer of criticism to a system I otherwise consider absolutely necessary for the current human rights regime. By focusing on one specific category of NHRI, the Iberoamerican Defensor del Pueblo, I will depict those local realities that have so far been overly disregarded in the institutionalization processes that NHRIs have recently benefited from. At the international level, no official NHRI evaluation has ever been made by seeking to identify the critical human rights issues in the country to then determine how the NHRI has addressed them. The different local circumstances which the NHRI is bound to be characterized by have never been taken into consideration in processes of evaluation, and it is self-evident that NHRIs do not exist in a vacuum.

The purpose of this paper is to examine the institutionalization process of NHRIs through a critical lens, cognizant of the fact that the mere existence of a NHRI in any one country does not necessarily mean an improvement for local human rights. There is an inherent problem with the current NHRI project and that is the substantial disregard for the local context within the assessment of these institutions’ effectiveness. An overly confident reliance on international standards for evaluation, embodied in the Paris Principles adoption and the worldwide recognition of their value as sole means of institutional promotion or criticism, is at the root of the tainted success that these institutions have had in the last thirty years.

Consequently, the thesis sets out to answer the following question:

Are the Paris Principles a sufficient mechanism to evaluate NHRIs effectiveness in the light of the local context’s influence?

1.2 Method and Sources

This research project is a combined descriptive and analytical effort, carried out through a combination of primary and secondary sources.

For the initial description of the NHRI concept, both scholarly articles and practitioners' reports were used. The fair conception of NHRIs that results from the analysis is due to a balanced choice between laudatory and critical writings, UN-documents, NGO and independent experts reports, an essential approach for transmitting an unbiased account of the subject matter.

As far as the regional focus section of the thesis, of invaluable help has been the three-month internship period spent at the *Office of the Defensor del Pueblo de Ecuador* (May – August 2013). During my placement, apart from learning the workings and technicalities of a NHRI from within, I drafted a capacity assessment worksheet divided into five different areas of concern (Internal Procedures, Human Resources, Leadership, Accountability and Technical Resources). Each of these areas is itself divided into three parts.

The first part presents a number of indicators/guide statements (36 in total) to be rated following a set rating system (out of 5). This represents the only quantitative data analysis of the capacity assessment, the rest of which is all qualitative. Within this first part, explicatory evidence is also asked to be given in support for each graded indicator in order to be able to review objective facts rather than simple personal opinions; the second part consists of a SWOT analysis table, where each member of staff is asked to list his/her perceptions on the Dirección's Strengths, Weaknesses, Opportunities and Threats on that particular area of concern; the third and final part is a space left for general recommendations, obviously directed only at the relevant area of concern.

The worksheets were handed out to each member of staff of the Dirección and a working week was left for its completion. Once all the worksheets had been handed in, both quantitative and qualitative data was analyzed. The analysis' purpose was to reflect back to the staff of the Dirección their own understanding of the strengths, weaknesses, challenges and overall effectiveness of their work. From such analysis a list of final recommendations was proposed with a view to increase the Dirección's effectiveness for its future. Furthermore, the capacity assessment worksheet was given out to staff members of four Provincial Delegations (Orellana, Sucumbios, Guayas and Azuay) during my visits to these external offices. The data collected was then processed separately, in order to discern the different realities present in the country.

This whole activity is supposed to be a pilot scheme, which will hopefully become an integrating part of the self-assessment mechanism of the Defensoría in the future. The objective of such assessment is in fact to understand the existing strengths and weaknesses of the Dirección in order to develop future capacity development strategies. It is for this reason that I would see such Capacity Assessment as a complementary feature to the regular Strategy

Plan processes. This project goes hand in hand with the purpose of the thesis, as a practical example of alternative means of assessment mechanisms which directly relate to the local context. A copy of my work at the office of the Defensor del Pueblo of Ecuador is attached in Annex II.

During my stay in Ecuador, I also benefited from the possibility of accessing the extensive collection of specialist publications found in the *Facultad Latinoamericana de Ciencias Sociales* (FLACSO - Sede Ecuador). It is in FLACSO's library that I managed to conclude the short comparative analysis of the various Iberoamerican Defensor del Pueblo offices' mandates.

On my return from Ecuador, I had the chance to attend the second *International Conference of the Programa Regional de Apoyo a las Defensorías del Pueblo en Iberoamerica* (PRADPI). The three day event (25 – 27 September 2013), attended by the majority of Iberoamerican Defensores del Pueblo, was a fantastic opportunity to discuss and share points of view on the strengths and weaknesses of the global NHRI system of governance. Notwithstanding the fact that I have not regarded these extremely instructive discussions as outright interviews, they highly influenced the considerations found throughout my thesis as well as my conclusions.

As far as the third part of the thesis is concerned, and more specifically regarding the critique of the current NHRI project, I based my research on both scholarly articles, official UN-documentation and ICC instruments. Due to my current six month internship at the *Office of the High Commissioner for Human Rights* (January – July 2014), I have had access to the UNOG Library as well as to a wide variety of human rights practitioners in the field of NHRIs, a list of which I have set in the bibliography. It has obviously been of great help in my research to be able to count on this sort of opportunity.

1.3 Outline

The present paper can be divided into three parts. **Part I** (chapters 1-6) serves to introduce the figure of the ombudsman from an historical, theoretical and technical perspective. A gradual outline of the figure of the ombudsman is given, starting from an historical perspective of the means through which the power of the state has been limited for the benefit of the population (Chapter 2). The analysis continues with the result of a legal history-based research of the various bodies that have preceded that of the first ombudsman body (Chapter 3), the Swedish *Justitieombudsmannen* (which is the main subject of Chapter 4). Part I continues with a theoretical explanation of how the ombudsman, nowadays a particular category of the wider class of institutions called National Human Rights Institutions, has expanded on such a global scale (Chapter 5). Chapter 6 concludes Part I of the paper with the necessary analysis of the technical characteristics that shape NHRIs and their role in the international community.

Part II (chapters 7-9) presents the case study of the paper. It focuses on the peculiarly Iberoamerican category of NHRI, namely the Defensor del Pueblo. It is for this reason that the

Latin American social and cultural background is analyzed in Chapter 7, starting from its multicultural heritage and its colonial history and concluding with the XX century dictatorial regimes and current political trends. This analysis is presented with a constant focus on how these uniquely Latin American traits have molded the conception of the state, both formally and in the eyes of the population. Particular attention is given to the dysfunctions of the democratic state in the region and its effects on the state administration. In Chapter 8, the institution of the Defensor del Pueblo is explained within the previously mentioned Latin American context. Its common features are outlined and a comparative analysis of the various mandates is presented in order to give a broad overview of the Defensor's functions. The focus at this point of the paper is given to the peculiar characteristics that these mandates figure vis-à-vis other kinds of NHRIs, with Chapter 9 dedicated to such discussion.

Part III (Chapters 10 and 11) features a critique of the current NHRI project (framed in Part I of the paper) considering the essential local context (analyzed in Part II). The relatively quick world-wide expansion of NHRIs have without a doubt brought the human rights system of promotion and protection “closer to home” and filled a gap that burdened the system as the only means of bridging the international with the national was left to civil society efforts. Through a critique of both the Paris Principles and the international systems' approach to NHRI development, supplemented by real-case examples from NHRIs in two different continents, the paper concludes that NHRIs cannot anymore be evaluated without specific reference to the local and a tentative solution is presented.

In conclusion, overreliance on whether or not the Paris Principles have been fully respected suggests that criteria for evaluation are based on essentially external factors with respect to the national variables of any one country. We have reached a moment in time when the international system of NHRI evaluation cannot stop at structural precepts and mandate-based considerations. An increased attention to the impact that these fundamental institutions actually make on the ground is now a necessary step if we want to avoid that NHRIs lose not only in performance levels but also in legitimacy. The particular traits that each region, let alone each state, is characterized by are too crucially different from one another to be left out of assessment mechanisms.

PART I

2 Limitation of State Power by the Rule of Law

The contemporary democratic state is characterized by a number of constant dysfunctions, many of which can be linked to the same antithesis between liberalism and democracy, which is on the one hand the distribution of power and on the other the necessity to control it. Corruption, bureaucracy³, abuse of power (be it by the Executive or whoever else exercises power in the name of the people) and maladministration are just some of the most important of such dysfunctions, and from each of them stem a multitude of potential human rights violations by the hands of the State towards its citizens. If we follow Bertrand Russell's analysis of the State⁴ as being an abstract entity, the interests of which cannot, in the end, be other than the interests of those who guide it, we manage to easily view the dangerous picture: the functioning of governmental institutions are bound to be shaped by the will and the ideas of the people working in them, from the Minister all the way down to the ordinary civil servant and functionary. And it is an unfortunate, albeit questionable, truth that the individual has an innate tendency to prefer its own convenience to the one of the others, a truth which seen in the light of Russell's point of view, is one of the fundamental and probably unsolvable problems of democratic institutions. If it is true that democracy is something else apart from the mere right to periodically elect one's representatives, than such inclinations have to be civically controlled. The separation of powers as we know it today, firstly theorized by Montesquieu in his *L'Esprit des Loix* (1748), may be presumed to have been announced with the above preoccupation in mind. However, that was definitely not the first time that it had been discussed, especially so if we are to consider the separation of powers as a means to control the State.

We can go back all the way to Egyptian times, and more specifically to the *Teachings of Merikare* (2050 B.C.), to find proof of the existence of a certain type of control on the ruler. The teachings were written from the Pharaoh to his son in order to let the future ruler know that his behaviour would eventually be judged by the divine tribunal.⁵ It is with the ancient Greek and ancient Roman philosophers and orators that the discussion on the limitation of power was taken to a less transcendental level. The issue was framed in the philosophical discussion on which form of government is to be preferred between one of laws and one of men. Plato, in the fourth book of his *Laws*, stated the following: "when I call the rulers servants or ministers of the law, I give them this name not for the sake of novelty, but because I certainly believe that upon such service or ministry depends the well- or ill-being of the state. For that state in which the law is subject and has no authority, I perceive to be on the highway to ruin; but I see that the state in which the law is above the rulers, and the rulers are the inferiors of the law, has salvation, and every blessing which the Gods can confer".⁶

³ In this sense, the word "burocracy" has to be given its negative value of the word.

⁴ Bertrand Russel, *Authority and the Individual*, Routledge (1949).

⁵ Etienne Drioton and Jaques Vandier, *Histoire du Egypt*, 2nd Ed. Eudeba (1994) in Carlos R. Constenla, *Teoria y Practica del Defensor del Pueblo*, Editorial Reus (2010) at p. 18.

⁶ Plato, *The Laws*, Book IV available at <http://classics.mit.edu/Plato/laws.html> (accessed 1st Sept 2013)

Respect towards the law is the safeguard against the likely risk of the ruler's biased behavior towards his own personal interests. The subordination of power to law left its slightly mythological background and entered the realm of pure political policy with the first Roman law theoretical treaties. Cicero's *pro Cluentio* in fact contains one of the very first and most extraordinary theorizations of the idea of law as the necessary element for a truly free people, in that it serves as a safeguard against the discretionary power of rulers or, as Cicero himself succinctly stated, "in order to be free, we have to be servants of the law".⁷ As will be discussed in the following chapter in detail, it is within the Roman intricate system of checks and balances during its Republican period that the first sign of what will eventually become the modern day ombudsman institution can be traced back to. The introduction of the Tribune of the People as an official whose task was to safeguard the rights of plebeians from the oppression of the patrician magistrates is only one of the many novelties of that era, the collegial form of government and the annual duration of the posts being other examples. Even in later periods of Roman history, notwithstanding the drift away from fully republican principles, the ruler would not be called Rex again, but rather Princeps (in Latin, "first" amongst citizens).

Evidence of the constant search for a limitation of power in favour of the citizenry continues relentlessly in history. One of the most reproduced quotes on the matter dates back to the XIII century, to be found in Henry Bracton's *De Legibus Consuetudinibus Angliae* which states that "[...]The King must not be under man but under God and under the Law, because law makes the king, for there is no rex where will rules rather than lex".⁸ In this field of political analysis, transcendental arguments finally disappear with Marsilio da Padova who, in line with the biblical "give back to Caesar what is Caesar's" principle, can be said to be the precursor of what has been labeled civic humanism. From his works the new role of the legislator vis-à-vis the ruler is introduced, a role that sees the former able to control the latter in an unprecedented way, even to the point of being able to depose him if the law is not being respected. One of the most extraordinarily contemporary thinkers of the Renaissance, Niccolò Machiavelli, considered that one of the fundamental tenets of a republic is the citizens' right to freedom, which is at high risk of being limited when the powerful (be them the rich, the rulers or, as it often is, both at the same time) make the laws following their own interests. To this problem, which is neither more nor less what we now call state corruption, Machiavelli found the solution in the regularization and distribution of power: "[the people] are easily satisfied by creating institutions and laws which, together with [the Prince's] power, gives realization to the general security of the people. And when a Prince does this, and the people see that no one breaks such laws by accident, they will begin in a very short time to live in security and contentment".⁹ This represents an early constitutionalist perspective which once

⁷ Marcus Tullius Cicero, *Pro Cluentio*, n. LIII, translated in Spanish by Juan Bautista Calvo, Libreria de Hernando y Compañía (1898) in Carlos R. Constantla, *cit.* At p. 23.

⁸ Henry Bracton, *De Legibus et Consuetudinibus Angliae*, translated in English by S.E. Thorne, II Ed. Harvard University Press (1968) at p. 33.

⁹ Niccolò Machiavelli, *Discourses on Livy*, Book I, XVI available at <http://www.latinamericanhistory.net/discorsi1.html> (accessed on 1st September 2013).

again shows the importance given to the reining in of power in order to avoid maladministration and corruption by the hands of the rulers.

The superiority of the law above the ruler's decision-making power is the key principle of the English tenet of the Rule of Law which, ever since the signing of the *Bill of Rights*, product of the so called Glorious Revolution, is the guiding principle of English constitutionalism. The Rule of Law is, rather easily put, the superiority of the law over the sovereign, a formal means of power control. A further fundamental step in identifying the relationship between the individual and power was brought forward by John Locke at the end of the XVII century.¹⁰ The individual, in this perspective, does away with a part of its innate absolute liberty and delegates it to a public authority, keeping for itself those natural liberties which result being what we today call fundamental rights, which the State has the duty to respect and uphold. This limited role of the state has been a tenet of both the French (see Rousseau's *Social Contract*¹¹) and American Revolutions, notwithstanding their ideological differences. And continues today to fuel those aspirations towards a state which is not dominated by arbitrary political choices but is impersonally fixed to principles of legality and justice, that is a state which is subject to the rule of law. A negative power of control is thus necessary for such aspirations to become closer to reality. Rousseau is very clear in theorizing this alternative and necessary form of power whilst introducing the institution of the Tribune: "When an exact proportion cannot be established between the constituent parts of the State, or when causes that cannot be removed continually alter the relation of one part to another, recourse is had to the institution of a peculiar magistracy that enters into no corporate unity with the rest. This restores to each term its right relation to the others, and provides a link or middle term between either prince and people, or prince and Sovereign, or, if necessary, both at once. This body, which I shall call the tribunate, is the preserver of the laws and of the legislative power. It serves sometimes to protect the Sovereign against the government, as the tribunes of the people did in Rome; sometimes to uphold the government against the people, as the Council of Ten now does at Venice; and sometimes to maintain the balance between the two, as the Ephors did in Sparta".¹²

Rousseau's analysis inspired many democratic thinkers of the time, both in Europe and on the other side of the Atlantic as well, all pushing for a more balanced power between the state and the citizenry. Italy, for example, had a number of political philosophers during the start of the XIX century, just before its Unity, that specifically mentioned and proposed novel bodies, the purpose of which was to protect the solidity of the pact between the citizenry and the state. In *Saggio sulle Leggi Fondamentali dell'Italia Libera*¹³, republican politician Giuseppe Abamonti introduced to the Italian political scene two new bodies that according to him

¹⁰ John Locke, *Two Treatises of Government – Essay concerning the True, Original Extent and End of Civil Government*, Book II, II available at <http://www.lonang.com/exlibris/locke/loc-202.htm> (accessed on 1st September 2013).

¹¹ Jean Jaques Rousseau, *Du Contrat Social ou Principes du Droit Politique*, Book III, XV, Chez Marc Michel Rey (1762).

¹² *Ibid.* at p. 278.

¹³ Giuseppe Abamonti, *Saggio sulle Leggi Fondamentali dell'Italia Libera*, stampatore Luigi Veladini - Isernia (1797).

should have been included in what was soon to become Italy's first Constitution, also known as Statuto Albertino. The two bodies were the "Conservatori della Legge", a nine member body whose task was to control the bills that passed through the Assembly and that national authorities fully complied with the law, and the "Difensori del Popolo", composed of nine members as well, responsible of controlling the personal behavior of state officials and civil servants vis a vis the citizen. During the constituent assembly of the Repubblica Romana, a very short experience of Italian independence (1849) which predated by a decade the unification of the peninsula, the figure of the Tribunato was introduced with firm belief by its members, to the point of it being defined as "...the master key of our new political mechanism".¹⁴ On the other side of the Atlantic, as an example of an early Latin American experience that sees such emancipatory bodies being introduced, the 1811 *Proyecto de Constitucion Provisoria de Las Provincias Unidas del Rio de la Plata*, in describing the body of the Provedorado, says: "in order to safeguard the sacrosanct rights and liberties of the people against the usurpation of the governments such body is established [...] Its only obligation will be to exclusively protect the liberty, security and the sacrosanct rights of the people against the usurpation of the government."¹⁵

As briefly mentioned above, during the whole of the XIX century liberalism is the dominant political ideology. With time, after the atrocities of the First World War, those guaranteed liberties that the natural laws of the market were supposed to enjoy from the state became very thin. The Russian Revolution, with its Marxist socialist ideals, the Mexican Revolution, with the nationalization of its natural resources and the formal recognition of workers' rights and the 1919 Weimer Constitution, where social rights were finally put into writing, are clear signs of a worldwide change in the conception of the role of the state in its relations with the citizen, the so called Welfare State. In a nutshell, the individual and society stopped being regarded as two separate entities and the responsibilities and functions of the state increased, something which meant an unavoidable strengthening of the administrative sector. To the increase in power of the state over its citizens followed the necessity of an increase in its control by the hands of the citizenry. And when talking about bureaucracy, Carlos Constenla, President of the Latin American Institute of Ombudsmen, describes it as such: "In reality we are dealing with the first and most inexpensive means to mystify and limit the rights of people through its own legal (or pseudo-legal) structure which has been in place since the introduction of a strict division of powers".¹⁶

3 Common historical heritage of the Ombudsman

To fully appreciate the nature of the ombudsman institution (which was officially introduced in Sweden in 1809, as will be explained in the next chapter) and to frame it in the ancient and borderless mission of protecting justice and the most fragile against the influences of power, what follows is an analysis of some of the numerous examples of past institutions that can be considered distant relatives of the ombudsman itself.

¹⁴ Pierangelo Catalano, *Diritti di Libertà e Potere Negativo* in Carlos R. Constenla, *cit.* at p. 84.

¹⁵ *Ibid.* at p. 79.

¹⁶ Carlos R. Constenla, *cit.* at p. 110.

In ancient Greece, both major cities established bodies that had as its main purpose the control of the decision makers, be them kings (Sparta) or democratically elected leaders (Athens). As far as the former is considered, the body in question was that of the *Eforoi*, a five-member body elected by the *Guerusia*, the “council of the elderly”. They had the power to question the magistrates, depose them as well as sentence them to death in case their misapplication of the codes of conduct was grave enough. Its influence on the elite was so strong that Polybius described Sparta as being governed by its kings “together with the vigilant and paternal protection of the eforoi”.¹⁷ In Athens, where a collegial body of magistrates ran the city with an annual duration, the controlling function was supervised by the public office of the *Euthynoy*. At the expiration of each magistrates’ assignment, this official’s task was to go through the population’s complaints and decide whether the magistrate indeed deserved a penalty for its misdoings.

In ancient Rome, and more precisely since the V century BC, the institution that more resembled the current ombudsman and which is by many scholars seen as the first real ancestor of the latter, is the *Tribune of the Plebe*. At the start of that century, an uprising took place by the hands of the people of Rome against the corruption, excessive power and violent behavior of the elite which had been subduing the poorer sections of society over the decades. This revolutionary act, known as the “Succession of the Plebe”, brought forward fundamental institutional changes for the centuries to come. One such change regarded the establishment of a novel body, made up of a team of two magistrates whose only task was that of defending the people’s liberty from the injustices and abuses of power of the state. The defense of the people from any sort of abuse was sealed by the powerful right to veto (*intersessio*) which could be expressed both by the request of a citizen (*appellatio*) and by the tribunes’ own initiative. This power of veto could be used against any decision taken by the constitutional organs of the Roman republic (consuls, magistrates, senate and assembly members) in order to protect the less powerful section of society, the plebe. The controlling power of this institution was such that historian Polybius, in his *Universal History of the Roman Republic*, went as far as defining the form of government of the time as a “government of the people”¹⁸, something which lead even Lenin himself to use it as an example of revolutionary militancy in his *What is to Be Done*, when he described the Roman Tribune as someone “who is able to react to every manifestation of tyranny and oppression, no matter where it appears, no matter what stratum or class of the people it affects”.¹⁹ In the words of Giovanni Lobrano, renowned Italian professor of Roman Law, the *Tribunato* was “the defense that the citizens endowed themselves with against the government. An extraordinary invention: a judiciary of its own, something close to being a counter-judiciary; a power close to being a counter-power. It is the institutionalization of social dialectic”.²⁰

¹⁷ Polybius, *The Histories of Polybius*, Vol XXIV, translated in English by Evelyn S. Shuckburg, Macmillan and Co. (1889) at p. 692.

¹⁸ *Ibid.* Vol. VI at p. 351.

¹⁹ Vladimir Illich Ulianov Lenin, *What is To Be Done*, Ch. III in Carlos R. Constenla, *cit.* at p. 165.

²⁰ Giovanni Lobrano, *Dal Tribuno della Plebe al Difensore del Popolo* in Pietro Catalano, Giovanni Lobrano and S. Schipani, *Da Roma a Roma – Dallo Jus Gentium al Tribunale Penale Internazionale*, Istituto Italo Latinoamericano (2002) at p. 83.

Fast forwarding in this legal history analysis to the Middle Ages, another body that had characteristics similar to the modern day ombudsman's and that presumably functioned with similar functions was that of the *missus dominicus* (in English "envoy of the ruler"), introduced by Charlemagne in order to keep under control the vast empire under his rule. They were representatives of the royal authority in the various regions of the Sacred Roman Empire (each region was controlled by two *missi*, one of civil and one of ecclesiastical backgrounds) who were called to roam their region making sure that the rich landowners were not abusing their power as well as receiving claims of misdoings from the people against their lords. The reports would then be passed onto the sovereign who would then decide the actions to be taken against these local authorities. It is with the *missi* and their controlling functions that we can for the first time clearly see the double edged sword pertaining to such "defenders of the people": in fact these representatives, as well as undoubtedly working in favour of the less powerful members of society, were also a very fierce tool of political control and censorship of local authorities. As later chapters will discuss, it is an issue which has been particularly central to the ombudsman institution up until our days.

Yet another ancestor of our modern day ombudsman is the 13th century *Justicia Mayor de Aragón*, presumably a direct relative of the current Iberoamerican institution of the Defensor del Pueblo. Similar to the introduction of the Roman Tribune, The Kingdom of Aragón introduced the *Justicia* after an uprising against the sovereign by the hands of the nobility. King Jaime I was in fact accused of arbitrary conduct in the running of the Kingdom and as such the noblemen demanded the introduction in the mechanisms of power of an authority which would limit the sovereign's exercise of power. With the years, the *Justicia* grew in importance and prestige in the defence of the 'constitutional' legal system of the Kingdom of Aragón by successfully defending the personal rights and liberties of its inhabitants. Amongst its functions, two are worth mentioning more specifically as we can see similarities with the current functions operated by ombudsmen nowadays: the *Fueros de Manifestaciòn* and the *Firma de Derecho*.

The *Fueros de Manifestaciòn* were substantially equivalent to what is known as "habeas corpus". It is the power to order whichever public or private institution that has authority to deprive somebody of their freedom, to physically bring the subject of such deprivation in front of the *Justicia* in order to avoid such penalty to be exercised. Additionally, the order could be issued in instances of mistreatment of detainees, a sort of primordial form of an institutionalized prohibition of torture. The *Firma*, on the other hand, is similar to what in the modern Spanish legal system is known as *amparo*: an order from the *Justicia* (it would be the Defensor del Pueblo nowadays) towards another authority obliging it to terminate a certain procedure which was considered contrary to the rights and freedoms of the petitioner, which could be the *Justicia* himself *de officio*. Fundamentally, the King was also subject to the latter's jurisdiction and there have been recorded instances of royal inhibitions, such as that affecting King Peter IV of Aragón in 1386.

Historians²¹ say that the figure of the Justicia had not been a brand new introduction in the Iberian peninsula by the Kingdom of Aragón, being inspired by Spanish Islam. The sultanate of Cordoba introduced a body of law called the “judge of injustices” (*Sahib al Màdalin*), whose only role was to resolve the complaints handed in to him by the population against the abuses and misdoings of public authorities.

At this point, in order to give a truly worldwide outlook of the historical expansion of bodies that may be considered the ancestors of modern day ombudsmen, the analysis turns to ancient institutions established in the Latin American continent. The first of such bodies, unveiled by history, dates back to the Inca empire. The *Tùcuyricoc* (which may be translated as “he who sees everything”) was an agent nominated by the Inca himself for a determined period of time, trained in law, who was secretly sent to external provinces in order to check upon the conduct of the administrative bodies. They had no power of issuing penalties however, and could only suggest their opinion to the governor. The Incas had in fact a very developed system of checks on the administration of the empire, so much so that “whichever judge, governor or minister who was found to not have properly safeguarded justice within its mandate or to have committed any other illegality, was more severely punished than any other layman who was found to have committed the same illegality. And the higher the position in the state hierarchy, the more severe was the penalty. This was due to the fact that it was not tolerated that someone chosen to safeguard justice behaved unjustly [...] as he who was chosen was supposed to behave better than all of his subordinates”.²²

In colonial times the Spanish brought a substantial part of its administrative mechanism to its colonies, in order to facilitate the management of the vast territories it conquered. Amongst the newly introduced bodies was that of the *Procurador Síndico General*, directly nominated by the governing body of each province (known as *cabildo*), whose role was to defend the collective rights of the citizens against the other administrative bodies. The importance of this post can be seen by its longevity even in post-colonial America, to the point that in a few Latin American countries the modern day ombudsman is still called *Procurador* (instead of the more classic *Defensor del Pueblo*).²³

After this varied analysis of past institutions one can clearly see the leitmotiv that has been recurring in all stages of history, no matter what legal tradition is followed: the necessity in state-organized communities for a controlling power over its administration in order to safeguard its citizens from abuse and injustice.

4 The Swedish Ombudsman

The first sign of a state institution with tasks linked to the overlooking of the state’s good governance and protection of the citizenry from the abuses of state administration dates back

²¹ Angel Gonzalez Palencia, *Historia de la España Musulmana*, Labor (1925) in Julian Ribera y Tarrago, *Orígenes del Justicia Mayor de Aragón*, De Comas Hermanos (1897).

²² Garcilaso de la Vega (El Inca), *Comentarios Reales de los Incas*, Vol. II, XIV, Emecè (1945) in Carlos R. Constenla, *cit.* at p. 192.

²³ Guatemala, Nicaragua, El Salvador and Puerto Rico.

to early 18th century Sweden, when King Charles XII established the institution of the Chancellor of Justice (originally called *Högste Ombudsmannen*, now named *Justitiekanslern*) in 1713. Even though its task was effectively similar to that of the Ombudsman we know nowadays, monitoring that the civil servants of the time behaved according to their obligations and the law, the interests meant to be safeguarded were not the private citizens' interests, but the Executive's instead, from which the Chancellor depended and by which it was nominated. According to André Legrand, the Chancellor's role was one of general control over the civil service, and more specifically "over the observance of the laws and obligations of each state employee".²⁴ Scholars have suggested that the function of the Chancellor of Justice was, in turn, inspired by the Ottoman Empire's figure of the *Kadi*²⁵, who overlooked that the Islamic precepts were being adhered to by all state officials, from civil servants to the sultan himself. In fact, King Charles XII was exiled from Sweden to Turkey after his defeat against Russia in 1709. It is thus credible that he came into contact with the idea of such an institution during his stay in Istanbul.

In the 1720 Constitution, which sanctioned the supremacy of Parliament over the Crown, the Chancellor of Justice had not only its presence confirmed within the state administration, but received the additional task of informing Parliament on its findings. From this moment onwards, notwithstanding its continued dependence from the Crown, one can see the start of a gradually closer relationship between this body of control and the citizenship itself. An even closer connection with Parliament was tied during the last years of the 1760s, when the appointment function of the Chancellor turned to the *Riksdag of the Estates*²⁶, the Assembly made of representatives from the Nobility, the Clergy, the Burghers, and the Peasants (which predated the modern day Swedish Parliament - *Sveriges Riksdag*). This function swiftly returned under royal exclusivity after the coup d'état of 1772.

The dispute between the Executive and Parliament on this issue was eventually settled with the adoption of the new Constitution of 1809. It is in this constitutional document that the concept and position of the Ombudsman was officially established for the very first time. It is evident that the previous body of control, the Chancellor, was not endowed with a sufficient amount of independence from the Crown to be fully credible in the eyes of the citizens²⁷. According to a specialist in the field, Alfred Bexelius, "it is exactly due to this [lack of independence] that the decision was taken to allow public authorities to be controlled by a totally independent office".²⁸ And this independence, engraved in the Constitution, did not only mean towards the Crown, but towards the government and Parliament as well.²⁹ In this

²⁴ André Legrand, *L'Ombudsman Scandinave*, E. Pichon & R. Durand-Auzias (1970) at p.23.

²⁵ The figure of the Kadi has been dealt with when talking about the Ombudsman's ancestors in Moorish Spain.

²⁶ Nobility, Clergy, Burghers, and Peasants.

²⁷ The office of Chancellor of Justice continued to exist, but with other functions.

²⁸ Alfred Bexelius, *The Ombudsman for Civil Affairs* in Ronald C. Rowat, *The Ombudsman*, George Allen & Unwin Ltd. (1966) at p.24.

²⁹ The first Ombudsman, Lars August Mannerheim, was elected by Parliament in 1810 and, contrary to what had been declared in the Constitution, was the leader of the Constitutionalist Party, hence tainting

way, and for the first time, the reins of control were officially taken away from the executive and given to an independent body, meant to become “the guardian of the common and individual rights of the people”.³⁰ Article 96 of the 1809 Constitution declared that Parliament “should elect a person of known legal ability and respected for his dignity and integrity, to act as an agent of the Parliament in accordance with the instructions to be decreed. [The Ombudsman] had to ensure that the laws were properly observed by judges and civil servants. He had to prosecute those who by abuse of power oppressed the people or otherwise neglected to fulfill their functions”.³¹ Since then, this body of control has existed within the Swedish state with the name of Parliamentary Ombudsman (*Riksdagens Justitieombudsman*).

A boost in the Ombudsman’s importance within the state administration came after the 1865 Parliamentary Act, which abolished representation by estate and established a bicameral parliament. Notwithstanding this constitutional change, Parliament was in fact far from the modern day kind, still discerning between a lower Chamber whose members were voted by those citizens included within the official census, and a higher Chamber in which only landowners were allowed. This conservative drift did not affect the Ombudsman’s office, but to the contrary it was with the 1865 Act that its independence was reiterated and the requirement of reporting annually to Parliament was established. It was however quite usual at the time that Parliament would meet rather irregularly, a fact which increased even more the Ombudsman’s importance within the organs of control of the state. After all, lacking in a constantly present assembly, it was often the Ombudsman that played the role of the only body of control over the executive, something which becomes even more astonishing when one realizes that even the judiciary of the time was directly answerable to the King.

Another fundamental reform that shaped the Parliamentary Ombudsman in those early years of its existence came just after the end of the First World War. The wording of Article 96 of the Instrument of Government (1915) was edited as such: “... the Riksdag shall appoint two citizens of known legal ability and outstanding integrity, the one as Ombudsman for Civil Affairs (*Justitieombudsman*) and the other as Ombudsman for Military Affairs (*Militieombudsman*), to supervise the observance of the laws and statutes in the capacity of representatives of the Riksdag, according to instructions issued by the Riksdag... The Ombudsman for Civil Affairs should supervise the observance of laws and statutes as apply to all other matters (except the Military) by the courts and by public officials and employees”, a division of roles that lasted until 1968 when the office of *Militeombudsman* was officially done away with and their functions amalgamated into one single body, which kept the old name of *Justitieombudsman*. The number of ombudsmen necessarily grew from the original two to four by 1975, due to a constant increase in workload. Each was given an area of expertise, according to his/her personal background. One Ombudsman was put in charge of

this election as politically influenced. Luckily, apart from rare instances, the post has since been given to apolitical lawyers.

³⁰ Alfred Bexelius, *The Swedish Ombudsman*, The University of Toronto Law Journal, Vol. 17 No. 1 (1967) at p.171.

³¹ Fariborz Nozari, *The Swedish Institution of Justice Ombudsman*, International Journal of Legal Information, Vol 18 at p. 1.

judicial control as well as detention centres; another was introduced to deal with issues related to the Armed Forces, as well as cases regarding health, education/culture and means of communication; a third specialized in matters revolving around tax, social security and vulnerable groups, whilst one was elected as Chief Ombudsman, responsible for the administration of the institution and allowed to take charge of the most important cases, whether or not they fall within his own area of expertise. Fundamentally, each one of them is given an equal judicial status and each has as its ultimate aim that courts, administrative bodies and municipalities respect the rule of law and do not abuse their power at the expense of the citizenry. Its mandate and responsibilities are now laid down in three legislative texts: the Constitution (Instrument of Government) and the Riksdag Act contain the general rules, whilst the more detailed regulations are to be found in the Instructions for the Parliamentary Ombudsman (*Lag med Instruction for Riksdagens Ombudsman*). This is what the Instrument of Government 12:6 currently establishes on the figure of the Parliamentary Ombudsmen:

“(1) The Parliament shall elect one or more Ombudsmen to supervise under instructions laid down by the Parliament the application in public service of laws and other statutes. An Ombudsman may initiate legal proceedings in the cases indicated in these instructions.

(2) An Ombudsman may be present at the deliberations of a court or an administrative authority and shall have access to the minutes and other documents of any such court or authority. Any court or administrative authority and any State or local government official shall provide an Ombudsman with such information and reports as he may request. A similar obligation shall also be incumbent on any other person coming under the supervision of the Ombudsman. A public prosecutor shall assist an Ombudsman on request.

(3) Further provisions concerning the Ombudsmen are set forth in the Riksdag Act”.

Apart from these regulatory frameworks, the Ombudsman is endowed with a certain amount of freedom in terms of internal rules and distribution of work by provisions found within the Instructions. This independence is however curtailed by the requirement to consult the Parliamentary Committee on the Constitution on matters of high importance.³² Hence, even though the institution’s mandate is provided for by the law, it is not totally independent from governmental control. Those entities which are included within the Ombudsmen’s supervision are nearly all state and municipal authorities, their staff, and even enterprises with strong ties of influence with the state. The Ombudsmen’s main legal responsibility is to ensure that the courts and public authorities “obey the constitutional requirements of objectivity and impartiality and that the fundamental rights and freedoms of citizens are not encroached upon by these organs”.³³ Some organs of the state are however exempted from the Ombudsmen’s control, amongst which are the King, members of Parliament, Cabinet Ministers and the Chancellor of Justice.³⁴ A fundamental characteristic of Swedish

³² *Lag med Instruction for Riksdagens Ombudsman*, Art. 12.

³³ *Ibid.* Art 3.

³⁴ *Svensk Forfattningssamling* (1974), Section 2.

constitutional law is in fact the strict separation between the political and administrative role. This creates two very distinct blocs within the state: the King, its counselors and its Ministers on the one hand, and the State Administration with its Administrative Departments on the other. The Ombudsmen thus follow and represent this Swedish dichotomy to its fullest.

In its supervisory authority the Parliamentary Ombudsmen's Office can fulfill its mandate through a number of functions: it can investigate complaints received by the general public, initiate investigations on its own initiative, carry out inspections of State/local authorities and make recommendations of amendments to both Government and Parliament as well as give advice on the application of the law. However, the function that is not constitutionally recognized but figures as the one with the highest efficiency is that "by its mere existence it counteracts tendencies to transgressions of authority and abuse of powers".³⁵ In fact, as ex chief Ombudsman Alfred Bexelius eloquently describes, its continuous reminders of the true contents of the law, "like the drops that hollow the stones by continuous falling, have had a definite influence on the way that civil servants have fulfilled and fulfill their missions".³⁶ And to the reasonable question on why this body is necessary when the mechanisms such as the right of appeal are fully functional, the Swedish historian Alexanderson explains that "the Ombudsman is also an expression of the idea that the private citizen would, with greater frankness and confidence, dare to present his legal worries if he could turn to a guardian of the rights and liberties of the individual, appointed by the popular representatives and outside the bureaucracy, than if he had to go to a high officer appointed by the crown".³⁷

For notional clarity's sake, the recent developments of the Swedish Ombudsman's office will very briefly be discussed, before continuing our discussion on how such body expanded from Sweden worldwide. During the 1980s and 1990s Sweden introduced a number of specialized ombudsman institutions inspired by the great advances of its first, revolutionary example of ombudsman in order to cater for an ever growing role of the state in the population's daily lives. In fact, society has been compelled to interfere in a regulating fashion in activities which previously were totally unrestricted. These novel institutions are the Equal Opportunities Ombudsman (1980), the Ombudsman Against Ethnic Discrimination (1986), the Children's Ombudsman (1993), the Disability Ombudsman (1994), and the Ombudsman Against Discrimination on Grounds of Sexual Orientation (1999).

The fundamental importance between these later "discrimination-based" ombudsmen and the original Parliamentary Ombudsmen, is the state body they are subordinated to: instead of being nominated and having to report back to Parliament, these new Ombudsmen bodies have been put directly under the government, not only in terms of nominations but also of annual tasks and goals, leaving no scope for formal independence. Since 2009, however, all the above ombudsmen (apart from the Children's Ombudsman) were merged into one single office: the Equality Ombudsman. Its task follows what the previous ombudsmen were

³⁵ Alfred Bexelius, *The Swedish. cit.* at p. 175.

³⁶ *Ibid.* at p. 176.

³⁷ Nils Andren, *The Swedish Ombudsman*, Anglo-Swedish Review (1962) in Albert H. Rosenthal, *The Ombudsman-Swedish "Grievance Man"*, Public Administrative Review, Vol. 24 (1964) at p. 228.

established for, that is monitoring that those laws prohibiting discrimination are complied with at the workplace, in schools, etc. The reason for this merger of different institutions can be traced to the risk that these different ombudsmen were facing: the decrease of their authority due to the addition of a new office every time a new set of discrimination laws was introduced by the legislature. Additionally, it may be added that in this way not only would the new institution be more cost effective, but discrimination itself would lose its hierarchical value without the different grounds being dealt with by different offices. Interestingly, the Equality Ombudsman is the only Swedish body that applied for accreditation as a NHRI at the ICC and since May 2011 it holds a B status for not fully complying with the Paris Principles.

It took almost 150 years since the Ombudsman's 1809 introduction for this Swedish political innovation to start receiving a much deserved attention from abroad. Its balancing role, on the one hand protecting the citizens' individual rights and on the other maintaining the citizens' control over government, started to be viewed with a marked interest by public law scholars, who did not hesitate to define the *Justitieombudsman* as "[the most important] of all the factors contributing to the Swedish citizen's characteristic confidence and respect for government".³⁸ A common conception, by past and present citizens, of their own state administration is in fact to look at the latter as an "enemy" rather than as a "servant". On the situation of 1960s' United States for example, it was noted that a certain idea had been fostered that the US Government "somehow did not belong to the people but instead was its enemy. Not corruption, injustice or inequities in representation, but the federal government itself, and most particularly the Executive and Judicial branches, was made out to be some kind of enemy. The local government may be doing things for you, like paving roads for example, but those 'bureaucrats' in Washington take things from you".³⁹ It does not take too much historical imagination to conceive these words in a contemporary key. It is due to this rather timeless conception of the state that the figure of the Swedish Ombudsman started to gain importance, first amongst scholars and then within actual institutional reforms' roundtables. In the eyes of many, the great psychological value of such introduction was, and continues to be nowadays, a newly-found knowledge that before the large, impersonal administrative machinery of government, the citizen is not helpless and that reparatory actions are easily obtainable.

5 Theoretical Explanation of NHRIs' Global Expansion

To understand the mechanisms behind the gradual but constant worldwide expansion of national institutions, which took the Swedish Ombudsman as inspiration, one needs to approach the issue from an international relations theory perspective, taking us back to issues of state sovereignty, national citizenship and the global human rights regime. In discussions over the rise and expansion of the international human rights regime, one fundamental question revolves around whether national legacies or world influences are worthy of a higher degree of importance. In theoretical terms, one finds two distinct frameworks that explain the

³⁸ Albert H. Rosenthal, *cit.* at p.1.

³⁹ *Ibid.* at p. 12

forces behind the adoption of human rights standards: one that asserts the fundamental importance of national realities, such as economic, political and cultural profiles, above any other kind of force (neo-realist theory); and the other that emphasizes worldwide diffusion processes and linkages between structures (world polity theory). Before entering into this analysis however, it is better to frame it within a more general discussion on how modern conceptions of human rights have evolved from being a relatively “western” idea to the universal standard we now strive to achieve.

Human rights have been strongly connected to the social and political practices of “the West”. In the post-Westphalia 17th century the rise of modern markets and the birth of a modern conception of the state left the European population to face a whole new range of threats to their dignity and interests. By the late 17th century, claims of equality and toleration by the emerging bourgeoisie became to be formulated in terms of natural rights and after the violent consequences that the religious schism caused by the Reformation spread all over Europe, religious tolerance started to emerge as a recognized value. A growing social and physical mobility facilitated the spread of a new load of human rights-based demands, and by the start of the 20th century western states were guaranteeing an extensive set of civil and political rights to their citizens, shortly followed by economic, social and cultural rights as well. By codifying these rights, the introduction of the International Human Rights Bills⁴⁰ helped towards their full recognition, expanding the beneficiaries of human rights to all humanity.

This extremely simplified historical development of the human rights discourse in “the West” can be used as proof of the fact that human rights as we know them today “are not a timeless system of essential moral principles but a set of social practices that regulate relations between, and help to constitute, citizens and states in ‘modern’ society”.⁴¹ They are not innate and depend highly on the surrounding environment.

The special relationship between human rights and the West, that for some is so strong as to become one of “proprietorship”⁴², is however arguably down to a matter of timing. The indignities brought about by modern markets which had to be faced were first encountered by the West. Before the great social and political struggles of the last three centuries, the West was in fact far from the human rights champion that is depicted as today by many scholars. The ideas that “all human rights imagination is estate of the West”⁴³ or that “human rights are exclusive heritage of the Western liberal political tradition”⁴⁴ clash with European and

⁴⁰ Informal name given to one General Assembly resolution and two international treaties established by the United Nations. It consists of the Universal Declaration of Human Rights (adopted in 1948), the International Covenant on Civil and Political Rights (1966) with its two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights (1966).

⁴¹ Donnelly Jack, *Universal Human Rights in theory and practice*, 2nd ed. Cornell University Press (2003), at p.61.

⁴² Henkin Louis, *The Universality of the Concept of Human Rights*, *Annals of the Academy of Political and Social Science*, 506, 1989, pp 10-16.

⁴³ Messer Ellen, *Pluralist Approaches to Human Rights*, *Journal of Anthropological Studies Research* 53 (1997), pp. 293-317.

⁴⁴ Baxi Upendra, *Voices of Suffering, Fragmented Universality and the Future of Human Rights*, in *The Future of International Human Rights*, Pergamon Press (1999).

American historical associations with the slave trade, violent colonialism and religious persecution. However one can still very frequently find scholarly arguments in favour of human rights being a western exclusive. For example Dr. Rhoda Howard argues that non-western societies “did not and do not have conceptions of human rights”.⁴⁵ This sense of Western ownership puts the global movement at risk⁴⁶, as it leads to believe ideas of human rights as “political, invasive of sovereignty, a result of imbalances of power and ethnocentric”.⁴⁷ As Jack Donnelly points out, even though gunpowder was invented in China and Arabic numerals were invented in the Muslim Near East, “we do not conclude that they are of merely local application or validity”.⁴⁸ Human rights should be considered in the exact same light. Even though the West played a central role in starting the first human rights defence systems and their development, these have been acknowledged and adopted in the great majority of states worldwide. Peter Schwab and Adamantia Pollis find that “all societies cross-culturally and historically manifest conceptions of human rights”⁴⁹ and An-Na’im’s view is that “while it may not be completely plausible to argue that these rights have existed in their precise present formulation within the cultural traditions of most historical civilizations [...] the essence of these standards is already present”.⁵⁰

It is somehow generally accepted that modern conceptions of human rights are directly related to the individual yet universal form found in Roosevelt’s four freedoms⁵¹ present in the 1941 Atlantic Charter, which initially started as a geopolitical strategy “to mobilize support for the Allies among non-aligned countries and colonies”.⁵² However this newly established international human rights regime eventually started to play a different role. In fact national independence movements, such as the ones in South Africa, India and Mexico for example, started to make these rights their own, quickly introducing the right to self-determination amongst those new freedoms.

Western regimes, as well as those regimes indirectly supported by Western powers, started to be criticized by the use of “its own” product, whilst invocation of human rights to justify trials against perpetrators of “crimes against humanity” became more and more common, leading to what has been defined as the *Nuremberg paradigm*. Human rights have since been treated with a rather prosecutorial approach, with the fairly recent introduction of truth commissions

⁴⁵ Howard Rhoda, *Occidentalism, Human Rights and the Obligations of Western Scholars*, Canadian Journal of African Studies 29 (1995), pp.111-125.

⁴⁶ Henkin Louis, *The Universality of the Concept of Human Rights*, Annals of the Academy of Political and Social Science, 506, 1989, pp 10-16.

⁴⁷ Idem.

⁴⁸ Donnelly Jack, *Universal Human Rights in theory and practice*, 2nd ed. Cornell University Press (2003), at p. 69.

⁴⁹ Pollis Adamantia and Schwab Peter, *Human Rights: a Western Construct with Limited Applicability*, in *Human Rights: Cultural and Ideological Perspectives*, Preager (New York, 1980), at p.15.

⁵⁰ An-Na’im Abdullahi, *Religious Minorities under Islamic Law and the Limits of Cultural Relativism*, *Human Rights Quarterly*, Vol. 9, No. 1 (Feb., 1987) , at p.3.

⁵¹ Freedom of Speech and Expression, Freedom of Religion, Freedom from Want (economic security) and Freedom from Fear.

⁵² Jeong-Woo Koo and Francisco Ramirez, *National Incorporation of Global Human Rights: Worldwide expansion of National Human Rights Institutions, 1966-2004*, *Social Forces*, Vol. 87, No.3 (March 2009), at p.1323.

as alternative to outright judicial courts. Both systems recognize the primacy given to nation-states as the legitimate bodies for promoting and protecting human rights, as was strongly underlined during the 1993 Vienna World Conference on Human Rights. National governments were thus officially put for the first time at the centre stage of human rights protection. At the same time, international authorities together with civil society “increasingly emphasized the importance of establishing independent national machinery explicitly devoted to the enforcement and improvement of human rights”.⁵³ It is from this dual push that National Human Rights Institutions emerged within the international fora and the Swedish Ombudsman, with more than 150 years of experience already, resulted in being the best retro-active pilot scheme available, filling that precise gap in the protection of citizen’s rights that was present in the international human rights regime of the time. Since 1809, when the first Parliamentary Ombudsman was founded in Sweden, 178 NHRIs have been established in 133 countries.⁵⁴ Whilst a detailed analysis of the various typologies of NHRIs follows in the upcoming chapter, it is now time to consider the reasons behind such a widespread national incorporation of NHRIs, by turning to the two above-mentioned theoretical frameworks: neo-realist theory and world polity theory.

5.1 Neo-realist theory

To be academically correct, there are three different versions of neo-realism: Kenneth Waltz’s structural realism, offensive/defensive realism and modern realism, represented by the scholarly contributions of Joseph Grieco. All three versions however inherit the essential realist perspective of the first of the so-called “three Ss”: statism, survival and self-help.⁵⁵ In other words, the classical realist perspective views nation-states as “unconstrained rational actors pursuing their own interests in an anarchic world”.⁵⁶ Neo-liberalism’s innovation rests on the increased autonomy assigned to international organizations and regimes, nevertheless controlled by powerful nations-states which strive to satisfy their own interests towards an advantage in the world arena. These nation-states can summarily be identified with “the West”, whose economic and political hegemony may lead other states to follow the standards set by them, hence dictating the “rules of the game”.⁵⁷ The international human rights regime may very well be seen as one recently introduced “rule of the game”. The straightforward implication is that alignment with the international human rights regime (which, as previously discussed, is characterized by a strong Western heritage) will be less demanding in a regime in which democracy is a foundational pillar, or in which democracy has recently been introduced, and where human rights are already sufficiently recognized. So, on the one hand democratic, economically advanced and human rights-friendly countries are more likely to adopt NHRIs than poor countries which have a tradition of low levels of democracy and human rights protection. On the other hand, there are the so called “cheaters”. Double-

⁵³ Ibid. at p.1324.

⁵⁴ Ibid., Appendix B.

⁵⁵ John Baylis and Steve Smith, *The Globalization of World Politics*, 4th Edition Oxford University Press (2008) at p.100.

⁵⁶ Jeong-Woo Koo and Francisco Ramirez, *cit.* at p. 1327.

⁵⁷ *Idem.*

interests in promoting such human rights-friendly regime can be seen by adopting one specific version of neo-liberalism, that is Grieco's conceptual focus on relative and absolute gains within cooperation endeavours (known as modern realism). Grieco claims that "states are interested in increasing their power and influence (absolute gains) and, thus, will cooperate with other states or actors in the system to increase their capabilities".⁵⁸

Even though realists usually concentrate their attention on security issues, the above notions will be read adapting them to the topic of concern, NHRI expansion: if states agree to introduce national institutions with the aim of promoting and protecting human rights, all those states concerned will be dealing with matters of compliance. Institutions will be established to enforce such agreement. Modern realists argue that leaders must be vigilant for "cheaters", as these might adapt to the agreed terms in order to achieve its absolute gains and increase its reputation worldwide – with all the beneficial consequences this entails -without taking into real consideration the actual human rights situation of its citizens. Either way, from a general neo-realist perspective, country profiles are crucial elements in NHRI acceptance and adoption, be it for strictly hegemonic purposes or in order to be accepted within that "hegemonic" world order, in order to receive the benefits that such a situation entails.

5.2 World Polity Institutionalism Theory

This perspective does away with the centrality of nation-states, emphasizing "the extent to which nation-states are embedded in a wider world and influenced by world models of 'proper' nation-state identity"⁵⁹, creating a sort of isomorphism amongst chosen paths taken by states themselves. These models are spread through carriers such as international organizations and conferences, whose role is absolutely fundamental within the international order, especially in terms of human rights' worldwide acceptance. Practically speaking, with more attention given to human rights by international organizations (and in our case, attention to NHRI's role in safeguarding and promoting such rights), the more likely it is that states accept to follow a human rights model (in our case, NHRI establishment). What comes out of these organizations are standards that reach levels of constraint similar to those of official legal regimes, to which states feel obliged to adhere by peer-pressure, be it regionally or globally. This sort of diffusion process has been defined as "norm cascade" or "normative bandwagon"⁶⁰, with an increased importance given to what other countries do and a consequential decrease in "normative isolationism" typical of realist perspectives. By adhering to such theoretical approach, NHRI diffusion is seen as a direct consequence of the world order being saturated by NHRI-based discourse delivered by an ever growing amount of human rights organizations. Once this discourse has been settled theoretically, the establishment of NHRIs in some countries throughout the world will automatically influence other countries in following the latter's lead, creating the above-mentioned "norm cascade". International standards and legitimacy are put at the peak of influential factors in the decision-

⁵⁸ John Baylis and Steve Smith, *cit.* at p.129.

⁵⁹ Jeong-Woo Koo and Francisco Ramirez, *cit.* at p. 1329.

⁶⁰ *Ibid.* at p. 1330.

making processes of nation-states. Obviously, the above are not necessarily mutually exclusive since states may be subject to multiple concurrent sources of establishment.

Another possible categorization of establishment behaviour which still treads along the same lines of the already mentioned theoretical approaches is the one set up by Sonia Cardenas in one of her latest scholarly papers on NHRI and state compliance.⁶¹ She divides the driving forces that states are subject to into two different commitments: strategic calculations (which somehow retraces what has already been said about the neo-realist perspective) and normative commitments (similar to world polity institutionalism).

5.3 Strategic calculation

According to this point of view, state actors' behaviour is deeply moulded by material incentives such as enforcement and inducement mechanisms. Often these incentives reach the level of coercion, such as when states behave in a certain manner because they fear the consequences of violating international norms.⁶² Complying with said norms usually purveys in the eyes of the rational state-actor possibilities of benefits and the avoidance of potential penalties on their behalf. Arguably, a wide range of states have followed a strategic calculation when deciding to establish a NHRI, especially those states that are at the centre of international criticism for their poor human rights records. As a matter of fact "human rights pressures present states with a problem for which NHRIs can provide a solution"⁶³ and as such states view NHRI establishment as a relatively "low cost" solution, especially if the NHRI is given moderate to low power vis-à-vis the executive. However, NHRIs have been introduced in an extremely wide range of states (in democratic, economically developed countries as much as in nondemocratic poor countries). This leads the NHRI researcher to view NHRI establishment as being driven by yet another kind of force, one which is more normative-driven.

5.4 Normative commitment

Instead of basing state-actors' behaviour on cost-benefit analyses, decisions may be "socially constructed and historically contingent".⁶⁴ From this perspective, socialization and normative commitment are the two main driving forces of state actions and, in our case, institutionalization. More precisely, it is through socialization that widespread normative commitment takes place, with regularized international networks, forums and dialogue with civil society organizations being the main channels for exchange of ideas and the transmission

⁶¹ Sonia Cardenas, *National Human Rights Institutions and State Compliance* in Ryan Goodman and Thomas Pegram, *Human Rights, State Compliance and Social Change – Assessing National Human Rights Institutions* (Cambridge, 2012) at p. 33.

⁶² Jonas Tallberg, *Paths to Compliance: Enforcement, Management and the European Union, International Organization* 56 (2002) in Sonia Cardenas, *National Human Rights Institutions and State Compliance* in Ryan Goodman and Thomas Pegram, *Human Rights, State Compliance and Social Change – Assessing National Human Rights Institutions* (Cambridge, 2012) at p. 33.

⁶³ Sonia Cardenas, *Emerging Global Actors: the UN and the National Human Rights Institutions*, *Global Governance* 9 (2003), at p.32.

⁶⁴ *Idem*.

of common practices. In a very “world polity institutionalist” perspective, it is those worldwide accepted policies that are more easily introduced by the rest of the community of states within their own national systems. This mechanism is wider in reach, and probably more complicated, than the strategic approach mentioned in the above section and as such, mere financial incentives are not sufficient. Prolonged technical assistance is thus needed, through the continuous support of international organizations on the one hand and transnational advocacy networks on the other, which leads to the conclusion that, from this perspective, what lies as the backdrop of institutionalization mechanisms is international standards and support. Norm implementation can in fact be an easy matter for some states, but as far the majority of states is concerned, external capacity building and assistance is absolutely essential. As proof of the fact that normative commitment is indeed a functional account of compliance, one has to take into consideration the regional pattern of convergence that NHRI establishment has regularly followed since its inception. It is in fact through regional networks that NHRIs have been created, a phenomenon which can be viewed for example by the initial Scandinavian sprint in NHRI establishment, the 1970s boom of NHRIs in the Commonwealth states and the 1990s period in Latin America, during which the majority of NHRIs started to operate in the south American continent.

In conclusion, both neo-realist/strategic calculation and world polity institutionalist/normative commitment perspectives have some truth in them, and being theoretical approaches one can freely choose to adopt one or the other in order to justify NHRIs’ global expansion. However, a recent statistical study conducted by Stanford University⁶⁵ brings some light to the matter. The study estimates the influence of variables motivated by both theories (GDP per capita, Autocracy/Democracy Scores, Human Rights Practices for neo-realism; International Organizations/Conferences, International Human Rights Instruments and World/Regional Adoption Densities for institutionalism) using the so-called “event-history analysis” method. The conclusion that resulted from the study is quite clear: “the political culture of the world is the only variable that consistently and positively affects adoption rates”⁶⁶, thus openly favouring a world-polity institutionalist perspective over its realist counterpart. Not everything realist is to disregard however. In fact, it is the nation-state that is asked to manage such worldwide identity, its national sovereignty being very much intact throughout this whole process. Furthermore, the activity of transnational advocacy networks show somehow mixed compliance mechanisms at work simultaneously: through their lobbying activity they lead powerful actors to apply pressure on states (igniting strategic calculations) whilst at the same time directly helping states through the exchange of best practices and capacity building (committing these states to common normative standards).

6 National Human Rights Institutions: Characteristics and Identification

To someone who has no prior knowledge of National Human Rights Institutions the most elementary of explanations would be to depict them as “a bridge between international norms

⁶⁵ Jeong-Woo Koo and Francisco Ramirez, *cit.*

⁶⁶ *Ibid.* at p. 1343.

and local implementation [...] designed to ensure the state's compliance with its international legal obligations"⁶⁷, obviously with international human rights law as the overarching field of practice. A more precise definition is however that given by the United Nations Centre for Human Rights which defines a NHRI as "a body which is established by a Government under the Constitution or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights".⁶⁸ In an arena which has historically had non-state actors as its main characters, fighting against states for the protection of the citizens' human rights, the introduction of these state bodies is an absolutely crucial step for any state towards a satisfactory promotion and protection of national human rights.

The NHRI terminology is a relatively new one as it officially dates back to the 1990s, strictly referring to a restricted set of institutions whose task is to bring forward policies of protection and promotion of human rights in any one country where such institutions are found. This attempt at a restricted notion is done so as to differentiate these essentially "state" bodies from other organizations which have similar aims but lack the official standing NHRI have within the state, such as NGOs, syndicates, the media and religious associations.

The Office of the High Commissioner for Human Rights (OHCHR), in trying to enunciate the common characteristics that define the various typologies of NHRIs, has listed the following:

"They are institutions of an administrative character, thus neither judicial nor legislative bodies;

Whose competence revolves around counseling in human rights-related matters, both nationally and internationally;

Their function is based on the issuance of opinions and recommendations only, with the possibility of examining petitions directed at them by the citizenry;

Of a constitutional nature, or at least regulated by national laws and/or decrees;

independent from the Executive."⁶⁹

This latter characteristic is however the most difficult to be adhered to and many NHRIs are indeed directly or indirectly linked to the government of the day. As will be analyzed below, NHRI independence is a very controversial matter. As of now, it is sufficient to say from which elements is a NHRI independence judged by, and that is through its composition and overall functioning.

⁶⁷ Ryan Goodman and Thomas Pegram, *Human Rights, State Compliance and Social Change – Assessing National Human Rights Institutions*, Cambridge (2012) at p. 29.

⁶⁸ 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 para 39 (hereafter *National Human Rights Institutions: a Handbook*).

⁶⁹ OHCHR, *National Institutions for the Promotion and Protection of Human Rights*, Informative Bulletin No.19, Geneva (2003).

6.1 Evolution of the NHRI Concept

Even though the NHRI concept as we know it today was born in the first years of the 1990s, it has been since the earliest years of UN's history that "the idea of national bodies, that would contribute to the promotion and protection of human rights, surfaced in international discussions".⁷⁰

The first official mention of local human rights committees, at this stage with no requirement of independence from the government and with the main purpose of stabilizing said institutions in the country rather than actually implementing a human rights protection programme, dates back to 1945 when UNESCO's Constitution was signed. In its Article VII there is in fact an explicit mention of national commissions that would liaise with the parent-organization in advising the government and relevant national bodies towards a full implementation of UNESCO guidelines and recommendations nationally.⁷¹ The second official sign of this novel institutional movement comes the following year, more precisely in an Economic and Social Council's (ECOSOC) resolution of 1946. This document invited party members to "[...] consider the desirability of establishing information groups or local human rights committees within their respective countries to collaborate with them in furthering the work of the Commission of Human Rights"⁷², which by the wording itself seems more of an invite to merely consider the possibility of such establishment rather than to actually set it up. Nonetheless it was the first real step that the international community formalized towards NHRIs institutionalization.

The response by the member states to these two initial proposals was a mix of enthusiasm and indifference. Whilst the UNESCO example can be said to have mildly succeeded in practice from the start, ECOSOC did not have an equivalently positive result. When the Commission on Human Rights' Secretariat brought to the attention of its 1951 plenary session the issue of establishing national institutions, the response was idle. The reason behind this standstill is probably due to the relevant youth of the international human rights regime, at this point of time more adamant to proceed with the global standard-setting agenda than to already deal with localizing human rights protection mechanisms. Another factor that might have influenced this standstill was the fact that many colonial powers still held many of its territories under their jurisdiction, with the well known discriminatory practices that followed.

A decade later, more precisely in 1962, the Commission made an important step forwards: the potentially fundamental function that national institutions could have in the promotion and protection of human rights at a national level was finally recognized.⁷³ Instead of an invite to "stimulate" this institutional process, states were now encouraged to "favour" the formation of national institutions. A clear-cut agenda was formulated and a supporting role to the UN

⁷⁰ Pohjola Anna, *The Evolution of National Human Rights Institutions – the Role of the United Nations*, Danish Institute for Human Rights (2006) at p. 30.

⁷¹ Constitution of the United Nations Educational, Scientific and Cultural Organization, London 16th November 1945, Art. VII (1-3).

⁷² ECOSOC Res. 2/9 of 21 June 1946 on Commission of Human Rights, section 5 "Information Groups".

⁷³ CHR Res. 9 (XXXVI) of March 1962, endorsed by ECOSOC Res. 888 F (XXXIV) of 24 July 1962.

system of human rights protection was awarded to these nascent institutions, a “blueprint for NHRIs [in terms of their] purposes of human rights monitoring, advice and education had now truly started to take shape”.⁷⁴

The idea reached a worldwide audience for the very first time 1963, when it was finally included within the General Assembly’s agenda.⁷⁵ This had the clear effect of sharing the potentially positive role of NHRIs with the highest number of member states thus far (112 governments represented in the General Assembly of the time, in contrast to the 21 governments taking part in the Commission of Human Rights), including all those states that had finally settled their independence struggles and were busy with their domestic institutional processes. However, no serious commitments were made at UN level, due to what has already been said about the human rights regime still being too young to take into consideration anything else apart from creating a body of international human rights law based on the Universal Declaration of Human Rights. One has to bear in mind that the International Bills of Human Rights were ratified in 1966 and entered into force only in 1976.

The first international seminar on National Institutions took place in Geneva exactly two years after the Bills became law, in 1978, organized by the UN Programme for Human Rights under the official auspices of Human Rights Commission.⁷⁶ What resulted from the seminar was an outline of recommendations on functions, status and composition. As far as functions are concerned, the guidelines mentioned the provision of information to the government and public, the education of public opinion, the analysis and review of the status of legislation, decisions and administrative arrangements and an advisory role for the state on human rights questions, amongst other things. It furthermore set out for the first time in UN history the requirement of autonomy, impartiality and statutory status of NHRIs, fundamental tenets which states are still struggling with nowadays.

With 1978 the first crucial stage of NHRI evolution sees an end, an historical stage of introduction and development of the NHRI idea. The following period, which lasts until 1990, has been defined as that of the “popularization of the concept”.⁷⁷ Together with a constant increase in the number of National Institutions being established on a worldwide scale, this second stage saw a definitely more determined attitude by UN bodies to establish a solid normative background and support programmes for those states interested in NHRI institutionalization. A series of General Assembly Resolutions⁷⁸ during the 1980s actually invited Member States to set up NHRIs or strengthen those already in place as well as encouraging a constant exchange of experiences regarding their establishment. NGOs’ participation in this process was also underlined and the requirements of NHRI integrity and autonomy were once again brought to the attention of participating governments.

⁷⁴ Pohjola Anna, cit.op. at p. 37.

⁷⁵ GA Res. 1961 (XVIII) of 12th December 1963.

⁷⁶ Seminar on National and Local Institutions for the Promotion and Protection of Human Rights, ST/HR/SER.A/2 (1978).

⁷⁷ Pohjola Anna, Op. Cit. at p. 6.

⁷⁸ In Particular GA Res. 42/116 of 7th December 1987 and Ga Res. 44/64 of 8th December 1989.

By this time, already five international human rights law conventions were in place together with their own monitoring systems⁷⁹, the Commission's role was definitely strengthened and the operational status of the human rights law regime was finally in full flow. This allowed the UN to undergo a review of its approach to human rights protection, which eventually led to a fundamental change of attitude in terms of the Member States' role, something which increased the NHRIs' role rather substantially. Rather than focusing on mere negative obligations for governments to abide by, a growing recognition surfaced on the international fora that states should have a more direct role in human rights' promotion and protection. The need for a set of positive obligations became more and more evident, especially following what the "third wave" democratization process led to in many parts of the developing world. What the UN had done up to then was seen as simply highlighting the problems, rather than facing them directly. *Technical assistance* projects thus started to be established in many parts of the world, with the UN assisting countries in need of capacity development and training. In this panorama, the NHRI movement benefited greatly and a proof of this, National Institutions were included as potential beneficiaries of such *technical assistance* programmes by the Secretary-General himself who, in his outline presented to the Commission in 1988, introduced NHRIs as a specific target group.⁸⁰ During this period, in line with the "popularization" trend that characterized it, the UN stopped being the only international body involved in the development and strengthening of NHRIs, with regional organizations such as the Council of Europe, the Commonwealth States and the Organization of African Unity actively supporting the expansion of this institutional revolution.

With the turn of the 1990s the third period of NHRI evolution's history starts, the so-called "diffusion stage", more specifically following the *First International Workshop on National Human Rights Institutions*, organized in Paris in October 1991. The latter is considered a milestone in NHRI narrative, the contribution of which is of incomparable value if viewed in the light of previous UN efforts in this field. The meeting was attended by delegates from national institutions, States, the UN (represented by its differently specialized bodies), intergovernmental institutions and NGOs, with experts and rapporteurs playing a very influential role therein. A group of four human rights commissions (namely Australia, Canada, Mexico and the Philippines) represented the leading group of proposal makers, with the Federal Human Rights Commissioner of Australia considered to be of central importance in the drafting of the recommendations which resulted from the Workshop. It is interesting to highlight at this point of the discussion the peculiar situation that came about from this selected core group of NHRI representatives: all four of the above mentioned national institutions were, and still are, characterized by the same kind of archetype, that is the Human Rights Commission model.⁸¹ The fact that it was mainly focusing on this model's experiences that the recommendations were drafted does lead to the conclusion that already since this

⁷⁹ The International Convention on the Elimination of All Forms of Discrimination (1969), the International Bill of Human Rights (1966) and the International Convention on the Elimination of All Forms of Discrimination Against Women (1981), the International Convention Against Torture and Other Cruel Treatment, Inhuman and Degrading Treatment or Punishment (1987).

⁸⁰ E/CN.4/1988/40.

⁸¹ The description of the different existing models of NHRIs figure in the following subchapter,

stage in NHRI history the international community showed some preference towards one particular model of NHRI.⁸² It is from this moment onwards that a certain predominance of a worldwide approach to NHRI establishment can be noticed, with local realities put in the background or, at least, not taken too much into consideration.

Discussions varied from legal status-related matters to more practical issues over mandate and powers. It was a huge step forwards from the previous milestone represented by the 1978 guidelines (which were characterized by a very open approach to membership, according to which all public bodies specialized in human rights could be considered national institutions). At the Paris meeting in fact a rather more narrow definition of NHRI was drafted, one which focused on their necessary independent status and with a more strict approach to the possibility of varied mandates and structures. Before getting into an analysis of how the Paris recommendations were officialized within the international community, it is also important to note what by many has been considered to be a great drawback from what had previously been discussed in 1978. Due to strong lobbying by a substantial number of participating states, the complaints-handling function that once was a stronghold of national institutions was introduced as a mere optional task in the 1991 recommendations, a drawback for definitional purposes which lasts until our days.

The recommendations that resulted from the Paris Workshop have since then been known as the *Paris Principles*⁸³, the alma mater of modern day NHRIs and their minimum internationally recognized standards. The Principles are divided into four main areas:

- The scope and function of NHRIs in relation with their founding legislation as well as their main tasks;
- The composition of NHRIs and the guarantees of independence and pluralism, with a list of criteria on the appointment process founded on a pluralist representation and financial autonomy;
- The actual methods of NHRI activity, which include the different powers for tackling issues within their mandate as well as cooperative issues with civil society;
- As previously stated, a last section is dedicated to those institutions with a quasi-judicial function and the minimum standards that such institutions have to attain to.

The six main criteria for NHRIs present in the Paris Principles are:

- Mandate and competence, to be as broad as possible and based on universal human rights norms and standards;
- Autonomy from Government;
- Independence guaranteed either by statute or, preferably, the Constitution;
- Pluralism;
- Adequate resources; and
- Adequate powers of investigation.

⁸² Lindsnaes Birgit and Lindholt Lone, *National Human Rights Institutions. Article and Working Papers*, Danish Centre for Human Rights (2001) at p.8.

⁸³ Principles relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights (The Paris Principles), GA Res. 48/134 (1993).

Since the Paris Workshop published its Principles, it took three years for them to receive a definite role as universal objective for all countries to adopt. It first passed the Commission on Human Rights' assessment in 1992, although with a rather cautious attitude. Unanimity was reached but the wording of the final resolution that, in accepting the idea of NHRI establishment, merely "welcomed the guidance" provided by the new standards.⁸⁴

What really opened the door of universal acceptance to NHRIs as the key national body with competence to promote and protect human rights was the World Conference on Human Rights, which took place in Vienna in June 1993. The Final Declaration and Programme of Action, also known as the Vienna Declaration, once again affirmed "the important and constructive role of national institutions 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 in education in human rights".⁸⁵ More specifically regarding the Paris Principles, they were recognized as a benchmark for national institutions and as such governments were encouraged to establish and strengthen already existing NHRIs "having regard to the 'Principles' relating to the status of national institutions – also acknowledging – "the right of each State to choose the framework which is best suited to its particular needs at the national level".⁸⁶ Criticism around the Vienna Declaration as a whole centered on the fact that no novelties were introduced by it to the UN Human Rights Programme⁸⁷, something which can be seen by its approach towards the Paris Principles themselves. However, notwithstanding merely supporting their final version without carrying any real innovations to NHRI development, what the Vienna meeting did was to mark "a breakthrough in the evolution of the international status of these institutions".⁸⁸ As Pohjolainen states, the Vienna Declaration had a twofold effect on NHRIs' overall value: it officially placed national institutions within the UN Human Rights Programme, thereby ensuring a more "domestic-level" human rights work for the future; and it affirmed that national institutions "constitute an important part of the domestic structures of any state committed to human rights"⁸⁹ with the Paris Principles being the minimum standards to be followed when building and fortifying them. The Principles were finally approved by the UN General Assembly in December 1993.⁹⁰

NHRI expansion received a further boost with a number of international meetings (1993-1995) and the publication of the UN Handbook on National Institutions⁹¹ shortly thereafter. The meetings referred to are the *Second and Third International Workshops of National Institutions* in Tunis (1993) and in Manila (1995) and the series of meetings held during this short period of time by the *Coordinating Committee of National Institutions*. In these occasions the role of NHRIs was not only promoted and more deeply analyzed, but by having

⁸⁴ E/CN.4/1992/SR.52, para 99.

⁸⁵ A/CONF.157/24 (1993) Part 1, para 17.

⁸⁶ *Idem*.

⁸⁷ Davidse Koen, *The Vienna World Conference on Human Rights: Bridge to Nowhere or Bridge Over Troubled Waters?*, *Touro International Law Review* (1995) at 6(1).

⁸⁸ Pohjolainen Anna, *cit.op.* at p. 64.

⁸⁹ *Idem*.

⁹⁰ GA Res 48/134 of December 1993.

⁹¹ *The UN Handbook* (1995).

a substantial amount of different states' representatives present around the same table meant a true exchange of experiences, which obviously strengthened the NHRI movement all-round. Very importantly, at the 1993 *Tunis International Conference*, NHRIs established the *International Coordinating Committee of NHRIs* (ICC), with the aim to coordinate the activities of the NHRI network.⁹² As far as the UN Handbook is concerned, its importance is fundamental due to the fact that until its publication (late 1995) the Paris Principles were yet to have an official "commentary" nor any technical instructions for states to follow on how to apply the recommendations present within the Principles. Even though a clear-cut solution to many problems which had arisen from the Paris Principles was still not resolved, it was definitely another important evolution in NHRI normative establishment.

The UN approach until now was, as always, strictly bureaucratized and developments in the sphere of NHRIs followed the usual routine as any other field dwelled upon by the UN Human Rights Programme. This was considered standard procedure until 1995, when the Centre for Human Rights created the post of *Special Adviser on National Institutions*, with the intention to turn the UN's approach into a more flexible mechanism for the various States to benefit from. As holder of this prestigious post it was decided to appoint the then Human Rights Commissioner of Australia Brian Burdekin, whose successful engagement lasted until 2003. In fact the Special Adviser's post was directly accountable to the High Commissioner for Human Rights and, as such, independent from any sort of party-related biased attitude. This direct link facilitated easier access to advice from States, rendering the whole process easier and less formal. This obviously brought an increased number of States to become interested in the establishment of their own NHRI, something which is objectified by the fivefold rise in the number of NHRIs since the introduction of the Special Adviser's post.⁹³

The Centre for Human Rights in this period changed structure and in 1997 changed name, becoming the Office of the High Commissioner for Human Rights (OHCHR). In this structural change, a special body was established within the Office, the *National Institutions Team*, as a support group for the Adviser especially in terms of UN coordination activities. Of undoubtedly precious value, their support was even more positive if read in conjunction with the *Programme of Action for Technical Assistance to National Institutions*, the overarching UN framework on the implementation of the Paris Principles worldwide. As the general technical assistance approach was being quite broadly criticized as being too opaque in its mission statements, the choice of technically assisting the establishment of independent national institutions perfectly fitted the need for innovation, apart from creating a "human rights space" in those countries with poor human rights commitment records "while avoiding the risk of being criticized for supporting abusive government agencies or for wasting resources".⁹⁴ At this point, great support by the hands of agencies such as the UN Development Programme (UNDP) has to be acknowledged, thanks to which these technical

⁹² For a more detailed analysis of the ICC and its subdivisions, please read within the chapter "International and Regional Mechanisms of Coordination" within this paper.

⁹³ Whilst in 1995 the countries involved in the Special Adviser's programme were less than 10, in 2000 the total number reached more or less 50 countries.

⁹⁴ Pohjolainen Anna, Op. Cit. at p.70.

assistance mechanisms managed to operate functionally, together with the continuous flow of voluntary funding that has characterized NHRI establishment's history. A common criticism to the UN's approach during this latter stage deals with the lack of a sound "accountability" test for nascent NHRIs, with all the attention given to the set up and not to the actual working of any given national institution, shielding many of them from constructive assessment even in countries whose human rights agenda was poor or practically absent. To this issue we will return in the conclusive chapters of the paper, but it is an aspect to take into consideration throughout any NHRI-related discussion as it is one of the foundational problems inherent in UN technical assistance projects related to NHRI establishment.

Following their constant rise in importance and legitimacy within the international community, NHRIs were for the first time permitted to address the Commission as themselves in 1996, albeit from the seat of their government's delegation. In 1998 however, a separate section within the Commission was especially set up for "National Institutions"⁹⁵, and since then they have had their own say in Council assemblies.

In the early 2000s a steady growth of NHRIs worldwide was coupled by a rather substantial number of both General Assembly and Human Rights Council Resolutions on the role of the Ombudsman and NHRIs in general in the promotion and protection of human rights⁹⁶, something which kept the NHRI movement always at the forefront of any international human rights discourse taking place both universally and within national borders.

One fundamental characteristic of this latter stage of NHRI history is its promotional aspect. Systemic evaluation and actual institutional analysis has been somewhat undermined vis-à-vis the project of expanding the number, resources and access to NHRIs, without taking into consideration the local realities of each and every NHRI. A clarificatory example is that of leadership: more often than not problems related to poor levels of leadership have been treated by the international NHRI community as mere internal capacity issues, to be dealt with by increased external, unconditional funding and training rather than considering national political circumstances which might have had an impact on the work of the institutions. National realities, be them political, social and/or cultural have to be taken into consideration when establishing and evaluating the proprieties and faults of national institutions.

One way to understand this international attitude is to acknowledge the fact that during a first period of institutional introduction, whatever the kind of institution being introduced, promotion has to play a bigger role than critical evaluation, which is followed by what Peter Rosenblum aptly defines as "ratcheting up compliance".⁹⁷ Efforts from the OHCHR, the ICC, regional mechanisms and local pressures amongst others have in the recent past created the conditions for an effective normative distribution whilst setting a low bar for access by

⁹⁵ E/CN.4/1998/47, paras. 6-9; CHR Res 1997/40 of 11th April 1997 at para. 16.

⁹⁶ GA Res A/Res/67/163; GA Res A/RES/66/169; HRC Res. A/HRC/RES/20/14 being the latest in chronological terms.

⁹⁷ Rosenblum Peter, *Tainted Origins and Uncertain Outcomes in System in Goodman Ryan and Pegram Thomas, Human Rights, State Compliance and Social Change – Assessing National Human Rights Institutions* (Cambridge, 2012) at p. 314.

demanding modest initial commitments. This phase is usually followed by a steady increase in efforts to “ratchet up” compliance and induce acculturation, mainly through coercion and persuasion. The reasoning by which “promotion raises the stature of the enterprise, which, in turn creates a disincentive for withdrawing, if and when more stringent conditions are demanded”⁹⁸ does in fact follow a rational line of thought but sometimes can hide potentially dangerous outcomes. Some countries might, and in fact have tried to obtain benefits from this situation with no intention to follow the normative commitments which full compliance would entail.

This tension between the promotional impetus and the local effectiveness is going to be at the centre of the discussion in the second half of this paper, where the importance of local/regional realities will be highlighted and a dose of skepticism will be injected into a project which is undoubtedly positive for the international human rights law system, but which could increase its effectiveness by veering towards a less universalistic approach.

6.2 Categorization of NHRIs

Having described the recent development of NHRIs from an historical-institutional perspective, what follows is the categorization of the different kinds of national institutions that have been established around the world. There is some truth in the often repeated saying that “there are as many NHRIs as there are states” (133 is the current total amount on national institutions, including those not fully complying with the Paris Principles), however one can find at least two different categorizations available to the NHRI analyst:

*6.2.1 Origin and name*⁹⁹:

Legislative/Parliamentary Ombudsmen: responsible to Parliament, their legitimacy is directly related to parliamentary decisions;

Executive Ombudsmen: with an absolutely lower level of independence, they have the dangerous potential to depend from whom they have been nominated within the government (usually the head of government).

*6.2.2 Formal characteristics*¹⁰⁰:

Human Rights Commissions: this kind of NHRI is the one most strictly adherent to the Paris Principles, present above all in the Commonwealth countries and in the Asia-Pacific region, arguably due to the above mentioned normative commitment process. In some literature in fact it is referred to as “the Commonwealth model”. As their name suggests, they are collegiate bodies composed by a number of “experts”, each with its own technical field of

⁹⁸ *Ibid.* at p. 315.

⁹⁹ Kessing Peter Vedel, *Implementation of the Western Ombudsman Model in Countries in Democratic Transition* in Lindsnaes Birgit, Lindholt Lone, Yigen Kristine, *National Human Rights Institutions, Articles and Working Papers*, Danish Centre for Human Rights (2001) at p. 121-140.

¹⁰⁰ Pohjolainen Anna, *Op. Cit.* at p.16.

specialization. Their mandate varies in scope from one Commission to the other but generally speaking their functions range from investigation and conciliation of cases brought to them or suo motu, monitoring of the state's compliance with its international obligations, training of civil servants in matters related to human rights and human rights awareness campaigns.

Advisory Committees: also known as “the French model” after the first institution of the kind was established in France in 1984 (the National Consultative Commission of Human Rights), it later spread to most of Francophone Africa. Unlike the Human Rights Commissions, they do not hold the power to receive complaints nor to investigate cases. Their mandate mainly revolves around advising the government as well as undergoing human rights-related research. They are usually composed by a higher number of functionaries than the Commissions, which increases the chance of having a truly pluralistic representation but, on the other hand, are subject to a higher degree of dependence from the Executive.

Human Rights Ombudsmen: they represent a mélange between the classic “Scandinavian” Ombudsman, with its priority focused on the control of the public administrative sector, and the Human Rights Commission model, reason for which the literature also refers to them as “hybrid offices”.¹⁰¹ The first established institutions of the kind appeared in Spain and Portugal in the 1970s, after the fall of both countries' dictatorial regimes of the time, and quickly spread to the Latin American continent, where they experienced an introductory boom during the late 1980s and 1990s. During this period, after the fall of the URSS, a number of Central and Eastern European states also decided to install such kind of body in their newly established states. In contrast with the classic Scandinavian model with its exclusive power over the Administration, the Human Rights Ombudsman is also endowed with the promotion and protection of the human rights of the citizenry in front of the public sector. This latter characteristic is usually strictly adhered to and is one of the most discussed faults of this particular type of NHRI. Nowadays the private sector is more and more involved in our daily lives, running many kinds of services that once were subject to the control of the public sector. Not being able to cater for such potentially dangerous situations is indeed a problem. But luckily it is not an overwhelming majority that are limited in such a way. Just like the Human Rights Commissions, complaints handling, state monitoring and the issuing of recommendations are the essential tasks the Human Rights Ombudsmen undergo in their respective countries. And just like the classic Ombudsman, it is a single-person body with its own staff but with a very distinct feature: its nearly exclusive focus on human rights. In this regard, the Human Rights Ombudsman may also offer training and human rights-related education to the public sector as part of the fundamental role it holds in human rights promotion, something which Human Rights Commissions usually cannot offer. One additional characteristic that may confuse the boundaries between this human rights-specific Ombudsman and the classic Ombudsman is the fact that many Human Rights Ombudsmen are participating institutions of both the International Ombudsman Institute (IOI) and the International Coordinating Committee of National Institutions (ICC).¹⁰²

¹⁰¹ *Ibid.* at p. 18.

¹⁰² To which we will turn below.

Human Rights Institutes: this category is set aside from all the rest of the above even though it is only one body that may be included within it, that is the Danish Centre for Human Rights. This particular kind of NHRI is unique in the sense that it only deals with matters related to human rights information, divulgation and research both within Denmark and abroad. It does not have the power to receive complaints nor to undergo any kind of control over the state's policies.

To the above four categories, which have been used to differentiate between NHRIs in many scholarly instances since they were outlined by a researcher of the Danish Institute for Human Rights in 2006, the International Council on Human Rights Policy¹⁰³ adds three distinct ones which arguably complete the vast array of NHRIs present as of today:

National Commissions Against Discrimination: these bodies are very similar to what has already been said about Human Rights Commissions with one fundamental difference: they focus only on discrimination and the human rights violations that flow from it.

Classic Ombudsmen: this is what has up to now been referred to as the Classic Ombudsman, or Scandinavian model Ombudsman. Words have been spent on this category in the above chapter on the Swedish *Justitieombudsman*, so no further analysis will be given. Suffice here to say that it is a one-person institution focused on one specific aspect such as maladministration and discrimination.

The Defensores del Pueblo: generally viewed as a variance of the Classic Ombudsman, it clearly traces its composition outline but as far as the mandate is concerned, the Defensores del Pueblo include within its own "jurisdiction" all the various mandates dealt by singularly by the different Ombudsmen. As the name might suggest, these bodies are to be found in Spain, Portugal and in practically all states of Central and South America, sometimes under a different title (such as Procuraduría, Comisión Nacional or Defensoría). Part II of the thesis will be dealing with the analysis of this particular kind of institution.

One last remaining category of NHRIs is what can be defined as *Sub-National NHRIs*. In countries with a decentralized system of governance, legislative competence is shared and sometimes even divided between national and sub-national levels. In Spain, for example, the national Defensor del Pueblo does not deal with every case of human rights breach as many autonomous communities have their own ombudsman institutions. These bodies are often disregarded from official accreditation processes as problems related to institutional representation might endanger the full implementation of their mandates. Undoubtedly these institutions play a vital role in those states of a federal nature where sub-national governments have exclusive jurisdiction over certain fields of human rights, but cannot be considered to replace a fully functional national NHRI.

After this broad description of the many different classifications of existing NHRIs, one specification is needed in order to understand the real value of such analysis. As already

¹⁰³ ICHRP, *Performance and Legitimacy: National Human Rights Institutions*, Second Ed. (2004) at p.5.

mentioned, it is internationally understood that only national-level bodies are considered to be NHRIs. However, for many international organizations, only human rights commissions and human rights ombudsman institutions are deemed worthy of NHRI status. The ICC-accreditation process based on the Paris Principles has been openly preferring these two categories by awarding them with A-status in a vast number of cases. This leads many elements of the UN human rights system, as well as their regional counterparts, to follow suit in this institutional preference.

Slightly complicating the definitional argumentation is the fact that within the UN itself there are some discrepancies. The UN General Assembly has, for instance, included the Classic Ombudsmen within its definition of NHRI, whilst the Committee on the Rights of the Child actively “promotes the establishment and strengthening of thematic NHRIs for children as part of CRC state parties’ treaty obligations”.¹⁰⁴ These differences however are not without a purpose. As Linda Reif points out, these definitional specificities are imposed for a multiplicity of political and pragmatic reasons: they function as institutional “gatekeepers”, in order to limit the number of NHRIs allowed to participate in the international human rights machinery, and they act as quality control mechanisms, pressurizing faulty NHRIs to improve their institutions in order to benefit from the membership status. In this regard it is interesting to note that the European region has been less strict in approaching this definitional control, allowing for both national and sub-national institutions, classic ombudsmen and thematic institutions within their definition of NHRI.¹⁰⁵ This peculiarity comes from the fact that European Ombudsmen benefit from a long history of respectable activity, thus lowering the need for a strong “gatekeeper” within the region.

Now that the concept, functions and typologies of NHRIs have been outlined, it is time to turn to their engagement with the international human rights system.

6.3 International and Regional Mechanisms of NHRI Coordination

One of the most evident proofs of the recent global-scale development of NHRIs is the proliferation of networks and platforms created and strengthened in the last couple of decades with the aim to facilitate the coordination between the different levels of NHRI engagement (international, regional and sub-regional). As far as the international level is concerned, there are two bodies worth of mention: the International Coordinating Committee of NHRIs (ICC) and the International Ombudsman Institute (IOI).

6.3.1 The International Coordinating Committee (ICC)

The International Coordinating Committee is a representative body established with the purpose of creating and strengthening Paris Principles-compliant national human rights institutions. It was founded in 1993 at the Tunis International Conference under the official

¹⁰⁴ Reif Linda, *Boundaries of NHRI Definition* in Ryan Goodman and Thomas Pegram, *Human Rights, State Compliance and Social Change*, *op. cit.* at p. 71.

¹⁰⁵ Simmons B, *Mobilizing for Human Rights: International Law in Domestic Politics*, Cambridge (2009) at p. 90-96.

auspices of the UN Human Rights Commission and its legal entity has been granted to it in 2008, when it was registered under the Swiss Civil Code. The main functions of the Committee are the following:

- To coordinate the activities of Paris Principles-compliant NHRIs internationally;
- To act as a bridge between NHRIs and the OHCHR or whatever other international organization is interested in collaborative efforts with NHRIs;
- To support from the start the establishment of new NHRIs in those countries which yet have to establish one;
- To support the NHRI-capacity strengthening in those countries already endowed with one.
- A last, fundamental task of the Committee is that of NHRI Accreditation: in fact it is through its Sub-Committee on Accreditation (SCA) that newly established and existing National Institutions receive their NHRI status, with the OHCHR serving as permanent observer and secretariat of both the ICC and the SCA. Through this process, NHRIs are periodically reviewed on a 5 year basis according to the normative outlines found in the Paris Principles, with the possibility of appeal by reviewed NHRIs in case of negative results in their institutional examination.

There are currently three levels of accreditation:

- “A” Voting Member: the NHRI fully complies with the Paris Principles, which allows it to participate as voting members in the international meetings held within the ICC agenda as well as to participate with no restrictions in the HRC sessions.
- “B” Observer Member: the national institution does not fully comply the Paris Principles or has been faulty in document-submission for the determination to be made. The institution may participate in ICC meetings but may not vote on matters discussed during such meetings, as they do not hold the “NHRI badge”.
- “C” Non-Member: the national institution does not comply with the Paris Principles, and as such has no right under neither the ICC nor the UN forums.¹⁰⁶

6.3.2 The International Ombudsman Institute

¹⁰⁶ www.nhri.ohchr.org visited on 16th October 2013.

The IOI is an international organization representing ombudsmen bodies of whatever designation, as long as its mandate derives from legislative sources. It is the oldest of its kind, having been established in 1978, and is endowed with legal personality under Canadian legislation. Its main tasks¹⁰⁷ are that of institutional promotion of the Ombudsman institution and of regional participation of the Institute's activities, so as to decentralize its activities. It also functions as a centre for research and exchange of information relevant to Ombudsmen bodies.

6.3.3 Regional Coordinative Bodies

At the regional and sub-regional level, there is an ever-increasing array of coordinative bodies, which occupy the institutional space between the above-mentioned international networks and NHRIs themselves. Amongst the most important ones we may find:

- The *European Group of NHRIs*;
- The *Asia Pacific Forum (APF)*;
- The *Federacion Iberoamericana de Ombudsman (FIO)*;
- The *Network of National Institutions for the Promotion and Protection of Human Rights of the American Continent*;
- The *Network of African National Human Rights Institutions (NANHRI)*;
- The *Commonwealth Forum of National Human Rights Institutions (CFNHRI)*;
- The *Association of Mediterranean Ombudsmen*.

Within Latin America, a region which has been characterized by a very dynamic institutional reality ever since the fall of the many dictatorial governments which polluted its recent history, we can find at least three sub-regional coordinative NHRI networks: the Consejo Andino de Defensores del Pueblo, the Consejo Centroamericano de Procuradores de Derechos Humanos and the Asociacion de Ombudsman del Caribe.

Due to this paper's case study, and for purely practical matters, only FIO will be analyzed more closely in order to give an idea of how these regional bodies function.

The *Federación Iberoamericana de Ombudsman (FIO)* is a network of human rights ombudsmen established in 1995 in Cartagena de Indias, Colombia. It runs following its Statute, firstly approved in 1995 and later reformed in several other reformatory meetings, the last of which was in 2006 in Nueva Vallarta, Mexico. Apart from its Statute, its governing apparatus is made up of Resolutions adopted by both its General Assembly and its Directive Committee. Its primary objective is to be a forum of cooperation, exchange of experiences and the promotion diffusion and strengthening of the Ombudsman institution in the geographical region under its jurisdiction, independently on what name the national/regional/provincial body has been given (in Latin America, Ombudsmen institutions vary in names, such as Defensores del Pueblo, Procuradores, Razonadores, etc).¹⁰⁸ The General Assembly is FIO's maximum authority, which comprises one delegate from each participating country, each with a right to speak and vote. Other two FIO organs are the Directive Committee, made up of the heads of the participating national bodies together with three

¹⁰⁷ IOI Statutes, Art. 5.

¹⁰⁸ FIO Statutes, Article 7 in Iràizoz Maria, *La Eficacia del Defensor del Pueblo en Iberoamerica – Expansion y cartecerizacion como Instituciones Nacionales de Derechos Humanos* (Universidad de Alcalá, 2012) at p. 36

representatives of civil society organization; and the “Rector” Council, the body that deals with the day-to-day matters brought to the FIO’s attention. It is made up of representatives selected, every two years, from the various regions that are included within FIO’s sphere of influence (Europe, North America, Central America, Andean Region and South Cone). A last important body guaranteed by the Statute is the Technical Secretariat, which deals with the administrative development of FIO. As of 2012, countries that are part of the FIO network are Andorra, Argentina, Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Spain, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Puerto Rico and Venezuela. After the above overview of those “in-house” coordinating bodies, in the sense that they are made up of and deal with national institutions as per mandate, it is time to take into consideration the engagement between NHRIs and the international human rights system.

6.4 NHRI and the International Human Rights System

By now it should be understood that as a “bridge” between international human rights standards and their implementation at national level, NHRIs are deeply involved with both treaty monitoring bodies and the UN more generally. The Paris Principles themselves envisage a clear role for NHRIs as contributors of states’ reporting obligations, although without that clarity which would be necessary due to the Principles’ nature of most authoritative international statements on such institutions. What now follows is a tentative clarification of the kind of relationship national institutions have with the various organs within the international human rights law regime, as well as the core functions that NHRIs serve within said regime.

As an introduction, one recognized fault of the Principles and current literature is the fact that NHRI classification stops at a structure and function-level, categorizing institutions following such institutional characteristics only. We have seen, for example, how commissions are different from ombudsman institutions as much as quasi-judicial bodies are more highly regarded than those without such function. However, NHRI analysis should not stop there. When discussing on NHRIs’ role in the international human rights system, and more precisely on their role in implementing international standards domestically, one should take into consideration a bigger picture.

Starting from a merely theoretical point of view, it would be understandable to presume that depending on whether a state automatically incorporates international standards in its domestic legal order or whether it has to follow a legislative approach, NHRIs’ activity would be more or less facilitated. In other words, one has to at least consider whether the basic international law difference between monist and dualist states affects the practice of national institutions in any one state where these bodies have been introduced. In fact, from countries with a monist approach it is expectable to either assign NHRI mandates with references to treaties rather than domestic human rights instruments or to actually not have any explicit treaty mandate due to the automatic nature of treaty incorporation into the domestic system. From dualist states, on the other hand, what would be expected is the presence of precise provisions relating to their mandate’s international scope as ratified treaties always need incorporative legislation.

By using a recent and very detailed mandate-related research published by Richard Carver¹⁰⁹, in consultancy with the International Council on Human Rights Policy (Switzerland), we evince that the monist-dualist theoretical divide is not strictly reflected in NHRIs’ mandates vis-à-vis the international human rights law system. In Carver’s paper he assembles a database of 69 different NHRIs’ founding legislation, purposefully covering all geopolitical regions and with an establishment date ranging from 1981 (Spain) to 2007 (France). He groups the statutes in three different categories: pre-1992, 1992-1999 and 2000-2007 whereby 1992 is when the Paris Principles were firstly introduced and 1999/2000 is “the halfway point

¹⁰⁹ Carver Richard, *A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law*, *Human Rights Law Review* (Volume 10, 2010) at p. 1-32.

to test the hypothesis that more recent laws would be more likely to contain an explicit international law mandate”.¹¹⁰

What can be seen from his analysis is the following: fifty-seven per cent of pre 1992 NHRI founding legislation explicitly refer to international treaties; in the 1992-1999 period, whilst thirty per-cent refer to international treaties and thirteen per-cent to domestic only, it is significant that the remaining fifty-six per cent do not specify; most strikingly, amongst the latest NHRI mandates, seventy per-cent mention treaties as the legislation to follow, with five per-cent restricting their scope to national laws and twenty-five not specifying. These percentages span a variety of countries that go from “ultra-monist” Netherlands (with the *Dutch Equal Treatment Commission*) to dualist South Africa (*South African Human Rights Commission*). The fact that both latter examples are Commissions is purely casual, as Latin American Defensores del Pueblo are included in the survey, as well as Advisory Committees and the like. What this leads to is the realization that different theoretical approaches to domesticizing international norms do not influence NHRI legislation. To the contrary, what is actually influencing mandates, apart from obvious political traditions, is the global trend. The more NHRIs become accepted and well regarded within the international human rights system of human rights promotion and protection, the more directly linked their founding legislation appear to be to such a system.

As proof of the latter conclusion, one is invited to consider the growing tendency to increase NHRIs role in treaty monitoring and implementation. Whilst General Comment 10 of the CESCR¹¹¹ explicitly calls States Parties to include Economic and Social Rights within their existing NHRIs’ mandates in order to facilitate the monitoring of the Treaty’s fulfillment nationally, General Comment 2 of the CRC goes even further. The role of NHRIs found in this instrument’s wording is probably one of the most fully developed when it says that “the establishment of such bodies... falls within the commitment made by States parties upon ratification to ensure the implementation of the Convention”.¹¹² What really acts as proof of this growing trend however is the role that NHRIs have been formally given under both Optional Protocol to the Convention Against Torture (OPCAT) and Convention on the Rights of Persons with Disabilities (CRPD), two of the latest international human rights conventions to be drafted. What these two treaties actually require from ratifying states is that national institutions “be given the necessary powers to carry out the various functions specified in the treaty itself”.¹¹³ It is not a mere invitation to act, but a straightforward requirement, the lack of which is considered to be a grave misapplication of treaty regulations. More specifically, OPCAT introduces within State Parties a distinct body, a National Preventive Mechanism (NPM), which has to be set up within one year from ratification and, key to our discussion, NPMs have been in most cases considered to be equivalent to NHRIs, with explicit reference

¹¹⁰ *Ibid.* at p. 8.

¹¹¹ CESCR General Comment No.10: the Role of Independent National Human Rights Institutions in the Promotion and Protection of Economic, Social and Cultural Rights (1998), E/C.12/1998/25.

¹¹² CRC General Comment No.2: the Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child (2002), CRC/GC/2002/2.

¹¹³ Carver Richard, *Ob.Cit* at p. 25.

to the Paris Principles. In other words, NHRIs have often been regarded as the one national body which should take NPM within its structure. As far as the CRPD is concerned, Art 33(2) also requires the establishment of “independent mechanisms” to follow up on national adherence to the Convention and, as with the OPCAT, reference is made to the Paris Principles for guidance.

NHRIs mandates thus cut across strict theoretical boundaries and have been introduced in treaty monitoring mechanisms on a constantly more radical manner. We may even go as far as saying that NHRIs have somehow reached a stage whereby their identity has attained a separate level in international law, a statement which can be better understood if read in light of the UN Secretary General’s 2005 Report on the effectiveness of NHRIs¹¹⁴. In this fundamental document, NHRIs are seen as “the answer to the old question of the implementation gap – the inconsistency between formal treaty obligations and actual respect for human rights on the ground”¹¹⁵, a clear indication of the rise of NHRIs’ importance in the international human rights regime. From the previously-understood role that NHRIs were considered to have (monitoring state adherence to state obligations), they now clearly represent an integral part of the implementation of human rights treaties.¹¹⁶

NHRI international engagement can be said to be of mutual advantage. In fact it is not only NHRIs that need an international dimension for their activity to function successfully. Within the intricate canvas that lies at the basis for the international human rights regime there are quite clear indications that NHRIs are actually a necessity for the regime to aptly work. NHRIs without international engagement would be some kind of a voiceless creature, which would be a disaster in terms of effectiveness if we add to this the commonly known characteristic of NHRIs being “toothless” bodies in terms of enforcement mechanisms. NHRIs need such international dimension for several reasons: state’s international accountability for its human rights performance would not be put to the test as much as it is vis-à-vis the international community, the latter probably being the most effective way of pressurizing governments into human rights-friendly behavior; it would not be able to fulfill that fundamental function that is comparing domestic traditional standards to international ones, reinforcing the principle of the universality of human rights; common problematic issues within any one region would not be tackled with the contribution of other members of said region, which is the only way to forward a successful strategy of human rights promotion and protection, sharing best practices and approaches; it would furthermore be much more difficult to actually set the international human rights agenda, as national institutions need an international outlook in order to make their voice be heard.

¹¹⁴ Report by the Secretary-General, *Effective Functioning of Human Rights Mechanisms: National institutions and Regional Arrangements – National Institutions for the Promotion and Protection of Human Rights* (2005), E/CN.4/2005/106.

¹¹⁵ Carver Richard, Ob.Cit. at p.30

¹¹⁶ Nowak, *Introduction to International Human Rights Regime* (Leiden/Boston: Martinus Nijhoff Publishers, 2003), at p.28.

However, it is not only NHRIs that need the international system. The strong endorsement received from the international community ever since the 1993 Vienna Conference is probably the best evidence to show that national institutions are an extremely convenient introduction to an effective global system of human right protection. These bodies offer what had been lacking in terms of independent, objective information on national human rights situations: whilst state reports have often been regarded as “inevitably self-serving”¹¹⁷, NGOs’ accounts have also been seen as partly biased and politically motivated. A level of independent honesty is expected by national institutions when reporting in international forums, as well as a level of authoritativeness which derives from their legal (and sometimes even constitutional) obligation to investigate on the domestic situation of their nation. Furthermore, the level of knowledge “on the field” that NHRIs are endowed of is unparalleled if one takes into consideration the daily activities that such institutions undertake.

This two-way relationship is however not without its obstacles. States themselves often try to tackle national institutions which shed negative light on them in international forums, something which increases the image of independence that NHRIs strive for, but which can also be a radical way of diminishing their effectiveness. This leads to yet another obstacle in the way of NHRIs, with issues relating to financial and personnel realities. International engagement obviously involves a high degree of expenditure and if the budget, which is directly flowing from the state, is curtailed for whatever reason, it will deeply influence the possibility of the national institutions’ contribution to the international human rights regime. There are alternative means of access to funding and training, such as OHCHR-run programs, regional networks of NHRIs and academic institutions such as the Swedish Raoul Wallenberg Institute, but without the state’s acknowledgement and backing, national institutions cannot develop their full capacity. It is for this reason that engagement in international forums should be seen as a positive appendix to their domestic activity, both with reference to a supportive role and as a boost to its effectiveness.

Having seen both the negative and positive elements that make up NHRIs’ engagement with the international system, let us now turn to a more detailed analysis of which international bodies are dealt with through this interaction.

6.4.1 Treaty Monitoring Committees

Once a treaty is ratified by a state, its compliance is monitored by bodies of independent experts elected by the states themselves. These monitoring bodies have a purely legal function, not linked to any political end due to the fact that it is not state officials that staff them. There is no tie to any one state and discussions only reflect the legal implications of matters taken into consideration during meetings, the authority for which flows from a commonly agreed text.

¹¹⁷ Sidoti Chris, *NHRIs and the International Human Rights System* in Goodman Ryan and Pegram Thomas, *Human Rights, State Compliance and Social Change – Assessing National Human Rights Institutions* (Cambridge, 2012) at p. 100.

The reason to analyze this arena of international engagement first is not casual. These committees in fact have seen “national institutions far more engaged than with other parts of the international human rights system and there are many opportunities for them to increase and improve their engagement”.¹¹⁸ On this regard, both the Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights as well as the more recently established Committee on the Rights of the Child have adopted General Comments in which the role of NHRIs were explained and fostered.¹¹⁹ The reason behind this higher level of commitment is arguably linked to that superior level of independence from state-politics mentioned at the start of this sub-chapter. The role that national institutions are expected to play during committee sessions and in their preparatory stages vary from lobbying states into ratification to monitoring compliance. One of the most debated functions that NHRIs are allowed to carry out is that of aid to state-parties in the preparation of their reports to any of the treaty monitoring committees. Paragraphs 3(a) and 3(b) of the Principles state that national institutions should provide “opinions, recommendations, proposals and reports on any matter concerning the promotion and protection of human rights” as well as “promote the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation”.

6.4.2 Universal Periodic Review

When the Human Rights Commission was dismantled in 2006, paving way for the establishment of the Human Rights Council, a new mechanism was set in place which took the domestic human rights review method to a higher level of consistency and coverage. It adopted a four year cycle for each of the 192 member states, and in negotiations processes the possibility of having non-state actors involved in the review was extensively debated. What resulted was a very ambiguous opening to this possibility, with a referral to “relevant national stakeholders” who should be consulted in the drafting of each state report. The HRC resolution went further by specifying that such stakeholders were to provide “additional, credible and reliable information” by having the opportunity “to make general comments before the adoption of the outcome of the plenary”.¹²⁰ It is clear that such indications were included in order to accommodate bodies such as NHRIs. As a matter of fact, national institutions have ever since been deeply engaged in the UPR, with high percentages of participation shown in all stages of the review process.¹²¹

The National Institutions’ role has recently increased in importance after the 2nd Cycle of the UPR started in 2012, up until then the only role NHRIs played being the pre-national report stage, suggesting and recommending issues that they think should be included in the review. After the working group session, the HRC meets in a plenary session to consider and adopt

¹¹⁸ Sidoti Chris, NHRIs and the International Human Rights System in Goodman Ryan and Pegram Thomas, *Human Rights, State Compliance and Social Change – Assessing National Human Rights Institutions* (Cambridge, 2012) at p. 117.

¹¹⁹ General Recommendation XVII (1193), General Comment 10 (1998) and General Comment 2 (2002) respectively.

¹²⁰ Human Rights Council Resolution 5/1, para. 15(c) and 31 respectively.

¹²¹ NHRI Survey, at p.58.

the outcome of the UPR; a one-hour meeting is devoted to each State under Review. At the HRC plenary session, the SuR, Member States, Observers including UN entities, as well as stakeholders, including A-status NHRIs and NGOs with ECOSOC status, have the opportunity to make interventions. A-status NHRIs can take the floor after the country's delegation. It is a very important chance for NHRIs to make their voice known in international forums as the recommendations have often been accepted by states and made their own during the dialogue which takes place at the presentation of any given states' review. NHRIs have thus been placed in a privileged position within the plenary discussion, a role which has been focusing on their respective countries only but which has nonetheless been of invaluable importance for the UPR system as a whole.

6.4.3 Special Procedures

Praised as “the jewel in the crown of the international human rights system”¹²², they may have a thematic focus (such as arbitrary detention or torture), have a country as specific subject matter of their mandate or take up individual cases. Within the Special Procedures' investigation and reporting, NHRIs may contribute in various ways, especially when Country Visits take place. Mandates more often than not include the obligation to undertake such visits, after which a report is prepared and presented at the Human Rights Council. In such instances, a national institution has potential for maneuver in many ways: it can actually initiate a Country Visit by inviting the mandate holder to include its country in the assessment or it may lobby the government itself to issue an invitation; it may submit relevant reports to the mandate holder, facilitating his task by organizing interviews with relevant stakeholders and pointing out the most critical of cases; it can help in the dissemination, domestically and abroad, of the final report and its recommendations, in this way raising awareness of the issues touched upon by the visit. It cannot be forgotten, in fact, that NHRIs have a crucial role not only in the protection of human rights, but in their promotion as well. However even when Country Visits are not in the agenda, NHRIs may contribute by providing general briefings on any matter relevant to the mandate holder's job. In this way they can positively mould the approach given from a vantage point, as no official institution has the capability of addressing domestic human rights-related matters as they have, let alone an external UN official and his team. Additionally, NHRIs may refer cases to Special Procedures, may assist in the follow up of individual cases before, during and after the UN's mission as well as helping victims of human rights abuses bring a case to Special Procedure's attention.

Unfortunately, according to a OHCHR survey¹²³, only thirty-five per cent of respondent NHRIs have been interacting with Special Procedures, which signals that the obstacles to international engagement are indeed a matter for serious consideration.

6.4.4 Human Right Council

¹²² UN Secretary-General Kofi Annan, Opening Ceremony of the Human Rights Council, Geneva (2006), accessible at www2.ohchr.org/english/bodies/hrcouncil/statements.htm.

¹²³ Office of the High Commissioner for Human Rights, Survey on National Human Rights Institutions (Geneva, 2009).

NHRIs' involvement with the HRC has increased considerably during the last couple of decades. Whilst it was only from their respective governments' seats that national institutions were allowed to address the Commission during the 1990s, a mild opening arrived in 1997 when they were allowed to speak in their own name, although with very restricted scope of action. In 2005 Paris Principles-compliant NHRIs were finally granted full participation through Resolution 2005/74, a sort of coming of age for institutions which up until then had not succeeded in receiving the amount of participatory space they had been striving for. As the Commission's era came to an end, and the Human Rights Council started its activity, NHRIs continued in this growing trend, now benefiting from their own separate area within the Council and full participation in both resolution-consultation and lobbying. It has so far been a rather disappointing contribution to the dialogue however, often focusing on their own domestic work rather than advocating for any serious human rights questions. Nonetheless, it is too early to draw conclusions. On the positive side, the ICC has placed a permanent representative in Geneva, whose role is to act as representative of these institutions within the HRC in terms of policy-advocacy both collectively and in the name of particular NHRIs. Another interesting fact worth of notice is the often concomitant dates of the ICC's annual meeting with an ordinary HRC session, both taking place in Geneva, an occasion for the various visiting NHRI delegations to attend the two meetings without having to stretch budget allocations excessively, the latter being one of the most serious problems facing national institutions' international engagement. Another difficulty for NHRIs in making the most of the space offered to them is linked to the well known politicization of the HRC, where a substantial amount of attention is given to states' reputation vis-à-vis the rest of member states rather than taking strong, objective stances against human rights violations worldwide. It is desirable that in the near future national institutions will be able to push discussions taking place at the Council towards a more honest and frank level than it has been so far, especially after their recent rise in importance and esteem.

6.4.5 Standard Setting

Last but not least, NHRIs have lately been increasingly involved in international instruments' negotiations. In fact, their extensive practical knowledge of particular human rights issues from "the field" makes them perfect candidates for standard setting mechanisms. Both the Convention on the Rights of Persons with Disabilities and the Declaration on the Rights of Indigenous Peoples, at their negotiation stages, have abundantly made use of NHRI staff's expertise and guidance. Noteworthy is the fact that both instruments are amongst the youngest in terms of publication (both signed in 2007), yet another symptom of the recent rise in regard given to NHRIs by the international community.

PART II

7. The Importance of the Social and Cultural Background to NHRIs

In the span of NHRIs' relatively short history, one can definitely notice a tendency towards a universal approach to their expansion, with local realities not taken into full consideration

when assessing their operability and effectiveness. In assessing national institutions, and more importantly in accepting them within the ICC-affiliated NHRIs, little to no attention has been given to the governments that created them, to the civil society they should be working with and to the general social, political and cultural background that allowed such institutions to be introduced.

In order to show the underlying reasons why these elements must be considered so as to inform evaluations and to understand how to tackle the successes and the downfalls of internationally recognized NHRIs, what will follow is a brief outline of some of the unique characteristics that mould one particular region of the world, Latin America. The reason behind this particular choice is due to my personal experience in the field, interning at the office of the Ecuadorian Defensor del Pueblo for a period of three months during the summer of 2013. During this internship I was able to learn the day-to-day activities of an A-status South American NHRI with all its intrinsic challenges of dealing with such a unique blend of societal components, exclusive to a continent which has both benefited and suffered from a vast array of uncommon elements to other parts of the world. By living in Ecuador I not only came to understand the local state of affairs by being immersed first-hand in the running of the Ecuadorian Defensoría. In fact, thanks to the frequent informal interviews with the civil servants I had the chance to interact with during these months as well as personal research, I managed to get a fairly decent perception of the very complicated, heterogeneous leverages that have molded this region's running of the *res publica*. It is a very hard task to condense this huge amount of information into one single chapter, so I apologize in advance if some points seem lacking in precious detail. The aim of this chapter is to expose the necessity for an acknowledgement of these elements that go to the roots of society, without which any sort of institutionalization process should not take place. This reasoning is obviously applicable to other particular regions of the world, and may be inscribed in a somewhat broad relativist conception. Whilst the initially global NHRI movement has allowed the widespread introduction of these institutions, I argue that after more than twenty years since the Paris Principles it is now time for an increased attention towards the local over the universal in terms of NHRI analysis.

7.1 Latin American multicultural heritage

Ever since the “high civilizations” (Inca, Maya, Aztec) ruled the vast expanses of the Latin American continent, these lands have been witnesses to a variety of complex economic and cultural networks that proceeded autonomously, in isolation from similar processes taking place in other parts of the world. Advanced social organization mechanisms, urban development, monumental architecture and sculptures, innovative agricultural methods as well as technological and scientific innovations (which lead to, for example, the Aztec calendar being more precise than the European one of the time) are all symptomatic of a very dynamic, in many aspects unique, multicultural basis on which Latin American society has been framed from the very start of civilization. Amongst these varied cultural manifestations, two elements are to me fundamental for an understanding of this Latin American “uniqueness”. First of all, the importance that nature has played, and still very much does, in

its relationship with human beings. The *pachamama*, which in the Andean world stands for the “mother earth”, is a central figure in every relation between man and nature and is reckoned to be one of the most respected values in society.

This cultural heritage is manifested today in many forms, and not from mere academic or scientific interest. Many Latin American countries regard cultural preservation as a definite cultural policy objective, aimed towards a fundamentally important strengthening of the national identity of the country, a sort of substratum of the American identity that cannot get lost in time. It may even be argued that such a close attention to pre-Hispanic mores and traditions be linked to the search for a symbolic “overcoming of the trauma of the conquest and civilization”¹²⁴ whilst at the same time reinforcing “the discourse of a mestizo nation built on the syncretism of its native cultures”.¹²⁵ And apart from these national efforts of preservation, there is of course the vitality of the existing indigenous cultures of the Americas, a dynamic reality which continues to play an increasingly important role, even in the running of the state, in many contemporary Latin American nations.

7.2 Colonial Rule

The Spanish imperial rule, the first of its time and with a duration of more than three centuries, started at the beginning of the 16th century. Fundamental to our discussion, it did not operate solely on economic and political levels, but also had a strong voluntary impact on the culture of the conquered. It seems redundant to say at this point that such impact affected the whole of the evolution of the Americas and its millions of people.

The progressive military invasion was readily followed by the introduction of a highly centralized colonial administration which led to undisputed control over most of the continent. The steady erosion of the autochthonous populations and “empires” was not only due to the slaughter and epidemics brought in by the so-called conquistadores. Once officially settled, the Spanish introduced a new economy which had serious ecological repercussions, where forced labour and repression were considered the norm, the legal doctrine of “terra nullius” justified land dispossession and eventually even forced cultural impositions started to take place mainly through evangelization. It is not surprising that the Spanish invasion of the Americas is nowadays considered the first genocide of the modern era. The highly hierarchical and stratified culture that was consolidated in the Spanish colonies, which turned the indigenous peasants into serf labour for the new dominant class, lasted throughout the XVI century until the XIX century, when the first sparks of separatist/nationalistic movements started to achieve their desired goals. The consequences of this destructive 300 year-old heritage is clearly visible in the Latin American culture of today. The above-mentioned stratification of society led to a characteristic that continues to negatively affect Latin

¹²⁴ Stavenhagen Rodolfo, *Cultural Diversity in the Development of the Americas – Indigenous Peoples and States in Spanish America*, Cultural Studies Series N.11, Unite for the Social Development Education and Culture, Organization of American States, at p. 6.

¹²⁵ *Idem*.

American society even today, leading to what has been defined as “cultural polarization”.¹²⁶ As a matter of fact, the duality dominator-dominated (with Spanish descendents as the former and indigenous ethnic groups, blacks and mestizos as the latter) is still very much present not only within national corridors of power but also in the ordinary lives of everyday Latin America.

During the colonial period, it was exclusively the colonizers’ culture that was officially supported and played a crucial role in the cultural formation of the continent. It is common knowledge that compulsory conversion by the hands of the Catholic Church was one of the main means through which autochthonous identities were wiped out from official streams of education. However, indigenous cultural resistance managed to tackle this attempt at societal decapitation, and notwithstanding a very harsh response by the hands of the colonizing power, what eventually resulted (referred to by academics as the “culture of conquest”) was a substantially different culture from that of peninsular Spain, intrinsically unique due to the numerous indigenous influences it benefited from.

7.3 A Newly Found Latin American Identity

After three centuries of suppressive colonization by the hands of the Spanish, and more precisely during the late XVIII century, local elites started to reach a political awareness different from what had been engrained onto them by the dominant power. The bourgeois revolutions that spread across the Old Continent, together with the American Revolution, sparked a growing interest in independentist movements, that started to appear and spread across the whole of Latin America. Worthy of a specific mention is Simòn Bolivar, one of the key actors in the liberation from Spanish rule of many nations during this period. His idea of building a united America involved the presence of all sets of society, obviously including indigenous communities and descendents of the African slaves brought to the colonies by the Spanish. However, within the official nationalist political attitude, none of the above was taken into consideration. After the successful emancipation of Latin America, national politics was once again in the hands of a minority of elites, with the only difference that now conservative ideologies (which still looked at their colonial past with sympathy) were contrasted by a liberal elite, more inclined towards those ideals coming from Europe and the United States. Independence movements promised liberation not only from a sovereignty point of view, but also in terms of a society finally free from colonizing prejudices and obstacles. In a striking contrast between what had been proposed at the outset and what really became the reality of Latin American political systems, society continued to be systematically stratified and a deep classist system re-appeared with no sign of change from the previous colonial reality. What became known as *caudillismo*, somehow still present in modern-day Latin American political culture, was introduced as a means of political and social control whilst new genocidal campaigns started to appear by the hands of these new elites, together with religious and cultural impositions, all following the ideology that the heterogeneous

¹²⁶ Ibid. at p. 9.

society that made up the various states of the continent were a danger to nationalistic movements.

A real change in mentality came with the Mexican Revolution first (1910-1917) and the Bolivian Revolution shortly after (1952). As Stevenhage's analysis perfectly explains, these popular social movements introduced a new kind of nationalism to Central and South America called "revolutionary nationalism". These revolutions were absolutely innovative in two important ways: "On the one hand, the emergence of an active peasant society and their agrarian reform movement, an issue that had a profound influence on the political and intellectual affairs of many nations of the continent. On the other hand, indigenism, that great ideological and cultural current that has left its mark on all Indo-american countries with a large indigenous population, both in terms of educational and cultural policies, and of intellectual creativity".¹²⁷

Stevenhage continues in his analysis of 20th century Latin American society by describing the emergence of a new ethnic group which fed from the cultural syncretism implicit in a society made up of different races and cultures, the mestizos. The European, indigenous and African characteristics gradually ceased to be exclusive in their nature and grew into becoming a new Latin American culture, a symbol of the new nationality. The *mestizaje* is thus to be considered a unique social process that through the centuries has shaped Latin American society and cannot be compared to any previous elements common to the geographical area at hand, let alone the rest of the world. Notwithstanding the establishment of this new common/unique feature, flowing from a process of ethnic integration, the stratification of Latin American society and discriminatory practices continue nowadays as a constant plague which is cause of social unrest and uneven distribution of power with the consequent distrust towards the state. It is clear that it is these kinds of peculiarities that have previously been referred to as "worthy of special attention by local NHRIs", and according to which NHRIs' effectiveness should be interpreted and judged.

7.4 The "Lost Decades"

Ever since the end of the colonial rule in Central and South America, the majority of newly established states suffered a dictatorial drift that is of unlikely comparison with the situation found in other continents. Without presenting the extremely long list of dictatorial governments that succeeded each other during the 1970s until the start of the 1990s (which ranged from Chilean Augusto Pinochet, to Argentinean Jorge Videla, to Nicaraguan Anastasio Somoza just to name three of the most notorious criminal dictators of the continent), it is important to shortly discuss the effects that such extreme cases of authoritarian governments had on the population of these countries, as well as its everlasting molding of local culture and perception of the state by the citizenry.

¹²⁷ Ibid. at p. 14.

Up to the start of the new millennium in fact, when XXI century socialism appeared in Latin America, the armed forces were the main actors in the golpes that overthrew democratically elected presidents, that abolished any existing constitutional order and established dictatorships. What came after usually followed the same kind of pattern: destitution of the President (sometimes leading to his execution), closure of the National Congress and finally instauration of a military caudillo (who seldom came from civil backgrounds). These caudillos, sometimes accompanied in their directive role by a small number of other high ranking officials (in this case defined as military juntas), although endowed with enough power to run the country single-handedly through presidential decrees, all decided to act otherwise. For purposes of popular appearance and legitimacy, they decided to keep the Constitution in force, except for those articles that clashed with their political interests. It was a successful attempt at judicial legitimacy, with constitutional assemblies and sometimes the invocation of referendums that led to the passing of constitutions which mirrored the dictatorial intentions of these oppressors. A number of them lasted for extended periods of time through piloted reelections, as was the case of Augusto Pinochet's almost 20 year rule with the official backing of a large part of the Chilean population.

Fraudulent elections (such was the case of Guatemala, for example, which from 1970 to 1982 was scenario of four different fraudulent elections which put in power military governments exclusively), or simply forceful perpetration of the governments' tenure (such as was the case for Paraguay, with Genral Alfredo Stroessner in power from 1954 to 1989, or of Nicaragua, where three generations of Somozas held "office" from 1933 to 1979) were the norm in XX century Latin America. During these dramatic decades, Latin America was profoundly hit by massive human rights violations with some governments responsible for vast amounts of forced disappearances¹²⁸ and the elimination of those persons whose effort in the field of human rights made them direct targets of those military governments they were strongly criticizing.¹²⁹ In these states, the rule of law was a non-existent principle, as much as independent democratic institutions, with the purpose of enabling the citizenry to present claims for the gross violations of their most fundamental human rights, did not exist. These events were of dramatic impact to the conception of the State held by society. Some of the dictatorships that were governing these Latin American states during the 1970-1990s period were simply the third or fourth generation of national rulers, and they single-handedly took society to the same level of brutal repression and discrimination that characterized the colonial period. In the region there is also a second group of States (if we do not consider a third group made up of Costa Rica only, which never suffered conflicts nor alterations in the democratic order) that although free from direct military oppression, had institutional weaknesses that made their democracies very fragile anyway. Brevity of presidential tenure, political dependence to US influence, internal conflicts between different factions, and the

¹²⁸ In Argentina alone, more than 25000 persons disappeared (the so-called *desaparecidos*) during this infamous period of dictatorships.

¹²⁹ One example of such barbaric use of arbitrary killing by the hands of the state was the killing of San Salvador's Archbishop, Monsenor Oscar Arnulfo Romero, assassinated during a Mass celebration due to his efforts to better the human rights situation in a country whose military government was totally disregarding any sort of human rights agenda.

overarching social stratification which in turn led to social unrest, are only a few of the causes of institutional weakness of these otherwise fairly un-militarized States.

Whatever the reasons behind it, institutional weaknesses became the common characteristic of Latin American States, with obvious results in terms of extremely poor human rights protection mechanisms and a very low consideration of the State by the population at large.

7.5 Bolivarian States

More recently, a current of thought considers that the so-called Bolivarian States¹³⁰ figure as a novel, somehow less recognized, form of modern dictatorial regimes. It is a highly controversial point of view, subject to strong criticism by a great number of thinkers and normal citizens alike, and as such I simply restrain myself to indicate its presence and will not indulge in any personal reflections on the matter. Whatever opinion one follows however, its uniqueness is indicative of a purely Latin American reality that should definitely be taken into consideration when dealing with normative and institutional innovations in such countries.

This current of thought pictures governments such as the ones run by the late Venezuelan President Hugo Chavez (and current President, as well as Chavez's apparent heir, Nicolas Maduro), the Ecuadorian President Rafael Correa, Bolivian President Evo Morales and Nicaraguan President Daniel Ortega as concealed contemporary forms of "soft dictatorships". The term "soft" has been used due to the fact that no illegal presidential depositions have taken place nor were Constitutions abolished. On the other hand, once in power following free democratic elections, they proceeded to mould the existing constitutional paper with the apparent purpose of bettering the situation of the middle and low class, the great majority of these nations' populations. Through fairly docile constitutional assemblies and vast popular support, which enabled them to make use of popular referendums as further means of legitimization, these Bolivarian leaders have started to exercise close-to unlimited power over the legislative and judicial powers of the State as well as those supervisory organs supposed to overlook the various organs of the State itself. It goes without saying that in situations of such uncontested power, it is not simply the official branches of the State that are in jeopardy: many cases of fundamental human rights violations have taken place in these countries, accountability levels decreased considerably and electoral manipulations have played as obstacles to political alternations. Large numbers of laws and decrees have passed through Parliament which have, according to some, captured national democratic institutions within their reach, subordinating them to the President's party and its executive power. Public opinion has been one other main card used in order to reach this level of control, through the nationalization of the media.

¹³⁰ Members of the Bolivarian Alliance for the Americas (ALBA) are Antigua and Barbuda, Bolivia, Cuba, Dominican Republic, Ecuador, Nicaragua, Saint Vincent and the Grenadines, Venezuela and Saint Lucia. The name "Bolivarian" refers to the ideology of Simón Bolívar, the 19th century South American independence leader born in Caracas who wanted the continent to unite as a single "Great Nation."

What is intrinsically peculiar about these States not only lies at the heart of their ideological background (“Latin American socialism”), of a nature of its own if we compare it to other forms of past and present socialist governments around the world, but also in the way that it has been judged by many analysts and by large parts of these States’ citizens as well. What has been taken into account is only the face-value survival of democratic institutions on the one hand, and the great electoral successes that have brought these populist governments into power on the other, “as if the citizens’ votes were sufficient to make up for arbitrariness, to legitimize authoritarianism, to convert unconstitutional acts into acts with full constitutional value and to qualify as democratic many institutions that in reality are not”.¹³¹ What thinkers of this line of thought view in the Bolivarian democracies is a very precise paradox: in a time when democracy and institutions that follow democratic mechanisms have finally spread in basically the whole of the Americas, what now have to be recognized as the main enemies towards a fully functional democratic system of governance are not the armed forces and military caudillos, but rather civil political leaders and their parties, democratically elected into power and with a strong popular support.

7.6 The Principle of *Sumac Kawsay/Buen Vivir*

It is from this background that in South America a novel debate has started to spread, originating from social movements, especially of an indigenous nature, as well as from certain academic environments, above all in countries of the Andean region. The *Buen Vivir* (“Good Living” if we are to translate it literally) is a critique of the contemporary form of development to which it proposes alternatives, nearly always adopting contributions from indigenous cultures. *Buen Vivir* is a powerful principle which means “life in harmony and equilibrium between men and women, between different communities, and, above all, between human beings and the natural environment of which they are part. In practice, this concept implies knowing how to live in community with others while achieving the minimum conditions for equality. It means eliminating prejudice and exploitation between people as well as respecting nature and preserving its equilibrium”.¹³²

Apart from criticizing the modern conception of development, its practices and its institutionalization, the *Buen Vivir* also puts into question the current means of understanding welfare and “well being”, together with a critique of how natural resources are perceived nowadays within the optics of development. This ensemble of theoretical critiques and alternatives has flown into a very pragmatic “political platform”¹³³ which, notwithstanding its origin coming from a very specific marginal societal group, is a very specific attempt at switching perspectives of the whole society of any one state that adopts its principles.

¹³¹ Hurtado Osvaldo, *Dictaduras del Siglo XXI – El Caso Ecuatoriano*, Paradiso Editores (2012), at p. 12.

¹³² Bizerra Cecilia, *Sumac Kawsay/Buen Vivir*, *Monthly Review*, Vol 48 (December 2009) available at <http://mrzine.monthlyreview.org/2009/bizerra181209.html>.

¹³³ Gudynas Eduardo, *Buen Vivir y Criticas al Desarrollo: Saliendo de la Modernidad por Izquierda* in Flor Francisco Hidalgo, *Contrahegemonia y Buen Vivir*, Francisco Hidalgo Flor y Alvaro Marquez Editores (2012) at p. 83.

The defence of plurality and the appraisalment of different forms of knowledge means that the *Buen Vivir* cannot advance specific reforms, in terms of practical proposals to be followed in detail such as tax reforms or agricultural reform strategies. What it can do, however, is to offer a framework of principles and values with which such reforms can take place, determining both the conditions for such specific governmental programmes and the restrictions to them. As an example, the *Buen Vivir*'s focus on the protection of the Rights of Nature, the latter recognized as an absolute right-holder for the first time in modern history, obliges the state to shape all its programmes of action, practices and indicators around this biocentric stand. Of fundamental importance, there is no single typology of *Buen Vivir*. The various kinds of "Buen Vivires" depend on the various historical, cultural and ecological terms of each context and as such no universal guideline of the *Buen Vivir* is either desirable or possible.

Buen Vivir's influence, even though underlining the majority of the new political leftist realities of the continent, has been stronger in the Andean region, due to its origin flowing from the indigenous populations present in these countries (*Buen Vivir* is a fairly inappropriate translation into Spanish of the Ecuadorian Kichwa People's principle of *Sumac Kawsay*, the original concept). Ecuador and Bolivia went as far as including the principles pertaining to *Buen Vivir* in their Constitutions during their latest Constitutional reforms.

Notwithstanding this novel possibility of change, there are severe limits to its full implementation. The increased visibility and more active participation that the *Buen Vivir* guarantees to the indigenous communities of Latin America has often been hindered by the governments in power. It is a matter of fact that a very common political feature of contemporary Central and South America has been a tendency to a strong presidential tradition of government. This implies a low level of influence by the so-called "party politics" (sometimes even limited by the president itself) and the reliance on a strong charismatic leadership. The necessary institutional and representative balance is thus interfered with, often through plebiscitary mechanisms, and the voice of the less represented (in which group, amongst others, we find indigenous communities) is usually silenced. It is clear that notwithstanding a formal commitment to the ideals underlying the *Buen Vivir*, many states fail to practically accomplish their undertaking.

The above-mentioned focus of post-dictatorial Latin American states on economic growth and the reliance on the export of raw materials means that there is not just an ideological clash with their (sometimes) constitutional commitments, but also a very pragmatic contradiction in their decision-taking. Whilst for example, the so-called politics of social justice, such as economic redistribution through direct conditioned payments to the poorest members of society, are catered for by many governments of the region, there is also widespread dependence on extraction industries which have severe social and environmental impacts on the lands involved.

All these characteristics are undoubtedly the backbone of Central and South American culture and as such should not be left in the background of neither national nor international decision-

making. More to the point of major concern for our analysis, in the case of institution-building, all these factors should be taken in consideration when introducing certain elements in countries with such strong and ancient traditions. The “copy-paste” approach that can arguably be said to apply to the NHRI movement since its formal inception in 1991 may not continue to consider these traits as simply “attachments” to the bigger picture. And what has been said so far is most definitely not the whole organic peculiarity that distinguishes the Latin American continent from the rest of the world.

7.7 Dysfunctions of the Democratic State in Latin America

A more detailed analysis of yet another, potentially even more topical feature than any of the above characteristics of modern day Latin American democracies, is however necessary. Within Hispanic civilization there is an arguably low level of affection towards following the law to the letter. Americo Castro, in one of his most influential works on Latin American culture, has this to say on the matter, a somewhat exaggerated generalization that does hold some truth within its words: “for the Hispanic everything depends from what he/she feels or does not feel like doing, and not from what ought and ought not to be done. If we feel like doing it, we would give everything away, even our own lives, for our closest ones; however, we would not spontaneously go and apply ourselves so thoroughly for the collective good, however small is the effort required from us”.¹³⁴ In another work of his, Castro explains that even if the above was indeed true, Spanish colonies had yet another issue to handle: “In those countries where no precious minerals were to be found, or which found themselves far from the main commercial routes and thus outside the empire’s influence, it was impossible to establish that special systems of rules and hierarchies coming from continental Spain. [...] Authority, as an internal and conceptual function, is not acknowledged by members of that people, who feel the overwhelming tendency to see the State as an emblem of fraud”.¹³⁵ This rather bold comment has to be read within the historical context that justified forced European “culturalization” and states the obvious difficulties found by the colonizing powers in introducing a particular form of government unknown to the American continent. This had obvious repercussions on the manner that the modern state was and has been perceived by the population in the last two centuries of independent Latin American history.

Furthermore, some other historical traits can be viewed as an expressed tendency towards the low respect for strict legal rules. In medieval Spain a very peculiar set of local laws, called *fueros*, was introduced in the various regions that continental Spain was divided into. This sort of “legal federalism” may be symptomatic of the judicial spirit that reigned at the time and that has survived, albeit in a rather milder and implicit form, up until our days in Spain but also in those countries with a colonial history leading back to the Spanish empire. According to Grenadian writer Angel Ganivet, “the *fueros* were holders of the Law’s denial. The *fuero*’s concept is founded upon the idea of diversifying the law in order to adapt it to

¹³⁴ Castro Americo, *Caracter Argentino e Hispanoamericano* in *Archivo de Cultura*, Ediciones Aga-Taura (Buenos Aires) at p. 73.

¹³⁵ Castro Americo, *La Peculiaridad Linguistica Rioplatense y su Sentido Historico* (Buenos Aires, 1941) at p.41.

small social groups; however, if this difference becomes excessive, as it were in many cases of the past, it eventually leads to such an exaggerated legislative atomism that each family asks for a separate set of laws so as to accommodate its own interests. During the Middle Ages our regions were seeking their own rulers, not to be able to be better governed, but rather to overcome royal power; the cities wanted local laws that exempted them from royal authority and every social class often requested new *fueros* and privileges that applied to them personally”.¹³⁶ Ganivet goes even further by declaring that Imperial Spain ended up very close from its judicial ideal: “that every Spanish man would be authorized to do what he feels like doing”.¹³⁷

Even though some might read the words of Ganivet as a provocative historical generalization, there is some truth applicable to modern day Iberoamerican culture in terms of the administration of the State. The modern democratic state, in which the ideals of freedom and justice are amongst its most foundational values, is subject to a certain numbers of controls that ideally should be used only marginally. Constitutions the world over identify within themselves a strict adherence to a separation of powers which lies at the roots of any functioning democracy. This reasoning is however based on formal legal norms that, unfortunately, have little to do with the informal reality of everyday state administration. And the latter consideration is especially true of the geographical region we are dealing with, so much so that Spanish administrative lawyer Augustin Gordillo defined it as the “Parallel Administration”.¹³⁸ According to Gordillo, these countries seem to have been subject to a tendency whereby institutionalized administrative sources of power, flowing from the constitution and the various legal rules, are accompanied by different sources of power tantamount to a “parallel power” of the state. In other words, as a corollary to the extensive official written legal codes and procedures, there exists a set of unwritten rules that society has been more and more inclined to regard as the norm. A perfect example of such attitude is given by Carlos R. Constenla, former President of the *Instituto Latinoamericano del Ombudsman*, in describing what in Argentinian popular language goes by the name of *gauchada*¹³⁹: “those who have been professionally involved with the civil service know that whichever acquaintance of his, called to court for an administrative breach, whether or not at fault, will visit them before attending their hearing, in order to seek some sort of protection from the potential sentence”.¹⁴⁰ It is this formally concealed, but informally very obvious, parallelism in the system that has brought the administrative system of Latin American states in a desperate need for a more strict and thorough mechanism of state control. In fact, “the constant comparison between values of generosity, tolerance and magnanimity with those of lightness, simplicity and superficiality [...] has strengthened the weaknesses of the States’

¹³⁶ Ganivet Angel, *Idearium Espanol*, Espasa Calpe Argentina (Buenos Aires, 1940), at p. 54.

¹³⁷ *Idem*.

¹³⁸ Gordillo Augustin, *La Administracion Paralela* (Civitas –Madrid, 1982).

¹³⁹ “Help or favour that is made disinterestedly” see Coluccio Felix, *Diccionario Folkloriko Argentino* (Luis Lasserre Editores, Buenos Aires 1964), at p.183.

¹⁴⁰ Constenla R. Carlos, *Teoria y Practica del Defensor del Pueblo* (REUS Editores, Madrid, 2010), at p. 105.

existing organs of control, to the point of establishing an extensive system of normative violation, also known as impunity”.¹⁴¹

7.8 State Administration in Latin America

This above discussion is even more parenthetical if we set it within one of Latin American’s most obvious obstacles to good state administration, and that is the extreme bureaucratization of the state apparatus. The term “bureaucracy” was first used in the XVIII century by Vincent de Gournay with the function of outlining the power pertaining to that body of functionaries and state employees who were dependent on the Crown. De Gournay was a fervent physiocrat, and as such very critical towards absolutism and the centralization of the administration of the state. Read in this key, it is clear that the very birth of the term came with a strong pejorative connotation.

What is understood by bureaucracy nowadays is the overgrowth of unnecessary rules and regulations, the great waste of resources, the lack of initiative due to an established unofficial ritualism that eventually affects the rights of the citizen in a very deep manner. These negative traits lead to a certain kind of generalized apathy of the State apparatus, forcing the functionary to base all its activities on decisions already taken in the past in similar cases, as well as not urging him to take definitive conclusions on whichever case he is asked to deal with. Thus, there seems to be a generally diluted responsibility over the whole of the administrative system which obviously means the lowest of accountability vis-à-vis the right-holder/citizen, with its numerous human rights implications.

To sum up the negative characteristics of the Latin American state’s overly bureaucratic system of government, I would like to use a phrase by Erich Fromm which perfectly explains the mechanism that such system entails: “(a system) which administers human beings as things and administers things in quantitative rather than qualitative terms, in order to simplify and cut the costs of the operation and ultimately dominate”.¹⁴² What the word bureaucracy evokes is a world of paperwork, of lack of responsibility and often even oppression and arbitrary acts, the first and cheapest form of cutting off and restricting the rights of a human being through the State’s own (pseudo)legal structure.

Furthermore, the Iberoamerican administrative tradition has been one of “silence, secrecy, reserve, not publicity. And it is not the case that the public functionary considers such behavior illicit: to the contrary, he regards that as correct, what is supposed to be done, the licit and normal; he stands as jealous guardian of all administrative information and is very attentive on not sharing with the ones being administered, as it might be jeopardized otherwise”.¹⁴³ Secrecy is one of the most effective mechanisms to isolate the powerful and

¹⁴¹ *Idem.*

¹⁴² Fromm Erich, *Escape from Freedom* (Farrar and Nighthead, London, 1941), at p. 174 in Constenla R. Carlos cit.

¹⁴³ Gordillo, cit.

lead to institutional immunity, as the possibility for accountability disappears and control mechanisms over the administration have no material to control. This is an unfortunate degeneration of the modern democratic principles that originated in the XIX century, when “the following Kantian axiom became law: actions concerning the rights of other men are unjust if their precepts do not permit their sharing”.¹⁴⁴ And while the liberal ideology according to which ‘the best government is the one which governs the least’ faded away with the horrors of the First World War and the introduction of the so-called social rights started being introduced both in Europe (Weimar’s Constitution) and in Latin America (after the Mexican Revolution), a different approach to democracy appeared. State interventionism became the norm for a rising number of policy areas, following the notion that the individual and society should not be isolated but, on the other hand, implicitly connected.

The affirmation of the Welfare State after the Second World War brought new, major responsibilities on the part of the State, the obvious consequence of which is the growth and strengthening of the administrative sector into something which has been called the “super-administration of the State”.¹⁴⁵ The growth of the executive over the legislative and judicial powers had obvious repercussions on the level of control that the latter were supposed to play in the relationships amongst the various bodies of the state, with the obfuscation of the necessary difference law - politics and legislation - government. All of the above is even more noticeable in Latin America, where the major system of republican governments has been of a presidential nature. In this region, if the administration of the state is not put under serious control, the risk of abuses on the citizenry has led to the gravest human rights violations, as every overflow in the exercise of power is an abuse.

This increasingly close relationship between national politics and the economic and social situation of the population brought about the emergence of a variety of new rights (of an economic, social and cultural nature) within the sphere of human rights. In varying degrees, the State is increasingly responsible for the guarantee of a new set of basic rights to its citizens such as health, education and adequate housing. In Latin America, extreme inequality and the exponential increase of the amount of people living below the poverty line reaches dramatic proportions. And the reasons behind it all are clearly not due to natural phenomena but rather directly related to the political choices of those who have been in power in Central and South American States during the last centuries.

It is within this fairly broad frame that we have to view the particular importance of NHRIs in Latin America. It is a context in which common historical, economic and cultural traits have molded society in such a way that a global approach to institutionalization, without consideration of all of the above when assessing the quality of NHRI’s activities and implementing policies to increase their effectiveness, cannot be the right approach. Whilst the international community should indeed “support structures that can mobilize and leverage

¹⁴⁴ Constenla R. Carlos, cit. At p. 113.

¹⁴⁵ Idem.

local institutions in pursuit of the shared values represented by international human rights”¹⁴⁶, I believe that NHRI assessment and analysis should take place according to the local context, in light of the local human rights situation and developments. It seems to me quite obvious that the reality described in the above pages cannot apply to countries in which the state administration is regarded by the general population as a guardian of the rights of the citizenry, as for example is the case in the Scandinavian region. Nevertheless, the policies and regulatory frameworks that NHRIs in both areas of the world have to follow in order to be accepted as fully-functioning NHRIs, are the same.

The particular terms that characterize development in South America are directly related to an historical memory which is a warning sign against the inefficiency of previous neoliberal reforms and a springboard for a major general role of the State itself. Various nations (Argentina, Bolivia, Brazil, Ecuador, Uruguay and Venezuela for example) have cut from their recent past and governments pertaining to the “new left” have risen to power. These progressive governments, even though heterogeneous in attitudes and stances, have as common ground several development strategies, such as the emphasis on economic growth and the reliance on the export of raw materials, whereby a state’s reserve of natural resources for example, becomes of fundamental importance for its insertion in the globalized economy.

Governments in Latin America have benefited from an extraordinary level of unaccountability, and as such organs of institutional control of an independent nature need to adjust to such a dramatic reality. There are many unique characteristics that exclusively pertain to this part of the world, and to not take into consideration these “autochthonous” instances of maladministration of the state is, in my opinion, rather absurd.

8. The Defensor del Pueblo

8.1 The Defensor del Pueblo within the Latin American Context

Even though the Ombudsman body makes its first official appearance in the Iberoamerican world in 1976, when the Provedor de Justicia de Portugal was included within the Portuguese Constitution¹⁴⁷, followed suit by the establishment of the Spanish Defensor del Pueblo in 1978¹⁴⁸, “the Ombudsman first reaches Iberoamerica as an intellectual preoccupation, rather than a constitutional creation”.¹⁴⁹ It was mainly through the promotion within academic and intellectual environments, and mainly from an Administrative Law point of view only, that the idea of an Ombudsman body¹⁵⁰ was first introduced in Iberoamerica during in the 1950s. Regarding the introduction in the Latin American region of the actual

¹⁴⁶ Goodman Ryan, *Human Rights, State Compliance and Social Change.*, cit. at p. 298.

¹⁴⁷ Constitution of Portugal (1976), Art. 23.1.

¹⁴⁸ Constitution of Spain (1978), Art 54.

¹⁴⁹ Santistevan de Noriega Jorge, *El Defensor del Pueblo en Iberoamerica* in Iraizoz Mari, *La Eficacia del Defensor del Pueblo en Iberoamerica – Expansion y caracterizacion como Instituciones Nacionales de Derechos Humanos*, Dykinson S.L (Madrid, 2012), at p. 49.

¹⁵⁰ At this stage the Ombudsman’s function was seen purely as an organ of control of the public administration.

state-run bodies, apart from Guatemala's Procuraduría de Derechos Humanos which was established in 1985, every Ombudsman body was introduced, be it constitutionally or simply through specific legislation, from 1990 onwards. This fairly recent tendency is directly linked to the social and political events that shaped the whole continent during the last crucial decades of the 20th Century, all united by a common democratizing trend that led to the end of authoritarianism in both Central and South American states.

The Defensorías del Pueblo have thus been an integral part of those constitutional reforms that were at the basis of each national transitional process, as such an essential mechanism for the establishment of democracy and its consolidation in the vast majority of Latin American states. In order to understand the full scope and meaning of the Ombudsman's introduction in the region, it is necessary to include in the analysis, on a very general scale, the Latin American social and political context of the last decades, and its significance in terms of democracy and human rights.

As explained in the previous chapter, the period between 1978 and 1990 was characterized by an astonishing disrespect of even the most fundamental of human rights by the hands of the state. The extreme human rights violations that took place during these years led the succeeding policymakers to place institutions with a human rights mandate in the foreground of the new constitutional reforms. The necessity to turn page from these horrors implied that responsibility be established and perpetrators be punished. In line with this reasoning, the majority of states set up what became known as "Truth Commissions", bodies with the specific purpose to investigate on the most grave violations taken place during the authoritarian years, bring to justice the guilty and repair the violated. This period not only introduced fair elections and an increased respect for human rights, but also sparked a trend of institutional reforms "aimed at enhancing and strengthening popular participation, the rule of law, accountability and other values associated with democratic governance"¹⁵¹, such as decentralization, constitutional courts and ombudsmen. Already existing foreign means of horizontal accountability (such as human rights commissions and the ombudsman) were used as important models to get inspiration from, in a general attempt at rebuilding public institutions "with checks to avoid the human rights abuses and bureaucratic ineptitude of the prior regimes".¹⁵² Thus, similar drastic changes in a relatively short period of time brought about a common necessity for new institutional models, all within the same process of "transitional justice". It is within this contextual framework that the figure of the Defensor del Pueblo is introduced.

In 1986 the Spanish Centre for Constitutional Studies organized the first Spanish-American Meeting on "The Ombudsman Project for Latin America", a chance to promote a body that would enhance the democratic revolutions that were taking place at the time. The discussions that took place facilitated the expansion of the figure of the Ombudsman within the Latin American community of states, with many representatives openly supporting its fast

¹⁵¹ Uggla Frederik, *The Ombudsman in Latin America*, Journal of Latin American Studies (2004) 36, p. 423.

¹⁵² Reif, *Transplantation and Adaptation* (note 3), p.276.

integration within their national politics. One intervention is worth reproducing, as it aptly expresses the common idea that came out of the international meeting: “I think that the point of view according to which our idiosyncrasies, our Latinoamericanidad/being Latin American, our underdevelopment and our ‘tropicality’ denies the necessity for an Ombudsman institution is an offence to our political intelligence. In fact, these very same idiosyncrasies have not prevented us from establishing a monstrous and labyrinthine modern State. Our own, same underdeveloped societies have charged the State with responsibilities to not only guarantee public order and the right not to be tortured or imprisoned, but also to promote development and provide services to the community. If we have been able to create such State, how can we say that we are not able to create mechanisms of control and protection of the citizen vis-à-vis the State?”¹⁵³ And while the abovementioned idiosyncrasies do not preclude the possibility for the establishment of a national Ombudsman institution, it is through their close consideration that the Defensor del Pueblo is endowed with the characteristics it holds today. It is a history of adaptation of this originally Nordic institution, fitted into the neo-democratic context of post-dictatorial Spain and Portugal, finally suited to the necessities of the Latin American continent. What this adaptation into a different reality has brought is eloquently summarized by Dr Jorge Luis Maiorano, Argentinian Public Defender and Vice-President of the International Ombudsman Institute: “during the institution’s transit to countries of southern Europe, and even more so to the Latin American region, a new model was born, strictly tied to the constitutional developments of the democratic transitions that took place after the collapse of the existing authoritarian regimes. This new model adds two new fundamental elements to the classic Ombudsman body: first of all an explicit and prioritized function of human rights promotion and protection, without setting aside its non-judicial competence over the control of the state administration; secondly, the power to transfer to the prosecution those proceedings worthy of a criminal trial”.¹⁵⁴

In this sense, the Latin American Defensor del Pueblo overcame the classic Ombudsman’s exclusive responsibility over cases of State maladministration, as the latter was only one of the preoccupations of that historical moment. Human rights promotion and protection, be it of a constitutional or international character, becomes the Defensor’s main role in societies torn by internal wars and dictatorial repression. The difference between this new model and the classic Nordic “administrative” organ of control is easily discernible. In its Atlantic crossing, the Ombudsman body came across a variety of social, political and cultural issues that moulded its function in such a way that led certain scholars to rename it the “*Criollo Ombudsman*”, which has to operate within a State whose institutions are weak and inefficient, whilst lacking the confidence and credibility of its citizens. In certain cases, the state finds itself with unhealed wounds coming from the massive human rights violations, such as instances of torture and forced disappearances, perpetrated by those authoritarian regimes

¹⁵³ Gueròn Carlos, Intervención in VVAA. El Proyecto de Ombudsman para America Latina, Cuadernos de Documentación, Serie III, Cuestiones Iberoamericanas, No. 1 (Madrid, 1986), p.33-34.

¹⁵⁴ Maiorano Jorge Luis, El Defensor del Pueblo en America Latina. Necesidad de Fortalecerlo in Iraizoz Mari, La Eficacia del Defensor del Pueblo en Iberoamerica – Expansion y caracterización como Instituciones Nacionales de Derechos Humanos, Dykinson S.L (Madrid, 2012), at p. 61.

whose actions have not been investigated with proper clarity. It has to face complaints over the slowness of legal procedures and the rising impunity which is caused by the inadequate proficiency of national investigative bodies. In addition to this, it is faced with the cruelest of situations: thousands of homeless people, without access to food, to the most basic of health services and education and discriminatory practices that affect a great number of children, women, the elderly and indigenous people. The Ombudsman is thus spurred to defend not only their civil and political rights, but their economic, social and cultural rights as well".¹⁵⁵ From the above, it should be clear that a certain kind of prioritization is implied in a body which finds itself facing at the same time grievances relating to cases of torture and ones dealing with administrative delays.

Furthermore, some less obvious Latin American distinctions still contribute to the particular shaping of the classic Ombudsman into its hybrid version of the Defensoría del Pueblo.

In terms of democratic index, whilst it is a confirmed reality that the vast majority of contemporary Central and South American states benefit, officially speaking, of a democratic system of government, it cannot be said to be benefiting from a healthy one. In fact, a number of instances¹⁵⁶ during the last two decades have put into question the quality of many democracies in the region which, in turn, has brought to a very high level of dissatisfaction amongst the population of the political practices and institutions of their respective countries. A consequence of Latin America's steep percentages of inequality and poverty is the weakness of a "culture of legality" that directly hinders upon the rule of law. What this region is facing is not a crisis of democratic values which, now more than ever, is crystallized into society, but rather a crisis of how these values are managed by the State for its people. The Defensorías del Pueblo find themselves in the perfect institutional and normative space to be able to tentatively master these inequalities and democratic deficits, a function unknown to their Classic counterparts in Europe.

After having overcome the complexities related to the transitional period, the citizens have to face the overwhelming presence of the Public Administration. Its intricate system of distinct territorial competences, usually divided at least into regional and national offices, has led to a normative and authoritative dispersion that damages the already feeble relationship between the general population and the State. Additionally, the increasing privatization that national services have been witnessing in the last years is yet another ingredient to the citizenry's perception of helplessness in front of an apparent dissolution of responsibility by the hands of the State. It is both the frailty of some Latin American democracies and the degree of social exclusion and stratification that all countries of the region are suffering from that boost the Defensor's office importance. The widespread institutional disaffection, which reaches structural levels due to the economic, social and cultural differences that co-exist within any one state of the continent, could be seen as an opportunity to build upon. The introduction of

¹⁵⁵ Valladares Lanza Leo, *The Challenges Facing the Ombudsman in Latin America* in *The International Ombudsman Yearbook*, Vol.2 at p. 161.

¹⁵⁶ United Nations Development Programme, *Democracy in Latin America: Towards a Citizens' Democracy*, available at <http://www.un-ngls.org/orf/democracy-undp-publication.htm>.

the Defensor del Pueblo, with its independent role as defender of the human rights of citizens, has been seen as a necessary evolution of the developing Latin American democratic State.

8.2 Common Features of the various Defensores Del Pueblo

The various Iberoamerican national institutions are all, on paper, characterized by a set number of features which can be summarized as the following:

8.2.1 Independence

The fundamental attribute of any functioning Defensoría, and the element which guarantees its legitimacy vis-à-vis society, is its independence. The lack of dependence from any other state body, especially if part of the executive, is what “most clearly underpins a national institutions’ legitimacy and credibility, and hence its effectiveness”.¹⁵⁷ Most importantly, the office of the Defensor del Pueblo is obliged to treat matters of legitimacy with extreme seriousness due to its very nature, an institution which lacks coercive powers and bases its performance margin on its persuasive power. Independence does not in fact derive from the mere declaration of being so (even though it is an essential element for an organic law to have), but is acquired through a process of external recognition. The relationship between the Defensor del Pueblo, the legislative and the executive powers has to be one of mature coexistence, each cognizant of their specifically different roles and legal responsibilities. It is for this reason that the figure of the Defensor itself is of extreme importance due to the usually complex role, made of complex institutional relationships, with the political sphere. Respect, by both the population (whose rights it is defending) and state authorities (over which it is playing a controlling role), is essential for the effective fulfilment of its functions. As such, independence can be divided in two different categories: independence of the figure of the Defensor himself and of the institution as a whole.

- Independence of the Person

In the whole of the region, the appointment of a Defensor del Pueblo follows a number of requirements which have been introduced with the common interest of shielding the person of the Defensor from any concerns of political bias. The appointment procedure is key to its legitimacy, even more so due to its unipersonal character. As such all states of Iberoamerica (apart from Puerto Rico) elect its Defensor del Pueblo through their legislative power, with varying degrees of majority vote.¹⁵⁸ Notwithstanding the fact that it is the representative of popular sovereignty that is taking the ultimate decision, and which provides democratic legitimacy to the post, in reality there still is a degree of risk that such procedure allows for a political appointment, constraining its independence. The fact that the vast majority of states

¹⁵⁷ International Council on Human Rights Policy, *Assessing the Effectiveness of National Human Rights Institutions* (2005) at p. 12.

¹⁵⁸ Iraizoz Maria, *La Eficacia del Defensor del Pueblo en Iberoamerica – Expansion y caracterización como Instituciones Nacionales de Derechos Humanos*, Dyckinson S.L. at p. 87.

rely on a 2/3 majority at least shows “the intention of guaranteeing the maximum level of neutrality and political independence in the implementation of the Defensor’s function”.¹⁵⁹ The problems start to arise when one analyses the path that the actual candidatures have to undergo before reaching the legislature’s examination. In fact, few legislations regulate the nomination procedure, as in the majority of states it is the political parties that bring names to the fore in dedicated parliamentary commissions, in which nominations are negotiated behind closed doors. However there are some positive examples of the contrary: civil society is directly involved in the selection process through public contests, during which the citizenry is directly called to choose the candidate. This is the case of Bolivia, Costa Rica, Mexico, Nicaragua, Peru and Ecuador. The mandate’s duration is also an important facet for the position of Defensor. A certain stability is necessary and as such, long and non-renewable periods of tenure guarantee a higher degree of independence than short renewable ones. In Iberoamerica the time of tenure varies from a minimum of three years to a maximum of seven and in most cases the second reelection is not permitted in order to prevent potential double interests being involved in the continuation of the tenure.

A Defensor has, furthermore, to abide by a number of personal qualities which, notwithstanding being mostly unwritten, are to demonstrate the apt nature of the candidate. Minimum required age (only Spain and Portugal do not set a limit), the necessity of having a jurist background, personal distance from any form of party politics and ethical qualities are all elements that are taken into consideration before the election of a candidate to the post of Defensor.

- *Independence of the institution*

In addition to the above characteristics relating to the person of the Defensor, one can also find other which are directly related to the institution itself, in place so as to safeguard its independence from the other state bodies and authorities. This kind of independence can be divided into three main categories: functional independence, financial independence and independence of its internal procedures from external influence. As far as its functional independence is concerned, the International Council on Human Rights Policy recommends that legislation always be put in place in which it is expressly stated that “the members and personnel of the NHRI will not receive instructions by members of government or from other functionaries, neither direct nor indirect, and that functionaries should not try to give such instructions”.¹⁶⁰ This recommendation is partly followed in the region, with six constitutions¹⁶¹ openly stating independence as one of the necessary facets of their national institutions.

A Defensoría can benefit from as much functional independence as possible, however its obvious need for funding is the element that will finally determine its actual limits. What this

¹⁵⁹ Idem. at p. 240.

¹⁶⁰ International Council on Human Rights Policy, *Assessing the Effectiveness of National Human Rights Institutions* (2005) at p. 13.

¹⁶¹ Argentina, Bolivia, Paraguay, Peru, Portugal and Venezuela.

category of independence ultimately deals with is the capacity of budget negotiation and proposal by the hands of the institution and its ability to not fall victim of cuts in the following funding intakes. Out of the whole Iberoamerican panorama, only five Constitutions make a reference to this kind of independence.¹⁶² The real issue on the matter is the impossibility of finding any official indications on how the budget allocation should function or how to determine the allocation of resources in comparison to other institutions or previous years. And in circumstances of imprecision, the least powerful body is the one to suffer the most. This is a surprising fact, as financial independence is a vital ingredient to the correct functioning of such a novel institution. The result of this legal vacuum is that most Iberoamerican Defensorías del Pueblo find themselves at the mercy of their respective country's legislators and sometimes even executives, a tremendous obstacle to the human rights protection of the citizenry.

Lastly, the Iberoamerican Defensor del Pueblo should strive for a third kind of independence, related to its internal organization. A Defensoría should be able to issue its own regulations on organizational matters as well as dealing with its operations. Fortunately, regulations on the matter are more evident with the vast majority of Iberoamerican Defensorías enjoying autonomy in freely designating its personnel and methods of work.¹⁶³

8.2.3 Sole-membership

The function of the Defensor is strictly personal and the moral authority can only be recognized to one individual and not to a set of people. As previously mentioned, the personal reputation of the individual is a fundamental pawn towards the necessary popular legitimacy that the office of the Defensor del Pueblo has to hold.

8.2.4 Complaint-Handling Mechanism

One of the most characteristic functions of the Defensor is the power to investigate de oficio or through a complaints procedure which directly allows the petitioner/citizen to appeal against an action of the state which is unreasonable, unjust, arbitrary or discriminatory.

The complaints procedure is also a form of political participation due to the possibility for citizens to influence political decisions through their complaints, both at their preparatory and implementation stage. The huge majority of Iberoamerican legislations allow for any individual to file a complaint, with the sole requirement of having a personal interest in the matter. It is only with the Spanish and Ecuadorian Defensor that the requirement of "legitimate interest" comes into play.¹⁶⁴ In this way the citizen does not behave as mere spectator of governmental decisions and may actively be involved through the legal channeling of popular participation of which the Defensor is the main enabler. The Defensor may ask any state authority for reports on issues of concern without having to follow

¹⁶² Bolivia, Ecuador, Mexico, Perú and Venezuela.

¹⁶³ Only Ecuador, Mexico, Paraguay and Venezuela benefit from administrative autonomy from both Constitution and legislation.

¹⁶⁴ Ecuador, art 14, Spain art 10.1.

hierarchical structures and when individual or group petitions are being dealt with, the outcomes can be varied: official requests for information, investigations, inspections amongst others.

8.2.5 Non-Binding Character of its Resolutions

The Defensor del Pueblo is a "magistry of conscience" in the sense that it is only through its opinions and influence that its recommendations are considered by the authorities under scrutiny. These recommendations only have the authority that is granted to them by the prestige of the institution and the rightfulness and moderation of its resolutions. It is a fundamental characteristic of the Defensor the lack of an ultimately decisive function and as such cannot undo or change any administrative decision. Its resolutions cannot be held obligatory due to it not being a court of justice and can be interpreted as exhortations, requests and advices, with the only obligation on behalf of the receiving institution to consider it, whether or not it is in accordance with their findings.

8.2.6 Informality

The essence of the function of the Defensor del Pueblo is to guarantee to the population the easiest access to its protection and assistance. It is an informal alternative, accessible to all, without however replacing any administrative act or jurisdictional decision. As such an underlying feature of the institution is its lack of formalisms and the requirement of being as accessible as possible, be it in the forms of regional offices or through informal means of redress.

9. A Mandate Peculiar to the Defensor del Pueblo

The global normative approach that has characterized the last thirty years of NHRI expansion, with the Paris Principles as the main regulatory framework, has placed every national institution within the same conceptual space. Since 1991 the amount of states that established a human rights commission or ombudsman rose exponentially, each with the obligation to adhere to the general norms found in the Principles for them to be fully accepted within the NHRI community, with all the benefits that stem from this membership. Every typology of national institution has been included within the Paris Principles' reach, as much as every country has been asked to accept and follow their regulations. Even though with a potential for theoretical redundancy, we have already seen how one particular region of the world, due to its historical, social and economic traits, has delineated a very unique kind of nation state both in terms of the citizens' approach towards the state as well as the state's approach towards its citizens. Fundamental to our argument, this distinctive approach is mirrored in the Latin American Ombudsman's competence framework which figures a number of distinguishing features.

9.1 An express mandate to promote and protect human rights

A comparative analysis of the various Iberoamerican Ombudsman bodies shows that the majority of national founding legislation grants an express mandate to promote and protect human rights.

National institutions with a longer tradition of activity, such as the Nordic Ombudsman bodies, find themselves basing their activities on a legal framework that implicitly includes the respect for human rights within its institutional overview. This is possible due to a longer national history and fewer grave human rights violations in their recent past. In these cases, an explicit reference to the defense and promotion of human rights within the national institutions' mandate is not as necessary as it is in the case of younger democracies, such as Spain, Portugal and the whole community of Latin American states. Many countries, especially those with a relatively short democratic history, lack this intrinsic value that human rights benefit from elsewhere. It is also often found that these young democracies, notwithstanding a commitment to the various international human rights treaties, have not adjourned their national legislation to the required standards. It is fundamental in these cases for the NHRI's mandate to directly allude to the guarantees found in the ratified international treaties. It is through the citizens' complaints over the state's maladministration that human rights are thus safeguarded, following what the American Bar Association defines as the Ombudsman's "basic concept": "Human rights are not protected simply by constitutions or legislation, by guarantees or speeches, by proclamations or declarations, but primarily by the availability of remedies. The Ombudsman system is one of the remedies which seeks to preserve human rights."¹⁶⁵

For clarity's sake, the Iberoamerican countries that either mention "human rights" in their national institution's mandate expressly or indirectly through allusion to "international human rights treaties" in their Constitutions are the following: Argentina, Bolivia, Colombia, El Salvador, Guatemala, Mexico, Panama, Paraguay and Venezuela.¹⁶⁶ Spain and Portugal, even though not mentioning human rights specifically in their Constitution's articles through which the Defensor is founded, refer to Part I of their respective Constitutions, which indirectly count for the protection of human rights. Ecuador, Honduras and Nicaragua on the other hand do not mention human rights in their Constitutions and leave every normative clarification regarding their Defensor del Pueblo office to national legislation, an issue that has direct consequences on both the independence of the institution and on its potential longevity, being susceptible to easy reformation by the hands of the government of the day. Costa Rica and Peru do not even mention human rights in the founding legislation of their Ombudsman body, referring to "constitutional rights" instead.

Another peculiarity of Iberoamerican Ombudsmen bodies that distances itself from the very essence of the Classic Ombudsman revolves around the controlling function over public authorities. Whilst the latter function still is an intrinsic part of their mandate, the great majority of Latin American states have opted for a mandate with human rights protection as

¹⁶⁵ Gottehrer Dean M. and Hostina Michael, *The Classic Ombudsman Model*, in Iraizoz Mari, *La Eficacia del Defensor del Pueblo en Iberoamerica – Expansion y caracterizacion como Instituciones Nacionales de Derechos Humanos*, Dykinson S.L (Madrid, 2012), at p. 149.

¹⁶⁶ Constitution of Argentina Art. 86, Constitution of Bolivia Art. 218, Constitution of Colombia Art. 282, Constitution of El Salvador Art. 194, Constitution of Guatemala Art. 274, Constitution of Mexico Art. 102, Constitution of Panama Art. 129, Constitution of Paraguay Art. 276 and Constitution of Venezuela Art. 280

their main point of focus, the supervision of the State administration relegated to a secondary function. Administrative supervision is subordinated to the protection of fundamental rights in Argentina and Central American states, as well as Spain, notwithstanding some controversies related to differences between the Constitutional mandate and the Defensor's Fundamental Law.¹⁶⁷ As a matter of example, the Argentinian constitutional mandate establishes that "the fundamental objective of this institution is to protect the rights and interests of the individuals and the community as a whole vis-à-vis the actions and omissions of the national public administration".¹⁶⁸ Similar examples can be seen in the Constitutions of Mexico, Panama, Guatemala, Nicaragua, El Salvador and Honduras. It is particularly meaningful to note at this stage that the prioritization of human rights protection is preferred by countries which have experienced recent waves of grave violations of human rights and which are in a situation of post-conflict re-establishment.

The furthest from the classic ombudsman model are the mandates of the National Institutions of Colombia, Ecuador and Paraguay, which do not even contemplate the administration's supervision¹⁶⁹. Representative of this latter group of states is Art. 215 of the Ecuadorian Constitution, which states as mandate "the protection and safeguard of the rights of the people of Ecuador and the defence of the rights of Ecuadorians which find themselves outside of the country". Yet another group of states, comprising Bolivia, Peru and Venezuela have been defined by existing literature as holding "parallel mandates"¹⁷⁰, in the sense that both human rights and the public administration's supervision are treated in an equal manner. Art. 162 of the Constitution of Peru, for example, states that "it is the Defensoría's role to defend the constitutional and fundamental rights of the person and of the community as well as supervise the fulfilment of the duties of the public administration and the provision of public services to the citizenry".

Only Portugal, Costa Rica and Puerto Rico follow the classic tradition. As such their power of supervision and control over the Administration represents their principal task within their mandate, as can be seen by the words of Art. 23.1 of the Constitution of Portugal: "the citizens can present complaints for the actions and omissions of the public authorities".

As the brief comparative mandate analysis above has shown, it is typical of National Institutions of Ibero-America to have a promisingly broad mandate of human rights

¹⁶⁷ Art. 54 of the Spanish Constitution explains that the Defensor del Pueblo's mandate is to "defend the rights comprised within Title I of the Constitution (Fundamental Rights), for which it will be able to supervise the Administration's activities", a clear statement in which the Administrations' supervision is subordinated to the actual protection of the Fundamental Rights enshrined in Title I. The Ley Organica del Defensor del Pueblo (LODP) Art.9.1 however, seems to direct the main focus of the institution's mandate in the opposite direction: "the Defensor will be able to undergo [...] whichever investigation related to the Acts and Resolutions of the Public Administration and its agents, which affect citizens, in light of what is enshrined in Art 103.1 of the Constitution, and the respect towards the rights proclaimed in its Title I".

¹⁶⁸ Constitution of Argentina, Art.86.

¹⁶⁹ Iraizoz Mari, *La Eficacia del Defensor del Pueblo en Iberoamerica – Expansion y caracterizacion como Instituciones Nacionales de Derechos Humanos*, Dykinson S.L (Madrid, 2012), at p. 156.

¹⁷⁰ Iraizoz Mari, *La Eficacia del Defensor del Pueblo en Iberoamerica – Expansion y caracterizacion como Instituciones Nacionales de Derechos Humanos*, Dykinson S.L (Madrid, 2012), at p. 155.

protection, mainly due to the atrocities suffered by these states in the not so distant past. What will follow is an analysis of the concrete measures put in place by the various institutions so as to verify whether such generous mandates are fully complied with or whether they are subject to limitations. As a matter of fact, it is the conjuncture of the objectives set out in the general mandate together with the available means for their fulfillment that make out the overall competence framework. For the majority of cases, the Defensoría's mandates are circumscribed to the activities underwent by the public authorities. It is not however a term of a clear-cut nature. Whilst it has been considered that "the supervisory activity should extend to the totality of the public Administration in all its forms, be it military, judicial, local, national, etc..."¹⁷¹, one can nonetheless find very limiting mandates. A controversial example of such limitations is found in Ley Argentina art. 16, which states that "outside the competence of the Defensoría del Pueblo [of Argentina] lie the Judicial and Legislative power, the Municipality of Buenos Aires and the national organs of defence and security".

As a matter of fact it is not an easy task to offer a generalized overview of the scope of Latin American NHRIs' mandates. It is from the terminology itself that one can notice this complexity: whilst in Spain, Costa Rica and Argentina what is being overlooked by the Defensor is "la Administración", in Costa Rica it is "el sector publico" and in Mexico it is "those acts and omissions of an administrative nature", just to name a few. In order to be as concise as possible, only selected examples of the 17 Iberoamerican Defensorías will be given, which will nonetheless give an insight into the mandates' area of influence and its implicit limitations.

9.2 Mandate over the Judicial Power

In its original version, the Swedish Parliamentary Ombudsman plays a fundamental role with respects to the judiciary, "overlooking the manner in which judges, government functionaries and other civil servants observe the laws and accusing those who act illegally or forget their duties".¹⁷² More specifically, while the mandate itself does not cover actual judicial decisions and the majority of cases deal with formality issues (such as undue delay or improper conduct), nothing impairs the J.O. from expressing his views on any decision taken by the judiciary. It is then obviously up to the moral authority that the office beholds for the Ombudsman's point of view to actually be taken into consideration by the relevant authorities.

In Iberoamerica this approach is, apart from few exceptions, adhered to. In this particular region it is in fact of absolute importance that the administrative acts of the judicial powers be controlled by an independent body, as impunity levels within weak judicial administrative entities are usually very high. The right to effective judicial protection is, in the end, an

¹⁷¹ Asterloa Villena Francisco, *El Defensor del Pueblo en Espana* in Iraizoz Mari, *La Eficacia del Defensor del Pueblo en Iberoamerica – Expansion y caracterizacion como Instituciones Nacionales de Derechos Humanos*, Dykinson S.L (Madrid, 2012), at p. 179.

¹⁷² Rudholm, Sten, "Sweden's Guardians of The Law: The Chancellor of Justice", ed. Donald C. Rowat, *The Ombudsman, Citizen's Defender*, London, George Allen and Unwin Ltd., 1968, p.16.

essential service that comes within the Defensor del Pueblo's scope of an all-round protection of the citizens' fundamental rights.

From a theoretical point of view, there is an important difference between the concept of jurisdictional power and that of jurisdictional function. Whilst the former is a power that derives from the sovereignty of the state, deeply rooted within the separation of powers principle and which cannot allow for other "jurisdictions" to limit its function, the latter is the only concept that the Defensor's office may act upon. In this way the manner in which the jurisdictional power is being administered comes within the scope of the mandate, leaving the jurisdictional power and the substance of the judicial decisions intact from any external intrusions.

Whereas a number of legislatures are silent on the matter (Colombia, Ecuador, El Salvador, Guatemala, Honduras and Nicaragua), the rest specify with a certain amount of clarity what role their Defensoría plays when dealing with judiciary-related matters. A very clear and express formulation on how a Defensoría is to behave when matters related to the judiciary come into question, and which can be used as an example of the role the Defensor has vis-à-vis the judiciary, can be found in the Peruvian legislation: "when the investigations of the Defensor del Pueblo refer to the administration of justice, he may obtain the information which is regarded as necessary from the competent bodies and institutions, without its actions interfering with the exercise of the power of the judiciary. In case the results of its investigation show an abnormal or irregular functioning of the administration of justice, the Defensor is allowed to let the Executive Council of the Judicial Power know as well as the Public Ministry. In its annual report to the National Congress, it will have the task to inform the members of the Congress on the efforts taken by the Defensor on these issues".¹⁷³ Importantly, cases which deal with issues of due process represent one of the most frequently dealt issues of the Peruvian Defensoría del Pueblo, and similar records can be found in most offices around Latin America. Similar limitations can be found in the majority of Latin American States as well as in Spain and Portugal so much so that on this aspect the Defensor's role has been compared by critics to that of a "post office"¹⁷⁴, with the sole purpose of forwarding those claims received to the relevant state body. Against this general trend is the Venezuelan legislation, which specifically includes the judicial branch of the National Public Power within its Defensor's mandate, whereas both the Argentinean and Mexican legislations firmly disallow any sort of competence on behalf of the Defensor's office over matters related to the judiciary.¹⁷⁵

In the end, apart from a few exceptions, one can see that Latin American NHRIs include within their mandate non-jurisdictional matters related to the administration of justice, which is an important step towards the strengthening of a rule of law sometimes set aside in countries of this region of the world.

¹⁷³ Ley Peru, Art 14.

¹⁷⁴ Perez-Ugena Maria, "Defensor del Pueblo y Partidos Politicos" in *Revista de la Facultad de Derecho de la Universidad Complutense* N.82 (Madrid, 1994) at p. 340.

¹⁷⁵ Ley Argentina Art. 16, Constitucion de Mexico Art 102b).

9.3 Mandate over the Military

The role that the military played in Latin American recent history, often responsible of coup d'états in a frame of gross human rights violations, would lead to assume that newborn democracies would have taken into serious consideration the possibility of putting the military forces under some sort of independent control.

To the contrary, during those debates that led to the passing of many National Institutions' organic laws, there have been instances of open opposition to this eventuality, such as when the accusation was made that "it would reach a level of extremism were we to allow the Defensor's mandate to have a say on any national body".¹⁷⁶ This quote is symptomatic of a trend that is rather surprising but that gained the upper hand only in one country of the continent, Argentina. In fact, Art. 16 Ley Argentina is presumably the most controversial of Latin American organic laws, especially if one takes into consideration the military dictatorships that ruled over the country in the 1970s and 1980s. After listing what is to be considered under the label of "national public administration", and thus falling under the Defensor's mandate, it continues with the national bodies that in turn do not fall under its' competence which include, apart from the judicial power, the legislative power and the municipality of Buenos Aires, also "those bodies related to national defense and security".

On the other hand, Bolivia, Honduras, Spain, Panama, Portugal and Venezuela expressly include the armed forces within their own Defensor's mandate. As an example of such a group of mandates, the Statute of the Portuguese Prevedor de Justicia lists the following as within the competence: "scope of the activities of the services integrated in the central, regional and local public administration, the Armed Forces, the public institutions, the public companies or the companies whose capital is mostly public and the concessionaires operating public services or exploiting state property".¹⁷⁷

There is also a third group of states, made up of Mexico, Paraguay and Peru, which do not state with clarity their position on the matter. The use of such expressions such as "whichever authority or civil servant"¹⁷⁸ may, in fact, be interpreted in either way.

In the end, the inclusion of the armed forces within the Defensor del Pueblo's mandate is surprisingly rather varied, notwithstanding the original Swedish *Justitieombudsman* had made such inclusion a strict requirement.

9.4 Mandate over Individuals

A further characteristic peculiar to the Defensorías del Pueblo amongst the broader NHRI family, is the role some play vis-à-vis individuals. This is a highly contentious subject-matter, as one of the pillars of the ombudsman institution is, quite openly, the role it plays in

¹⁷⁶ Abad Yupunqui Samuel, Defensoria del Pueblo y Administracion de Justicia in La Constitucion de 1993: Analisis y comentarios (Lima, 1996).

¹⁷⁷ Portugal Estatuto, Art 2.1.

¹⁷⁸ Constitucion de Mexico, Art 102.b.

controlling the proper functioning of the administrations, of the functionaries and of the civil servants in general. It is all the more contentious in Latin America, where non-state armed groups such as guerrilla groups or paramilitaries have played a central role in shaping the geopolitical structure of the continent for decades, with the obvious human rights repercussions implied in their violent activities. This is not a merely legal issue, where one legal point of view is in contrast with another. It is fundamental for any mandate to be as clear as possible on whether an individual's responsibility can also be included within its sphere of influence, allowing the population to understand which claims can and cannot be made. What may otherwise happen is "to bring the popular denotation of the concept of human rights to the extreme, and as a result negatively affect the efficacy of NHRIs themselves, if these start to be perceived as protectors from insurgents".¹⁷⁹

In total, four states have included individuals within their Defensorías' mandate, that is Colombia, Ecuador, Paraguay and Guatemala. As an example of how individuals' are included in a Defensoría's mandate, the case of Colombia will be analyzed. It is a great example to give due to the situation that Colombians have been facing in terms of internal insurgencies and gross violations of human rights by the hands of non-state organized military groups. It is probably due to this that the Colombian Constitution, in its Art 282, states that the primary function of the Defensor del Pueblo will be that of "guide and instruct the citizens, within the national territory and abroad, on the exercise and defence of their rights against the competent authorities or entities of a private character". Furthermore, its organic law as one of the Defensor's tasks that of "presenting recommendations and observations to the authorities and to individuals in case of threat against or outright violation of human rights"¹⁸⁰, with no further explanation as to when an individual can be held responsible for human rights violations.

Mexico, together with a number of other Iberoamerican states,¹⁸¹ also extends the competence of its NHRI to individuals, however qualifying such extension and rendering the previously analyzed, unlimited scope of action, all the more efficient. Individuals are included "when committing unlawful acts under the acquiescence or tolerance of any civil servant or authority, or when the latter refuse without reason to exercise the tasks that they are legally supposed to undergo in relation to such illicit acts, in particular with regards to conduct that affects the personal integrity of the person."¹⁸² his latter manner of handling cases of individuals' violations of human rights by the hands of a NHRI is arguably more apt for an institution whose main task is that of controlling the state administration. As Gil-Robles rightly warns, an exaggerated widening of the scope of competence, instead of being a benefit

¹⁷⁹ Iraizoz Mari, *La Eficacia del Defensor del Pueblo en Iberoamerica – Expansion y caracterizacion como Instituciones Nacionales de Derechos Humanos*, Dykinson S.L (Madrid, 2012), at p. 160.

¹⁸⁰ Ley Colombia, Art. 9.3.

¹⁸¹ Argentina, Honduras, Panama, Peru, Portugal and Venezuela.

¹⁸² Ley Mexico, art. 6.II.b.

for the population, could be “a trap set up to paralyze the institution due to an excess of scope and an exaggerated burden of work that cannot lead to the institutions’ discredit.”¹⁸³

9.5 Limits on NHRI mandates – Separation of Powers and Mandate Universality

Having undergone a short comparative analysis of some of the main issues relating to Iberoamerican NHRI’s mandates, we can see how wide their span of activity can be. So wide in fact that it may arouse mixed emotions: on the one hand, the satisfaction towards constitutional texts with such a developed human aspiration; on the other the anxiety which comes from the fact that such good ambitions usually end up being merely superfluous.

A problem that flows from interpreting mandates so generously is that Defensorías around the continent could fall in a form of activism that eventually would spread to fields which are not supposed to be of their competence. When National Institutions are officially given the competence to “represent the State in international fora over matters that fall within its field of action”¹⁸⁴, ideally a task for the Ministry of Foreign Affairs to accomplish, one can sense the risk of the “universalization” of NHRIs’ role, an issue that in Sweden for example was solved by the institution of four different Ombudsman bodies.

Let it be reminded in fact that “the Ombudsman’s function is not that of replacing any other pre-existing authority; to the contrary, it is that of making sure that such authorities function correctly through the proper performance of their mandate”.¹⁸⁵ There is a clear difference between the Defensor del Pueblo and those other institutions which have the protection of fundamental rights as their main function (as can be, for example and depending on which state, the Constitutional Court).

A wide interpretation of the mandate, even if stemming from the actual wording found in Constitutions and in the founding legislation, is directly linked to the possibility of these institutions’ legitimacy to be eroded. Once the mandate is given a somewhat universal value by wrongful interpretations, it is the institution’s efficiency that is hindered. In other words, with an increase in the populations’ expectations from the Defensor’s office, it is rather direct that the office’s success decreases.

9.6 Protection of Economic, Social and Cultural rights by the Defensorías del Pueblo

Whilst for civil and political rights the traditional systems of judicial control have the upper hand in terms of protection, the same cannot be said for economic, social and cultural rights. The result of the regulatory frameworks that all human rights have been subject to, be it internationally or based on national constitutions, lead to the obligation of the Administration to respect them, even though at times such respect is not under judicial constraint. It is within

¹⁸³ Gil Robles Alvaro, *El Defensor del Pueblo – comentarios en torno a una proposición de Ley organica* (Madrid, 1979).

¹⁸⁴ Ley Ecuador, art. 8.n.

¹⁸⁵ Santisteven de Noriega Jorge, *El Defensor del Pueblo en Iberoamerica in Comentarios a la Ley Organica del Defensor del Pueblo* (Navarra, 2002).

this frame that the Defensor's role holds a distinguished spot, as the guarantor of all fundamental rights of the citizens.

The topic is particularly relevant for the Latin American region, where economic, social and cultural rights are regarded as playing an important political role, with no terms of comparison to the more developed countries, where a higher quality of life and supposedly more efficient administrations tend to treat "second generation" rights in a more streamlined fashion. As a matter of fact, already in 1985 out of the total amount of complaints received by the Spanish Defensor del Pueblo, only 5% were related to civil and political rights. The clear meaning behind this percentage is clearly described by the then Defensor Ruiz-Jimenez: "at this moment in time our juridical system holds a structure that allows for a quick and summary solution as well as overall protection towards violations of civil and political rights [...] On the other hand, economic, social and cultural rights do not benefit from the same judicial protection".¹⁸⁶

A problem with all Iberoamerican national institutions on the matter is, however, the absolute lack of clarity. Whereas on one side of the argument we have the Defensor seen in the perspective of a panacea-like recipient of claims dealing with all generation of rights (including third generation rights such as the right to development and to a healthy environment), we have also had very opposite outlooks. In order to "start with the easiest, with the most efficient"¹⁸⁷ and progressively broaden its mandate in light of its gained experience, many legislators and scholars alike have purposefully limited the Defensor's mandate to individual rights only.

This debate has not been dealt with face first by the various Iberoamerican legislations, and to the contrary no indications on which approach to follow has thus far been given to Defensores in the region, within whose mandates we often encounter rights of an economic, social and cultural nature. According to this approach, the efficiency of the institution is hampered by the magnitude of its mandate, with its inability to comply with the decrees the national legislature has directed at it, yet another particularity of Iberoamerican national human rights institutions.

PART III

10. A Critique of the current NHRI Project

Public legitimacy is essential for the well-functioning of a NHRI, whose underlying function is to connect the international effort of human rights promotion and protection with the national sphere. Human rights that are internationally accepted as universal need that "local embrace" for them to be fully respected and legitimized, and embedding an institution

¹⁸⁶ Retuerto Buades Margarita, *The Internationalization of Human Rights ; Constitution and Ombudsman in Spain* in Ref Linda, *Building Democratic Institutions, The Role of NHRI in Good Governance and Human Rights Protection*, p. 37.

¹⁸⁷ Rojas Franco Enrique, *El Defensor del Pueblo (San Jose 1993)*, p. 23.

within the state apparatus is a first step towards this end. Positive aspects that stem from the introduction of a NHRI are related to this localization, starting from the obvious unparalleled awareness of the socio-cultural context within which human rights promotion and protection has to be immersed in. Another great advantage is related to the feeling of proprietorship that civil society enjoys over the work of the institution due to its necessary quality of independence from other bodies notwithstanding its unique position of proximity from the government of the day and national decision-makers in general. It is obvious that a poor domestic system of human rights protection is ultimately an issue of accountability for the state to assume, but a publicly legitimized national institution has a great role to play in the race towards such accountability, be it by documenting the local human rights situation, advising the state on its international human rights obligations or by aiding international bodies of human rights protection in their examination of the state's actions.

The relatively quick world-wide expansion of NHRIs have without a doubt brought the human rights system of promotion and protection "closer to home" and filled a gap that burdened the system as the only means of bridging the international with the national was left to civil society efforts. But the mere existence of NHRIs in any one country does not necessarily mean an improvement for local human rights. There is an inherent problem with the current NHRI project and that is the substantial disregard for the local context in the assessment of these institutions' effectiveness. An overly confident reliance on international standards for evaluation, embodied in the Paris Principles adoption and the worldwide recognition of their value as sole means of institutional promotion or criticism, is at the root of the tainted success that these institutions have had in the last twenty years.

Before getting into the analysis of such a questionable approach and the current overreliance on the Paris Principles for NHRI effectiveness assessment, an illustrative example will be given which demonstrates that even if all of the characteristics for a fully functional human rights ombudsman are put in place, it is the local context that, in the end, holds the balance of power between a successful and a failed institution. To follow the same geographical trend of the paper, a Latin American example has been chosen. However, to prove the global scale of the issue, two other examples will later be given from the African continent.

10.1 The Procuraduría para la Defensa de los Derechos Humanos (PDDH) of El Salvador

After the 12-year civil war that tore El Salvador apart between 1979 and 1992, peace accords were organized in order to settle the countries devastated institutions. The establishment of a truth commission was an integral part of these accords as a way to investigate the human rights violations committed during the war. During the reporting stage, it was found that "El Salvador [had] no system for the administration of justice which met the minimum requirements of objectivity and impartiality".¹⁸⁸ This led to a strong movement for judicial

¹⁸⁸ Dodson Michael, Jackson Donald Wilson, *Horizontal Accountability in Transitional Democracies: The Human Rights Ombudsman in El Salvador and Guatemala*, Latin American Politics & Society, Volume 46, Number 4, Winter 2004, p.12.

reform which comprised the establishment of a new form of ombudsman with a strong human rights mandate.

The first PDDH ombudsman, elected with a large majority by the Assembly, was Carlos Molina Fonseca, an important political figure of the time but with no substantial human rights experience. Notwithstanding his little familiarity with human rights, his term of office was highly regarded both within the state and internationally. During this period, the Human Rights Division of the UN Observer Mission (ONUSAL) helped in the running of the office and departmental delegations were set up throughout the country, increasing its accessibility and thus its effectiveness.

In 1995 ONUSAL withdrew from the country, which coincided with the elections for a new chief ombudsman. It was clear to all that with the withdrawal of the UN mission, the Salvadorean Ombudsman was going to need a strong leadership. The Assembly assigned the post to a navigated human rights lawyer, Dr. Victoria Velazquez de Avilez, who brilliantly spent her three year mandate to strengthen every aspect of the office. She firstly increased the use of her investigative powers, reaching an astonishing one thousand complaints per month¹⁸⁹, making sure that the most difficult of cases reached the Inter-American Court of Human Rights. She did not hesitate to confront the government over alleged abuses of authority and collaborated with the attorney general's office to develop a programme to "combat impunity in the administration of justice". The ombudsman's budget allocated by the Assembly was found to be insufficient for the extent of necessary action and thanks to her excellent cooperation with international bodies, she managed to secure substantial funding from UNDP. It is also by looking at national public opinion polls of the time that we can see how successful these first few years were. The 1996 opinion poll commissioned by the University of Central America found that whilst 47 per cent of the respondents considered the Salvadoran justice system to be corrupt (with 75 per cent declaring that many judges were subject to political control), almost 30 per cent considered the job of the ombudsman to be effective in defending citizens' human rights, with De Aviles' personal evaluation was considered good or very good by two thirds of the respondents.¹⁹⁰

This intense use of the PDDH authority was not at all appreciated by El Salvador's governing party (Alianza Republicana Nacionalista – ARENA) which even led to a number of death threats directed at De Aviles and her closest staff members. Reelection was thus strongly opposed to the point that a revision of the ombudsman law was rushed through the Assembly. What resulted was the election of Eduardo Penate Polanco, a senior member of the judiciary close to ARENA officials, who immediately began a "systematic purge of personnel trained for human rights work". All the previous collaborative efforts with external funding agencies were stripped of their success, a process which culminated in Penate excluding the UNDP from the PDDH programmes. The Investigation Department was also reduced to a near standstill, with 31 cases completed in his first six months of office. Even from an

¹⁸⁹ *Id.*, p.7.

¹⁹⁰ *Id.* p.8.

organizational point of view, contracts were offered to new staff members for brief periods of time, increasing employee insecurity and thus affecting the ombudsman's office effectiveness. And even though Penate was forced to a premature resignation due to the misuse of Swedish funds, his successor continued this trend of administrative miscarriages. As proof of the decline in both prestige and success of the institution, a 2001 Gallup Central America poll shows that 80 per cent of the respondents did not even know about the ombudsman's identity and nearly 60 per cent could not give a response to the question regarding which Salvadoran public body was most likely to be effective in protecting human rights.¹⁹¹

This example of institution building in a transient democratic state demonstrates that politics still have a patronizing attitude which is difficult to surmount. The Salvadoran Ombudsman suffered a process of political isolation which led to its quick and dramatic decline. ARENA, which had not been defeated in an election from 1989 to 2009, had a dissenting attitude towards horizontal accountability which strongly affected its approach towards the human rights ombudsman's office. The Salvadorean Human Rights Ombudsman had surprised everyone for its effectiveness in countering the impunity that the executive, the judiciary and national administration in general was enjoying in the early years of democratic government. It was highly regarded both by the people of El Salvador, which turned to its services in growing numbers, and by the international community, leading to significant funds being directed to the Ombudsman's budget. However, the increase in the State's accountability was seen as a menace by a wide number of political powers, which proceeded to crush the agency in a matter of years. This dynamic is unfortunately not to be found only in El Salvador, and should be viewed as an example of a frequent mechanism of political influence on horizontal accountability mechanisms in many countries around the world. In established democracies, the cooperative nature of the human rights ombudsman is sufficient for its role of administrative watchdog and human rights defender. However, in states that are in the process of consolidating their democratic structure, this rather weak form of accountability agency leads to it being at the mercy of those political powers that are supposed to be checked upon.

10.2 African counterparts

As proof of the global extent of the above considerations, I will use two examples of A status NHRIs from the African continent. The first example (*Commission Nationale des Droits de l'Homme* [National Human Rights Commission] of Togo -CNDH) will bring to light the not necessarily direct correlation between NHRI presence and advancement in human rights protection. The second example (*Uganda Human Rights Commission* - UHRC) goes one step further, and demonstrates that even A status NHRIs can go as far as actually facilitating human rights violations by the hands of the state. The reason for choosing the *Commission Nationale des Droits de l'Homme* (CNDH), apart from it being the first NHRI to be

¹⁹¹ See the Polls Section in Dodson Michael, Jackson Donald Wilson, *Horizontal Accountability in Transitional Democracies* (2004) (supra note 33).

established in Africa in 1987, is due to the two diametrically opposite roles it played within Togo during its first twenty years of history. As Peter Rosenblum aptly puts it “the Togolese Commission shocked the region with its “heroic” and unanticipated boldness at the outset, but was subsequently crushed into embarrassing boosterism for the government”.¹⁹² Established by President Gnassingbe Eyadema as a form of easing the tension amongst his single party rule and the numerous human rights related criticisms he received, its initial years were surprisingly dynamic. Notwithstanding the lack of an express permission within its mandate, CNDH overcame any prior expectation by undergoing investigations and denouncing many cases of human rights violations which up until then were not even mentioned in official discussions. The independence of the institution from the executive reached very satisfying levels, which brought to the fore politically sensitive issues such as security forces-related cases and instances of extra-judicial killings of demonstrators during the rallies which took place in the 1990-1991 two-year period. It is fair to say that CNDH played a major role in the fight for democracy, the 1991 Constitution and the effective end of the single party rule in the Togo. The political situation in the country however did not cease to undermine democratic principles. To the contrary, President Eyadema retained power and underwent a gradual but systematic repression of independent human rights activism, with the CNDH being one of the first victims of this purge. The chief commissioner at the time was forced to find refuge abroad, all things considered analogous to outright exile, whilst the new directorate put in place featuring people closely connected to the President himself. In 1997 a new law was passed with the intention of re-launching an otherwise dormant institution, but to no avail. According to a Human Rights Watch report, “the CNDH [continued to] be more concerned with defending itself and the national authorities than protecting and promoting human rights in Togo”¹⁹³, with its efforts at human rights promotion have since been viewed by the population at large “as largely hollow in the absence of a will to engage in protection as well”.¹⁹⁴ The CNDH’s defensive attitude towards international human rights investigations in the country, paired with its protracted refusal to respond to claims coming from national and international NGOs, has brought the Togolese Commission to be a prime example of how NHRI establishment may indeed go hand-in-hand with systemic repression of civil society and democratic pluralism, demonstrating a great potential, but at the same time the easily breakable fragility of national institutions.

The second example, the Ugandan Human Rights Commission (UHRC), also went through a gloriously promising start. Set within the 1995 Constitution, it courageously championed human rights protection and promotion efforts in a country which has been single-handedly run by President Yoweri Museveni and his National Resistance Movement since 1986. Its powers to subpoena information, order the release of detainees and order compensation for abuses has initially gone a long way towards a fair oversight of the human rights situation in

¹⁹² Rosenblum Peter, *Tainted Origins and Uncertain Outcomes – Evaluating NHRIs in in Goodman Ryan and Pegram Thomas, Human Rights, State Compliance and Social Change – Assessing National Human Rights Institutions* (Cambridge, 2012), p. 307.

¹⁹³ Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa* (2001) available at <http://www.hrw.org/reports/2001/01/01/protectors-or-pretenders>.

¹⁹⁴ *Idem*.

Uganda. It has notably been involved in highlighting prison conditions in the country, as well as dealing with sensitive topics such as police brutality and arbitrary arrests.¹⁹⁵ At the outset, the task that the UHRC underwent of publicly denouncing the state's wrongdoings was accomplished with great sense of responsibility and an open approach to collaborations with civil society organizations. Resistance from government agencies and resource constraints considerably limited the work of the Commission throughout its existence, but the level of independence was capably achieved, above all thanks to the initial leadership of its first director Margaret Sekaggya. However, by assessing the Commission's work over time, one can notice once again the terribly thin line that these institutions tread on, especially in countries with political systems that shield the state from human rights-related accountability measures. Already by the end of the 1990s observations started to appear regarding "the tendency of the commissioners to avoid what appeared to be the most serious human rights issues for the country, including multiparty democracy and the death penalty".¹⁹⁶ Furthermore, the various investigations undergone seemed to be poorly acted on by the government, with the total sum of damages owed by the state to torture and detention victims amounted to \$1,030,000 in 2009, according to UHRC itself.¹⁹⁷

In 2005 the constitution was amended in order to eliminate presidential term limits, thus leading Uganda to yet another democratic defeat. Instead of taking the reins of the social discomfort that started to surface in the country and challenging the abuses of the state officials of the time, the UHRC "invested more resources in private disputes, particularly mediating child maintenance cases, and reporting on private violations [such as] road carnages and school fires"¹⁹⁸, remaining silent on some of the most egregious human rights abuses taking place at the time. By 2009 President Museveni had appointed five new commissioners, overtly loyal to the government, a situation which led an observer to define the UHRC situation as one in which "the commission is starting to look like a bystander to a decay of rights – maybe even an enabler, by virtue of the strong international cover that it provides – rather than a promoter of human rights".¹⁹⁹

What these examples are to show, and many more could have been given²⁰⁰, is that there is no reason to correlate NHRIs with human rights improvement. To remain in the same regional sphere, the state of Benin has done away with its NHRI per se, deciding to focus on other means of state-control functions. A hybrid Constitutional Court was established in the early 2000s, its functions ranging from human rights complaints' and relevant individual standing rights (as well as the right to initiate proceedings *motu proprio*), rulings on legislative norms

¹⁹⁵ *Idem*.

¹⁹⁶ Topp Markus, Human Rights Protection by the State of Uganda in Lindsnae B. et al., National Human Rights Institutions: Articles and Working Papers, Danish Institute for Human Rights (2000), p- 169-98.

¹⁹⁷ U.S. Department of State Human Rights Report available at <http://www.state.gov/drl/rls/hrrpt/2009/af/135982.htm>.

¹⁹⁸ Rosenblum Peter, Tainted Origins and Uncertain Outcomes – Evaluating NHRIs in in Goodman Ryan and Pegram Thomas, Human Rights, State Compliance and Social Change – Assessing National Human Rights Institutions (Cambridge, 2012), p. 313.

¹⁹⁹ *Idem*.

²⁰⁰ Benin, Ethiopia and Rwanda, just to name a few, have had similar issues with their NHRIs.

and international norms' implementation. Notwithstanding these functions, to which one has to highlight its pluralistic membership, and the fairly successful record that the Court witnessed during its first years of activity, the international community's response was absolutely negative. The hybrid nature of Benin's particular solution to finding a national mechanism that would help in the human rights protection of the country's citizen is clearly not compliant with the NHRI mold. As such, when it was its turn to be examined by the ICC, all it received was a mere "C" grade, relegating it to being an uninfluential institution in the international fora.

10.3 The Root of the Problem

And here is, in my opinion, the potentially foreseeable error that the international community has made towards these faulty national systems of human rights protection: the activity of NHRIs of the caliber of the CNDH, the UHRC or the PDDH of El Salvador, notwithstanding all the worrying issues presented above, has been celebrated in international fora ever since these institutions' inception. Taking the example of the Togolese Commission, despite the publication of information on the dangerously close ties between the government and the Commission itself²⁰¹, it still "continued to enjoy UN support [...], its Chair never failed to participate in UN meetings and to vaunt the Commission's compliance with the Paris Principles".²⁰² Even more ironically, on the same year in which the HRW report on African NHRIs was published (2001), African NHRIs decided that it was none other than the Togolese Commission to host their annual regional meeting, a very explicit endorsement of an institution that at that precise moment in time was far from being of an exemplary nature.

The determining factor has always been the institution's structure, financing and the overall operation of the NHRI itself rather than its actual effect on the human rights situation of the country or even issues of state compliance, let alone considerations related to the particular geographical region of belonging. No official, internationally approved, NHRI evaluation has ever been made by seeking to identify the critical human rights issues in the country to then determine how the NHRI has addressed them. The different local circumstances which the NHRI is bound to be characterized by have never been taken into consideration in processes of evaluation, and it is self-evident that NHRIs do not exist in a vacuum. It could be the case that an institution with scarce results but in a human rights-averse state would still be considered effective and of use towards human rights protection whereas a fully functional NHRI in a fully democratic state could be deemed worthy of ameliorations due to the positive environment it is acting in. It could even be the case (see Benin) whereby human rights improvements have arrived without any sign of NHRI institutionalization processes. Evaluations should be informed by assessing the relationship between an NHRI, the government that created it and civil society it should be collaborating with. All these

²⁰¹ Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa* (2001) available at <http://www.hrw.org/reports/2001/01/01/protectors-or-pretenders>.

²⁰² Rosenblum Peter, *Tainted Origins and Uncertain Outcomes – Evaluating NHRIs in in Goodman Ryan and Pegram Thomas, Human Rights, State Compliance and Social Change – Assessing National Human Rights Institutions* (Cambridge, 2012), p. 307.

interactions should, on another level, be analyzed taking into consideration the local context of time and place, without which we neutralize differences that, as we have seen from the pages above, constitute the essential contours which frame any given national human rights consideration.

It is as if international organizations have been focusing more on aspirational elements (how an NHRI is set up in order to promote and protect human rights) rather than actual practice. And when we deal with NHRIs' capacity building and development, by international organizations one means the OHCHR and ICC.

As a matter of fact, if it had not been for the persistent activism that the UN underwent in the area of standard setting, the NHRI proliferation that we have witnessed in the last two decades would not have been of the same scale. As already mentioned in Chapter 6, the first engagement that the UN had with the idea of NHRI institutionalization dates back to 1946²⁰³, and since then a gradual increase has taken place in the number of official UN resolutions and guidelines on NHRI establishment and support.²⁰⁴ International consensus, of an obviously political nature, was so strong as to overcome the historical East-West and North-South divisions.

A critical reading key to this unprecedented support follows a three-fold explanation: first of all, the ongoing human rights institutionalization machinery did not show any margin for ostracism by the hands of states. At best states could hope to control rather than to halt a process that was to inevitably rise in magnitude. Secondly, the internalization of at least part of the international human rights accountability structure could be used as a shield for state sovereignty, the latter being one of the greatest obstacles to the creation of a global system of state accountability. Thirdly, "for any state that was subject (or feared being subject) to international human rights pressure, national institutions may have offered a way to avoid greater international institutionalization".²⁰⁵ Efforts towards this goal were being used by states to divert international attention from the ongoing national human rights problems. For instance, the following excerpt is taken from a letter sent in 1962 by a former UN Commission on Human Rights US representative to the US Secretary of State Rusk, in a period during which the US was under serious pressure from the UN for both its civil rights record and its initial opposition to the creation of the UN High Commissioner for Human Rights : "Judging from the interest evoked in the Commission by the US report on its national advisory committees on human rights (national and state Civil Rights Committees) and the comparative lack of government committees on human rights in all other countries... our

²⁰³ ECOSOC Res. 9 (II), 21 June 1946.

²⁰⁴ ECOSOC Res. 772 B (XXX), 25 July 1960; ECOSOC Res. 888 F (XXXIV), 24 July 1962; UN GA Res. 2200 C (XXI), 16 December 1966; UNGA Res 41/129 (December 1986), all these instruments being the first, most important UN statements of the initial period of NHRI establishment process.

²⁰⁵ Sonia Cardenas, *Emerging Global Actors: the UN and the National Human Rights Institutions*, Global Governance 9 (2003), at p.30.

Government could profitably elucidate this point – especially for the benefit of African and Asian states”²⁰⁶.

In this very statement, one can find the roots of the core issues that go at the heart of the inherent problems to global NHRI establishment (apart from the irony related to the US still lacking a NHRI more than half a century later): first of all the fact that *national efforts might have the potential for providing cover to a broader repression of human rights* and; secondly a *one-size-fits-all approach whereby a single institutional template is used* (which, if not adhered to, will strike out of the “adults table” any other sort of national institution with a cause for human rights protection and promotion, with no particular regard for the actual performance of the institution itself). It is this “institutional template”, which has been formally outlined by the Paris Principles, that leaves room for doubt.

10.4 A Critique to the Paris Principles

The Principles are comprised of a number of sections, each with a particular focus on specific characteristics that NHRIs should attain to: competence and responsibility, composition and guarantees of independence and pluralism, methods of operation and additional principles concerning the status of commissions with quasi-jurisdictional competence.

In terms of NHRI competence and responsibilities, the Paris Principles do allow leeway to adapt to the different legal, political and social circumstances, where flexibility in its mandate and structure (as we have already seen, ranging from multi-member commissions to single-member ombudsman bodies) is guaranteed by Art 2 (Competence and Responsibilities).²⁰⁷ The issues start arising from the ambiguity of the wording, which leaves too much space for states to maneuver due to the requirement that the mandate be “as broad [...] as possible”. States who are not allowing a broad mandate to their NHRI could potentially find themselves still within the regulatory structure of the Principles were they to prove some sort of national emergency for doing so.²⁰⁸ The possibility for states to choose between “a constitutional or legislative text” as founding instrument for their national institution is also a matter of concern. It is very clear that legislative texts may very easily be modified or repealed by the government of the day, something which endangers the fundamental requirement of NHRI independence.

Independence is the main topic of the second section of the Principles (“Composition and Guarantees of Independence and Pluralism”), where vagueness is also a problematic issue. As

²⁰⁶ Letter from the representative to the UN Commission on Human Rights (Tree) to the US Secretary of State (Rusk), New York, 14 May 1962, National Archives and Records Administration, RG 59, Central Files 1960-63, 341.7/5-1462.

²⁰⁷ “A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence”.

²⁰⁸ Observation 5.3 of the ICC Sub-Committee references the role of the NHRI in periods of volatility or emergency, which calls for heightened vigilance but acknowledges the possibility of not being able to meet all the requirements of the Paris Principles (ICC Sub-Committee on Accreditation general Observations, Geneva -2009).

a matter of fact, the wording offers very little guidance on how to achieve this independence.²⁰⁹ According to the Principles, NHRIs are allowed to establish their composition through “a procedure which affords all necessary guarantees”²¹⁰ but absolutely no guidelines are given on what that procedure may be or what level of independence the institution has to attain to. The requirement of benefiting from “adequate funding [the purpose of which] should be to enable [the NHRI] to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence”²¹¹ is yet another sign of the overriding lack of clarity. For example, funding might be made available for staff and premises, but not much can be done when an adequately funded national institution suffers from weak leadership, which often flows from a political choice rather than problems of capacity.²¹² It is the local political context that matters a lot more than compliance to any formal set of internationally accepted principles.

The weak construction of the Paris Principles can also be seen by the formulation of the last of its sections, that relating to the “quasi-jurisdictional competence” that a national institution may benefit from.²¹³ As such, the power of investigation is considered as an optional function for a NHRI to have, without which an institution can be regarded as fully compliant to the Principles. It is above all towards this formulation that many criticisms have already been directed to²¹⁴: the power to investigate is in fact considered as an essential power for all ombudsmen and hybrid human ombudsmen. Without a doubt, it is this conception that undermines the perception and application of the Paris Principles in Latin America. Commentators have praised the importance of the complaints handling procedure as “the backbone which gives real sense to [the Defensor’s] current existence”²¹⁵, the fundamental working tool inherent in the figure of the office. It thus seems that the Paris Principles were drafted “with only the classical human rights commission model in mind”²¹⁶, the original sin which most of the Principles’ criticisms have originated from. They are not, in fact, a set of guidelines that reflect the human rights issues of each state but rather “were created by authorities outside the state who may have different expectations and priorities based on their own situation”.²¹⁷

²⁰⁹ GA Resolution 48/134 of December 20, 1993 (U.N. Doc.: A/RES/48/134(1993)).

²¹⁰ *Idem*.

²¹¹ *Idem*.

²¹² Rosenblum Peter, *Tainted Origins and Uncertain Outcomes – Evaluating NHRIs* in in Goodman Ryan and Pegram Thomas, *Human Rights, State Compliance and Social Change – Assessing National Human Rights Institutions* (Cambridge, 2012), p. 299.

²¹³ GA Resolution 48/134 of December 20, 1993.

²¹⁴ Cardenas Sonia, *Emerging Global Actors: The United Nations and National Human Rights Institutions*, *Global Governance* 9 (2003), p. 23-42; Pohjolainen A., *The Evolution of National Human Rights Institutions – the Role of the United Nations*, Danish Institute for Human Rights (2006).

²¹⁵ Gil Robles Alvaro, *El Defensor del Pueblo – comentarios en torno a una proposición de Ley organica* (Madrid, 1979).

²¹⁶ Reif Linda C., *Building Democratic Institutions: the Role of National Institutions in Good Governance and Human Rights Protection*, *Harvard Human Rights Journal* 13 (2000), at p. 43.

²¹⁷ Mertus Julie, *Evaluating NHRIs-Considering Structure, Mandate and Impact* in Goodman Ryan and Pegram Thomas, *Human Rights, State Compliance and Social Change – Assessing National Human Rights Institutions* (Cambridge, 2012), p. 75.

10.5 A Critique to the International Community's Approach to NHRI Development

If one takes a look at the evolution of NHRIs, it is not hard to see where the above criticisms stem from. The 1990s, a fundamental decade for NHRIs, were characterized by an unprecedented amount of human and financial resources being devoted to their establishment worldwide, with the OHCHR playing a pivotal role, benefiting from “the monopoly of expertise”²¹⁸ on this particular field. “Technical Cooperation” (the OHCHR mechanism for assisting states in fulfilling their human rights obligations, previously known as “technical assistance” or “advisory services”) was the logistical framework within which the UN supported NHRI establishment, a mechanism which has been per se reason for doubts, having been regarded as strongly reliant on governments’ good faith. Ever since the first sign of UN technical cooperation (the UN “advisory services” of the 1980s), commentators have noted that almost “every country that requested advisory services or technical cooperation received it without regard to the genuineness of its commitment”.²¹⁹ OHCHR assistance to NHRI establishment can thus also be included within this criticism. This is not to say that every instance of technical cooperation has been flawed by an exaggerated faith in the good will of requesting states, of course. The willingness to provide support to any requesting government and the absence of significant criteria for evaluating results may, however, have led to a weakening of the critical engagement with states that the UN championed in the field of human rights. Once again, the global approach to NHRI establishment has been brought forward with too little attention to the “local”. There has been a tendency “to take for granted the rationale for expanding National Institutions as a key area of support, based on positive experiences in different transitional situations [see the preliminary stages of the Procuraduría of El Salvador]. However, the weak documentation as regards positive impact renders it quite relevant to ask questions about the performance of national institutions in relation to the assumptions made about their promotional and protective roles”.²²⁰

A practical example of this approach can be seen by looking at the initial structure of the main “gatekeeper” of NHRIs, the ICC, a body composed of NHRIs for the promotion and strengthening of NHRIs themselves. The implicit fault in this is the limits it faces vis-à-vis its own members, whereby external processes of review seem rather scarce: apart from the OHCHR’s role (ICC’s permanent observer, serves as secretariat to the ICC through functions such as Needs Assessment Missions) there does not seem to be “any substantive requirement that would measure whether the NHRI commitment to human rights or the effectiveness of the NHRI within the state is genuine”.²²¹ The ICC Sub-Committee on Accreditation has

²¹⁸ Pohjola A., *The Evolution of National Human Rights Institutions – the Role of the United Nations*, Danish Institute for Human Rights (2006), fn 266.

²¹⁹ Rosenblum Peter, *Tainted Origins and Uncertain Outcomes – Evaluating NHRIs in Goodman Ryan and Pegram Thomas, Human Rights, State Compliance and Social Change – Assessing National Human Rights Institutions* (Cambridge, 2012), p. 305.

²²⁰ Flinterman C. and Zwamborn M., *From Development of Human Rights to Managing Human Rights Development*, Netherland Institute of Human Rights (2003) at p.54.

²²¹ Rosenblum Peter, *Tainted Origins and Uncertain Outcomes – Evaluating NHRIs in Goodman Ryan and Pegram Thomas, Human Rights, State Compliance and Social Change – Assessing National Human Rights Institutions* (Cambridge, 2012), p. 317.

published an important General Observation on the matter which stresses the NHRI's interaction with "other human rights institutions, including those of the state and civil society"²²², and that is to signal that steps are being taken to rectify the initial hermetic process of accreditation. However the reform process of the accreditation procedure, initiated by the 2008 Sub-Committee Discussion paper²²³ continues with its trend of partiality. In its definition of independence, for example, one can find merely two elements for analysis: "a clear definition of roles" and "an absence of bias". Still no sign of external criteria can thus be found. Even by taking a closer look at the substantive grounds of NHRI assessment, there is little sign that "the Guidelines for Accreditation now consider the effectiveness of NHRIs".²²⁴ By reading the texts of the Guidelines, the Rules of Procedure or of the General Observations, not even an explanation of what "effectiveness" might entail is provided. General Observation 1.6 is the only instrument that allows the Sub-Committee to review the NHRI's work through cooperation with external independent bodies (NGOs). The perception is that of a top-down approach to institutionalization, where even standards for accreditation are focused on the structure, financing and overall operation of the NHRI rather than assessing its contribution depending on the critical national human rights issues and how the NHRI is tackling them. To use a direct example, "if resources are being devoted to child support and road carnage, but not suppression of political pluralism, that should be explained".²²⁵

All the above criticisms may, of course, be considered part and parcel of an unavoidable attempt at broadening as much as possible the introduction of National Institutions within the state apparatus of the many countries that showed interest in their establishment. In one of their excellent works on human rights treaty mechanisms, Goodman and Jinks have termed this approach as a strategy "of delayed onset coercion [whereby] a human rights regime might also enhance its effectiveness by demanding modest initial commitments and ratcheting up obligations over time".²²⁶

This gradual vetting can be documented by the publication of the abovementioned Guidelines, Rules of Procedure and General Observations which, to a critical eye, may be seen as an admittance of poor initial clarity in the field. However, if states can still hold within their institutional framework A status institutions, whilst at the same time breaching the most fundamental of human rights, doubts are bound to arise. By adding to this already preoccupying fact the realization that the NHRI accreditation process, even if followed with extreme rigour, does not offer a pragmatic solution to these doubts, the puzzle is made even more complicated.

²²² General Observation 1.5, ICC Sub-Committee on Accreditation general Observations, Geneva -2009.

²²³ ICC Working Group on Accreditation, Decision Paper on the Review of ICC (2008).

²²⁴ Rules of Procedure for the ICC Sub-Committee on Accreditation, adopted by ICC members during its 15th session (September 14th 2004 – South Korea), amended by ICC members during its 20th session (15th April 2008 – Switzerland).

²²⁵ Rosenblum Peter, Tainted Origins and Uncertain Outcomes – Evaluating NHRIs in in Goodman Ryan and Pegram Thomas, Human Rights, State Compliance and Social Change – Assessing National Human Rights Institutions (Cambridge, 2012), p. 321.

²²⁶ Goodman Ryan and Derek Jinks, How to Influence States: Socialization and International Law, Duke Law Journal 54 (2004) at p. 658.

The evaluative mechanism that NHRIs worldwide are subject to relies too heavily on the idea that the shared interests of these bodies are directly proportional to their own well-functioning. Too much attention has so far been given to the mere implementation of the Paris Principles rather than focusing on the local effectiveness standards of NHRIs. The intermesh with government departments, judicial bodies, civil society and the general socio-cultural situation of any one country is highly affecting NHRIs' performance and quality. More than thirty years have passed since the introduction of the Paris Principles, and half a century since the NHRI "establishment boom" spread around the world with great coherence. To the contrary, it may be firmly stated that whichever way we look at the current situation, it is no longer one characterized by efforts of promotion, but rather one in which NHRI refinement and consolidation should be playing the leading role.

11 Recommendations and conclusions

I thus propose that different priorities should be given in order to assess whether a NHRI is purposefully and efficiently undergoing their commitment towards the promotion and protection of national human rights. That is far from saying that the Paris Principles should be discarded or to propose reformulations of the latter. The Paris Principles are an essential component, whose purpose is that of laying minimum standards for existing and future NHRIs. However, if one considers a common definition of "effectiveness" – ability to produce desired results – one cannot help but notice the unrelated nature of the Paris Principles' focus on structural elements. It is often overlooked in NHRI discussions that, in the end, "the desired ultimate result is not independence qua independence but rather human rights promotion"²²⁷ as "an NHRI can be highly independent and cooperative whilst still being unable to affect much in terms of social and political human rights gains".²²⁸

The purpose of the latter half of this paper has been to prove that the current reliance on the rather broad and overarching minimum standards found in the Paris Principles is too distant from considerations of local effectiveness. NHRI establishment seems to have so far been considered the magic bullet of contemporary human rights promotion and protection and cost of this behavior has the potential for diminishing the fundamental importance that National Institutions have in the human rights international system. The privileged position that listed NHRIs are given in the international arena make it mandatory for an increased attention on their assessment mechanisms as well. It is outside the scope of this paper to offer a unique, detailed solution to the concern that has been developed in the above pages. However some brief indications will follow of what may be done to at least partially fill the current gap between the general method of NHRI assessment (Paris Principles) and the need for a more attentive focus on the local human rights situation.

²²⁷ Mertus Julie, *Evaluating NHRIs-Considering Structure, Mandate and Impact* in Goodman Ryan and Pegram Thomas, *Human Rights, State Compliance and Social Change – Assessing National Human Rights Institutions* (Cambridge, 2012), p. 80.

²²⁸ *Idem.*

First and foremost, the solution would stem from the syllogistic connection that NHRIs have with their stakeholders. If measures are to be set up for assessing local NHRI effectiveness, it is those with whom they interact that should be consulted. The already existing points of contact that NHRIs have with those that use their services (especially those endowed with a complaints mechanism) should be the starting point for the establishment of consultation procedures²²⁹, within the institution as much as with all major external stakeholders. These consultations would make use of the unparalleled knowledge that NHRIs' stakeholders have of the local human rights situation, whilst opening up to wider participation by the population at large, thus increasing the essential ingredients for NHRI effectiveness, accessibility and social legitimation. Human rights NGOs and community bodies would be instrumental in building a number of indicators located in time and place which would bring to light impacts unimaginable to international bodies of assessment such as the ICC. The results would obviously not be the sole means of impact-assessment as more formal sets of indicators should also be present in the process. However the commixture of a participatory process with a more strictly institutional one would allow a much more nationally-sensitive assessment if compared to the strictly mandate-based mechanism currently in place. This mechanism is definitely going to result in increased length and expense from the consultations which currently take place on a one-way trajectory between the ICC and the NHRI itself (as part of their re/Accreditation Procedure). I would however consider it a necessary step towards improvement: it would increase effectiveness on the ground by identifying local trends, problems and charting progress. Once these tailor-made indicators have been collected, they have to undergo a phase of interpretation. The analysis, within which these interpretations would need to be considered, heavily relies on the knowledge of the country at hand and its particular human rights situation, the relationships that the NHRI has with different national and international partners, all framed within the overarching political, social and economic backdrop. Independent external bodies of evaluation should play a leading role in this interpretative phase, with representative bodies (ICC being one of them) being relegated to a secondary role.

These locally-induced indicators would be used against the backdrop of a set of minimum conditions and specific objectives common to all NHRIs, derived from "best practices" in the field, dealing with the character of the institution, its mandate and its accountability. The connection should be easily discernible: the Paris Principles would then become a set of benchmarks against which purely national indicators can be analyzed. In this way, only at this second stage would the Paris Principles start being an influential part of the NHRI assessment mechanism. This change in approach would diminish the current overreliance on the Principles, the main elements for NHRI evaluation today, to being instrumental to a bottom-up mechanism where the main focus is on the local impact that NHRIs make in the field of human rights promotion and protection.

²²⁹ A valid example being the evaluation sheets produced for the Defensoria del Pueblo of Ecuador during an internship period spent in their offices (headquarters and regional offices).

This solution would be extraordinarily convenient whilst at the same practical. In fact, “reopening the Paris Principles is not an option [...] as this could be co-opted by states with their political agenda”.²³⁰ It would also mean spending an exorbitant amount of time and resources on something that is already a miracle of balance between competing political interests. Without actually modifying the current NHRI mechanism, and by merely introducing an additional official layer of assessment, we would do away with criticism relating to the ICC’s “brand protection-approach” to evaluation whilst ensuring a systematic examination of whether NHRIs respond to critical local human rights issues.

In conclusion, if one relies too much on whether or not the Paris Principles have been attained to, it is clear that criteria for evaluation are essentially external to the national variables of any one country. We have reached a moment in time when the international system of NHRI evaluation cannot stop at structural precepts and mandate-based considerations. An increased attention to the impact that these fundamental institutions actually make on the ground is now a necessary step if we want to avoid that NHRIs lose not only in performance levels but also in legitimacy. The particular traits that each region, let alone each state, is characterized by are too crucially different from one another to be left out of assessment mechanisms. The case-study used for this paper has been that of Latin America and its regionally-specific NHRI structure, the Defensoría del Pueblo. However, different regional examples could have been used and the above discussion on two African NHRIs stand as proof of the global value of our discussion. As the present paper attests, NHRIs cannot anymore be evaluated without specific reference to the local.

²³⁰ Mertus Julie, *Evaluating NHRIs-Considering Structure, Mandate and Impact* in Goodman Ryan and Pegram Thomas, *Human Rights, State Compliance and Social Change – Assessing National Human Rights Institutions* (Cambridge, 2012), p. 89.

Annexes

Annex I

Principles relating to the Status of National Institutions (The Paris Principles)

Adopted by General Assembly resolution 48/134 of 20 December 1993

Competence and responsibilities

1. A national institution shall be vested with competence to promote and protect human rights.
2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.
3. A national institution shall, inter alia, have the following responsibilities:
 - (a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:
 - (i) Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;
 - (ii) Any situation of violation of human rights which it decides to take up;
 - (iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;
 - (iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;
 - (b) To promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;
 - (c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;

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

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

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

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

Composition and guarantees of independence and pluralism

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

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

(b) Trends in philosophical or religious thought;

(c) Universities and qualified experts;

(d) Parliament;

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

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

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

Methods of operation

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

- (a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner,
- (b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;
- (c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;
- (d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly concerned;
- (e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;
- (f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular, ombudsmen, mediators and similar institutions);
- (g) In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

Additional principles concerning the status of commissions with quasi-judicial competence

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

- (a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;
- (b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;
- (c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;

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

Annex II

Informe Final Autoevaluación, Análisis de la Hoja de Trabajo y Recomendaciones

Cumpliendo con el Acuerdo de Cooperación firmado entre la Universidad de Lund y el Instituto de Derechos Humanos y Ley Humanitaria Raul Wallenberg por un lado, y la Defensoría del Pueblo del Ecuador por el otro, realicé una pasantía con una duración de dos meses y dos semanas (del 20 de mayo al 2 de agosto de 2013), durante la cual me fue asignada la tarea de realizar un reporte final que contenga un *análisis de gestión de peticiones* de la Dirección Nacional de Derechos Humanos y de la Naturaleza. El objetivo del reporte consiste en la proposición de *recomendaciones* para fortalecer la actividad futura de la Dirección.

A la luz de esta tarea, he desarrollado una hoja de trabajo de la evaluación de la capacidad dividida en 5 áreas de interés: Organización de Trabajo, Talentos Humanos, Liderazgo, Responsabilidades y Recursos Técnicos. Cada una de estas áreas es a su vez dividida en tres partes:

1. la primera parte presenta un número de declaraciones de indicadores/guías (36 en total) a ser calificadas según el sistema de calificación del 1 al 5. Esto representa el único análisis cuantitativo de datos de la evaluación de la capacidad, el resto del cual es cualitativo. Dentro de esta primera parte, también se solicita dar una evidencia explicativa que respalde el indicador calificado, con el fin de revisar los hechos objetivos y no las simples opiniones personales. Obviamente, los indicadores encontrados en la presente hoja de trabajo han sido escogidos por mí mismo y son para futuras referencias solamente si son reconocidos como útiles.
2. La segunda parte consiste en un análisis FODA, en el cual se solicita a cada miembro del personal hacer una lista de las percepciones sobre las Fortalezas, las Oportunidades, las Debilidades y las Amenazas sobre cada área de interés.
3. La tercera y parte final es un espacio destinado a recomendaciones generales, obviamente dirigidas hacia el área de interés relevante.

Las hojas de trabajo fueron entregadas a cada miembro del personal de la Dirección y una semana laborable fue destinada para completarlas.

Una vez que todas las hojas de trabajo son entregadas, tanto los datos cualitativos como los cuantitativos son analizados. El análisis reflejará para el personal de la Dirección su propia comprensión de las fortalezas, debilidades, desafíos y efectividad en general de su trabajo. Para tal tarea no hay mejor juez que el mismo personal ya que es, por mucho, el que mejor conoce sobre tales asuntos internos. A partir de dicho análisis se propondrá una lista de recomendaciones finales con miras a incrementar la efectividad de la Dirección en el futuro.

Además, la hoja de trabajo de la evaluación de la capacidad fue entregada a los funcionarios de cuatro Delegaciones Provinciales (Orellana, Sucumbíos, Guayas y Azuay) durante mis visitas a dichas oficinas externas. Los datos obtenidos van a ser procesados por separado con el fin de discernir las distintas realidades presentes en el país.

En mi opinión, para que la evaluación de la capacidad esté completa, debería ser llevado a cabo un paso extra, el cual no tendrá lugar en la presente evaluación por motivos de falta de tiempo y coordinación, que consiste en realizar entrevistas con las actores externos interesados. Dichas partes pueden consistir en instituciones gubernamentales, organizaciones internacionales, organizaciones de sociedad civil, la academia y los medios. Esto conduciría ya sea a una confirmación de las percepciones internas del personal o a la oposición de las mismas; básicamente, a una perspectiva externa sobre una evaluación potencialmente subjetiva.

Toda esta actividad pretende ser un esquema piloto, que se espera que en un futuro se convierta en una parte integrante del mecanismo de auto-evaluación de la Defensoría.

El **objetivo** de dicha evaluación es el hecho de entender sistemáticamente la existencia de fortalezas y debilidades de la Dirección, con el fin de desarrollar estrategias futuras de desarrollo de la capacidad. Por esta razón, yo vería a la Evaluación de la Capacidad como un rasgo complementario a los procesos regulares de Planes Estratégicos.

Lo que sigue es una visión general de la manera en la que el proceso de evaluación fue dividido desde el comienzo:

Enfoque:

- Habilitar a la Dirección para que evalúe sus capacidades, a la luz de sus fortalezas y debilidades.
- Habilitar al personal para que exprese su opinión sobre una variedad de asuntos relacionados a su trabajo diario. Esta “ventana abierta” para la discusión es esencial no sólo para un incremento de la eficiencia del trabajo en la oficina, ya que nadie tiene mayor conocimiento sobre los aspectos positivos y negativos de la Dirección que su propio personal, sino que también muestra a los funcionarios que sus opiniones son analizadas con atención, incrementando su nivel de involucramiento.
- Identificar las brechas más urgentes de capacidad, para ocuparse de ellas lo más pronto posible.
- Ser capaz de tener una base fortalecida a partir de la cual desarrollar estrategias a largo plazo para enfrentar las brechas de capacidad identificadas.

Participantes

- Personal de la Dirección Nacional de Protección de Derechos Humanos y de la Naturaleza.
- Personal de las Delegaciones Provinciales de la Defensoría del Pueblo de Guayas, Orellana, Sucumbíos y Azuay.
- Idealmente, pero no para esta primera instancia del análisis de la evaluación de la capacidad, actores externos clave a los que se les solicita compartir sus ideas sobre la base de su involucramiento con el trabajo de la Dirección.

Metodología:

- Discusiones individuales y grupales tanto con el personal de la Dirección como con el personal de las Delegaciones Provinciales anteriormente mencionadas.
- Antecedentes compartidos por la Dirección.
- Repartición de hojas de trabajo de evaluación de la capacidad, a ser completadas y entregadas para su análisis.
- Idealmente, entrevistas con actores externos.

La Tabla 1 presenta los resultados de la hoja de trabajo de la autoevaluación de la Dirección. Cada una de las columnas enumeradas (e.g. Unidad 1) representa el número de hojas de trabajo devueltas para su análisis (número de personal participante). La primera columna contiene el tema central a ser evaluado, seguido

por el promedio de las evaluaciones de cada miembro del personal. Este promedio será de ayuda para comprender las fortalezas y debilidades de la Dirección, mientras se priorizan ciertos aspectos sobre otros.

La Tabla 2 sigue el mismo patrón de la Tabla 1, con la diferencia de que 12 funcionarios fueron tomados de las Delegaciones Provinciales durante las visitas a dichas oficinas. Las Provincias que fueron visitadas no constituyen una mayoría entre las Provincias Ecuatorianas, pero fueron escogidas para representar tanto a las oficinas exitosas como a las problemáticas. Observando la diferencia en promedio entre la Dirección Nacional y las Delegaciones, las prioridades relacionadas con Planes de Acción futuros pueden ser establecidas, y las fortalezas y debilidades, identificadas.

Declaración guía	Calificación de Capacidades													
	General	Unidad 1	Unidad 2	Unidad 3	Unidad 4	Unidad 5	Unidad 6	Unidad 7	Unidad 8	Unidad 9	Unidad 10	Unidad 11	Unidad 12	
Organización de Trabajo														
La Dirección Nacional de Protección tiene la capacidad de desarrollar planes generales anuales, planes estratégicos y unidades estratégicas que coinciden exactamente con las funciones y actividades de las unidades de trabajo.	3.5454545455	4	4	4	4	3		2	4	3	3	4	4	
La Dirección Nacional de Protección tiene la capacidad para poner en marcha los mecanismos de coordinación entre las unidades y dentro de la Defensoría en su conjunto.	3.6666666667	3	5	1	5	3	5	4	4	4	3	4	3	
La Dirección Nacional de Protección tiene la capacidad para verificar que el enfoque de género está integrado en todas sus políticas.	4.0833333333	3	5	5	5	3	5	4	4	2	4	5	4	
La Dirección Nacional de Protección tiene la capacidad para implementar sus planes de trabajo anuales, planes estratégicos para la Dirección y sus unidades.	3.6363636364	4	4	2	3	4	5		4	4	3	4	3	
La Dirección Nacional de Protección tiene la capacidad para identificar las prioridades financieras necesarias.	3.25	4	1	1	4	4	5	2	4	4	2	4	4	
La Dirección Nacional de Protección tiene la capacidad para desarrollar y mantener una base de datos interna para el personal tanto en instrumentos de derechos humanos como en procesos de planificación interna.	3	2	3	3	2	3	5	2	4	2	2	5	3	
La Dirección Nacional de Protección tiene la capacidad para recibir y tramitar quejas de cualquier persona, grupo de personas u organizaciones no gubernamentales alegando violaciones de los derechos humanos.	4.4166666667	5	5	5	5	3	5	4	5	3	4	5	4	
La Dirección Nacional de Protección tiene la capacidad para desarrollar e implementar procesos estándar para llevar a cabo investigaciones independientes de violaciones de derechos humanos y prácticas discriminatorias.	3.4166666667	4	2	4	5	2	5	3	4	2	4	5	1	
La Dirección Nacional de Protección tiene la capacidad para desarrollar recomendaciones apropiadas para reparar las violaciones de los derechos humanos.	3.9166666667	5	5	4	4	3	1	4	4	4	5	5	3	
La Dirección Nacional de Protección tiene la capacidad de promover y supervisar la aplicación de las recomendaciones.	3.3636363636	5	3	4	4	2	1		3	4	4	4	3	
Talentos Humanos														
La Dirección Nacional de Protección tiene la capacidad para desarrollar y poner en marcha el desarrollo de recursos humanos a largo plazo para garantizar la adecuada dotación de personal y las competencias del personal.	3.3	3	4	3	3	3	5			4	2	3	3	
La Dirección Nacional de Protección tiene la capacidad para poner en marcha un adecuado número de mecanismos de medición de rendimiento.	2.75	3	3	1	4	3	5	2	2	2	2	3	3	
La Dirección Nacional de Protección tiene un número adecuado de personal calificado para cumplir su mandato.	2.9		4	2	3	4		2	4	2	3	2	3	
La Dirección Nacional de Protección tiene la capacidad para acceder y adaptarse a las políticas internacionales y a las mejores prácticas para abordar y responder a violaciones de derechos humanos en el país.	4	3	5	4	4	3	5		4	4	4	4	3	
El personal de la Dirección Nacional de Protección tiene la capacidad para distinguir entre las violaciones de derechos humanos y las violaciones de otros derechos y sugerir reparaciones apropiadas.	3.380952381	4	5	5	3			2	2		4	4	3	
La Dirección Nacional de Protección tiene la capacidad para investigar los centros de detención sin impedimentos externos.	3.25	4	2	3	4	3	5	2	4	3	2	4	3	
El personal de la Dirección Nacional de Protección tiene la capacidad de participar con los actores adecuados para llevar a cabo una investigación.	3.8	4	3	4	4			3	4	3	5	5	3	
El personal de la Dirección Nacional de Protección tiene acceso a bases de datos sobre los derechos humanos nacionales e internacionales.	4		4	4	3			5	5		5	3	3	
El personal de la Dirección Nacional de Protección tiene la capacidad para articular sus ideas y opiniones abiertamente con los actores claves externos para llevar a cabo sus responsabilidades más efectivamente.	3.3636363636	2	4	1	5	2	5	4	4		4	4	2	
El personal de la Dirección Nacional de Protección tiene la capacidad para participar con las organizaciones no gubernamentales y trabajar activamente con ellos para la protección de los derechos humanos.	3.0833333333	2	3	2	5	3	5	3	2	4	3	3	2	
Capacidad de la Dirección Nacional de Protección de coordinación con las oficinas provinciales.	3.9166666667	4	4	4	5	3	5	4	4	3	4	4	3	
Liderazgo														
La Dirección Nacional de Protección tiene la capacidad para decidir cómo dirigir, aceptar o rechazar quejas basadas en el mandato.	4.2	5	5	4	5		5	4	4	4	5	5	3	
La Dirección Nacional de Protección tiene la capacidad para garantizar la aplicación de mecanismos transparentes y procedimientos para recibir y actuar en quejas y medidas disciplinarias.	3.6	4	3	3	5	2	5		3	4	4	4	3	
La Dirección Nacional de Protección tiene la capacidad para asegurar que los derechos del personal estén protegidos y promocionados a través de un código de conducta.	2.2	3	1	3	2			1	2	1	3	4	2	
La Dirección Nacional de Protección tiene la capacidad para garantizar la aplicación de un seguimiento basado en el mérito y los resultados y un marco de evaluación para medir el impacto del trabajo de la Dirección.	3.1111111111	3	4	3	3		5		2	2	2	4	3	
Capacidad de la Dirección Nacional de Protección para liderar el desarrollo de una supervisión y plan de evaluación para medir la eficacia de su trabajo.	3.2	3	3	4	4		5	2		2	2	4	3	
Responsabilidades														
La Dirección Nacional de Protección tiene la capacidad de realizar un análisis integral de la situación que involucra a todo el personal para promover la gestión del cambio y la rendición de cuentas institucional.	3.1111111111	3	3	4	3			2	2		3	4	4	
La Dirección Nacional de Protección tiene la capacidad para llevar a cabo monitoreos regulares y evaluación de las actividades de la Dirección.	3.7272727273	4	4	4	5	3	3	3		3	3	5	4	
La Dirección Nacional de Protección tiene la capacidad para hacer público el número de las quejas y porcentaje de las quejas aceptadas.	3.4285714286	4	5	5	4	1	1	2	4	1	5	5	3	
La Dirección Nacional de Protección tiene la capacidad para participar sin impedimentos externos con todos los interesados en el ejecutivo incluyendo las fuerzas armadas, las prisiones y la policía.	2.625	2	2	2	4			2			3	3	3	
La Dirección Nacional de Protección tiene la capacidad para participar y colaborar sin problemas con todas las organizaciones de la sociedad civil de los derechos humanos y las ONG.	2.5454545455	2	2	3	4	2	1	3		2	1	5	3	
La Dirección Nacional de Protección tiene la capacidad para desarrollar mecanismos para el procesamiento de los tramites defensoriales.	3.75	4	5	4	5	4	5	2	4	3	1	5	3	
La Dirección Nacional de Protección tiene la capacidad para asegurar auditorías/veedurías ciudadanas independientes regulares.														
Recursos Técnicos														
La Dirección Nacional de Protección tiene la capacidad para movilizar y garantizar recursos basados en las prioridades del Plan estratégico / otros planes de trabajo.	2.9	3	1	3	4	4	5	2		3	1		3	

Declaración guía	Calificación de Capacidades									
	General	Unidad 1	Unidad 2	Unidad 3	Unidad 4	Unidad 5	Unidad 6	Unidad 7	Unidad 8	Unidad 9
Organización de Trabajo										
La Delegación Provincial tiene la capacidad de desarrollar planes generales anuales, planes estratégicos y unidades estratégicas que coinciden exactamente con las funciones y actividades de las unidades de trabajo.	3.583333	2	3	1	4	5	4	4	4	4
La Delegación Provincial tiene la capacidad para poner en marcha los mecanismos de coordinación entre las unidades y dentro de la Defensoría en su conjunto.	3.583333	2	3	2	4	5	4	4	3	4
La Delegación Provincial tiene la capacidad para verificar que el enfoque de género está integrado en todas sus políticas.	3.818182	3	3	3	4	3	5	5	4	
La Delegación Provincial tiene la capacidad para implementar sus planes de trabajo anuales, planes estratégicos para la Dirección y sus unidades.	3.363636	3	1	2	4	4	3	4	4	
La Delegación Provincial tiene la capacidad para identificar las prioridades financieras necesarias.	2.909091	2	3	1	4	1	4	4	1	
La Delegación Provincial tiene la capacidad para desarrollar y mantener una base de datos interna para el personal tanto en instrumentos de derechos humanos como en procesos de planificación interna.	3.090909	2	3	2	3	2	3	4	3	
La Delegación Provincial tiene la capacidad para recibir y tramitar quejas de cualquier persona, grupo de personas u organizaciones no gubernamentales alegando violaciones de los derechos humanos.	3.916667	3	3	2	4	4	3	5	5	5
La Delegación Provincial tiene la capacidad para desarrollar e implementar procesos estándar para llevar a cabo investigaciones independientes de violaciones de derechos humanos y prácticas discriminatorias.	3.6	2		2	4	4	3	4	4	
La Delegación Provincial tiene la capacidad para desarrollar recomendaciones apropiadas para reparar las violaciones de los derechos humanos.	3.909091	3	3	2	4	4	5	4	4	
La Delegación Provincial tiene la capacidad de promover y supervisar la aplicación de las recomendaciones.	3.454545	2	3	2	4	2	5	4	1	
Talentos Humanos										
La Delegación Provincial tiene la capacidad para desarrollar y poner en marcha el desarrollo de recursos humanos a largo plazo para garantizar la adecuada dotación de personal y las competencias del personal.	2				2					
La Delegación Provincial tiene la capacidad para poner en marcha un adecuado número de mecanismos de medición de rendimiento.	2				2					
La Delegación Provincial tiene un número adecuado de personal calificado para cumplir su mandato.	4				4					
La Delegación Provincial tiene la capacidad para acceder y adaptarse a las políticas internacionales y a las mejores prácticas para abordar y responder a violaciones de derechos humanos en el país.	4				4					
El personal de la Delegación Provincial tiene la capacidad para distinguir entre las violaciones de derechos humanos y las violaciones de otros derechos y sugerir reparaciones apropiadas.	4				4					
La Delegación Provincial tiene la capacidad para investigar los centros de detención sin impedimentos externos.	3				3					
El personal de la Delegación Provincial tiene la capacidad de participar con los actores adecuados para llevar a cabo una investigación.	4				4					
El personal de la Delegación Provincial tiene acceso a bases de datos sobre los derechos humanos nacionales e internacionales.	4				4					
El personal de la Delegación Provincial tiene la capacidad para articular sus ideas y opiniones abiertamente con los actores claves externos para llevar a cabo sus responsabilidades más efectivamente.	3				3					
El personal de la Delegación Provincial tiene la capacidad para participar con las organizaciones no gubernamentales y trabajar activamente con ellos para la protección de los derechos humanos.	3				3					
Capacidad de la Delegación Provincial de coordinación con las oficinas provinciales.	4				4					
Liderazgo										
La Delegación Provincial tiene la capacidad para decidir cómo dirigir, aceptar o rechazar quejas basadas en el mandato.	4.083333	3	3	2	4	5	5	5	2	5
La Delegación Provincial tiene la capacidad para garantizar la aplicación de mecanismos transparentes y procedimientos para recibir y actuar en quejas y medidas disciplinarias.	3.8	2	2	2	4	4		5	4	
La Delegación Provincial tiene la capacidad para asegurar que los derechos del personal estén protegidos y promocionados a través de un código de conducta.	3.636364	2	2	2	3	3	5	5	3	
La Delegación Provincial tiene la capacidad para garantizar la aplicación de un seguimiento basado en el mérito y los resultados y un marco de evaluación para medir el impacto del trabajo de la Dirección.	3.272727	2	3	2	2	1	5	5	1	
Capacidad de la Delegación Provincial para liderar el desarrollo de una supervisión y plan de evaluación para medir la eficacia de su trabajo.	2.666667	2	2	1	2	4	3	4	2	4
Responsabilidades										
La Delegación Provincial tiene la capacidad de realizar un análisis integral de la situación que involucra a todo el personal para promover la gestión del cambio y la rendición de cuentas institucional.	3.181818	2	3	2	2	3	4	4	4	
La Delegación Provincial tiene la capacidad para llevar a cabo monitoreos regulares y evaluación de las actividades de la Dirección.	2.545455	2	2	1	2	2	4	4	4	
La Delegación Provincial tiene la capacidad para hacer público el número de las quejas y porcentaje de las quejas aceptadas.	3.272727	2	2	1	4	5	3	4	3	
La Delegación Provincial tiene la capacidad para participar sin impedimentos externos con todos los interesados en el ejecutivo incluyendo las fuerzas armadas, las prisiones y la policía.	3.090909	2	3	2	3	3	5	4	1	
La Delegación Provincial tiene la capacidad para participar y colaborar sin problemas con todas las organizaciones de la sociedad civil de los derechos humanos y las ONG.	3.75	3	2	2	3	5	5	4	3	5
La Delegación Provincial tiene la capacidad para desarrollar mecanismos para el procesamiento de los tramites defensoriales.	3	3	3	2	3	4	4	4	4	
La Delegación Provincial tiene la capacidad para asegurar auditorias/veedurias ciudadanas independientes regulares.	3	3	3	2	2	3	5	4	2	
Recursos Técnicos										
La Delegación Provincial tiene la capacidad para movilizar y garantizar recursos basados en las prioridades del Plan estratégico / otros planes de trabajo.	2.3	2	2	1	3	3	3	3	1	
La Delegación Provincial tiene la capacidad financiera para adquirir equipos adecuados para llevar a cabo las investigaciones sobre violaciones de derechos humanos y para recibir y tramitar las quejas.	2	1	2	1	2	1	3	4	1	

Recomendaciones

Las siguientes recomendaciones serán divididas siguiendo la misma categorización que caracteriza a la hoja de trabajo de la evaluación de la capacidad: Organización de Trabajo, Talentos Humanos, Liderazgo, Responsabilidades y Recursos Técnicos. Las recomendaciones vienen dadas no sólo por el análisis de las hojas de trabajo, sino también por discusiones individuales/grupales con el personal y evaluaciones personales. El Mecanismo Nacional para la Prevención de la Tortura se beneficiará de un análisis por separado, debido a su particular espacio institucional dentro de la Dirección.

Organización de Trabajo

- Existe una sobrecarga de trabajo para cada funcionario y una **acumulación de casos antiguos** sustancial que afecta claramente a la calidad de su trabajo. Existe una clara necesidad de un incremento del personal.
- Dicha acumulación también viene dada por un **retraso en la emisión de Resoluciones y Apelaciones**. Esto es causado por un **alto número de filtros** previos a la publicación de una Resolución. Sería recomendable que **dichos filtros sean reducidos a una cantidad mínima necesaria**, de manera que se acelere el sistema Defensorial en su totalidad.
- **No existe una base de datos interna que contenga tanto instrumentos nacionales como internacionales de protección de los derechos humanos**. Es recomendable que dicha base de datos sea constituida.
- Existe una **coordinación escasa entre la Dirección y las otras Unidades de la Defensoría** lo cual afecta la efectividad y la calidad de trabajo. Por ejemplo, **reuniones regulares entre las Unidades y la Dirección** ayudarían a obtener un incremento de la eficiencia en conjunto. Una preocupación común entre los funcionarios es que **la Dirección debería tener voz y voto en los asuntos de asignación presupuestaria** con el fin de priorizar ciertos aspectos sobre otros.
- Un incremento en el **uso de trabajo en equipo sobre el trabajo individual** es recomendable para cada área de enfoque de la Dirección. Existe una tendencia del personal a “apropiarse” de los casos en lugar de compartir las resoluciones de los casos con el equipo. Compartir opiniones sobre cómo enfrentar cualquier contingencia está a la mano y no sólo amplía el alcance de la eficiencia, sino que también crea mecanismos de ayuda recíproca, la cual sólo puede ser positiva en la resolución de casos.

- **No existe capacidad relacionada con la supervisión y el monitoreo del seguimiento de las recomendaciones.** Sería recomendable que **una unidad específica sea establecida con el fin de dar seguimiento a las recomendaciones** dadas a la institución relevante.
- Existe una **colaboración demasiado débil con las ONGs.** Es recomendable **introducir nuevos foros de diálogos con dichas instituciones tan esenciales** con el fin de incrementar de una manera coordinada la efectividad de la protección de los derechos humanos en el país.
- Debido a una **supuesta presencia de límites impuestos al trabajo de la Dirección por parte de cierto número de instituciones Estatales,** es recomendable que **se lleven a cabo reuniones frecuentes con dichas instituciones** con el fin de construir mejores conexiones y relaciones.
- Desde el punto de vista del actual establecimiento de las oficinas, existe la **necesidad de tener habitación(es) separada(s) para las audiencias.** El espacio abierto establecido que caracteriza a la Dirección podría afectar las audiencias debido a su **carencia de privacidad.**

Talentos Humanos

- La preocupación más común entre los funcionarios entrevistados fue la **falta misma de personal.**
- Algunos funcionarios están preocupados por una cierta **carencia de conocimiento general sobre la ley internacional de los derechos humanos** por parte de algunos funcionarios. **Es recomendable la capacitación y cursos de actualización en derechos humanos.**
- No existe **una manera de evaluación del personal.** Es recomendable un **proceso estándar de evaluación** (a parte de la autoevaluación en la hoja de trabajo que integra este informe).
- A pesar de que el ambiente de trabajo es muy positivo, **son recomendadas actividades que incluyan a todos los funcionarios,** con el fin de incrementar el compañerismo dentro el equipo de trabajo.

Liderazgo

- El **proceso de toma de decisiones no es participativo en su totalidad.** Por otra parte, incluso los jefes de las unidades dentro de la Dirección denuncian la sobrecarga de trabajo. Sería de ayuda el tener **un incremento en la delegación de la toma de decisiones a los funcionarios** y no sólo a los jefes/Director de la unidad.

- Como fue mencionado anteriormente, los jefes de unidad deberían tomar la iniciativa de introducir **procesos de cooperación entre los funcionarios con fines de formación de equipos de trabajo.**
- **No existe un código oficial de conducta.** La introducción de dicho código sería un paso adelante para la Dirección bienvenido.
- Han habido solicitudes dentro de la hoja de trabajo que denuncian el hecho de que usualmente **las opiniones de los funcionarios no son tomados en cuenta en su totalidad por los líderes de la Dirección.** Serían recomendables **reuniones generales más frecuentes con todo el miembro del personal** (por ejemplo, reuniones generales mensuales). Esto ayudaría motivando al equipo en su totalidad (lamentablemente, la carencia de motivación del personal ha sido señalada como un defecto de la Dirección varias veces en la hoja de trabajo).

Responsabilidades

- **No existe una herramienta estandarizada que permita a la población conocer la cantidad exacta de denuncias que llegan a la Dirección y tampoco existe una compilación estandarizada de los casos pendientes o resueltos.** Sería recomendable que se establezca un sistema que recolecte y **publique los datos de la Dirección,** tanto para la población en general como para la claridad de los mismos funcionarios.
- De alguna manera, se detectó una **posición débil con respecto a asuntos sensibles particulares.** La fuerza de la Defensoría viene dada exactamente de una independencia total y absoluta del Ejecutivo, la cual algunas veces se muestra carente. **Sería recomendable que la distancia Defensoría-Ejecutivo sea revisada y fortalecida.**
- Podría decirse que existen **demasiados pasos entre el momento en el que una demanda es entregada y su resolución.** Se requieren demasiadas autorizaciones antes de que un caso pueda darse por terminado. Con el fin de acelerar los procesos, **algunos de los pasos deberían ser eliminados, sobre todo aquellos que se tratan con organismos externos como otros Ministerios.** Incluso en este punto, la petición de independencia es algo que debe ser seguido por la Defensoría para seguir siendo reconocida como la institución respetable que viene siendo considerada hasta hoy.
- Consecuentemente, **es recomendable que se sellen lazos interinstitucionales más fuertes.** Si un oficial de un Ministerio determinado se encuentra a una simple llamada de distancia, se simplifica y acelera el proceso en su totalidad, lo cual es esencial en los casos de violación de derechos humanos.
- Es recomendable un **incremento de participación durante las reuniones con**

otras instituciones del Estado por parte del personal que trató directamente el caso en discusión, por encima de los jefes de unidad o el Director. Esto incrementa la participación del personal y, por tanto, la motivación.

Recursos Técnicos

- Una preocupación común entre el personal es que **muchas autorizaciones y propuestas presupuestarias dependen de otras unidades dentro de la Defensoría.** Es entonces **recomendable que la Dirección esté más involucrada en asuntos relacionados con su propio presupuesto,** ya sea por presidir las reuniones de asignación presupuestaria o por tener mayor voz y voto en sus peticiones.
- La **elaboración del Plan de Acción es realizada por una pequeña cantidad de personas** que no representan la totalidad de los miembros de las distintas unidades de la Dirección. **Un enfoque más amplio y participativo sería recomendable.**
- En términos de las faltas técnicas, **no existe una versión estándar del mismo software en las computadoras de la Dirección.** Unos utilizan Microsoft Office y otros usan software libre, causando problemas de incapacidad, los cuales dan lugar a un trabajo menos eficiente y menos veloz. Es recomendable que **todo el software sea unificado en una única marca de fábrica.**

Mecanismo Nacional para la Prevención de la Tortura

- Si bien se reconoce que la existencia del Mecanismo es ya un paso adelante en la lucha contra el uso de la tortura a manos del Estado y la Defensoría ha tenido un papel fundamental en su creación y funcionamiento, sería **recomendable aumentar su independencia dentro de la propia Defensoría. Una Directiva independiente incrementaría la eficiencia tanto en términos de medios como en términos de calidad y rapidez de sus acciones** (mecanismos en el extranjero, como los presentes en España y Argentina, se han beneficiado desde su establecimiento en un cuerpo propio e independiente).
- La falta de una coerción que caracterice el poder del Mecanismo, como una Unidad dentro de la Defensoría del Pueblo, es una debilidad sustancial en un área que necesita fuertes e inmediatos medios de resolución. A largo plazo, sería **recomendable que el Mecanismo sea una institución autónoma con su propio personal, presupuesto y poder de coerción.**
- La existencia legal del Mecanismo dentro de la Defensoría proviene de la

Ley Orgánica de la Defensoría del Pueblo, que es fácilmente variable. Como tal, **su continua presencia dentro de la Defensoría es demasiado dependiente de los poderes decisivos del Defensor.** Para evitar tal riesgo, **deberían aclararse las garantías de su continua presencia y actividad, ya sea constitucionalmente o con cualquier otro medio de garantía.**

- Desde un punto de vista operativo, la colaboración con las Delegaciones Provinciales han demostrado haber causado algunas complicaciones antes que soporte a las visitas del Mecanismo (el “efecto sorpresa” que las visitas a los centros de detención necesitan a veces ha sido develado por el personal de la Delegación, lo que hace a las visitas menos eficaces y útiles). **Es recomendable que dicha colaboración no sea necesaria en lo absoluto.**
- Por otra parte, **sería recomendable una red regional de oficinas pertenecientes al Mecanismo** con el fin de ser capaces de coordinar las distintas instituciones nacionales que están involucradas con la actividad del Mecanismo.
- Parece ser que existen demasiados pasos que las resoluciones del Mecanismo tienen que tomar antes de llegar a quienes en efecto toman las decisiones de manera coerciva (los Ministerios). Cuando el Mecanismo completa sus visitas y recomendaciones, no resulta estar en sus manos el que la situación llegue a manos superiores. **Sería mejor que las resoluciones del Mecanismo tuvieran un camino más directo, sin tantos pasos por tomar.**
- También dentro de esta unidad, **no existe un número adecuado de personal.** Por esta razón, a pesar de que el mandato permite al Mecanismo el hacerse cargo de todo tipo de centros de detención del país, actualmente sólo logra hacerse cargo de dos categorías (Centros de Rehabilitación Social y Centros de Adolescentes Infractores). **Un incremento de funcionarios** ayudaría a incluir las demás categorías a su alcance y así, finalmente, cumplir su mandato a cabalidad.
- El Mecanismo es difícilmente conocido entre la población. **Una mejor promoción de su función en los medios nacionales** ayudaría a incrementar su reconocimiento y, por lo tanto, su eficiencia.

Hojas de Auto-Evaluación de Capacidades

Dirección Nacional de Protección de Derechos
Humanos y de la Naturaleza

Índice

Hoja 1: Organización del Trabajo

Hoja 2: Talento Humano

Hoja 3: Liderazgo

Hoja 4: Responsabilidades

Hoja 5: Recursos Técnicos

Sistema de calificación de capacidades	
1. Muy Baja	Capacidad muy baja o no existente.
2. Baja	Capacidad baja o básica.
3. Media	Capacidad media o parcialmente desarrollada (ej. implementación irregular-básica).
4. Alta	Capacidad alta o bien desarrollada (ej. implementación parcial- completa).
5. Muy Alta	Capacidad muy alta o completamente desarrollada (ej. monitoreo activo y evaluación después de la implementación).

Hoja 1

Organización del Trabajo

	Clasificación	Explicación
<p style="text-align: center;">Declaración guía</p> <ul style="list-style-type: none"> • La Dirección Nacional de Protección tiene la capacidad de desarrollar planes generales anuales, planes estratégicos y unidades estratégicas que coinciden exactamente con las funciones y actividades de las unidades de trabajo. • La Dirección Nacional de Protección tiene la capacidad para poner en marcha los mecanismos de coordinación entre las unidades y dentro de la Defensoría en su conjunto. • La Dirección Nacional de Protección tiene la capacidad para verificar que el enfoque de género está integrado en todas sus políticas. • La Dirección Nacional de Protección tiene la capacidad para implementar sus planes de trabajo anuales, planes estratégicos para la Dirección y sus unidades. • La Dirección Nacional de Protección tiene la capacidad para identificar las prioridades financieras necesarias. • La Dirección Nacional de Protección tiene la capacidad para desarrollar y mantener una base de 		

<p>datos interna para el personal tanto en instrumentos de derechos humanos como en procesos de planificación interna.</p> <ul style="list-style-type: none"> • La Dirección Nacional de Protección tiene la capacidad para recibir y tramitar quejas de <i>cualquier</i> persona, grupo de personas u organizaciones no gubernamentales alegando violaciones de los derechos humanos. • La Dirección Nacional de Protección tiene la capacidad para desarrollar e implementar procesos estándar para llevar a cabo investigaciones independientes de violaciones de derechos humanos y prácticas discriminatorias. • La Dirección Nacional de Protección tiene la capacidad para desarrollar recomendaciones apropiadas para reparar las violaciones de los derechos humanos. • La Dirección Nacional de Protección tiene la capacidad de promover y supervisar la aplicación de las recomendaciones. 		
--	--	--

<p>Fortalezas</p>	<p>Oportunidades</p>
<p>Debilidades</p>	<p>Amenazas</p>
<p>Recomendaciones</p>	

Hoja 2

Talentos Humanos

Declaración guía	Clasificación	Explicación
<ul style="list-style-type: none"> • La Dirección Nacional de Protección tiene la capacidad para desarrollar y poner en marcha el desarrollo de recursos humanos a largo plazo para garantizar la adecuada dotación de personal y las competencias del personal. • La Dirección Nacional de Protección tiene la capacidad para poner en marcha un adecuado número de mecanismos de medición de rendimiento. • La Dirección Nacional de Protección tiene un número adecuado de personal calificado para cumplir su mandato. • La Dirección Nacional de Protección tiene la capacidad para acceder y adaptarse a las políticas internacionales y a las mejores prácticas para abordar y responder a violaciones de derechos humanos en el país. • El personal de la Dirección Nacional de Protección tiene la capacidad para distinguir entre las violaciones de derechos humanos y las violaciones de otros derechos y sugerir reparaciones. 		

<ul style="list-style-type: none"> • La Dirección Nacional de Protección tiene la capacidad para investigar los centros de detención sin impedimentos externos. • El personal de la Dirección Nacional de Protección tiene la capacidad de participar con los actores adecuados para llevar a cabo una investigación. • El personal de la Dirección Nacional de Protección tiene acceso a bases de datos sobre los derechos humanos nacionales e internacionales. • El personal de la Dirección Nacional de Protección tiene la capacidad para articular sus ideas y opiniones abiertamente con los actores claves externos para llevar a cabo sus responsabilidades más efectivamente. • El personal de la Dirección Nacional de Protección tiene la capacidad para participar con las organizaciones no gubernamentales y trabajar activamente con ellos para la protección de los derechos humanos. • Capacidad de la Dirección Nacional de Protección de coordinación con las oficinas provinciales. 		
--	--	--

<p>Fortalezas</p>	<p>Oportunidades</p>
<p>Debilidades</p>	<p>Amenazas</p>
<p>Recomendaciones</p>	

Hoja 3

Liderazgo

	Clasificación	Explicación
<p style="text-align: center;">Declaración guía</p> <ul style="list-style-type: none"> • La Dirección Nacional de Protección tiene la capacidad para decidir cómo dirigir, aceptar o rechazar quejas basadas en el mandato. • La Dirección Nacional de Protección tiene la capacidad para garantizar la aplicación de mecanismos transparentes y procedimientos para recibir y actuar en quejas y medidas disciplinarias. • La Dirección Nacional de Protección tiene la capacidad para asegurar que los derechos del personal estén protegidos y promocionados a través de un código de conducta. • La Dirección Nacional de Protección tiene la capacidad para garantizar la aplicación de un seguimiento basado en el mérito y los resultados y un marco de evaluación para medir el impacto del trabajo de la Dirección. • Capacidad de la Dirección Nacional de Protección para liderar el desarrollo de una supervisión y plan de evaluación para medir la eficacia de su trabajo. 		

<p>Fortalezas</p>	<p>Oportunidades</p>
<p>Debilidades</p>	<p>Amenazas</p>
<p>Recomendaciones</p>	

Hoja 4

Responsabilidades

	Clasificación	Explicación
<p style="text-align: center;">Declaración guía</p> <ul style="list-style-type: none"> • La Dirección Nacional de Protección tiene la capacidad de realizar un análisis integral de la situación que involucra a todo el personal para promover la gestión del cambio y la rendición de cuentas institucional. • La Dirección Nacional de Protección tiene la capacidad para llevar a cabo monitoreos regulares y evaluación de las actividades de la Dirección. • La Dirección Nacional de Protección tiene la capacidad para hacer público el número de las quejas y porcentaje de las quejas aceptadas. • La Dirección Nacional de Protección tiene la capacidad para participar sin impedimentos externos con todos los interesados en el ejecutivo incluyendo las fuerzas armadas, las prisiones y la policía. • La Dirección Nacional de Protección tiene la capacidad para participar y colaborar sin problemas con todas las organizaciones de la sociedad civil de los derechos humanos y las ONG. • La Dirección Nacional de Protección tiene la capacidad para desarrollar mecanismos para el procesamiento de los tramites defensoriales. 		

<ul style="list-style-type: none"> La Dirección Nacional de Protección tiene la capacidad para asegurar auditorías/veedurías independientes regulares. ciudadanas 		
<p>Fortalezas</p>		<p>Oportunidades</p>
<p>Debilidades</p>	<p>Amenazas</p>	
<p>Recomendaciones</p>		

Hoja 5

Recursos Técnicos

		Clasificación	Explicación
<p style="text-align: center;">Declaración guía</p> <ul style="list-style-type: none"> • La Dirección Nacional de Protección tiene la capacidad para movilizar y garantizar recursos basados en las prioridades del Plan estratégico / otros planes de trabajo. • La Dirección Nacional de Protección tiene la capacidad financiera para adquirir equipos adecuados para llevar a cabo las investigaciones sobre violaciones de derechos humanos y para recibir y tramitar las quejas. • La Dirección Nacional de Protección tiene la capacidad de administrar misiones de monitoreo y evaluación para evaluar el impacto del trabajo de la Dirección en todo el país. 			
Fortalezas		Oportunidades	

Debilidades	Amenazas
Recomendaciones	

Bibliography

Literature

Abdullahi An-Na'im, Religious Minorities under Islamic Law and the Limits of Cultural Relativism, *Human Rights Quarterly*, Vol. 9, No. 1 (Feb., 1987).

Adamantia Pohjolainen, *The Evolution of National Human Rights Institutions – the Role of the United Nations*, Danish Institute for Human Rights (2006).

Adamantia Pollis and Peter Schwab, *Human Rights: a Western Construct with Limited Applicability*, in *Human Rights: Cultural and Ideological Perspectives*, Preager - New York (1980).

Albert H. Rosenthal, *The Ombudsman-Swedish “Grievance Man”*, *Public Administrative Review*, Vol. 24 (1964).

Alfred Bexelius, *The Ombudsman for Civil Affairs* in Ronald C. Rowat, *The Ombudsman*, George Allen & Unwin Ltd. (1966).

Alfred Bexelius, *The Swedish Ombudsman*, *The University of Toronto Law Journal*, Vol. 17 No. 1 (1967).

Americo Castro, *Character Argentino e Hispanoamericano* in *Archivo de Cultura*, Ediciones Aga-Taura - Buenos Aires (1945).

Americo Castro, *La Peculiaridad Linguistica Rioplatense y su Sentido Historico* - Buenos Aires (1941).

Andrè Legrand, *L’Ombudsman Scandinave*, E. Pichon & R. Durand-Auzias (1970).

Anna Pohjolainen, *The Evolution of National Human Rights Institutions – the Role of the United Nations*, Danish Institute for Human Rights – Copenhagen (2006).

Augustin Gordillo, *La Administracion Paralela*, Civitas – Madrid (1982).

Bertrand Russel, *Authority and the Individual*, Routledge ed. – London (1949).

Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, Cambridge University Press (2009).

Birgit Lindsnaes and Lone Lindholt, National Human Rights Institutions, Article and Working Papers, Danish Centre for Human Rights – Copenhagen (2001).

Brian Burdekin and Jason Naum, National Human Rights Institutions in the Asia Pacific. Raoul Wallenberg Institute - Lund (2006).

C. Flinterman and M. Zwamborn, From Development of Human Rights to Managing Human Rights Development, Netherland Institute of Human Rights – Utrecht (2003).

Carlos Gueròn, Intervention in VVAA. El Proyecto de Ombudsman para America Latina, Cuadernos de Documentacion, Serie III, Cuestiones Iberoamericanas, No. 1 - Madrid (1986).

Carlos R. Constenla, Teoria y Practica del Defensor del Pueblo, Editorial Reus - Madrid (2010).

Cecilia Bizerra, Sumac Kawsay/Buen Vivir, Monthly Review, Vol 48 (December 2009) available at <http://mrzine.monthlyreview.org/2009/bizerra181209.html>.

Davidse Koen, The Vienna World Conference on Human Rights: Bridge to Nowhere or Bridge Over Troubled Waters?, Touro International Law Review (1995).

Dodson Michael, Jackson Donald Wilson, Horizontal Accountability in Transitional Democracies: The Human Rights Ombudsman in El Salvador and Guatemala, Latin American Politics & Society, Volume 46, Number 4 (2005).

Flor Francisco Hidalgo, Contrahegemonia y Buen Vivir, Francisco Hidalgo Flor y Alvaro Marquez Editores - Quito (2012).

Ellen Messer, Pluralist Approaches to Human Rights, Journal of Anthropological Studies Research 53 (1997).

Fariborz Nozari, The Swedish Institution of Justice Ombudsman, International Journal of Legal Information, Vol. 18 (1990).

Goodman Ryan and Pegram Thomas, Human Rights, State Compliance and Social Change – Assessing National Human Rights Institutions, Cambridge (2012).

Guillermo Escobar Roca, Actas del I Congreso Internacional del PRADPI - La Proteccion de los Derechos Humanos por las Defensorías del Pueblo, Dykinson S.L. (2012).

Henkin Louis, The Universality of the Concept of Human Rights, Annals of the Academy of Political and Social Science, 506 (1989).

Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa* (2001) available at <http://www.hrw.org/reports/2001/01/01/protectors-or-pretenders>.

International Council on Human Rights Policy, *Performance and Legitimacy: National Human Rights Institutions*, Second Ed. - Geneva (2004).

International Council on Human Rights Policy, *Assessing the Effectiveness of National Human Rights Institutions* – Geneva (2005).

Jack Donnelly, *Universal Human Rights in theory and practice*, 2nd ed. Cornell University Press (2003).

Jeong-Woo Koo and Francisco Ramirez, *National Incorporation of Global Human Rights: Worldwide expansion of National Human Rights Institutions, 1966-2004*, *Social Forces*, Vol. 87, No.3 (2009).

John Baylis and Steve Smith, *The Globalization of World Politics*, 4th Edition Oxford University Press (2008).

Jorge Santisteven de Noriega, *El Defensor del Pueblo en Iberoamerica in Comentarios a la Ley Organica del Defensor del Pueblo* – Navarra (2002).

Julie A. Mertus, *Human Rights Matters – Local Politics and National Human Rights Institutions*, Stanford University Press (2009).

Lanza Leo Valladares, *The Challenges Facing the Ombudsman in Latin America in The International Ombudsman Yearbook*, Vol.2 (2004).

Linda C. Reif, *Building Democratic Institutions: the Role of National Institutions in Good Governance and Human Rights Protection*, *Harvard Human Rights Journal* 13 (2000).

Linda C. Reif, *Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman*, *Boston College Third World Law Journal*, Volume 31, Issue 2 (2011).

Manfred Nowak, *Introduction to International Human Rights Regime*, Leiden/Boston: Martinus Nijhoff Publishers (2003).

Maria Iràizoz, *La Eficacia del Defensor del Pueblo en Iberoamerica – Expansion y caracterizacion como Instituciones Nacionales de Derechos Humanos*, Dykinson S.L – Madrid (2012).

Oswaldo Hurtado, *Dictaduras del Siglo XXI – El Caso Ecuatoriano*, Paradiso Editores (2012).

Pietro Catalano, Giovanni Lobrano and S. Schipani, *Da Roma a Roma – Dallo Jus Gentium al Tribunale Penale Internazionale*, Istituto Italo Latinoamericano (2002).

Rhoda Howard, *Occidentalism, Human Rights and the Obligations of Western Scholars*, *Canadian Journal of African Studies* 29 (1995).

Richard Carver, *A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law*, *Human Rights Law Review*, Volume 10 (2010).

Rodolfo Stavenhagen, *Cultural Diversity in the Development of the Americas – Indigenous Peoples and States in Spanish America*, *Cultural Studies Series N.11*, *Unite for the Social Development Education and Culture*, *Organization of American States* (2004).

Ryan Goodman and Derek Jinks, *How to Influence States: Socialization and International Law*, *Duke Law Journal* 54 (2004).

Seminar on National and Local Institutions for the Promotion and Protection of Human Rights, *ST/HR/SER.A/2* (1978).

Sergio Camara Arroyo and Eduardo Luna Cervantes, *Mejores Practicas del Ombudsman en Iberoamérica*, *Dykinson S.L* (2012).

Sonia Cardenas, *Emerging Global Actors: the UN and the National Human Rights Institutions*, *Global Governance* 9 (2003).

Uggla Frederik, *The Ombudsman in Latin America*, *Journal of Latin American Studies* 36 (2004).

Upendra Baxi, *Voices of Suffering, Fragmented Universality and the Future of Human Rights*, in *The Future of International Human Rights*, *Pergamon Press* (1999).

UN Documents (General Comments, General Observations, General Recommendations, Resolutions, Reports)

CESCR General Comment No.10: *the Role of Independent National Human Rights Institutions in the Promotion and Protection of Economic, Social and Cultural Rights* (1998), *E/C.12/1998/25*;

CHR Res. 9 (XXXVI) of March 1962, endorsed by ECOSOC Res. 888 F (XXXIV) of 24 July 1962;

Constitution of the United Nations Educational, Scientific and Cultural Organization, London 16th November 1945, Art. VII (1-3);

CRC General Comment No.2: *the Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child* (2002), *CRC/GC/2002/2*;

ECOSOC Res. 9 (II), 21 June 1946;

ECOSOC Res. 2/9 of 21 June 1946 on Commission of Human Rights, section 5 “Information Groups”;

ECOSOC Res. 772 B (XXX), 25 July 1960;

ECOSOC Res. 888 F (XXXIV), 24 July 1962;

GA Res. 1961 (XVIII) of 12th December 1963;

GA Res 48/134 of December 20, 1993;

GA Res 48/134 of December 20, 1993;

General Observation 1.5, ICC Sub-Committee on Accreditation General Observations, Geneva (2009);

General Recommendation XVII (1193), General Comment 10 (1998) and General Comment 2 (2002);

ICC Working Group on Accreditation, Decision Paper on the Review of ICC (2008);

ICC, Rules of Procedure for the ICC Sub-Committee on Accreditation, adopted by ICC members during its 15th session (September 14th 2004 – South Korea), amended by ICC members during its 20th session (15th April 2008);

Office of the High Commissioner for Human Rights, National Institutions for the Promotion and Protection of Human Rights, Informative Bulletin No.19 – Geneva (2013);

Office of the High Commissioner for Human Rights, Survey on National Human Rights Institutions, Geneva (2009) available at <http://www.nhri.net/2009/Questionnaire%20-%20Complete%20Report%20FINAL-edited.pdf>;

Principles relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights (The Paris Principles), GA Res. 48/134 (1993);

Report by the Secretary-General, Effective Functioning of Human Rights Mechanisms: National institutions and Regional Arrangements – National Institutions for the Promotion and Protection of Human Rights (2005), E/CN.4/2005/106;

UN GA Res. 2200 C (XXI), 16 December 1966;

UN Secretary-General Kofi Annan, Opening Ceremony of the Human Rights Council, Geneva (2006), available at www2.ohchr.org/english/bodies/hrcouncil/statements.htm;

UNGA Res 41/129 (December 1986);

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);

United Nations Development Programme, Democracy in Latin America: Towards a Citizens' Democracy (2007) available at <http://www.un-ngls.org/orf/democracy-undp-publication.htm>.

Oral Sources

Brian Burdekin, former Special Advisor on National Institutions to the UN High Commissioner for Human Rights; Lund, Sweden, 10 December 2013;

George Tugushi, Vice-Chair of the Committee Against Torture and former Ombudsman of Georgia; Geneva, Switzerland, 21 April 2014;

Katharina Rose, ICC Geneva Representative ; Geneva, Switzerland, 24 April 2014 ;

Ramiro Rivadeineira, Defensor del Pueblo de Ecuador; Quito, Ecuador, 23 June 2013;

Sisi Shahidzadeh, Senior Human Rights Officer, National Institutions and Regional Mechanisms Section, Office of the High Commissioner for Human Rights; Geneva, Switzerland, 25 April 2014;