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TRANSPLANTATION AND ADAPTATION: THE EVOLUTION OF THE HUMAN RIGHTS OMBUDSMAN

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Abstract: The number of human rights ombudsman institutions has increased dramatically over the past three decades. Such institutions are prevalent in Latin America and in Central and Eastern Europe, and are increasingly found in other regions of the world as well. Forces such as democratization, public institution-building, comparative law influences, limited state resources, and international human rights law continue the spread of human rights ombudsman institutions. This Article discusses the mandates and jurisdiction of human rights ombudsman institutions. It argues that all governments should endow human rights ombudsman institutions with as many additional powers as their institutional and legal systems permit to supplement the ombudsman's core investigatory mandate. These include inspection, litigation, research, and education powers. Further, this Article argues that all human rights ombudsman institutions must institute operating practices to increase their ability to protect and promote human rights.

INTRODUCTION

In 1809, Sweden established the *justitieombudsman*, the predecessor of the modern institution of the ombudsman.¹ The Swedish legislature appointed the ombudsman to supervise the conduct of the government administration and the judiciary.² It had the power not only to prosecute public officials, but also to pursue investigations and make recommendations to the government.³ Until the early 1960s, the ombudsman institution could only be found in a few Scandinavian states.⁴

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¹ See LINDA C. REIF, *THE OMBUDSMAN, GOOD GOVERNANCE AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM* 4–6 (2004). “Ombudsman” is the Swedish word for “representative.” *Id.* at 12. Because both women and men hold the office, the pronouns are neutrally used to reflect this fact. See *id.* at 1 n.2.

² *Id.* at 5–6.

³ See *id.* at 4.

⁴ See *id.* at 1.

Nevertheless, early in its history, the ombudsman's mandates diverged.⁵ While in Sweden and Finland the ombudsman had both prosecutorial powers and jurisdiction over the judiciary, the Danish ombudsman had neither of these functions.⁶ It was the Danish model that became popular in other jurisdictions around the world, particularly in Commonwealth nations and some Western European states.⁷ The core function of this popular Scandinavian ombudsman model—the so-called “classical” ombudsman—is to investigate administrative conduct impartially based either on a complaint or the ombudsman's own motion, to make recommendations, to rectify any illegal or unfair conduct uncovered, and to issue annual and special reports.⁸ The classical ombudsman is an institution that uses “soft powers” of persuasion and cooperation to control conduct rather than coercive or adjudicative means.⁹

Some schools of thought regarding common law and administrative law refer to the ombudsman as a non-judicial alternative for overseeing public administration.¹⁰ Similarly, comparative law scholars occasionally reference the ombudsman in discussions of comparative administrative law, essentially using it as an example of a public sector institution that has been successfully transplanted in different legal systems around the world.¹¹ Despite the changing face of ombudsman in-

⁵ See *id.* at 25.

⁶ See REIF, *supra* note 1, at 2, 138.

⁷ See *id.* at 6.

⁸ See *id.* at 2–4. Even within the family of classical ombudsmen, there are variations between institutions. See *id.* at 3. For example, some ombudsmen do not have own-motion powers, some can inspect facilities such as prisons where persons are involuntarily detained, and other ombudsmen are appointed by the executive rather than the legislative branch. See *id.* at 3–4, 406.

⁹ See, e.g., Marc Hertogh, *The Policy Impact of the Ombudsman and Administrative Courts: A Heuristic Model*, in 2 THE INTERNATIONAL OMBUDSMAN YEARBOOK 63, 64 (Linda C. Reif ed., 1998).

¹⁰ See, e.g., GERARD COFFEY, ADMINISTRATIVE LAW 73–79 (2009); COMMONWEALTH SECRETARIAT, COMPARATIVE STUDY ON MANDATES OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE COMMONWEALTH 87 (2007); PAUL CRAIG, ADMINISTRATIVE LAW 252–56 (6th ed. 2008); EUROPEAN OMBUDSMAN-INSTITUTIONS 22–23 (Gabriele Kucsko-Stadlmayer ed., 2008); Dennis Pearce, *The Ombudsman: Review and Preview—The Importance of Being Different*, in THE INTERNATIONAL OMBUDSMAN ANTHOLOGY: SELECTED WRITINGS FROM THE INTERNATIONAL OMBUDSMAN INSTITUTE 73, 80–81 (Linda C. Reif ed., 1999); H.W.R. WADE & C.F. FORSYTH, ADMINISTRATIVE LAW 74–93 (10th ed. 2009) (discussing the ombudsman's power to review matters where legal remedy may be doubtful).

¹¹ See, e.g., John S. Bell, *Administrative Law in a Comparative Perspective*, in COMPARATIVE LAW: A HANDBOOK 287, 299 (Esin Örücü & David Nelkin eds., 2007) (“The Swedish system of independent administrative redress through the Ombudsman has been followed by many European states.”); John S. Bell, *Comparative Administrative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1259, 1278 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

stitutions around the globe, the relevant legal literature primarily discusses only the Scandinavian or classical ombudsman model.¹²

Since the 1970s, governments around the world, on both national and sub-national levels, have established hybrid versions of the ombudsman institution by giving one institution multiple mandates.¹³ These additional mandates include protecting human rights, fighting corruption, ensuring ethical conduct by elected public officials, and protecting the environment.¹⁴ Even classical ombudsmen are being given “second hats” of differing scope with respect to freedom of information, protecting privacy, child protection, and health system oversight.¹⁵ This Article specifically addresses the human rights ombudsman phenomenon—in other words, ombudsman-type institutions that are given express mandates to protect and promote human rights.¹⁶

By 2003, about half of the approximately 110 national-level ombudsman institutions worldwide had human rights mandates.¹⁷ Many ombudsman institutions established since that time have also been given human rights-related duties, and classical ombudsman institu-

¹² See EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 59–62; REIF, *supra* note 1, at 2–4; Barbara von Tigerstrom, *The Role of the Ombudsman in Protecting Economic, Social and Cultural Rights*, in 2 THE INTERNATIONAL OMBUDSMAN YEARBOOK, *supra* note 9, at 3, 4–8.

¹³ See REIF, *supra* note 1, at 8.

¹⁴ See e.g., *id.* at 7–11. Some Asian-Pacific and African states have given their ombudsman institutions anti-corruption or public official ethics enforcement mandates. See *id.* at 10 (listing Vanuatu, Papua New Guinea, Philippines, Macao (China), Taiwan, Indonesia, East Timor, South Africa, Namibia, Uganda, Mauritius, Lesotho, Seychelles, and Rwanda as examples). A few states have given their institutions numerous mandates. See *id.* at 9. For example, the ombudsmen in Namibia and Lesotho are responsible for human rights protection, anti-corruption, and environmental protection. See *id.* at 8–11.

¹⁵ See *id.* at 9; see also *History and Purpose of the Ombudsman's Office*, OMBUDSMAN MANITOBA, <http://www.ombudsman.mb.ca/about.htm> (last visited May 8, 2011) (freedom of information, privacy, and personal health information); NEW BRUNSWICK OMBUDSMAN, <http://www.gnb.ca/0073/index-e.asp> (last visited May 8, 2011) (freedom of information and privacy and service as Child and Youth Advocate); N.S.W. OMBUDSMAN, <http://www.ombo.nsw.gov.au/> (last visited May 8, 2011) (workplace child protection); *Welcome to the Parliamentary and Health Service Ombudsman*, PARLIAMENTARY & HEALTH SERVICE OMBUDSMAN, <http://www.ombudsman.org.uk/> (last visited May 8, 2011); *What We Do*, YUKON OMBUDSMAN, <http://www.ombudsman.yk.ca/ombudsman/ombwedo.html> (last visited May 8, 2011) (freedom of information and privacy).

¹⁶ See REIF, *supra* note 1, at 87–88. Human rights ombudsman institutions are also often given powers beyond those typically given to classical ombudsmen such as the powers to launch or intervene in constitutional court actions, prosecute public officials, and engage in human rights research and education. See *id.* at 8, 88, 193.

¹⁷ See *id.* at 11, 393. On a sub-national level, there are numerous human rights ombudsman institutions, such as those in Spain and Argentina. See *id.* at 11.

tions are increasingly being transformed through the conferral of constitutional or legislative mandates to protect human rights.¹⁸

This Article examines the proliferation of human rights ombudsman institutions over the past three decades and argues that their numbers will continue to grow relative to their classical predecessors. The forces responsible for the growth of human rights ombudsmen include democratization, public institution building, comparative law influences, limited state resources, international and regional movements to establish national human rights institutions (NHRIs), and the recent adoption of human rights treaties, along with other initiatives that rely on NHRIs, for domestic implementation of international human rights obligations.¹⁹ Although some mixed jurisdictions and a few common law states have adopted the human rights ombudsman model, they are primarily found in civil law jurisdictions.²⁰

Additionally, this Article reviews the core powers of human rights ombudsman institutions in various jurisdictions. Although a human rights ombudsman endowed with limited, classical powers may be effective, governments should endow their human rights ombudsmen with as many additional functions and powers as their institutional and legal systems permit to support the institution's human rights mandate. Finally, all human rights ombudsmen should engage in appropriate institutional practices to maximize their ability to protect and promote human rights.

¹⁸ See *id.* at 393.

¹⁹ See *id.* at 8, 104–06, 393–94. See generally *Common Law Systems and Mixed Systems with a Common Law Tradition*, JURIGLOBE, <http://www.juriglobe.ca/eng/sys-juri/class-poli/common-law.php> (last visited May 8, 2011) (providing a list of common law and mixed systems worldwide); Int'l Ombudsman Inst., *Directory 2008*, U. ALBERTA FAC. OF L. (2008), <http://www.law.ualberta.ca/centres/ioi/docs/Directory2008.pdf> (listing contact information for ombudsman offices internationally).

²⁰ See REIF, *supra* note 1, at 8–9. These forces may also cause an increase in the number of human rights ombudsman institutions in common law jurisdictions. See *id.* at 8–9. See generally *Common Law Systems and Mixed Systems with a Common Law Tradition*, *supra* note 19 (providing a list of common law and mixed systems worldwide); *Directory 2008*, *supra* note 19 (listing contact information for ombudsman offices internationally).

I. THE HISTORICAL DEVELOPMENT AND CURRENT USE OF HUMAN RIGHTS OMBUDSMAN INSTITUTIONS

A. *The Evolution of the Human Rights Ombudsman: The Classical Ombudsman and Human Rights Commissions*

Since the 1960s, as government bureaucracies have grown in size, nations have steadily perceived the ombudsman as a useful mechanism for controlling administrative misconduct.²¹ Specifically, governments began adopting Scandinavia's classical ombudsman model.²² Commonwealth countries in particular, many of which obtained their independence following World War II, followed this trend.²³ Western European nations, among others, caught up with this trend a few years later and began establishing classical ombudsman institutions in the 1970s.²⁴

Born from the rubble of World War II, human rights commissions appeared as non-judicial mechanisms for protecting individuals from governments or private actors violating their rights.²⁵ At first, only a few human rights commissions existed, primarily in European and Commonwealth states.²⁶ Since the 1990s, however, many more have been created.²⁷ Human rights commissions are multiple-member bodies with numerous human rights protection and promotion functions, including human rights research and education, advocating for the implementation of human rights treaties, and monitoring the state's compliance with its international and domestic human rights obligations.²⁸ While some commissions have a limited advisory or research role, many have investigatory powers and may recommend or conciliate resolutions to complaints; some may even refer complaints to tribunals or to courts for binding resolution, intervene in court actions, act as *amici curiae*, and

²¹ See REIF, *supra* note 1, at 6–7; WADE & FORSYTH, *supra* note 10, at 73–75.

²² See REIF, *supra* note 1, at 2.

²³ See *id.* at 6–7. In 1962, New Zealand became the first Commonwealth state to establish a classical ombudsman, followed by countries in Africa, the Caribbean, Asia and the Pacific region, the United Kingdom, and most Canadian provinces. See *id.* at 6 & n.30 (listing countries that established a classical ombudsman chronologically by date).

²⁴ See *id.* at 6–7. For example, France's *Médiateur* was copied by Francophone African states, Italian regions and provinces, Austria, Netherlands, Ireland, Belgium, a few U.S. states, most Canadian provinces and territories, and many Commonwealth Caribbean nations. See *id.* at 6 & n.30, 7 & n.31, 11–12, 86–87.

²⁵ See *id.* at 6.

²⁶ See *id.* at 8–9, 83 n.8.

²⁷ REIF, *supra* note 1, at 83–85.

²⁸ *Id.*

conduct public inquiries.²⁹ By the 1970s and 1980s, as the public consciousness of the human rights abuses being committed by authoritarian or military dictatorships expanded, the number of international human rights laws increased.³⁰ At the same time, democratization flourished, first in Southern Europe, then in Latin American as well as in Central and Eastern Europe.³¹

In these countries, public sector reform was on the agenda as framers built—or in some cases rebuilt—constitutional, legal, and institutional frameworks.³² Faced with the challenge of both ensuring administrative justice and guarding against further human rights violations, many nations considered establishing horizontal accountability mechanisms in their new governments.³³ To build this public architecture, these new governments could draw on the existing models of ombudsman institutions and human rights commissions.³⁴ Nevertheless, rather than establishing separate accountability mechanisms, many of these nations created hybrid institutions reflecting each of the two institutional models.³⁵ Although the contours of each human rights om-

²⁹ See *id.* at 85; see also ANNA-ELINA POHJOLAINEN, *THE DANISH INST. FOR HUMAN RIGHTS, THE EVOLUTION OF NATIONAL HUMAN RIGHTS INSTITUTIONS—THE ROLE OF THE UNITED NATIONS* 16–20 (2006). See generally *THE PROTECTION ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS* (Bertrand G. Ramcharan ed., 2005) (discussing the protection roles of the human rights commissions in Australia, Denmark, Fiji, Ghana, India, Mexico, Nepal, Northern Ireland, Philippines, and Uganda).

³⁰ See REIF, *supra* note 1, at 128–33, 393–95; e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13; American Convention on Human Rights: “Pact of San José, Costa Rica,” Nov. 22, 1969, 1144 U.N.T.S. 144; International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195; International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

³¹ See SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 21–26 (1991). This development has been uneven and, as a result, some nations have experienced setbacks. See JOHN PEELER, *BUILDING DEMOCRACY IN LATIN AMERICA* 26–28, 182–83 (3d ed. 2009).

³² See HUNTINGTON, *supra* note 31, at 21–25.

³³ See Guillermo O’Donnell, *Horizontal Accountability in New Democracies*, in *THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES* 29, 43 (Andreas Schedler et al. eds., 1999).

³⁴ See REIF, *supra* note 1, at 393–95.

³⁵ See *id.* at 8–9. While the generic term “human rights ombudsman” will be used, the actual titles given to these hybrids vary, including “commissioner for civil rights protection,” “defender of the people,” “attorney for the defense of human rights,” and “ombudsman.” See *id.* at 12. For example, Poland uses the “commissioner for civil rights protection” designation. *Id.* “Defender of the people” is used in Spain and parts of Latin Amer-

budsman vary, nearly all are single office-holders and the institution always has the power to investigate public complaints, make recommendations, and report its findings.³⁶

The distinguishing characteristics of these institutions are their specific mandates with respect to human rights.³⁷ Many mix administrative justice duties with responsibilities for protecting and promoting human rights; nevertheless, there can be considerable differences in emphasis depending on an institution's particular constitutional or legislative mandate and its unique political and economic context.³⁸ Some single office-holder institutions have mandates similar to those of a human rights commission, which focuses on the protection and promotion of human rights and lacks an express ability to oversee administrative justice.³⁹ While a few institutions have only investigation, reporting, and recommendation functions, many have stronger powers like the right to inspect closed facilities, to bring abstract or concrete review actions before constitutional courts, to participate in administrative court proceedings, or to prosecute or recommend the prosecution of public officials.⁴⁰ Furthermore, some human rights ombudsman institutions have jurisdiction over aspects of private sector conduct in addition to public sector jurisdiction.⁴¹

As they transitioned to democracy in the mid-1970s, Portugal and Spain became the first countries to establish human rights ombudsmen.⁴² In 1975, Portugal established the *Provedor de Justiça*.⁴³ Spain enshrined its *Defensor del Pueblo* in the country's 1978 Constitution as well as in a legislative enactment.⁴⁴ The Spanish institution was tasked with defending constitutional human rights guarantees by supervising government administration; additional legislation added an ombudsman-

ica. *Id.* Variations of "attorney for the defense of human rights" can be found in Central America. *Id.* Namibia and Greece are examples of countries that use the term "ombudsman." *Id.* Several hybrids use the commission format such as Ghana's Commission on Human Rights and Administrative Justice and Tanzania's Commission for Human Rights and Good Governance. *Id.*

³⁶ See POHJOLAINEN, *supra* note 29, at 18–19; von Tigerstrom, *supra* note 12, at 4–8.

³⁷ von Tigerstrom, *supra* note 12, at 7–8.

³⁸ See *id.*

³⁹ See POHJOLAINEN, *supra* note 29, at 18–19. In practice, however, some of these human rights ombudsmen may nevertheless investigate administrative complaints. See *id.*

⁴⁰ See *infra* Part III.B.

⁴¹ See POHJOLAINEN, *supra* note 29, at 17.

⁴² See Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS. J. 1, 36 (2000).

⁴³ See REIF, *supra* note 1, at 8, 141–42. The institution was elevated to a constitutional office in 1976. See *id.* at 141.

⁴⁴ *Id.* at 8.

like element to the mix.⁴⁵ Beyond the powers to investigate, recommend, and report, both the Portuguese and Spanish institutions could bring actions before their respective constitutional courts.⁴⁶

In Sweden, legislation passed in 1986 established an express, albeit more subtle, duty for the ombudsman to protect human rights: "The Ombudsmen are to ensure in particular . . . that the fundamental rights and freedoms of citizens are not encroached upon in public administration."⁴⁷

After the collapse of the Soviet Union and the Eastern Bloc and their turn toward democracy in the late 1980s, similar desires both to improve bureaucratic performance and halt human rights abuses by the government led many Central and Eastern European governments to establish human rights ombudsman institutions.⁴⁸ Hybrid institutions also began to appear in some African, Asian, Caribbean, Pacific, and Western European nations.⁴⁹

B. Mapping the Human Rights Ombudsman and Classical Ombudsman Institutions

Today, the human rights ombudsman is an institution found in many nations around the world. Most Latin American countries have a

⁴⁵ See CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 54, Dec. 29, 1978; Ley Organica del Defensor del Pueblo (B.O.E. 1981, 10325); see also REIF, *supra* note 1, at 145-49; Ascensión Elvira Perales, *Implementing the Spanish Constitution*, in CONSTITUTIONAL POLICY AND CHANGE IN EUROPE 214, 220 (Joachim Jens Hesse & Nevil Johnson eds., 1995).

⁴⁶ See EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 354-55; REIF, *supra* note 1, at 147-49.

⁴⁷ See 3 § LAG MED INSTRUKTION FÖR RIKSDAGENS OMBUDSMÄN (1986:765); *Summary of the Committee's Proposals*, in JO: ÄMBETET EN ÖVERSYN: BETÄNKANDE AVGIVET AV 1983 ÅRS JO-UTREDNING TILLSATT AV RIKSDAGEN SOU 1986:26 [Report Delivered By the 1983 Ombudsman's Office Inquiry Appointed By the Parliament SOU 1986:26] 281, 281-82 (1985); Claes Eklundh, *The Swedish Parliamentary Ombudsman System*, in HUMAN RIGHTS COMMISSIONS AND OMBUDSMAN OFFICES: NATIONAL EXPERIENCES THROUGHOUT THE WORLD 423, 425 (Kamal Hossain et al. eds., 2000); see also Stig Jägerskiöld, *The Swedish Ombudsman*, 109 U. PA. L. REV. 1077, 1097-98 (1961) (describing the contribution of Swedish ombudsmen to civil liberties since the late nineteenth century). Sweden's Instrument of Government (Constitution) states, "The Riksdag elects one or more Parliamentary Ombudsmen to supervise the application of laws and other statutes in the public service, under terms of reference drawn up by the Riksdag." REGERINGSFORMEN [RF] [CONSTITUTION] 12:6. A former Swedish Ombudsman noted that this legislative provision refers to the human rights guarantees contained in the Swedish constitution. See Eklundh, *supra*, at 425 (adding that Sweden had recently implemented the European Convention on Human Rights into the Swedish domestic law system).

⁴⁸ See REIF, *supra* note 1, at 8, 155-60.

⁴⁹ See *id.* at 125, 171, 215.

national human rights ombudsman.⁵⁰ For example, Argentina, Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, and Venezuela all have human rights ombudsmen.⁵¹ In the broader Caribbean region, the ombudsmen of Belize, Guyana, Jamaica, and Haiti all have human rights mandates to differing degrees.⁵² Additionally, human rights ombudsmen or commissioners are found widely throughout Central and Eastern Europe.⁵³ While many of these institutions have dual human rights and administrative justice functions, a few focus exclusively on protecting human rights.⁵⁴ Increasingly, some ombudsman institutions in other European

⁵⁰ See *id.* at 188. Exceptions include Mexico (which uses the human rights commission model), Uruguay, and Chile. See *id.* at 190–91; see also *Institución Nacional de Derechos Humanos*, Ley No. 18.446 (2009) (Uruguay), available at <http://www.undp.org/uy/showNews.asp?NewsID=695> (follow “Texto del Ley” hyperlink); Linda C. Reif, *The Promotion of International Human Rights Law by the Office of the Ombudsman*, in *THE INTERNATIONAL OMBUDSMAN ANTHOLOGY: SELECTED WRITINGS FROM THE INTERNATIONAL OMBUDSMAN INSTITUTE*, *supra* note 10, at 271, 296. Chile also recently established a national human rights institution. See *Institucionalidad de Derechos Humanos en Chile*, in *INFORME ANUAL SOBRE DERECHOS HUMANOS EN CHILE 2010*, at 449, 449 (Jorge Contesse Singh ed., 2010), available at <http://www.derechoshumanos.udp.cl/informe-anual-sobre-derechos-humanos-en-chile-2010/>.

⁵¹ See *Directories of Ombudsman Offices: Ombudsman of Latin America*, INTER-AM. INST. OF HUM. RTS., http://www.iidh.ed.cr/comunidades/ombudsnet/english/F_O_LA.htm (last visited May 8, 2011). In Latin America, an ombudsman is commonly called *Defensor del Pueblo* (“Defender of the People”), but may also be referred to as *Defensor de los Habitantes* (“Defender of the Inhabitants”), *Comisionado de los Derechos Humanos* (“Commissioner of Human Rights”), or *Procurador de los Derechos Humanos* (“Attorney for Human Rights”). See *id.*; see also Leo Valladares Lanza, *The Challenges Facing the Ombudsman in Latin America*, in 2 *THE INTERNATIONAL OMBUDSMAN YEARBOOK*, *supra* note 9, at 159, 159–60.

⁵² See REIF, *supra* note 1, at 171 n.3. In 2011, the Dominican Republic made a commitment to appoint a *Defensor del Pueblo*, ten years after the adoption of a statute to create a *Defensor* in 2001. See *id.* at 115; Public Statement, Amnesty Int’l, Dominican Republic: Human Rights Council Adopts Universal Periodic Review Outcome on Dominican Republic: Amnesty International Welcomes Commitment to Strengthen Action to Combat Violence Against Women and Encourages the Government to Enhance Investigation of Violations Committed By Security Forces (Mar. 17, 2011), available at <https://www.amnesty.org/en/library/asset/AMR27/001/2010/en/cd5a548f-cf56-4d42-8692-1eddc0dcb8e3/amr27012010en.html>.

⁵³ See *id.* at 157–60; see also *EUROPEAN OMBUDSMAN-INSTITUTIONS*, *supra* note 10, at 503. Countries with human rights ombudsman institutions include Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Kazakhstan, Kosovo, Kyrgyz Republic, Latvia, Lithuania, Macedonia, Moldova, Montenegro, Poland, Romania, Russia, Serbia, Slovak Republic, Slovenia, Ukraine, and Uzbekistan. See REIF, *supra* note 1, at 157–60; see also *EUROPEAN OMBUDSMAN-INSTITUTIONS*, *supra* note 10, at 503. See generally *Directory 2008*, *supra* note 19 (listing contact information for ombudsman offices internationally). In Estonia, the Legal Chancellor is responsible for protecting human rights. See *EUROPEAN OMBUDSMAN-INSTITUTIONS*, *supra* note 10, at 6, 51.

⁵⁴ See *EUROPEAN OMBUDSMAN-INSTITUTIONS*, *supra* note 10, at 502. For example, institutions in Azerbaijan, Georgia, Kazakhstan, Ukraine, and Uzbekistan use only human rights standards in investigations. See *id.* The institutions in Argentina, Peru, Costa Rica,

regions have taken on human rights-related functions either at their inception or through legal reform.⁵⁵ France's 2008 constitutional reforms provided for a new human rights state institution, the *Défenseur des Droits*.⁵⁶ In Australia, the ombudsman of the State of Victoria handles complaints with respect to alleged breaches of the State's Charter of Human Rights and Responsibilities by public authorities.⁵⁷ Further, Denmark and Luxembourg have given their classical ombudsman institutions human rights monitoring responsibilities under the Optional Protocol to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁵⁸

African nations with human rights ombudsman institutions include Angola, Ethiopia, Gambia, Lesotho, Malawi, Namibia, and Sey-

and Venezuela have dual mandates, while others in Latin America are focused predominantly on human rights. See Reif, *supra* note 1, at 187–91, 188 n.116, 190 n.125, 197, 201.

⁵⁵ See REIF, *supra* note 1, at 137–69 (surveying the ombudsman's institutional development in various European countries). Human rights ombudsmen are also found in Spain, Portugal, Sweden, Finland, Norway, Greece, Andorra, and Cyprus. See EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 502. Finland's ombudsman was given an additional human rights mandate in 1995, which entered into force in 1999. See Ulla-Maija Lindström, *Compensation for Violations of Fundamental Rights—Decisions and Opinions by the Parliamentary Ombudsman*, in PARLIAMENTARY OMBUDSMAN: 90 YEARS 77, 79 (Greg Coogan & Arttu Tolonen trans., 2010), available at <http://www.oikeusasiamies.fi/Resource.phx/eoa/english/publications/jubilee-book.htm>; Pasi Pölonen, *Monitoring Fundamental and Human Rights as the Parliamentary Ombudsman's Duty*, in PARLIAMENTARY OMBUDSMAN: 90 YEARS, *supra*, at 51, 54. In 2007, Norway's ombudsman was given a dual ombudsman-human rights mandate in amendments to the institution's legislation. See Arne Fliflet, *Parliamentary Ombudsman of Norway Annual Report 2007: Summary in English*, SIVILOMBUDSMANNEN, 13–14 (May 2008), <http://www.sivilombudsmannen.no/getfile.php/Filer/%C3%85rsmelding/kortmelding%20ENGELSK.pdf>. A majority of Spain's autonomous communities also established their own human rights ombudsman institutions, albeit without the power to bring actions before the constitutional court. See REIF, *supra* note 1, at 149–51. These communities include Andalusia, Aragon, Asturias, the Basque region, the Canary Islands, Castile-La Mancha, Castile and Leon, Catalonia, Galicia, Navarra, and the Valencian Community. See *id.* at 150. Sub-national hybrids also exist in some other European states. See *id.* at 126.

⁵⁶ See 1958 CONST. 71-1, available at <http://www.assemblee-nationale.fr/English/8ab.asp> (last visited May 8, 2011) (English translation). Article 71-1 states that “[t]he Defender of Rights shall ensure the due respect of rights and freedoms by state administrations, territorial communities, public legal entities, as well as by all bodies carrying out a public service mission” by taking complaints from persons contending that their rights have been infringed. See *id.*

⁵⁷ See G.E. Brouwer, *Ombudsman Victoria Annual Report 2007–08*, OMBUDSMAN VICTORIA, 31 (Sept. 2008), http://www.ombudsman.vic.gov.au/resources/documents/Annual_Report_07-08_1.9mb1.pdf (stating that human rights responsibilities commenced January 1, 2008).

⁵⁸ See EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 159, 295.

chelles.⁵⁹ Human rights ombudsmen are far less common in Asia and the Pacific regions, but East Timor, Fiji, and Papua New Guinea are examples of states that have institutions with human rights mandates of varying scope.⁶⁰

In sum, while human rights ombudsmen are found in most global regions, they are predominantly established in Latin America and in Central and Eastern Europe.⁶¹ While many countries choose to have one unified human rights overseer, a human rights ombudsman sometimes exists alongside another, general-purpose human rights institution, often a research or advisory human rights commission.⁶² Most of the jurisdictions with human rights ombudsman institutions are civil law systems, although the ombudsman is present in some common law or mixed legal systems.⁶³ Furthermore, those civil law countries with a constitutional court may have a more powerful human rights ombudsman.⁶⁴ The quantity and quality of powers given to

⁵⁹ See REIF, *supra* note 1, at 220–22, 224; Angola: Office of the Ombudsman, ELECTORAL INST. FOR THE SUSTAINABILITY OF DEMOCRACY IN AFR., http://www.eisa.org.za/WEP/ang_agency.htm (last visited May 8, 2011); Message from the Chief Ombudsman, ETHIOPIAN INSTITUTION OMBUDSMAN, <http://www.ethombudsman.gov.et/> (last visited May 8, 2011). The institutions in Ghana and Tanzania have multiple mandates and a commission format. See REIF, *supra* note 1, at 224.

⁶⁰ See REIF, *supra* note 1, at 245, 249.

⁶¹ See *id.* at 9.

⁶² See Sonia Cardenas, *Adaptive States: The Proliferation of National Human Rights Institutions* 11 (Carr Ctr. for Human Rights Policy, Working Paper No. T-01-04), available at <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Cardenas.pdf>. Greece and Norway are examples of countries that have a human rights ombudsman and another general purpose human rights institution. See EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 220, 336.

⁶³ See generally *Common Law Systems and Mixed Systems with a Common Law Tradition*, *supra* note 19 (providing a list of common law and mixed systems worldwide); *Directory 2008*, *supra* note 19 (listing contact information for ombudsman offices internationally). Examples of states with common law systems using human rights ombudsmen include Jamaica, Victoria (Australia), and Belize. See *Common Law Systems and Mixed Systems with a Common Law Tradition*, *supra* note 19; *Directory 2008*, *supra* note 19, at 7–9, 12, 34. Mixed systems with human rights ombudsmen are found in Malawi and Papua New Guinea. See *Common Law Systems and Mixed Systems with a Common Law Tradition*, *supra* note 19; *Directory 2008*, *supra* note 19, at 37, 51. Lesotho, Gambia, Seychelles, and Namibia have mixed systems with hybrid institutions. See *Common Law Systems and Mixed Systems with a Common Law Tradition*, *supra* note 19; *Directory 2008*, *supra* note 19, at 22, 35, 46, 54; see also REIF, *supra* note 1, at 9, 11.

⁶⁴ See REIF, *supra* note 1, at 252. Many civil law states with constitutional courts have established human rights ombudsmen who are typically authorized to launch actions in constitutional courts. See *id.* at 9, 11. See generally *Common Law Systems and Mixed Systems with a Common Law Tradition*, *supra* note 19 (providing a list of common law and mixed systems worldwide); *Constitutional Courts (Links)*, COUNCIL EUR. VENICE COMMISSION, http://www.venice.coe.int/site/dynamics/N_court_links_ef.asp (last visited May 8, 2011) (providing

human rights ombudsmen in countries without constitutional courts varies.⁶⁵

On the contrary, the classical ombudsman is now found predominantly in North America, Commonwealth Caribbean nations and overseas territories, parts of Western Europe, and in a number of African, Asian, and Pacific states.⁶⁶ Some of the jurisdictions with classical ombudsmen, particularly Commonwealth nations, also have separate human rights commissions.⁶⁷ Thus, classical ombudsman institutions are found across common law, civil law, and mixed legal systems.⁶⁸

The concept of a modern human rights ombudsman is not alien to or irreconcilable with the classical ombudsman model. A testament to the compatibility of these two concepts is the substantial number of human rights ombudsman institutions that have been established and maintained since the 1970s using the ombudsman model.⁶⁹ At its core, the ombudsman is an institution designed to monitor illegality, unfairness, and injustice in public administration.⁷⁰ In this sense, breaches of human rights laws, whether domestic or international obligations, have

website information for constitutional courts and equivalent bodies worldwide); *Directory 2008*, *supra* note 19 (listing contact information for ombudsman offices internationally). On the contrary, Finland, Norway, Sweden, Denmark, and Argentina are civil law systems without constitutional courts that have human rights ombudsmen. *See* REIF, *supra* note 1, at 9, 11; *Common Law Systems and Mixed Systems with a Common Law Tradition*, *supra* note 19; *Constitutional Courts (Links)*, *supra* note 19; *Directory 2008*, *supra* note 19, at 2-7, 19, 21-22, 49, 59; *The Supreme Court, HÖGSTA DOMSTOLEN*, <http://www.hogstadamstolen.se/Funktioner/English/The-Swedish-courts/The-Supreme-Court/> (last visited May 8, 2011) (providing information about the Swedish Supreme Court).

⁶⁵ *See* *Constitutional Courts (Links)*, *supra* note 64. *See generally* REIF, *supra* note 1, at 13-15, 137-41 (outlining the powers of the legislative ombudsmen of Scandinavian countries without constitutional courts). For example, Argentina's *Defensor del Pueblo* can launch *amparo* court actions, while the human rights ombudsman institutions in Sweden and Finland can prosecute public officials, but do not have the mandate to launch constitutional human rights court actions. *See* ALLAN R. BREWER-CARÍAS, *CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA: A COMPARATIVE STUDY OF AMPARO PROCEEDINGS* 77 (2009); REIF, *supra* note 1, at 37-38.

⁶⁶ *See generally* *Directory 2008*, *supra* note 19 (listing contact information for ombudsman offices internationally).

⁶⁷ *See* REIF, *supra* note 1, at 102.

⁶⁸ *See generally* *Common Law Systems and Mixed Systems with a Common Law Tradition*, *supra* note 19 (providing a list of common law and mixed systems worldwide); *Directory 2008*, *supra* note 19 (listing contact information for ombudsman offices internationally). Saint Lucia, Quebec, Malta, Botswana, and Pakistan are examples of countries with mixed systems and a classical ombudsman. *See* *Common Law Systems and Mixed Systems with a Common Law Tradition*, *supra* note 19; *Directory 2008*, *supra* note 19, at 13, 17, 38, 49-50, 53.

⁶⁹ *See* REIF, *supra* note 1, at 6 n.30.

⁷⁰ *See* Marten Oosting, *The Ombudsman and His Environment: A Global View*, in *THE INTERNATIONAL OMBUDSMAN ANTHOLOGY: SELECTED WRITINGS FROM THE INTERNATIONAL OMBUDSMAN INSTITUTE*, *supra* note 10, at 1, 1.

always been part of the ombudsman's mission. It has long been recognized that even the classical ombudsman plays a role both in human rights protection and in the implementation of a state's domestic and international human rights obligations.⁷¹ Thus, one way of looking at the human rights ombudsman is as a workable adaptation of the classical ombudsman concept.

II. FORCES COMPELLING THE GROWTH OF THE HUMAN RIGHTS OMBUDSMAN PHENOMENON

A variety of forces, both legal and non-legal, have compelled the growth of human rights ombudsman institutions around the world, both in absolute terms and relative to the number of classical ombudsman institutions.⁷² These forces include democratization and public institution-building initiatives; comparative law influences in particular regions or sub-regions; the need to conserve government resources; international initiatives to establish NHRIs; and pressure resulting from regional standards, U.N. standards, and treaty initiatives to establish domestic institutions for human rights protection.⁷³ It is likely that these forces will continue to influence governments to establish some form of human rights ombudsman. These same forces have led other states to establish human rights commissions.⁷⁴ While common law jurisdictions tended to create separate, classical ombudsman institutions and human rights commissions, these forces may also induce common law states to establish human rights ombudsman institutions.⁷⁵

A. Democratization, Public Institution-Building, and the Influence of Comparative Law

Beginning in the 1970s, as a number of European and Latin American countries transitioned from authoritarian regimes to democ-

⁷¹ See REIF, *supra* note 1, at 3; Ann Abraham, Commentary, *The Future in International Perspective: The Ombudsman as Agent of Rights, Justice and Democracy*, 61 PARLIAMENTARY AFF. 681, 684–85, 690 (2008); Gerald E. Caiden et al., *The Institution of Ombudsman*, in INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: EVOLUTION AND PRESENT FUNCTION 3, 5 (Gerald E. Caiden ed., 1983); Bernard Frank, *The Ombudsman and Human Rights—Revisited*, in 6 ISRAEL YEARBOOK ON HUMAN RIGHTS 122, 139 (1976).

⁷² See REIF, *supra* note 1, at 6.

⁷³ See Reif, *supra* note 50, at 275.

⁷⁴ See COMMONWEALTH SECRETARIAT, *supra* note 10, at 18, 94.

⁷⁵ See *id.* at 18–19; EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 502. See generally *Common Law Systems and Mixed Systems with a Common Law Tradition*, *supra* note 19 (providing a list of common law and mixed systems worldwide); *Directory 2008*, *supra* note 19 (listing contact information for ombudsman offices internationally).

racies, they sought to rebuild their public institutions with checks to avoid the human rights abuses and bureaucratic ineptitude of the prior regimes.⁷⁶ These countries saw methods of horizontal accountability in public institutions, including human rights commissions and the ombudsman, as important models for their own use.⁷⁷

Thomas Pegram has explored the diffusion of NHRIs, including the human rights ombudsman, around the world.⁷⁸ He argues that the mechanisms of diffusion by acculturation and persuasion have led to the spread of NHRIs and that the acculturation process has resulted in a “general conformity, or isomorphism, across models within regional referent groups.”⁷⁹ With democratic transitions occurring throughout some regions in a relatively short period of time and the associated need for new institutional models, the acculturation process can help to explain the spread of the human rights ombudsman institution throughout Latin America and in Central and Eastern Europe.⁸⁰ As argued below, however, U.N.-level pressure to create human rights ombudsman institutions was weak in the early 1990s, so the acculturation process would likely have been spurred on in that period predominantly by regional organizational and institutional influences.⁸¹

Pegram also concludes that the human rights ombudsman and human rights commission models are found most often in countries with hybrid or “partly free” democratic regimes, while “the classical ombudsman continues to predominate in ‘free’ regimes, increasingly operating in conjunction with a human rights commission model.”⁸² This may be due in part to the novelty and related allure of the human rights ombudsman model in the late 1980s and early 1990s, which coincides with the period of democratic transition for several countries in Latin America and in Central and Eastern Europe.⁸³

More recently, however, an increasing number of “fully free,” democratic nations have adopted the human rights ombudsman model,

⁷⁶ See Oosting, *supra* note 70, at 4.

⁷⁷ See COMMONWEALTH SECRETARIAT, *supra* note 10, at 18.

⁷⁸ See Thomas Pegram, *Diffusion Across Political Systems: The Global Spread of National Human Rights Institutions*, 32 HUM. RTS. Q. 729, 729 (2010).

⁷⁹ *Id.* at 749.

⁸⁰ See *id.* at 760.

⁸¹ See REIF, *supra* note 1, at 258–87 (discussing U.N. involvement in post-conflict peace-building processes that established human rights ombudsman institutions).

⁸² Pegram, *supra* note 78, at 755.

⁸³ See *id.* at 748–49.

mainly in Western and Southern Europe.⁸⁴ This development may be traceable to the diffusion process. Moreover, it is likely that regional influences have played an important role. The growth of human rights ombudsman institutions in these states—including those that have transitioned from a classical to a human rights ombudsman model—along with the presence of classical, or anti-corruption, ombudsman institutions in states at varying points along the political spectrum, will likely increase the proportion of human rights ombudsman institutions in the free or partly free sector of the political spectrum.⁸⁵ This tendency will become more pronounced if the classical ombudsman institutions in free states with monitoring responsibilities pursuant to the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) are reclassified as human rights ombudsman institutions.⁸⁶

Comparative law influences are also instructive as a distinct force in the human rights ombudsman evolution. In particular, the legal transplant and adaptation concepts are useful in understanding the institution's development.⁸⁷ The diffusion by acculturation process posed by Pegram collapses comparative law aspects of the process into the broader theory of diffusion.⁸⁸ As noted above, most countries with human rights ombudsman institutions—and all countries with such institutions in Europe and Latin America—have civil law systems, so the transplantation of the human rights ombudsman has been predominantly into other civil law systems.⁸⁹ As discussed below, in many cases lawyer elites, government officials, and civil society groups regard the

⁸⁴ See REIF, *supra* note 1, at 83. A majority of these states are European Union members. See *id.* at 137, 141, 368.

⁸⁵ See *id.* at 84; Pegram, *supra* note 78, at 755.

⁸⁶ See REIF, *supra* note 1, at 84.

⁸⁷ See Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 11, at 441, 465. For background on legal transplant concepts, see generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993); Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003); William Ewald, *Comparative Justice (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995); Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839 (2003); David Nelken, *The Meaning of Success in Transnational Legal Transfers*, 19 WINDSOR Y.B. ACCESS JUST. 349 (2001). But see generally Pierre Legrand, *The Impossibility of 'Legal Transplants'*, 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997) (arguing that legal transplants, as described by proponents of the theory, cannot occur across jurisdictions because the meaning and significance of law is specific to the community that interprets it).

⁸⁸ See Pegram, *supra* note 78, at 747–50.

⁸⁹ See REIF, *supra* note 1, at 2, 8–9.

ombudsman concept, whether in its original or adapted form, as a prestigious or superior model.⁹⁰

Adaptation or hybridization, the next step in the evolution of the ombudsman, first occurred on the Iberian Peninsula.⁹¹ Reacting to the immediate political past, the newly democratic governments of Spain and Portugal modified the classic ombudsman model by adding a mandate that the ombudsman protect human rights.⁹² In other words, they adapted the legal transplant of the Scandinavian model by adding an express duty to protect human rights.⁹³ As Buades stated with respect to the establishment of Spain's *Defensor del Pueblo*,

[W]hen shaping the figure of the Ombudsman, Spanish constitutionalists had the characteristics of the Scandinavian model very much in mind in terms of independence, parliamentary links and control of the administration, in order to avoid abuses and errors in the omnipresent public administration With the intention of consolidating and strengthening the recently conquered freedoms, a further step was taken by entrusting the Ombudsman with the task of defending fundamental rights⁹⁴

The Spanish legal heritage of Latin America made the Spanish *Defensor del Pueblo* an attractive legal transplant for Latin American countries transitioning to democracy.⁹⁵ Spain and Latin America have civil law

⁹⁰ See Graziadei, *supra* note 87, at 457–58. In both Latin America and Europe, many of the legal experts and drafters involved in the process appear to have been familiar with the Scandinavian ombudsman concept and the Iberian hybrid human rights ombudsman. See REIF, *supra* note 1, at 8–9, 25. Where post-conflict peace-building agreements establish a human rights ombudsman, the particular ombudsman model chosen for the transitioning jurisdiction will likely have been influenced by the preferences of the international organization personnel of diverse nationalities involved in the drafting process. See *id.* at 284–87.

⁹¹ See REIF, *supra* note 1, at 8.

⁹² See *id.* at 141, 146.

⁹³ See *id.*

⁹⁴ Margarita Retuerto Buades, *The Internationalization of Human Rights; Constitution and Ombudsman in Spain*, in OMBUDSMAN AND HUMAN RIGHTS: PROCEEDINGS OF A SYMPOSIUM 37, 42 (Nat'l Ombudsman of the Neth. ed., 1995).

⁹⁵ See REIF, *supra* note 1, at 188. Brazil, however, has a Portuguese legal heritage. See *id.* at 191 (indicating that Brazil has ombudsman institutions in some states and municipalities); Jan Kleinheisterkamp, *Development of Comparative Law in Latin America*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 11, at 261, 266–67, 276–78; see also Aspásia Camargo, *Federalism and National Identity*, in BRAZIL: A CENTURY OF CHANGE 216, 247–49 (Ignacy Sachs et al. eds., 2009) (noting that Brazil's 1988 Constitution "recovered very old traditions of Portuguese municipalism" which led to "the strengthening of the power and legitimacy of local governments").

legal systems.⁹⁶ In its 1978 Constitution, Spain established a constitutional court outside the judicial branch for the adjudication of constitutional matters—including human rights—and adopted the *amparo* action, whereby persons can use litigation to protect their human rights.⁹⁷ Most Latin American nations also have constitutional courts and the *amparo* or equivalent actions.⁹⁸ Accordingly, the Spanish version of the human rights ombudsman, and its integral relationship with a constitutional court and the *amparo* action, was seen to be a natural fit for many Latin American states.⁹⁹

Guatemala was the first Latin American state to establish a human rights accountability institution, with its *Procurador de los Derechos Humanos*.¹⁰⁰ One early *Procurador* who helped formulate Guatemala's constitution in 1985 described both the Swedish ombudsman and Spanish *Defensor del Pueblo* as the institutions that inspired the Guatemalan *Procurador's* legal framework.¹⁰¹ Following Guatemala's lead, in the early 1990s a number of other Latin American states created *Defensor del Pueblo*, *Procurador*, and human rights commissioner institutions with varying emphasis on human rights protection and promotion.¹⁰² For example, Argentina and Peru followed the Spanish *Defensor del Pueblo*

⁹⁶ See M.C. MIROW, LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA 15, 45–47, 51–52, 104 (2004). Indeed, Spanish law was applied in the latter territories during the colonial period until local laws were developed, and Spanish law and doctrine remained influential in Latin America. See *id.* at 15.

⁹⁷ See EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 401. Curiously, while the *amparo* action originated in nineteenth-century Latin America, Spain did not adopt the action until the twentieth century. See BREWER-CARÍAS, *supra* note 65, at 1, 4–6, 73–76.

⁹⁸ See BREWER-CARÍAS, *supra* note 65, at 163; MIROW, *supra* note 96, at 178, 180.

⁹⁹ See, e.g., Lorena González Volio, *The Institution of the Ombudsman: The Latin American Experience*, 37 REVISTA IIDH 219, 223 (2003). Mexico, however, has a civil law system and the *amparo* action, but does not have a constitutional court and has adopted the human rights commission model. See MIROW, *supra* note 96, at 173, 178.

¹⁰⁰ See REIF, *supra* note 1, at 172, 188. The phrase *Procurador de los Derechos Humanos* translates into English as “Attorney for Human Rights.” Ramiro de León Carpio, *The Ombudsman in Guatemala*, in INTERNATIONAL CONGRESS: “THE EXPERIENCE OF THE OMBUDSMAN TODAY” 113, 115 (Nat’l Comm’n for Human Rights ed., José de Garay y Cuevas trans., 1992).

¹⁰¹ See de León Carpio, *supra* note 100, at 115; see also *Antecedentes*, PROCURADURÍA DE LOS DERECHOS HUMANOS, 1 (July 27, 2010), http://www.pdh.org.gt/index.php?option=com_content&view=category&layout=blog&id=25&Itemid=9 (follow hyperlink to pdf document under “Antecedentes” heading). Members of the Guatemalan College of Lawyers and Notaries met informally in the lead-up to the elections for the constitutional assembly and came up with ideas that included the *Procurador* model; in turn, some of these legal experts were elected to the constitutional assembly and lobbied successfully for the inclusion of the *Procurador* institution in Guatemala's new constitution. See de León Carpio, *supra* note 100, at 113–14.

¹⁰² See REIF, *supra* note 1, at 172, 187–91.

model by establishing clearly defined human rights and administrative justice mandates; the Swedish ombudsman institution provided more general inspiration.¹⁰³

In the late 1980s, as communist regimes imploded, Central and Eastern European nations began the process of nation-building.¹⁰⁴ Western European, U.S., and indigenous models all influenced the shape and substance of their new constitutions and public institutions.¹⁰⁵ Many adopted variants of the human rights ombudsman, albeit with differing powers and names. Poland was the first nation in the region to establish a human rights ombudsman.¹⁰⁶ Polish law scholars and organized civil society first discussed creating an ombudsman institution in the early 1980s.¹⁰⁷ Poland's communist regime actually created the country's Commissioner for Civil Rights Protection in 1987 prior to its collapse; it was "apparently conjured up by high state officials to prove that reforms undertaken by the communist government were not merely empty words."¹⁰⁸ The Commissioner was established to safeguard citizens' rights and freedoms found in the constitution and other normative acts infringed upon by public authorities.¹⁰⁹ Additionally, it

¹⁰³ See *id.* at 8–9, 188–91; Thomas Pegram, *Accountability in Hostile Times: The Case of the Peruvian Human Rights Ombudsman 1996–2001*, 40 J. LATIN AM. STUD. 51, 55 (2008); Jorge Santistevan de Noriega, *La Defensoría del Pueblo en el Perú: Reflexiones Correspondientes a sus Dos Primeros Años*, in DEBATE DEFENSORIAL: REVISTA DE LA DEFENSORÍA DEL PUEBLO 77, 77 (Jorge Santistevan de Noriega ed., 1998); Thomas Pegram, D.Phil. Candidate in Politics, Nuttfield Coll., Univ. of Oxford, Paper Presented at the Society of Latin American Studies Annual Conference: The Peruvian Ombudsman: The Last Bastion of Universality? 3 (Apr. 13–15, 2007).

¹⁰⁴ See Iván Bizjak, *The Role and Experience of an Ombudsman in a New Democracy*, in 2 THE INTERNATIONAL OMBUDSMAN YEARBOOK, *supra* note 9, at 57, 57–58.

¹⁰⁵ See Rett R. Ludwikowski, *Constitutional Culture of the New East-Central European Democracies*, 29 GA. J. INT'L & COMP. L. 1, 10 (2000); Rett R. Ludwikowski, "Mixed" Constitutions—Product of an East-Central European Constitutional Melting Pot, 16 B.U. INT'L L.J. 1, 50–63 (1998); Victoria Schwartz, *The Influences of the West on the 1993 Russian Constitution*, 32 HASTINGS INT'L & COMP. L. REV. 101, 110–13 (2009).

¹⁰⁶ See REIF, *supra* note 1, at 160.

¹⁰⁷ See Agnieszka Klich, *Human Rights in Poland: The Role of the Constitutional Tribunal and the Commissioner for Citizens' Rights*, 1996 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 33, 38; Ewa Letowska, *The Polish Ombudsman: (The Commissioner for the Protection of Civil Rights)*, 39 INT'L & COMP. L.Q. 206, 206 (1990); see also Mark F. Brzezinski, *The Emergence of Judicial Review in Eastern Europe: The Case of Poland*, 41 AM. J. COMP. L. 153, 173–76 (1993) (discussing the establishment of Poland's Constitutional Tribunal between 1981 and 1985).

¹⁰⁸ Klich, *supra* note 107, at 38.

¹⁰⁹ See THE CONSTITUTION OF THE REPUBLIC OF POLAND, Apr. 2, 1997, ch. II, art. 80; *id.* ch. IX, art. 208; see also EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 345–47; Marek Zubik, *Poland's Commissioner for Civil Rights Protection: Two Decades of Human and Civil Rights Protection*, in 10 THE INTERNATIONAL OMBUDSMAN YEARBOOK 182, 183–84 (Linda C. Reif ed., 2006).

had the power to bring actions before Poland's constitutional court and its administrative courts.¹¹⁰ The first Polish Commissioner stated, "Poland's ombudsman's office is modeled after the Scandinavian version which was vigorously promoted by Polish scholars acquainted with West European institutions. Communist officials, largely ignorant of the nature of this institution, agreed to establish [the] ombudsman without realizing the potential consequences."¹¹¹ One publicist stated that the Polish institution was also modeled on the classical ombudsman offices in France and the United Kingdom.¹¹²

In Hungary, a legislative proposal for an ombudsman was first put forth in 1988.¹¹³ It appears that the Swedish and Polish models were influential in the subsequent development of the Hungarian commissioners for human rights.¹¹⁴ The Slovenian Human Rights Ombudsman legislation was passed in late 1993 and "modelled the duties and authorities of the ombudsman on a classical Scandinavian type of ombudsman, combining it with some provisions of the legislation in those European countries, which recently established such institutions (e.g. Netherlands, Spain)."¹¹⁵ The drafters of federal constitutional law on the commissioner for human rights in Russia also looked to the ombudsman institutions of Sweden and Great Britain.¹¹⁶ The Russians were particularly influenced by ombudsman institutions in countries that had experienced or were experiencing a political transition; therefore "[s]pecial attention was paid to the experience of Poland, Slovenia, and post-Franco Spain," although the Russian model was adapted to fit its own particular environment.¹¹⁷

Thus, Central and Eastern European nations looked not only to classical ombudsman institutions for inspiration but also to hybrid mod-

¹¹⁰ See EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 345–47, 521.

¹¹¹ See Ewa Letowska, *The Ombudsman and Basic Rights*, 4 E. EUR. CONST. REV. 63, 63 (1995); see also Ewa Letowska, *The Commissioner for Citizens' Rights in Central and Eastern Europe: The Polish Experience*, 1996 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1, 2.

¹¹² See Howard Elcock, *The Polish Commissioner for Citizens' Rights Protection: Decaying Communism to Pluralist Democracy Through an Ombudsman's Eyes*, 75 PUB. ADMIN. 359, 363 (1997).

¹¹³ See László Majtényi, *On the History of Adopting the Institution of Ombudsman in Hungary*, 1 J. CONST. L. E. & CENT. EUR. 163, 169 (1994).

¹¹⁴ See *id.* at 167–69.

¹¹⁵ Ivan Bizjak, *The Human Rights Ombudsman of Slovenia*, in HUMAN RIGHTS COMMISSIONS AND OMBUDSMAN OFFICES: NATIONAL EXPERIENCES THROUGHOUT THE WORLD, *supra* note 47, at 373, 373.

¹¹⁶ See Emma Gilligan, *The Human Rights Ombudsman in Russia: The Evolution of Horizontal Accountability*, 32 HUM. RTS. Q. 575, 582 & n.30 (2010).

¹¹⁷ Bill Bowring, *Sergei Kovalyov: The First Russian Human Rights Ombudsman—and the Last?*, in CONSTITUTIONAL REFORM AND INTERNATIONAL LAW IN CENTRAL AND EASTERN EUROPE 235, 240 (Rein Müllerson et al. eds., 1998).

els like the Spanish *Defensor del Pueblo* and the Polish Commissioner for Civil Rights Protection.¹¹⁸ Unlike the Swedish ombudsman, both the *Defensor del Pueblo* and the Polish Commissioner had the power to bring human rights-related actions in a constitutional court, a power subsequently included in other human rights ombudsman institutional structures in Eastern and Central Europe.¹¹⁹ On the other hand, Scandinavian models—in particular the Swedish variant—along with the *Defensor del Pueblo*, were more influential in Latin America.¹²⁰ In both regions, however, adopting a human rights ombudsman model was not the end of the story: the structures of subsequent institutions were also shaped by other early intra-regional institutions in jurisdictions with political and legal environments similar to those of the copying state.¹²¹

Tracing the influence of comparative law on human rights ombudsmen created in other parts of the world is more difficult. Colonial legal histories likely play a role. For example, East Timor's past colonial legal ties to the Portuguese *Provedor de Justiça* model helped shape its own human rights ombudsman, which was enshrined in the nation's 2002 independence constitution and was given an additional corruption-fighting role.¹²² An institution's date of establishment, any relationship with a post-conflict peace agreement or transitional independence plan, and local conditions also influence the shape of these institutions.¹²³

¹¹⁸ See *id.* However, it is difficult to demonstrate any substantial influence exerted by the ombudsmen in France and Great Britain because these institutions did not have express human rights mandates.

¹¹⁹ See, e.g., EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 517–21. While the Swedish ombudsman had an express human rights mandate by 1987 and had the power to prosecute public officials, none of the Scandinavian nations have separate constitutional courts. See *id.* at 412–16, 460, 515–21. Additionally, none of the Scandinavian ombudsman institutions have mandates to bring court actions to determine the compatibility of legislation or treaties with constitutional human rights provisions. See *id.*

¹²⁰ See REIF, *supra* note 1, at 187–88.

¹²¹ See Linda C. Reif, *Introduction to THE INTERNATIONAL OMBUDSMAN ANTHOLOGY: SELECTED WRITINGS FROM THE INTERNATIONAL OMBUDSMAN INSTITUTE*, *supra* note 10, at xxiii–xxvi; see also Elcock, *supra* note 112, at 362.

¹²² See REIF, *supra* note 1, at 282–84; see also Bárbara Oliveira, Project Manager of the UNDP/OHCHR Capacity Building PDHJ Project & Valério Ximenes, Director of the Human Rights Division of the PDHJ, Paper Presented at the National Human Rights Institutions Workshop: Creating Change? NHRIs' (In)Action in the Asia-Pacific Region, The Provedor for Human Rights and Justice: First Boosting Years, Arduous Job Ahead 3–5 (July 22, 2009), http://iilah.unimelb.edu.au/files/NHRI_Workshop_Paper_PDHJ_BOliveira_and_VXimenes.pdf.

¹²³ See Reif, *supra* note 121, at xxiii–xxvi. In particular, African and Asian governments are more likely to give an anti-corruption mandate to an ombudsman institution. See REIF, *supra* note 1, at 9–10, 215.

In Africa, Uganda and Namibia established the first human rights ombudsman institutions.¹²⁴ Uganda's Inspector-General of Government, as established in 1987, had human rights protection and anti-corruption mandates but only classical ombudsman-type powers.¹²⁵ Namibia's ombudsman—established in the 1990 Constitution after the U.N.-assisted transition to independence from South African control—has multiple mandates, including administrative oversight and human rights, anti-corruption, and environmental protection.¹²⁶ The Namibian ombudsman was also given stronger powers to refer matters to other public officials for prosecution, bring court proceedings to halt government action and challenge the validity of laws, and provide legal assistance to persons engaged in constitutional human rights litigation.¹²⁷ For these first human rights ombudsman institutions in Africa, no colonial links influenced the particular hybrid model they chose, and few hybrids were found elsewhere in the world at the time.¹²⁸

B. *Limited State Resources*

Industrialized, transitional, and developing countries engage in government budget-cutting exercises for various reasons. Localized or widespread economic crises occur on a regular basis.¹²⁹ Some governments are ideologically predisposed to limit government action and spending or wish to reign in the spending of a prior administration.¹³⁰ Consequently, giving multiple mandates to a new institution, or adding additional oversight mandates to an existing institution, are attractive alternatives for governments seeking to cut public expenditures. Low levels of state resources, and sometimes a desire to devote minimal resources to the operation of good governance and human rights institutions, are factors leading to the establishment of the multiple mandate,

¹²⁴ See REIF, *supra* note 1, at 221–23.

¹²⁵ See *id.* at 232. The human rights mandate of Uganda's Inspector General was transferred to a human rights commission in 1995. *Id.*

¹²⁶ See *id.* at 234–37.

¹²⁷ See *id.* at 235–36.

¹²⁸ See *id.* at 224, 231, 234 (noting the hybrid models of Namibia and Uganda and the political history underlying the founding of these institutions).

¹²⁹ See Jorge Madrazo Cuellar, *The Ombudsman and His Relationship with Human Rights, Poverty and Development*, in 2 THE INTERNATIONAL OMBUDSMAN YEARBOOK, *supra* note 9, at 129, 132 (noting that neo-liberal economic policies contributed to economic problems in places such as Latin America).

¹³⁰ See *id.*

single office-holder ombudsman in developing countries, especially in Africa and Asia.¹³¹

The shape of human rights ombudsman institutions in developed countries is also changing because of the additional financial resources inherent in establishing separate horizontal accountability institutions.¹³² The cost-saving rationale may also be a reason for merging separate institutions. These considerations may result in the transformation of a classical ombudsman into a human rights ombudsman, an expansion of the mandates of an existing human rights ombudsman, or the creation of a new hybrid institution.¹³³ For example, a 2009 government report recommended that the Children's Ombudsman in Ireland be merged into the general ombudsman institution.¹³⁴ If it had been implemented, this change would have turned Ireland's classical ombudsman into a human rights ombudsman.¹³⁵ In France, 2011 legislation will eliminate the country's independent *Défenseur des Enfants* and entrust its child protection functions to a deputy within a larger Defender of Rights institution.¹³⁶

C. *International Initiatives to Establish National Human Rights Institutions*

Over the past twenty-five years, the international community has placed greater emphasis on the implementation of states' international human rights obligations at the domestic level through the establishment and strengthening of NHRIs.¹³⁷ The U.N. standards for NHRIs, popularly called the "Paris Principles," were drafted in the early 1990s.¹³⁸ Although not legally binding, the Paris Principles are consid-

¹³¹ See REIF, *supra* note 1, at 88; Oliveira & Ximenes, *supra* note 122, at 1 n.2.

¹³² See REIF, *supra* note 1, at 406 (noting the financial impact of retaining an independent ombudsman capable of performing its functions).

¹³³ See *id.* at 88 ("One factor [for establishing hybrid institutions] is that fewer financial and human resources are needed to operate one office rather than two separate institutions.").

¹³⁴ See Barry O'Halloran & Ruadhán MacCormaic, *Merger of State Bodies Would Save €83m*, IRISH TIMES, July 17, 2009, at 9.

¹³⁵ See REIF, *supra* note 1, at 8 (noting that a human rights ombudsman "combines both the ombudsman and human rights commission roles").

¹³⁶ See Loi organique 2011-334 du 29 mars 2011 relative au Défenseur des droits [Law 334 of March 29, 2011 Relative to the Defender of Rights] (in force April 1, 2011), available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023781252&dateTexte=>. See generally LE DÉFENSEUR DES ENFANTS, <http://www.defenseurdesenfants.fr/> (last visited May 8, 2011) (detailing recent developments).

¹³⁷ See Reif, *supra* note 50, at 275 ("The United Nations has recently affirmed the significance of national human rights institutions for the protection and promotion of human rights . . .").

¹³⁸ See G.A. Res. 48/134, ¶¶ 1-13, U.N. Doc. A/RES/48/134 (Dec. 20, 1993).

ered to be the core standards for independent and effective NHRIs.¹³⁹ Although the Paris Principles suggest a human rights commission as the model NHRI, the U.N. began to accept human rights ombudsmen as NHRIs later in the 1990s.¹⁴⁰ In 1994, an International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights was established under the auspices of the U.N.'s High Commissioner for Human Rights, and later created a NHRI accreditation process that, in effect, grants its highest accreditation only to human rights commissions and human rights ombudsman institutions.¹⁴¹ Paralleling this move, U.N. human rights treaty committees have issued general comments that call on contracting state parties in major U.N. human rights treaties to establish or strengthen NHRIs and have also made recommendations to states on the establishment and strengthening of NHRIs in concluding observations to periodic state reports.¹⁴²

On a regional basis, both the Council of Europe (COE) and the Organization of American States (OAS) have strongly supported the human rights ombudsman model.¹⁴³ In particular, the mandate of the COE's Commissioner for Human Rights includes facilitating the activities of national ombudsmen or similar institutions in the human rights field in COE member states.¹⁴⁴ This is unsurprising because the human

¹³⁹ See REIF, *supra* note 1, at 95–96.

¹⁴⁰ See G.A. Res. 48/134, *supra* note 138, ¶¶ 1–13. It is no coincidence, given that the number of human rights ombudsman institutions accelerated rapidly during the first half of the 1990s. See Linda C. Reif, *The Shifting Boundaries of NHRI Definition in the International System*, in HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE: ASSESSING NATIONAL HUMAN RIGHTS INSTITUTIONS (Ryan Goodman & Thomas Pegram eds., forthcoming 2011). For example, in 1995 “ombudsmen” were recognized by the U.N. Centre for Human Rights as one NHRI category, but the description focused mainly on the classical ombudsman format and there was no recognition of the various human rights protection powers given to human rights ombudsman institutions. See U.N. CTR. 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, ¶¶ 41, 56–62, U.N. Doc. HR/P/PT/4 (1995) [hereinafter U.N. CENTRE FOR HUMAN RIGHTS HANDBOOK].

¹⁴¹ See RACHEL MURRAY, *THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS AT THE INTERNATIONAL AND REGIONAL LEVELS: THE EXPERIENCE OF AFRICA* 30–31 (2007). For full accreditation, commissions and human rights ombudsmen must comply with the Paris Principles as fleshed out by ICC General Observations. See *id.* at 42.

¹⁴² See *id.* at 31; REIF, *supra* note 1, at 116–21.

¹⁴³ See Reif, *supra* note 140.

¹⁴⁴ See Eur. Consult. Parl., *Resolution on the Council of Europe Commissioner for Human Rights*, art. 3, 104th Sess., Res. No. 99 (50) (May 7, 1999), available at <https://wcd.coe.int/wcd/ViewDoc.jsp?id=458513&Site=COE>.

rights ombudsman format originated in Europe and quickly became the predominant model in both Europe and Latin America.¹⁴⁵

Some NHRIs have been externally imposed by international actors.¹⁴⁶ In particular, post-conflict peace-building processes undertaken by the U.N. and regional organizations resulted in the establishment or strengthening of NHRIs, most often employing human rights ombudsmen during the peace processes in Latin American and Central and Eastern European nations.¹⁴⁷ As part of the good governance initiatives launched in the late 1990s, international financial institutions and donor states pressured other nations to establish or strengthen NHRIs.¹⁴⁸ Pegram argues, however, that the concept of diffusion of NHRIs by coercion is of limited use in explaining their increased popularity during this period.¹⁴⁹

Given the Paris Principles' focus on the human rights commission, the large number of human rights ombudsmen established during the first half of the 1990s must have been due to the influence of factors other than these standards.¹⁵⁰ These influences were likely regional rather than international in nature. In Europe and Latin America, inter- and intra-regional legal transplantation was probably the initial cause, and the support of regional organizations such as the COE and later the OAS likely continued the trend.¹⁵¹ Nevertheless, as the U.N. increasingly acknowledged human rights ombudsmen as NHRIs, U.N.

¹⁴⁵ See REIF, *supra* note 1, at 172.

¹⁴⁶ See *id.* at 260–84.

¹⁴⁷ See *id.* (discussing the post-conflict peace-building processes in El Salvador, Bosnia and Herzegovina, Kosovo, and East Timor).

¹⁴⁸ See *id.* at 77.

¹⁴⁹ See Pegram, *supra* note 78, at 760.

¹⁵⁰ See REIF, *supra* note 1, at 88–89, 96. In addition to the pre-1990 Spanish, Portuguese, Swedish, Polish, Guatemalan, and Ugandan institutions, the following human rights ombudsman institutions were enshrined in law early on: Hungary (1990 constitution, 1992–1993 law); Slovenia (1991 constitution, 1993 law); Lithuania (1992 constitution, 1994 law); Croatia (1990 constitution, 1992 law); Macedonia (1991 constitution); Russia (1993 constitution); El Salvador (1992 constitutional amendment and law); Costa Rica (1992 law); Honduras (1992 decree, 1995 constitution); Nicaragua (1995 constitutional reform and law); Colombia (1991 constitution, 1992 law); Argentina (1993 law, 1994 constitution); Peru (1993 constitution, 1995 law); Bolivia (1994 constitution); Paraguay (1992 constitution, 1995 law); Belize (1994 law); Ethiopia (1994 constitution); Lesotho (1993 constitution); Malawi (1994 constitution); Namibia (1990 constitution and law); and Seychelles (1993 constitution). See *id.* at 126, 141, 145, 157–59, 172, 188–90, 206–07, 220–23.

¹⁵¹ See *id.* at 89–93; see also BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 110–11 (2009) (discussing empirical research finding that governments are influenced by other governments in the same region in decisions whether to and to what extent to make commitments under the core U.N. human rights treaties).

standards, interpretations, recommendations, and accreditation rules inevitably would have exerted more influence on the establishment of human rights ombudsmen.

*D. Treaties and Other International Initiatives that Use NHRIs
for Domestic Implementation*

A growing number of recent U.N. human rights treaties and initiatives call on nation states to establish or use existing NHRIs to implement their treaty obligations and improve human rights protections.¹⁵² States have reacted by creating NHRIs—including human rights ombudsmen—or by adding a human rights protection mandate to the duties of their existing ombudsman.¹⁵³ The following section discusses the impact of developments in the areas of children's rights; the prevention of torture and other cruel, inhuman or degrading treatment or punishment; and multinational corporations and human rights on these institutions.¹⁵⁴

1. Children's Rights Protection: The U.N. Convention on the Rights of the Child

The U.N. Convention on the Rights of the Child (CRC), ratified by nearly every nation state, contains civil, political, economic, social, cultural, and protective rights for children and youth.¹⁵⁵ In 2002, the U.N. Committee on the Rights of the Child issued General Comment Number Two, which stated that CRC parties should establish independent NHRIs, children's ombudsmen, or children's commissioners to promote and monitor the implementation of the CRC, using a thematic institution in states with enough resources or a "broad-based NHRI that includes a specific focus on children" in states with limited resources.¹⁵⁶

¹⁵² See REIF, *supra* note 1, at 97–99, 116–23.

¹⁵³ See *id.* at 82–83.

¹⁵⁴ See *infra* Part II.D; see also Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, Annex I, art. 33, ¶ 2, U.N. Doc. A/RES/61/106 (Jan. 24, 2007); International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, art. 28, U.N. Doc. A/RES/61/177 (Jan. 12, 2007). European Union directives combating discrimination are being implemented by member states' thematic institutions or by human rights ombudsmen. See EQUINET, <http://www.equineteurope.org> (last visited May 8, 2011).

¹⁵⁵ See generally Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3.

¹⁵⁶ Comm. on the Rights of the Child, The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child, ¶ 6, U.N. Doc. CRC/GC/2002/2 (Nov. 15, 2002). The General Comment also states that if a broad-

Unfortunately, a relatively small number of parties to the CRC have established children's ombudsman institutions to date, and there is little uniformity.¹⁵⁷

Rather than create a separate office or institution, states are more likely to use their human rights ombudsman or commission to address children's rights and to implement the CRC. For example, in Latin American and European countries, some human rights ombudsmen have developed internal departments for children's rights protection that place a special focus on investigations involving children.¹⁵⁸ The Greek government responded to the U.N. Committee on the Rights of the Child recommendations in 2003.¹⁵⁹ Greece's legislation expanded the mandate of its human rights ombudsman to include the defense and promotion of children's rights, established a Deputy Ombudsman for Children, and gave the institution jurisdiction over both the public and private sectors in matters concerning children.¹⁶⁰ In 1995, Finland's Parliamentary Ombudsman was transformed into a human rights ombudsman, and in 1998 the parliament requested that the ombudsman place a special focus on children's rights.¹⁶¹ Regardless of their form, human rights ombudsman institutions worldwide are increasingly addressing children's rights issues through the performance of their duties.

based NHRI is used, it should have either an identifiable commissioner specifically responsible for children's rights or a specific section or division responsible for children's rights. *See id.*

¹⁵⁷ *See Members*, EUR. NETWORK OF OMBUDSPERSONS FOR CHILD., <http://www.crin.org/enoc/members/index.asp> (last visited May 8, 2011) (listing children's rights ombudsmen in thirty-one European nations).

¹⁵⁸ *See* Linda C. Reif, *The Ombudsman and the Protection of Children's Rights*, 17 ASIA PAC. L. REV. 27, 38–48 (2009) (discussing such developments in Finland, Spain, and Greece).

¹⁵⁹ *See id.* at 46–48.

¹⁶⁰ *See id.* at 46–47.

¹⁶¹ *See id.* at 39; *Children's Rights*, PARLIAMENTARY OMBUDSMAN OF FIN. (Mar. 1, 2010), <http://www.oikeusasiamies.fi/Resource.phx/ea/english/ombudsman/tasks/childrensrights.htm>.

2. Designation of the Human Rights Ombudsman as a National Preventive Mechanism Under OPCAT

On June 22, 2006, OPCAT entered into force.¹⁶² OPCAT is designed to enhance the implementation of state obligations in the Convention Against Torture, one of the U.N.'s core human rights treaties.¹⁶³ Article One of OPCAT creates a system for independent international and domestic bodies to conduct regular visits to facilities where persons are "deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment."¹⁶⁴ State parties are required to establish, designate, or maintain one or more independent domestic visiting bodies, called national preventive mechanisms (NPMs), that give due consideration to the Paris Principles in conducting these visits.¹⁶⁵ Moreover, states must allow regular visits by the NPMs to facilities where persons are deprived of their liberty.¹⁶⁶ The purpose of these visits is to strengthen the protection of persons detained in these facilities.¹⁶⁷ The NPMs must be given powers to examine detained persons, make recommendations to the government with respect to relevant obligations of international law, and submit observations and proposals concerning extant or proposed legislation.¹⁶⁸

Some OPCAT states have established a new institution as their NPM; others utilize an existing human rights commission.¹⁶⁹ A pre-existing human rights ombudsman is often well-suited to this task: some ombudsman institutions, particularly those in Europe, already have the power to inspect facilities where persons are involuntarily detained and, thus, a number of OPCAT state parties have designated their human

¹⁶² See *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 57/199, Dec. 18, 2002, 2375 U.N.T.S. 237 (entered into force June 22, 2006) [hereinafter OPCAT]. As of May 8, 2011, there were fifty-seven contracting parties and sixty-eight signatories to OPCAT. See *Status*, U.N. TREATY COLLECTION (May 8, 2011, 07:03:16 EDT), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-9-b&chapter=4&lang=en.

¹⁶³ See OPCAT, *supra* note 162, preamble.

¹⁶⁴ *Id.* The international body is the U.N. Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the U.N. Committee Against Torture, which has powers similar to the NPMs. See *id.* art. 2.

¹⁶⁵ *Id.* arts. 2, 3.

¹⁶⁶ *Id.* art. 4.

¹⁶⁷ *Id.*

¹⁶⁸ See OPCAT, *supra* note 162, art. 19.

¹⁶⁹ See generally *Global Status of Ratifications, Signatures and NPM Designations*, ASS'N FOR THE PREVENTION OF TORTURE (Nov. 2010), <http://www.apt.ch/npm/OPCAT1110.pdf> (listing fifty-seven states parties, thirty-four of which had designated an NPM as of November 2010).

rights ombudsman as an OPCAT NPM.¹⁷⁰ A few nations, such as Denmark, New Zealand, and Luxembourg, have even designated their classical ombudsman as their NPM or as one of a number of NPMs.¹⁷¹ These designations demonstrate that European nations are the most predisposed to designate their human rights or classical ombudsman institutions as OPCAT NPMs.¹⁷² Designating human rights ombudsmen as OPCAT NPMs adds another important human rights protection function to the institution and increases the institution's ties to the international human rights community.

3. Multinational Corporations, Human Rights, and NHRIs

In recent years, the U.N. human rights overseers have turned their gaze to the behavior of multinational corporations (MNCs) and their role in human rights breaches. In April 2008, John Ruggie, the U.N. Secretary-General's Special Representative on Business and Human Rights, issued a report entitled "Protect, Respect and Remedy: a Framework for Business and Human Rights" ("Ruggie Report").¹⁷³ One of the core principles of the Ruggie Report is the need for more effective judi-

¹⁷⁰ See EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 491-92 (providing list of ombudsmen in Europe with inspection powers). As of November 2010, the human rights ombudsman institutions in Albania, Armenia, Azerbaijan, Costa Rica, Cyprus, Czech Republic, Estonia, Georgia, Macedonia, Moldova (with NGOs), Peru, Poland, Slovenia (with NGOs), Spain, and Sweden (with the Chancellor of Justice) have been designated as NPMs. See *Global Status of Ratifications, Signatures and NPM Designations*, *supra* note 169, at 1-4. The human rights ombudsman institutions in Croatia, Finland, Kazakhstan, Montenegro, Nicaragua, and Ukraine are under consideration for designation as NPMs. See *id.*; *Summary of the Annual Report 2007, PARLIAMENTARY OMBUDSMAN OF FIN.*, 24 (Feb. 25, 2008), <http://www.oikeusasiamies.fi/dman/Document.phx?documentId=vl22108104517482&cmd=download>.

¹⁷¹ See *Changes to Jurisdiction of the New Zealand Ombudsmen Institution*, IOI NEWSLETTER (Int'l Ombudsman Inst.), Dec. 2008, at 7, <http://www.theioi.com/publications/i-o-i-newsletter> (follow "IOI Newsletter_200812_English" hyperlink) [hereinafter I.O.I. Newsletter] (noting that the Human Rights Commission is the central NPM); *Global Status of Ratifications, Signatures and NPM Designations*, *supra* note 169, at 2, 3; *The OPCAT Tasks: General Principles*, DANISH PARLIAMENTARY OMBUDSMAN (Aug. 28, 2009), <http://en.ombudsmanden.dk/opcat/>. One might argue that giving an OPCAT NPM designation to a classical ombudsman pushes the institution into the human rights ombudsman category because the institution acquires an express and ongoing role in implementing the state's human rights treaty obligations. See REIF, *supra* note 1, at 82-83. Consequently, this position would increase the number of human rights ombudsmen relative to classical ombudsman institutions.

¹⁷² See *Global Status of Ratifications, Signatures and NPM Designations*, *supra* note 169, at 2-4.

¹⁷³ See Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, ¶¶ 10, 17, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (John Ruggie) [hereinafter Ruggie Report].

cial and non-judicial remedies for victims of corporate human rights violations; NHRIs are specifically included as non-judicial remedies to investigate and punish human rights breaches by companies.¹⁷⁴ The Ruggie Report states, "The actual and potential importance of these institutions cannot be overstated. Where NHRIs are able to address grievances involving companies, they can provide a means to hold business accountable. NHRIs are particularly well-positioned to provide processes—whether adjudicative or mediation-based—that are culturally appropriate, accessible, and expeditious."¹⁷⁵ The Ruggie Report was accompanied by research on eighty-five NHRIs, finding that at least forty of these can handle complaints related to the human rights activities of companies.¹⁷⁶ While this research is incomplete, the institutions listed are predominantly human rights commissions and human rights ombudsman institutions.¹⁷⁷

In June 2008, the U.N. Human Rights Council welcomed the Ruggie Report and extended Ruggie's mandate for three more years so he could "operationalize" his report.¹⁷⁸ Regarding non-judicial remedies, Ruggie has indicated that his "focus is on how to strengthen existing mechanisms, and identifying where new ones might be required."¹⁷⁹ Consequently, there will likely be an increasing U.N. and state interest in the use of human rights ombudsman institutions and commissions in the investigation of human rights breaches by corporate actors. Classical ombudsmen, lacking an express human rights protection mandate and with a limited, public sector jurisdiction, will probably not have the same attraction.¹⁸⁰ This may also provide the impetus for some states to transition their classical ombudsman to a human rights ombudsman. The jurisdiction of human rights ombudsmen, however, remains as a potential stumbling block: most MNC conduct occurs in the private sector, and the authority of many human rights ombudsmen is limited

¹⁷⁴ See *id.* ¶¶ 84–85.

¹⁷⁵ *Id.* ¶ 97.

¹⁷⁶ *Id.* ¶ 96.

¹⁷⁷ See OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, BUSINESS AND HUMAN RIGHTS: A SURVEY OF NHRI PRACTICES, 5–36 (2008), available at <http://www.business-humanrights.org/> (search "A survey of NHRI practices"; then follow "[DOC] Business and Human Rights: A Survey of NHRI [National Human Rights Institutions] Practices" hyperlink) (NHRIs on the list appear to be only those that are ICC-accredited).

¹⁷⁸ John G. Ruggie, Special Representative of the U.N. Sec'y Gen., *Prepared Remarks: Public Hearings on Business and Human Rights*, BUS. & HUM. RTS. RESOURCE CENTRE, 4 (Apr. 16, 2009), <https://198.170.85.29/Ruggie-remarks-to-European-Parliament-16-Apr-2009.pdf>.

¹⁷⁹ *Id.*

¹⁸⁰ See REIF, *supra* note 1, at 2–3, 8–9.

to the public sector.¹⁸¹ Accordingly, the jurisdiction and authority of human rights ombudsmen would have to be extended to private sector activity before they could investigate MNCs.¹⁸²

III. HUMAN RIGHTS OMBUDSMAN MANDATES: CORE POWERS AND OPERATING PRACTICES

There is no uniform model for a human rights ombudsman. Human rights ombudsman institutions vary considerably in their structure, functions, and powers, and these differences are often seen both intra- and inter- regionally. For example, except for Spain and Portugal, most Western European human rights ombudsman institutions more closely reflect the classical ombudsman model of investigation, recommendation, and reporting.¹⁸³ In contrast, human rights ombudsman institutions in Latin America and Central and Eastern Europe typically have more extensive powers.¹⁸⁴ Hybrid ombudsman institutions with human rights mandates in other parts of the world vary widely: some are limited to the classical powers, while others have expanded authority.¹⁸⁵

Both a comprehensive survey of the many human rights ombudsman institutions worldwide and the effectiveness of individual institutions are beyond the scope of this Article. NHRI effectiveness at any point in time is determined by many interrelated legal and non-legal factors.¹⁸⁶ From the perspective of comparative law, the functional suc-

¹⁸¹ See *id.* at 3; Reif, *supra* note 158, at 47.

¹⁸² See Ruggie Report, *supra* note 173, ¶¶ 84–85.

¹⁸³ See EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 79 (noting that Andorra's Citizen's Advocate reflects the classical model discussed); *The Parliamentary Ombudsmen—JO*, PARLIAMENTARY OMBUDSMAN (Swed.), http://www.jo.se/Page.aspx?MenuId=12&ObjectClass=DynamX_Documents&Language=en (last visited May 8, 2011) (investigations on complaint or own-motion, recommendations, reporting, inspections, power to prosecute public officials, power to initiate disciplinary procedures, OPCAT NPM); *The Tasks of the Ombudsman*, PARLIAMENTARY OMBUDSMAN OF FIN., <http://www.oikeusasiamies.fi/Resource.phx/ea/english/ombudsman/tasks/index.htm> (last visited May 8, 2011); *What is the Greek Ombudsman*, GREEK OMBUDSMAN, http://www.synigoros.gr/en_what_is.htm (last visited May 8, 2011) (investigations on complaint or own-motion, recommendations, reporting, private sector jurisdiction over children's rights matters).

¹⁸⁴ See REIF, *supra* note 1, at 191.

¹⁸⁵ See *id.* at 209–12, 222, 234–37, 282–84 (noting that institutions in Namibia, Seychelles, East Timor, and Jamaica have more expansive powers).

¹⁸⁶ See *id.* at 395–410; Reif, *supra* note 140. These legal and non-legal factors include compliance with the Paris Principles, democratic government, independence of the NHRI, broad jurisdiction over human rights matters, sufficient powers to carry out the NHRI's mandate, the provision of sufficient financial and human resources, the appointment of an ombudsman and staff with the appropriate expertise, experience and pluralism to handle all mandates successfully, accessibility of the institution, cooperative relationships with

cess—or lack thereof—of ombudsman transplants is also beyond the scope of this Article given that many, if not all, of the same factors come into play in individual jurisdictions in determining this question.¹⁸⁷ Instead, the following section engages in a more limited undertaking: it examines a selection of the core legal powers granted to, and operating practices instituted by, human rights ombudsman institutions. In doing so, it highlights those that should be regarded as essential for all human rights ombudsman institutions.

A. Specialized Ombudsman Institutions, Deputy Ombudsmen, and Designated Units or Departments

When a government adopts the human rights ombudsman model, it must decide whether to create one institution or several, depending on the human rights needs of the state or territory.¹⁸⁸ Furthermore, a government can create multiple human rights ombudsman institutions.¹⁸⁹ For example, Hungary has separate parliamentary commissioners for civil rights, national and ethnic minority rights, environmental protection (“future generations”), and data protection and freedom of information, although they are all housed in the same building.¹⁹⁰ Due to the forces described above, it is far more common for jurisdictions to establish one human rights ombudsman institution rather than multiple thematic institutions.¹⁹¹ Moreover, institutions tend to create subspecialties where human rights and general administrative oversight functions are separated.¹⁹² Sometimes there is even specialization in particular areas of human rights.¹⁹³

human rights NGOs and international organizations, government support of the institution and responsiveness to its recommendations, and a positive public image of the institution and its ability to effect improvements in human rights protection and government administration. *See generally* U.N. CENTRE FOR HUMAN RIGHTS HANDBOOK, *supra* note 140 (encouraging the establishment of strong NHRIs and explaining how to establish such institutions).

¹⁸⁷ *See supra* note 87 and accompanying text.

¹⁸⁸ *See* REIF, *supra* note 1, at 11; Fernando Alvarez de Miranda y Torres, *Human Rights and Their Function in the Institutional Strengthening of the Ombudsman*, in 2 THE INTERNATIONAL OMBUDSMAN YEARBOOK, *supra* note 9, at 146, 147.

¹⁸⁹ *See* REIF, *supra* note 1, at 11.

¹⁹⁰ *See* PARLIAMENTARY COMMISSIONERS' OFF. OF HUNG., http://www.obh.hu/index_en.htm (last visited May 8, 2011). The U.N. has exhibited conflicting views on multiple, thematic NHRIs. *See* Reif, *supra* note 140. While the ICC prefers one general-service NHRI in a state, the U.N. Committee on the Rights of the Child calls for thematic NHRIs for children, at least in developed states. *See id.*

¹⁹¹ *See* Reif, *supra* note 140; *supra* Part II.A–C.

¹⁹² *See* REIF, *supra* note 1, at 88.

¹⁹³ *See* Reif, *supra* note 140.

Specialization can be accomplished through a variety of legal provisions and operating practices. These include the appointment of deputy ombudsmen for specific human rights areas by the legislature, or a more informal appointment by the ombudsman without an express legislative mandate.¹⁹⁴ Another common practice is to create separate departments or units for different focus areas. For example, numerous Latin American human rights ombudsman institutions have departments for women's rights and children's rights.¹⁹⁵ As discussed above, growing numbers of human rights ombudsmen are being designated as OPCAT NPMs.¹⁹⁶ This trend is expected to produce more internal specialization: Costa Rica's *Defensor de los Habitantes* has already created an NPM unit.¹⁹⁷

B. *The Ombudsman's Jurisdiction over Government Departments and Human Rights*

The breadth of a human rights ombudsman's jurisdiction plays a crucial role in the ability of the institution to protect human rights.¹⁹⁸ A human rights ombudsman should have jurisdiction over all of the government departments, agencies, and other public bodies that are possible rights-infringers.¹⁹⁹ In particular, a human rights ombudsman should have jurisdiction over the police, armed forces, immigration and refugee departments, prisons, detention centers, young offender cen-

¹⁹⁴ See *id.* Legislative provisions are less common but do exist. For example, legislation created the Deputy Ombudsman for Children of Greece and a legislative enactment will place a deputy *Défenseur des Enfants* inside France's Defender of Rights institution. See Rachel Hodgkin & Peter Newell, *The Role and Mandate of Children's Ombudspersons in Europe: Safeguarding and Promoting Children's Rights and Ensuring Children's Views Are Taken Seriously*, EUR. NETWORK OMBUDSPERSONS FOR CHILD., 2, 10, 17, 36, 40 (Dec. 2010), <http://www.crin.org/docs/ENOC%20Malta%20report%20final.pdf>; *Members*, *supra* note 157. Legislation may also stipulate that there be a deputy focusing on women's rights, such as in Ethiopia. See REIF, *supra* note 1, at 114–15. The Ethiopian deputy also focuses on children's rights. See *id.*

¹⁹⁵ See REIF, *supra* note 1, at 114–15.

¹⁹⁶ See Reif, *supra* note 140; *supra* notes 169–172 and accompanying text.

¹⁹⁷ See *Global Status of Ratifications, Signatures and NPM Designations*, *supra* note 169, at 2. Other human rights ombudsman offices do not create distinct departments, but allocate tasks differently. See Reif, *supra* note 158, at 40. For example, Finland's Parliamentary Ombudsman, a human rights ombudsman institution, has two deputies, and subject-matter areas are divided between the three appointees. See *id.*

¹⁹⁸ See REIF, *supra* note 1, at 87.

¹⁹⁹ See Reif, *supra* note 140 (“[S]ince ombudsmen scrutinize administrative conduct they regularly investigate authorities that are infringing human rights such as the police, prisons and immigration authorities.”).

ters, and other facilities where persons are held involuntarily.²⁰⁰ For example, investigations by a wide variety of ombudsman institutions into child protection matters show that governments can infringe on children's rights not only through the conduct of child welfare, criminal justice, and police authorities, but also through the behavior of departments in charge of health, education, prison, immigration, and asylum, among others.²⁰¹

A human rights ombudsman should also have jurisdiction over a broad range of specific human rights. In addition to civil and political rights, economic, social, and cultural rights should also fall within the institution's mandate. Jurisdiction over these rights is particularly important given that they are often non-justiciable; thus, an NHRI like a human rights ombudsman may be the only venue for members of the public to complain about their violation.²⁰² In fact, complaints concerning health, education, and other social services are quite common for human rights ombudsmen.²⁰³

C. Jurisdiction over Private Sector Actors

One typical characteristic of the ombudsman institution is that its jurisdiction is limited to public sector conduct only, usually the administrative or executive branch of government and rarely the judicial branch.²⁰⁴ While a growing number of all types of ombudsman institutions have jurisdiction over private actors providing public services, a minority of human rights ombudsmen have more extensive jurisdiction over private sector conduct.²⁰⁵ For example, human rights ombudsman institutions in Namibia, Guatemala, El Salvador, Honduras, Colombia, and Papua New Guinea have jurisdiction over private persons in human rights cases to differing degrees.²⁰⁶ In Europe, some human rights

²⁰⁰ See *id.* Some authorities (for example, the armed forces or immigration authorities) may not exist in sub-national jurisdictions with a human rights ombudsman, but jurisdiction over the full spectrum of facilities for involuntary detention is essential if an ombudsman is to be designated as an OPCAT NPM. See *id.*

²⁰¹ See REIF, *supra* note 1, at 330–31, 302.

²⁰² See *id.* at 113.

²⁰³ See *id.* at 402.

²⁰⁴ See *id.* 11–13, 302 (noting different types of ombudsman jurisdiction over the judicial branch in Sweden, Finland, Slovenia, Albania, and Costa Rica).

²⁰⁵ See *id.* at 401–02.

²⁰⁶ See REIF, *supra* note 1, at 3, 402, 403. Hybrid commissions in Ghana and Tanzania also have jurisdiction over private sector conduct. See *id.*

ombudsmen have subject-specific jurisdiction over private actors.²⁰⁷ Portugal's *Provedor de Justiça* has limited jurisdiction over private sector entities that involve a special relationship of dominion in the protection of rights.²⁰⁸ Greece's ombudsman has jurisdiction over violations of children's rights allegedly committed by private persons.²⁰⁹ As argued earlier, there will likely be growing pressure on states to expand the jurisdiction of NHRIs to include private corporate conduct.²¹⁰

D. *Own-Motion Investigation Power*

Many classical and human rights ombudsman institutions have the power to launch investigations on their own motion.²¹¹ Own-motion investigations can be used in a variety of situations to enhance human rights protection—because the ombudsman need not wait for an actual complaint, she can be more proactive in monitoring events in her jurisdiction.²¹² The ombudsman can monitor the media for reports on behavior that may constitute the target of an own-motion investigation.²¹³ If the ombudsman has the power to inspect facilities where persons are detained involuntarily, such visits may bring to light situations which the ombudsman may desire to investigate.²¹⁴ Thus, own-motion investigations can benefit vulnerable populations such as prisoners, children, and the mentally ill, because they are less likely or entirely unable to complain themselves. Furthermore, a pattern of complaints about the same matter may indicate a systemic problem involving human rights issues; an own-motion investigation can be an effective mechanism to address larger systemic problems in addition to the individual concerns.²¹⁵

²⁰⁷ See EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 493 (listing Cyprus, Estonia, Greece, Latvia, and Portugal as examples); EQUINET, *supra* note 154.

²⁰⁸ See REIF, *supra* note 1, at 3, 141–42.

²⁰⁹ See *id.* at 153.

²¹⁰ See Ruggie Report, *supra* note 173, ¶¶ 84–85. Admittedly, this extension of jurisdiction could have its disadvantages. It has the potential to generate large numbers of complaints or investigations that drain financial and human resources, possibly resulting in backlogs and delays.

²¹¹ See EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 21. For example, most ombudsmen in Europe have own-motion investigatory power. See *id.* at 21, 490.

²¹² See REIF, *supra* note 1, at 3, 403; Hans Gammeltoft-Hansen, *The Ombudsman as a Non-Traditional Tool for Citizen Participation*, in 2 THE INTERNATIONAL OMBUDSMAN YEAR-BOOK, *supra* note 9, at 189, 193–95.

²¹³ See REIF, *supra* note 1, at 3, 403.

²¹⁴ See Gammeltoft-Hansen, *supra* note 212, at 194–95; Reif, *supra* note 50, at 273.

²¹⁵ See REIF, *supra* note 1, at 104; Gammeltoft-Hansen, *supra* note 212, at 193–95.

Examples of own-motion investigations of human rights issues abound. The public reports of these investigations are valuable, persuasive tools for ombudsmen to use in effecting legal or political reform. For example, various human rights ombudsman institutions have conducted own-motion investigations concerning children and their rights, covering matters such as the child welfare system, the child custody process, delays in investigation of alleged sexual abuse of children, police treatment of minors, the juvenile justice sector, the treatment of children in schools, and repatriation procedures for unaccompanied immigrant minors.²¹⁶ Because many affected individuals are unable to lodge complaints themselves, all human rights ombudsman institutions should be given strong own-motion investigation powers.

E. Inspection Powers

A number of human rights and classical ombudsman institutions have the statutory power to inspect places where persons are involuntarily detained to insure against inappropriate treatment.²¹⁷ The inspection power can cover a broad range of locations, including prisons, detention centers, immigration facilities, young offender centers, and mental health care facilities.²¹⁸ In the early 1990s an empirical study of ombudsman institutions in forty-eight nations found that sixty-six of seventy-six institutions (86.8%) had an inspection power.²¹⁹ More recently, a survey of ombudsman institutions found that most, but not all, of the human rights ombudsmen throughout Europe have the power to inspect a range of facilities.²²⁰ Additionally, a strong inspection power

²¹⁶ See Reif, *supra* note 158, at 41–48.

²¹⁷ See EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 41–42; *supra* note 214 and accompanying text.

²¹⁸ See EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 41–42.

²¹⁹ See Udo Kempf & Marco Mille, *The Role and the Function of the Ombudsman: Personalised Parliamentary Control in Forty-Eight Different States*, in THE INTERNATIONAL OMBUDSMAN ANTHOLOGY: SELECTED WRITINGS FROM THE INTERNATIONAL OMBUDSMAN INSTITUTE, *supra* note 10, at 195, 213.

²²⁰ See EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 41–42, 491–92 (finding ombudsman inspection powers mainly in Central and Western Europe, including Andorra, Denmark, Finland, Norway, Portugal, and Spain). The recent inspection work of the Czech Republic and Lithuania human rights ombudsmen provide examples of this power. See *The Work of Ombudsmen & Similar Bodies*, EUROPEAN OMBUDSMAN—NEWSLETTER, Apr. 2009, at 39–40, 55–56, available at https://oldbookshop.publications.europa.eu/eubookshop/download.action?fileName=QKAB09012ENC_002.pdf&eubphfUid=10243311&catalogNbr=QK-AB-09-012-EN-C.

backed up by adequate financial support is essential for an ombudsman that has been assigned OPCAT NPM duties.²²¹

In short, inspection powers should be given to all human rights ombudsman institutions. They should be exercisable by the ombudsman on her own motion at any time, cover the full range of detention facilities, and include powers sufficient to satisfy any international obligations of the state under OPCAT. These powers should be exercised regularly.

F. *Litigation Powers: The Constitutional Court and Other Legal Interventions*

Many national human rights ombudsmen in Europe and Latin America, where civil law systems dominate, have been given additional powers. They may bring actions on constitutional matters involving human rights to a constitutional or supreme court, become involved in administrative court proceedings, and prosecute public officials.²²² Professor Gabriele Kucsko-Stadlmayer's survey of European ombudsmen provides the following information: four human rights ombudsmen can start criminal proceedings, while many can recommend that they be instituted; seven can initiate disciplinary proceedings, while many can recommend that they be instituted; eleven can make applications before administrative or other courts; and many have the right to bring actions before the nation's constitutional court.²²³

To summarize, the number and form of European ombudsman actions before constitutional courts varies, but a fair number can challenge the constitutionality of laws and two can contest the constitutional compatibility of treaties.²²⁴ Several can contest the constitutionality of government action in individual cases.²²⁵ Several may take the

²²¹ See generally *Global Status of Ratifications, Signatures and NPM Designations*, *supra* note 169 (listing fifty-four states parties, thirty-seven of which had designated an NPM as of November 2010). For example, Poland's Commissioner for Civil Rights Protection was designated as the nation's NPM on January 18, 2008 and carried out seventy-three visits in 2008 in fulfillment of his OPCAT duties. See *European Union Law*, EUROPEAN OMBUDSMAN—NEWSLETTER, Apr. 2009, at 32, available at https://oldbookshop.publications.europa.eu/eubookshop/download.action?fileName=QKAB09012ENC_002.pdf&eubphfUid=10243311&catalogNbr=QK-AB-09-012-EN-C.

²²² See EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 51–53, 55–56. Given the number of institutions with these powers, a full survey is not possible within the scope of this Article.

²²³ See *id.* at 53–56, 508–10, 515–20. These numbers do not include classical ombudsmen who may have some of these powers, including disciplinary or prosecution powers. See *id.*

²²⁴ See *id.* at 51–53, 515–20.

²²⁵ See *id.*

unusual approach of arguing that the government has acted unconstitutionally by its failure to legislate.²²⁶ Lastly, some human rights ombudsmen can request the interpretation of constitutional provisions.²²⁷

The Portuguese and Spanish institutions were the first to have constitutional court powers and provide contrasting examples of their frequency of use.²²⁸ The Portuguese *Provedor de Justiça* is empowered to refer two types of constitutionality actions before the Constitutional Court: (1) an action to determine whether laws are unconstitutional or illegal and (2) an assessment regarding whether the government has failed to comply with the constitution through the omission of legislative measures necessary to render constitutional norms binding.²²⁹ Since it began operating in 1975, the *Provedor* has launched 175 actions before Portugal's Constitutional Court.²³⁰ Spain's *Defensor del Pueblo* is empowered to bring two types of actions before Spain's Constitutional Court: (1) actions challenging the constitutionality of legislative action, known as abstract review and (2) actions in support of an individual's core constitutional rights in concrete cases, known as concrete review or the *amparo* action.²³¹ As compared with the Portuguese *Provedor*, the Spanish *Defensor* has launched substantially fewer constitutionality actions over a slightly shorter time frame; the *amparo* action before the Constitutional Court is rarely used because individuals have the same right of action.²³²

²²⁶ See *id.* at 354–55, 517–18 (citing Portugal as an example).

²²⁷ See EUROPEAN OMBUDSMAN INSTITUTIONS, *supra* note 10, at 53–55, 517–18.

²²⁸ See Reif, *supra* note 42, at 36.

²²⁹ See Constitution of the Portuguese Republic, 7th Revision (2005), arts. 281–83, available at http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao_definitive.pdf; Estatuto do Provedor de Justiça [Statute of Portugal's Provider of Justice], Lei No. 9/91 de 9 de Abril, art. 20(3)–(4), available at <http://www.provedor-jus.pt/legislacao/estatutos.htm>; *The Work of Ombudsmen & Similar Bodies*, *supra* note 220, at 62–63.

²³⁰ See *The Work of Ombudsmen & Similar Bodies*, *supra* note 220, at 63 n.1.

²³¹ See REIF, *supra* note 1, at 147–48.

²³² See *id.* By the end of 2010, the *Defensor* had undertaken twenty-seven unconstitutionality actions and ten *amparo* actions. *Recursos de Amparo*, DEFENSOR DEL PUEBLO, <http://www.defensordelpueblo.es/es/Documentacion/Recursos/amparo/index.html> (last visited May 8, 2011); *Recursos de Inconstitucionalidad*, DEFENSOR DEL PUEBLO, <http://www.defensordelpueblo.es/es/Documentacion/Recursos/inconstitucionalidad/index.html> (last visited May 8, 2011). The *Defensor* has rejected many requests to launch unconstitutionality actions on the basis that they contained insufficient grounds for a feasible cause of action. See Emil Bălan & Gabriela Varia, *The Ombudsman and the Judicial Power: The Romanian Experience*, 26E TRANSYLVANIAN REV. ADMIN. SCI. 14, 27 (2009). Elsewhere in Europe, various Central and Eastern European human rights ombudsman institutions make regular use of their power to bring actions before their constitutional courts. See *id.* at 19–24, 28; Zubik, *supra* note 109, at 190–91.

The constitutional litigation power has also been influential in Latin America.²³³ Many Latin American human rights ombudsmen can take "unconstitutionality," *amparo*, habeas corpus, and other actions in their country's courts.²³⁴ Some Caribbean, African, and Asian human rights ombudsman institutions also have a variety of powers related to legal representation, such as providing financial support and legal advice to complainants who are launching their own constitutional litigation and taking court action.²³⁵

The vast majority of ombudsman institutions with prosecution powers, constitutional court litigation powers, or administrative court litigation powers exist in civil law states.²³⁶ Granting human rights ombudsman institutions litigation powers in these discrete judicial structures is a workable—even efficient—procedure for achieving timely decisions on constitutional and administrative legal questions. Further research should be done to determine whether a human rights ombudsman in a common law or pluralistic legal jurisdiction could operate in a cost-effective and timely manner with a litigation mandate. In common law jurisdictions, given their judicial branch structures, it may not even be possible to give a human rights ombudsman civil-law-type litigation powers. Giving *amicus curiae* or *intervener* functions to hu-

²³³ See REIF, *supra* note 1, at 188–92.

²³⁴ See *id.* at 188 & n.116, 189 & nn.118–20, 190 & nn.123–26, 192–93, 198, 201, 262 (Argentina: unconstitutionality, *amparo* actions; Peru: unconstitutionality, *amparo*, habeas corpus, *habeas data*, popular actions; Guatemala: judicial processes; Costa Rica: unconstitutionality, *amparo*, habeas corpus actions; Nicaragua: unconstitutionality, *amparo*, *exhibicion personal* actions; Panama: popular, nullity, *amparo*, *habeas data* actions; Colombia: unconstitutionality, popular, *tutela*, habeas corpus actions; Ecuador: unconstitutionality, *amparo*, *habeas data* actions; Bolivia: unconstitutionality, nullification, *amparo*, habeas corpus actions; Venezuela: unconstitutionality, *amparo*, habeas corpus, *habeas data* actions; Paraguay: *amparo*, habeas corpus actions). A few of these institutions can also participate in administrative court procedures to protect human rights. See *id.* at 191.

²³⁵ See *id.* at 208, 210, 220–23, 242–45. For example, the Jamaica Public Defender recommends that some complainants litigate constitutional rights issues and helps those complainants by compiling a list of pre-approved barristers who are qualified to litigate the issue and by administering a legal aid fund that pays for such litigation. See *id.* at 210. The Seychelles Ombudsman assists complainants in human rights charter litigation and may become a party to proceedings with leave of the court. See *id.* at 222 n.44.

²³⁶ See *supra* note 63 and accompanying text. In civil law countries, the constitutional court is considered to be outside the judicial branch of government and has the power to make legally binding decisions. See Lisa Hilbink, *Beyond Manicheism: Assessing the New Constitutionalism*, 65 MD. L. REV. 15, 22–23 (2006). A separate administrative court system exists in many civil law jurisdictions. See *id.*; see also EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 25–26. In a common law country, important legal issues are usually litigated in the general court system and appealed to a supreme court for final determination. See EDWARD McWHINNEY, SUPREME COURTS AND JUDICIAL LAW-MAKING: CONSTITUTIONAL TRIBUNALS AND CONSTITUTIONAL REVIEW xv, 1–3, 23–24 (1986).

man rights ombudsmen in common law jurisdictions may be more appropriate. Similarly, research is needed to determine whether more civil law states without constitutional courts, such as Scandinavian nations, could effectively add these types of litigation mandates to their ombudsman institutions.

G. Annual Reporting, Other Reports, Website Content, and Other Tools

A human rights ombudsman's reports and website are easy methods to provide useful information and assistance to the public. Annual and special reports can provide information on the important investigations undertaken by the ombudsman, which may increase public understanding of the ombudsman's role and the number of future complaints to the office.²³⁷ Moreover, reports may enhance the public perception of the usefulness of the institution.²³⁸ The ombudsman can also publicize and use reports in particular cases to persuade government authorities to change law and policy.²³⁹ Ombudsman offices that have OPCAT NPM status also need to describe the nature of this work in their annual reports or establish a separate reporting system.

Many ombudsman institutions have websites that provide public information regarding the activities of the office. These websites demonstrate the framework of the institution and what types of complaints it can investigate. Typically, they provide access to annual and special reports as well as to other relevant publications. Some websites also act as a means for members of the public to submit complaints to the ombudsman.²⁴⁰ Human rights ombudsmen go further and use their websites to enhance their human rights protection and promotion functions. Some post their public education publications on their websites. The website for Bolivia's *Defensor del Pueblo* provides a worthy example: it has numerous publications on topics such as discrimination, racism, indigenous

²³⁷ See EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 49.

²³⁸ See *id.* at 49–50; REIF, *supra* note 1, at 404, 407.

²³⁹ See EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 49–50. The investigative reports and public relations methodology of the Ontario Ombudsman Special Ombudsman Response Team is a good example of this phenomenon. See Reif, *supra* note 158, at 34. Further, annual reports can also be organized to highlight the human rights work of the multiple-mandate ombudsman by separating specific human rights issues into different chapters or sections. See EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 504.

²⁴⁰ See, e.g., GREEK OMBUDSMAN, *supra* note 183; *The Parliamentary Ombudsman—JO*, *supra* note 183.

rights, children's rights, and women's rights.²⁴¹ Human rights ombudsmen focusing on children often have a special section of their website designed for use by children with child-friendly language and design features. For example, the website of Catalonia's *Síndic de Greuges*, which has a Deputy Ombudsman for Children, contains a special section for minors.²⁴² It enables children and youth to submit their own complaints and opinions to the *Síndic* by e-mail and contains educational materials on children's rights.²⁴³

A few human rights ombudsman institutions may also have the resources for regular radio or television shows. These programs are capable of widely disseminating information about their work and human rights throughout the country. Argentina's *Defensor del Pueblo* is one such institution.²⁴⁴ Peru's *Defensor del Pueblo*, in its early years of operation, obtained funding to create a television infomercial to inform the viewing public about the nature of their rights and about the scope of the institution's ability to take complaints.²⁴⁵

H. *Promoting State Compliance with Human Rights Treaties, Human Rights Law Reform, Research, and Education*

A number of human rights ombudsman institutions have the responsibility to improve the contents of domestic human rights law and may recommend that the state accede to or ratify human rights treaties.²⁴⁶ In connection with this responsibility, a human rights ombudsman may also be empowered to make law reform proposals and may even become involved in the amendment process.²⁴⁷ Latin American institutions often have these duties.²⁴⁸ A few European human rights ombudsmen perform similar functions.²⁴⁹

²⁴¹ See *Materiales Producidos*, DEFENSORÍA DEL PUEBLO, <http://www.defensoria.gob.bo/> (follow "Promocion y Educacion" hyperlink; then follow "Materiales Producidos" hyperlink) (last visited May 8, 2011).

²⁴² See *El Defensor d'Infants i Adolescents*, SÍNDIC DE GREUGES DE CATALUNYA (Spain), <http://www.sindic.cat/ca/page.asp?id=113> (last visited May 8, 2011).

²⁴³ See *id.* The website for the human rights ombudsman in Andalucía, Spain has similar sections. See DEFENSOR DEL MENOR DE ANDALUCÍA, *supra* note 159.

²⁴⁴ See *Prensa*, DEFENSOR DEL PUEBLO DE LA NACIÓN ARGENTINA, <http://www.dpn.gob.ar/main.php?cnt=40> (last visited May 8, 2011).

²⁴⁵ See OMBUDSMAN'S OFFICE: PROTECTS YOUR RIGHTS (Ombudsman's Office of Peru, USAID) (videocassette) (on file with author).

²⁴⁶ See REIF, *supra* note 1, at 139, 190 n.124, 201-02, 262.

²⁴⁷ See *id.* at 188-90 nn.116-27.

²⁴⁸ See *id.* For example, the human rights ombudsmen in Peru, Colombia, Costa Rica, El Salvador, Nicaragua, Panama, Bolivia, Venezuela, and Paraguay all have these duties. See *id.* at 188-90 nn.116-27, 201-02, 262 (Peru: promote signature of treaties, propose new

Some human rights ombudsman institutions are empowered to engage in human rights research, to conduct studies, and to engage in human rights education.²⁵⁰ The educational efforts may be directed at public officials or the broader public.²⁵¹ Again, a number of Latin American institutions, along with a few European ombudsmen, have these human rights education mandates.²⁵²

In contrast to the potential difficulties of transporting human rights ombudsman litigation mandates from civil law systems to other legal systems, human rights research and education mandates can be provided to human rights ombudsman institutions in all types of legal systems. Full implementation of these such mandates is more likely contingent on sufficient resources.

CONCLUSION

The number of human rights ombudsman institutions has exploded over the course of the last three decades. They now account for at least fifty percent of the total number of ombudsman institutions worldwide. Human rights ombudsmen are prevalent in Latin America as well as in Central and Eastern Europe, but are increasingly found in Western Europe and other regions as well. There are many forces that will continue to drive nations to establish human rights ombudsman institutions. These include democratization, public institution-building or -rebuilding, comparative law influences, limited state resources, and international human rights law—in particular, the movement to establish NHRIs. Additionally, the continuing development of international human rights law will increase the pressure on states either to expand the mandates of human rights ombudsman institutions or to give express human rights duties to classical ombudsman institutions. While most human rights ombudsmen are found in civil law jurisdictions, some of these forces may lead to a greater number of these institutions in common law jurisdictions.

laws, become involved in legislative process; Costa Rica: make law reform proposals; El Salvador: make law reform proposals, issue opinions on draft laws; Nicaragua: promote law reform, encourage treaty ratification; Panama: promote law reform; Bolivia: promote law reform proposals, encourage treaty ratification; Venezuela: promote law reform; Paraguay: promote law reform).

²⁴⁹ See EUROPEAN OMBUDSMAN-INSTITUTIONS, *supra* note 10, at 56–57.

²⁵⁰ See *id.* at 57.

²⁵¹ See *id.*

²⁵² See *id.*; REIF, *supra* note 1, at 188 nn.118–20, 190 nn.123–26, 193, 262 (listing El Salvador, Guatemala, Honduras, Nicaragua, Panama, Colombia, Ecuador, Bolivia, Venezuela, and Paraguay as examples).

Some human rights ombudsman institutions have both administrative justice and human rights protection mandates while others stand much closer to the human rights commission model. There is considerable variation in the scope of the core powers given to and operating practices instituted by human rights ombudsman institutions. Excluding other factors that influence the degree of functional success of a human rights ombudsman transplant, a human rights ombudsman should be given wide jurisdiction over a spectrum of human rights and government actors. Such jurisdiction should include own-motion investigatory powers, inspection powers, and possibly deputy ombudsmen to focus on special human rights concerns such as children's rights, women's rights, and the protection of ethnic minorities. Additional human rights protection and promotion powers such as taking cases to constitutional or administrative courts, prosecuting public officials, lobbying government bodies to implement human rights treaties, and monitoring the state's implementation of its international human rights obligations, law reform activities, and human rights research and education enhance the ombudsman's core investigatory mandate. Governments should endow a human rights ombudsman with these additional functions and powers when the nature of the country's legal system and the institutional structure of the state permit. Human rights ombudsman institutions with the power to litigate legal questions in the courts exist almost entirely in civil law jurisdictions; thus, further inquiry is needed to determine whether human rights ombudsman institutions established in common law or mixed systems could be given equivalent mandates.

Finally, all human rights ombudsman institutions must institute operating practices that further their ability to protect and promote human rights. Such practices could include the designation of units or departments for human rights matters, the employment of a diverse staff with appropriate human rights expertise, and the dynamic use of annual and special reports. In addition, the use of a website and the media to publicize the human rights jurisdiction of the office will help to inform the public about the human rights norms binding the state and ensure that the public utilizes the ombudsman in cases of human rights violations.