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Is the ombudsman suitable for the role?“

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Preface

During my academic studies quite at the beginning, it became clear that I am interested in public law, with special regard to constitutional law. Non-judicial bodies that protect citizens' rights were at the centre of my interest. After graduation (2006), I started to work in an ombudsman office in Budapest. Handling citizens' individual complaints was precisely that kind of legal work I imagined to myself. Nevertheless, the reactive nature of our work was disturbing. This made me start searching into the practices of similar institutions of other countries. National Human Rights Institutions (NHRIs) came into my sight. In the course of different fellowship programmes, I had the opportunity to stay with the German Institute for Human Rights in Berlin (2010, 2011-2012), where I could not only familiarise myself with the functioning of an NHRI but explore its rich human rights library. The more I read about NHRIs, the clearer it became that I need to study international human rights law if I want to understand the topic in depth. After gaining my LL.M. in the subject (2013), I had the opportunity to observe the cooperation of NHRIs at the European level under the wings of the EU Agency for Fundamental Rights in Vienna (2013-2014). My stay with the Agency gave me several occasions to interact with NHRI practitioners. Meanwhile familiarising myself with the practice of NHRIs, I conducted research on their theoretical background. The present dissertation is the outcome of ten years of desk and empirical research (2009-2019).

I started my PhD studies in the course of a distance learning doctoral programme at the University of Pécs in Hungary in 2008. My topic was NHRIs and how Hungary could have one. My very first publication in the question raised the interest of the Hungarian Ombudsman of that time, who decided to apply for an accredited NHRI status; therefore, I had to change my original idea quite soon. The institution gained B-status. Consequently, I started to look into chances, how the institution should improve in order to obtain an A-status. I could not come up with my findings quickly enough, and therefore, when the institution received its A-status, I needed to change my topic again. At that time, I met

Manfred Nowak, who encouraged me to transfer my studies to the University of Vienna (2016). I am immensely grateful to Manfred for his suggestion to broaden the topic, focus on ombudsinstitutions and compare three regions of the world. The empirical research, with special regard to interviews, that followed this decision, profoundly enriched my writing. I genuinely believe that this is the added value of my work: collecting such sensitive data on the spot, with special regard to Latin America, that are hardly available from Europe. Since many contributed to my work, I dedicated a separate section following this preface to acknowledgements.

I hope that my findings can serve as a starting point to further research and assist decision-makers and ombudspersons, who want to transform their ombudsinstitutions from a reactive to a proactive human rights institution.

The way was long, but my affection towards NHRIs and ombudsinstitutions has never faded away. I truly believe in these institutions and wish to continue to promote them throughout my professional life. Hopefully, this attachment is also perceptible when reading my work. To which, I wish you joy and strength!

Balatonszárszó, 27 May 2019

Veronika Haász

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Dedicated to my Dad

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Abbreviations

AOB	Austrian Ombudsman Board
AOM	Association of Mediterranean Ombudsmen
AOMF	Association of Ombudsmen and Mediators of Las Francophonie
ASEAN	the Association of the Southeast Asian Nations
AT	Austria
CAT	Convention against Torture
CFR	Commissioner for Fundamental Rights
CHR	UN Commission on Human Rights
	Commissioner for Human Rights (Poland)
CoE	Council of Europe
CRPD	Convention on the Rights of Persons with Disabilities
CSOs	civil society organisations
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
ENOC	European Network of Ombudspersons for Children
ENOHE	European Network of Ombudsmen in Higher Education
ECOSOC	UN Economic and Social Council
ESCRs	economic, social and cultural rights
EU	European Union
FIO	Iberoamerican Federation of Ombudsman
FRA	European Union Agency for Fundamental Rights
GANHRI	Global Alliance of NHRIs
HRC	UN Human Rights Council
HU	Hungary
IACHR	Inter-American Commission on Human Rights
ICC	International Coordinating Committee of NHRIs
ICOAF	International Conference of Ombudsinstitutions for Armed Forces
IOI	International Ombudsman Institute
NGOs	non-governmental organisations
NHRIs	National Human Rights Institutions
NMM	national monitoring mechanism
NO	Norway

NPM	national preventive mechanisms
OAS	Organization of American States
ODIHR	Office for Democratic Institutions and Human Rights
OHCHR	Office of the High Commissioner for Human Rights
OPCAT	Optional Protocol to the Convention against Torture
OSCE	Organisation for Security and Cooperation in Europe
ODIHR	OSCE Office for Democratic Institutions and Human Rights
PL	Poland
PY	Paraguay
SCA	Sub-Committee on Accreditation
SE	Sweden
SWOT	strengths, weaknesses, opportunities, threats
TEU	Treaty on EU
TOWS	threats, opportunities, weaknesses, strengths
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UN GA	UN General Assembly
UN SG	UN Secretary-General
UPR	Universal Periodic Review
UY	Uruguay

Zusammenfassung (Abstract)

Die Dissertation analisiert, ob Ombudsinstitutionen für die Rolle der Nationalen Menschenrechtsinstitutionen (National Human Rights Institutions; NHRIs) geeignet sind. Es wird behauptet, dass Ombudsinstitutionen, die kürzlich als NHRI akkreditiert wurden, Schwierigkeiten haben, ihre traditionelle Rolle als Ombudsmann (Umgang mit individuellen Beschwerden) und ihre neue erweiterte Rolle als NHRI (Förderung der Menschenrechte) in Einklang zu bringen. Es wird davon ausgegangen, dass die Art und der ursprüngliche Auftrag der Ombudsinstitutionen – insbesondere derjenigen in der mittel- und osteuropäischen Region – es ihnen schwer machen, als NHRI effektiv zu arbeiten. Gleichzeitig gibt es weltweit Ombudsinstitutionen – insbesondere in Lateinamerika, aber auch in Osteuropa –, die im Rahmen ihres umfassenden Menschenrechtsmandats effizient arbeiten. Die Hauptforschungsfrage ist daher, wie reaktive Ombudsinstitutionen zu proaktiven nationalen Menschenrechtsinstitutionen werden können. Um die obigen Hypothesen zu testen und die Forschungsfrage zu beantworten, werden zwei Arten von Analysen durchgeführt. Zunächst werden die Stärken, Schwächen, Chancen und Bedrohungen (strengths, weaknesses, opportunities, threats; SWOT) der Ombudsinstitutionen im Allgemeinen untersucht. Diese SWOT-Analyse zeigt die üblichen Mängel und Stärken der Ombudsinstitutionen als NHRIs auf. Dann wird die Analyse praktischer und vergleichender. Die Dissertation analysiert NHRIs in drei geografischen Regionen: in Mittel- und Osteuropa, in den nordischen Ländern und in Lateinamerika. Die Einrichtung der österreichischen Volksanwaltschaft, des ungarischen Beauftragten für Grundrechte, des polnischen Beauftragten für Menschenrechte, des schwedischen Gleichstellungsbeauftragten, des norwegischen Parlamentsbeauftragten für öffentliche Verwaltung, sowie des paraguayischen und uruguayischen Ombudsinstitutionen werden vorgestellt. Anhand dieser Länderbeispiele sucht die Dissertation nach der Antwort auf die Frage, ob ein Modell besser als das andere und besser für die Rolle der NHRI geeignet ist. Das Gesamtziel besteht darin, die Merkmale herauszustellen, die eine reaktive Ombudsinstitution zu einer proaktiven nationalen Menschenrechtsinstitution machen.

Introduction

A. Background of the topic

National institutions that work for the promotion and protection of human rights exist a long time ago. Their establishment is often linked to political transitions and democratisation processes when human rights protection comes forward on national political agendas. As a result, most of the new constitutions contain some non-judicial mechanisms as a watchdog of fundamental rights and freedoms.

Not only national political changes influence the emergence of national institutions, but also the international human rights regime has recognised the importance of domestic entities. The international human rights monitoring mechanisms have an interest in having allies at the national level; therefore, they tend to formulate recommendations supporting the institutions' existence and strengthening. Furthermore, we can observe a trend among the latest international human rights instruments suggesting state parties to put in place effective national mechanisms for the monitoring of the implementation of these instruments. States are relatively free in the choice of means of implementation, including what organs they designate to the monitoring tasks. Some States mandate their exiting constitutional institutions to be partners of international human rights bodies; others establish new institutions for this assignment. Thus, existing national institutions are not only safeguards of fundamental rights enshrined in national constitutions or bills of rights anymore, but become associated with the promotion and protection of human rights established by international conventions. A significant number of such national actors are national institutions with a broad mandate for the promotion and protection of human rights, collectively known as National Human Rights Institutions (NHRIs).

NHRIs emerged rapidly worldwide in the last twenty years. The Paris Principles[1] developed by the United Nations (UN) in 1991 set minimum standards for the establishment, mandate and functions of the institutions. Nevertheless, there is no uniform institutional model. They are established in different forms and with various mandates

[1] UN Commission on Human Rights Resolution 1992/54. National institutions for the promotion and protection of human rights, 3 March 1992, E/CN.4/RES/1992/54; UN General Assembly Resolution 48/134. National institutions for the promotion and protection of human rights, 20 December 1993, A/RES/48/134.

according to the needs and legal traditions of their respective states.[2] Based on their similarities, the early literature – and the Paris Principles – suggests a classification, which distinguishes between human rights commissions, which are composed of more commissioners, and ombudsinstitutions, which are governed – in most cases – by one person.[3] However, considering the more than 100 existing NHRIs worldwide, beyond this categorisation, further institutional types, including human rights institutes, councils, centres are known.

Ombudsinstitutions constitute more than one-third of all NHRIs (45 from 122 in August 2018). It is important to note that not all ombudsinstitutions are NHRIs; only those who applied for and received an NHRI accredited status, i.e. their Paris Principles-compliance has been approved in a peer-review procedure by the collective representative body of NHRIs worldwide. Ombudsinstitutions are extraneous in comparison with other institutions from more aspects. The most significant difference is due to their organisational structure, but there are further distinctive characteristics as regards to their competences and working methods. We can find ombudsinstitutions on all continents, but their proliferation is especially remarkable in Latin America (16) and Central and Eastern Europe (23). One-third of NHRI-accredited ombudsinstitutions are not in full conformity with the Paris Principles (16 from 45 in August 2018).

B. Purpose of the dissertation

The purpose of the dissertation is to understand what makes an ombudsinstitution to a Paris Principles-conform and effective National Human Rights Institution.

The topic of NHRIs appeared in the academic research in the ‘90s, and the number of publications has increased since then.[4] The literature discusses various key issues relating to NHRIs, such as their history and evolution, as well as the status and interpretation of the Paris Principles. Furthermore, the independence of the institutions, the different angles of their competences, their complaint-handling function are often subjects of NHRI-related research. Their cooperation with the UN in general and with Treaty Bodies in particular,

[2] Veronika Haász, *National Human Rights Institutions in the UN Human Rights Framework* (GRIN Verlag 2013).
[3] UN Centre for Human Rights, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (United Nations 1995).
[4] Asia Pacific Forum, ‘Bibliography on National Human Rights Institutions’ <http://www.asiapacificforum.net/resources/nhri-bibliography/> accessed 11 February 2019.

and their distinctive status in comparison to other national actors – with special regard to non-governmental organisations (NGOs) – are also widely researched.[5] Research has been done regarding the effectiveness and efficiency of the institutions and the ways how to measure their impact on the promotion and protection of human rights. Similarly, ombudsinstitutions have often been in the spotlight of academic discussions. Still, there is no comprehensive analysis dealing expressly and exclusively with ombudstype NHRIs from a comparative perspective.

The present dissertation claims that ombudsinstitutions recently accredited as NHRIs struggle between their traditional ombudsman role and their new extended role as NHRI (hypothesis). It assumes that the nature and original mission of ombudsinstitutions – especially those in the Eastern European region – makes it difficult for them to perform effectively as an NHRI. At the same time, there are ombudsinstitutions worldwide – especially in Latin America, but also in the Eastern European region – that work efficiently within their broad human rights mandate.

In order to test the hypothesis, the research applies two types of analysis. First, it examines the strengths, the weaknesses, the opportunities, and the threats of ombudsinstitutions in general. This SWOT analysis highlights the usual shortcomings and strengths (SWOT) of ombudsinstitutions as NHRIs. Then the study takes a more practical and comparative approach. Unlike the traditional comparison between the commission-, ombuds- and institute-type NHRIs, the dissertation analyses ombudstype NHRIs in three geographic regions: in Central and Eastern Europe, the Nordic countries, and Latin America. Taking 2-3 country examples in each region, it searches the answer to the question, whether one model is better than the other and more suitable for the role of NHRI. The overall aim is to highlight those features that make a reactive ombudsinstitution to a proactive National Human Rights Institution.

C. Scope and method of research

The research focused on the theory and practice of NHRIs and the legal basis and practice of the analysed ombudsinstitutions in order to explore and understand the mission and functions of these national human rights bodies. The nature and process of the

[5] Stéphanie Lagoutte, Annali Kristiansen and Lisbeth AN Thonbo, Review of Literature on National Human Rights Institutions (The Danish Institute for Human Rights 2016).

accreditation procedure, i.e. the official peer-reviewed acceptance procedure was also observed and critically analysed. Findings of the last twenty years' accreditation procedures were used to explore the strengths, the weaknesses, the opportunities, and the threats of ombudsinstitutions in the course of the SWOT analysis.

Concerning presenting the specific features of ombudsinstitutions, **country examples** were selected. Different concerns governed the selection. The geographical division and choice reflect those regions, where the NHRI work is done traditionally by ombudsmen, such as in Central and Eastern Europe and Latin America. Nordic countries were chosen as a counterpole, as ombudsinstitutions there usually remain with their traditional ombudsman function, while a separate institution occupies the NHRI role. The country selection aimed at presenting various solutions and forms of ombudsinstitutions. In the Central and Eastern European region, the Austrian *Volksanwaltschaft*, the Hungarian *Alapvető Jogok Biztosa*, and the Polish *Rzecznik Praw Obywatelskich* are discussed. The Austrian institution is the oldest one in Central Europe. The Hungarian institution represents the traditional model of ombudsinstitution in the region that went through on several changes until it received its accredited NHRI status. The Polish Commissioner for Human Rights is the most significant institution of the region considering its size and activities that go beyond the traditional ombudsman actions. The Nordic region has its history and ways of development. The idea of the ombudsinstitution originates in Sweden (1809), where specialised ombudsinstitutions are dedicated to the protection of selected rights, and one of them, the *Diskrimineringsombudsmannen* is accredited as NHRI – at the moment. Norway represents the example, where not the Parliamentary Ombudsman is the country's NHRI. The Parliamentary Ombudsman for Public Administration (*Sivilombudsmannen*) and the Norwegian Human Rights Institution (*Norges institusjon for menneskerettigheter*) work parallel to each other, the latter in its capacity as NHRI. In Latin America, two neighbouring countries were selected. Paraguay and Uruguay share similar historical past, but the recovery from the authoritarian regimes (that lasted in Paraguay from 1954 till 1989, in Uruguay from 1973 till 1985) has worked out differently. This difference is reflected in the timing and circumstances of the creation, as well as the form and functioning of their NHRIs. While the *Defensoría* in Paraguay (*Defensoría del Pueblo de la República del Paraguay*) has its roots in the Swedish and Spanish ombudsman model – as most institutions in the continent – and was established in 1995, the *Defensoría* in Uruguay (*Institucion Nacional de Derechos Humanos y Defensoría del Pueblo*) is a

combination of the ombudsman and the institute models and is a relatively new institution from 2008.

The research aimed at describing the institutions, instead of analysing their everyday practice. The reason for this is that the study compares different solutions or models that is a matter of institutional choice at the time of establishment. Of course, the functioning and the effectiveness of an institution highly depends on how the reigning ombudsperson fulfils his or her legal mandate; therefore, this will be highlighted through some practical examples as well.

The early research dates back to 2008 and 2009 when mainly **desk research** on the NHRI concept as such was conducted. Information was obtained from various written materials, including monographs, edited books, journal articles, official UN documentation, UN collections, conference and academic papers listed in the bibliography. The desk research relies heavily on the publications of the International Ombudsman Institute (IOI), especially the compilations of its members' presentations and speeches gave in the IOI conferences in Stockholm (2009), Wellington (2012), and Bangkok (2016). Having aimed at a highly praxis-oriented research approach, the research sought and benefited from ombudspersons' and their colleagues' experiences.

The desk research has been ongoing since then and is complemented with **empirical research**. Personal observations were made in the accreditation sessions of NHRIs in Geneva in 2010-2011, and in the 23rd, 24th and 30th General Meetings of the Global Alliance of NHRIs in 2010, 2011 and 2017. Professional experiences were gathered in the German Institute for Human Rights (2010-2012) and with the National Human Rights Bodies Team of the European Union Agency for Fundamental Rights (FRA) in Austria (2013-2014). Personal discussions took place with NHRI representatives on several occasions, such as conferences, workshops, and seminars between 2009 and 2017. In order to understand the context in which ombudsinstitutions operate, interviews with different national human rights actors took place as well. At the end of 2016, semi-structured interviews were conducted with public administration, and ombudsinstitutions representatives, and the EU delegations in Paraguay and Uruguay. In February 2019, Skype and phone interviews took place in order to gather the views from visiting professors of the European Inter-University Centre for Human Rights and Democratisation in Venice, and with representatives of civil society organisations, the public administration,

NHRIs, and ombudsinstitutions in Austria, Poland, Norway, and Sweden. For this purpose, the Office of the Hungarian Commissioner for Fundamental Rights in Budapest was personally visited in March 2019.

D. Outline

After the present Introduction, the dissertation is divided into three Chapters. **Chapter One** gives an overview on National Human Rights Institutions by describing the development of the NHRI-concept; the standards within the Paris Principles: the institution-mandate, the competences and responsibilities, the methods of operation, the guarantees of independence and pluralism; as well as the typology of NHRIs. Within Chapter One, the accreditation of NHRIs is demonstrated as well, including the tasks of the Global Alliance of NHRIs (GANHRI; former name: International Coordinating Committee of NHRIs (ICC)) and the function and significance of the accreditation process. In order to locate NHRIs in the national human rights protection system, they are distinguished from other national actors for the promotion and protection of human rights, like public authorities, national courts, and human rights NGOs. Closing Chapter One, the interaction of NHRIs with the international human rights mechanisms is analysed. This Chapter aims at making it understandable why NHRIs have particular importance in the national human rights systems.

Chapter Two introduces ombudsinstitutions. From a historical perspective, it presents the definition, the origin and the proliferation of ombudsinstitutions. Chapter Two presents the two traditionally distinct types, the classic and the human rights type of ombudsinstitutions, as well as regional ombudsinstitutions. In the course of a SWOT analysis, the dissertation identifies the strengths, the weaknesses, the opportunities, and the threats of ombudsinstitutions. It explores those internal factors that advantage over or disadvantage ombudsinstitutions with other public institutions, and those external elements that ombudsinstitutions could exploit or avoid if they aim at being an effective and successful National Human Rights Institution.

After the first NHRI-focused and the second ombudsinstitution-specific chapters, **Chapter Three** presents concrete ombudsinstitutions in three regions. First, one Central and two Eastern European institutions, the Austrian Ombudsman Board, the Hungarian Commissioner for Fundamental Rights, and the Polish Commissioner for Human Rights

are analysed. Within the Nordic system, the Swedish Equality Ombudsman and the Norwegian Parliamentary Ombudsman for Public Administration are introduced. The third part of the chapter is devoted to two Latin American institutions, namely the *Defensoría del Pueblo de la República del Paraguay* and the *Institución Nacional de Derechos Humanos y Defensoría del Pueblo* in Uruguay. The analysis follows the same structure regarding all institutions, namely presenting their history and legal background; organisation; selection, appointment, and their leading person's tenure; independence and immunity; funding; functions; competences and powers; NPM mandate; cooperation activities; and NHRI accreditation. Each region section is closed by a summary analysis, pointing out the similarities and the differences of the analysed institutions on the one hand, and highlighting region specific observations on the other hand.

Chapter Four concludes in testing the findings of the SWOT analysis (Chapter Two) on the case study ombudsinstitutions (Chapter Three) in order to answer the research question in the dissertation title, whether ombudsinstitutions are suitable for the NHRI role. Recommendations address decision-makers, ombudsinstitutions, and the Sub-Committee on Accreditation (SCA), who have a say in the (trans)formation of ombudsinstitutions.

The following **Annexes** complement the piece: (I) the Paris Principles; (II) Map on the accredited status of National Human Rights Institutions (2018); (III) Chart on the accredited status of ombudsinstitutions worldwide (2018).

1.

National Human Rights Institutions: An Overview

National Human Rights Institutions are state-funded, independent and pluralistic national bodies established by law and mandated to promote and protect human rights at the national level. The concept of NHRIs originates from the UN, as the idea that 'national human rights commissions should be established to monitor state compliance with the norms contained in the Universal Declaration of Human Rights'[6] was designed in the earliest years of the UN, and developed actively in the last 25 years.[7]

1.1 Development of the concept of NHRIs

In 1946, one year before the establishment of the first NHRI in France (*Commission national consultative des droits de l'homme*) the UN Economic and Social Council (ECOSOC) invited the UN member states to establish local human rights commissions. The aim was to facilitate the communication between the UN and its member states by providing periodic information on national human rights practices to the UN.[8] At this time, the precise function of these new domestic entities was undefined.[9] In the '50s and '60s, 'the international human rights regime was only in its early stages of development' being engaged in standard-setting and institution building.[10] Therefore, the emphasis was not on the promotion of human right at the national level, but rather on how these national institutions could support the work of the 'emerging international human rights organization'.[11]

The next important step in the development of the concept of NHRIs followed only in 1978 when the UN Commission on Human Rights (CHR) called a Seminar on National and Local Institutions for the Promotion and Protection of Human Rights.[12] The purpose of the Seminar was to develop a set of guidelines on the structure and functionality of

[6] Richard Carver, 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law' (2010) 10 Human Rights Law Review 1, 3.
[7] Haász, *National Human Rights Institutions in the UN Human Rights Framework* (n 2).
[8] UN Economic and Social Council, Resolution adopted 21 June 1946 (documents E/56/Rev. 1 and document E/84, paragraph 4, both as amended by the Council) para 5.
[9] Valentin Aichele, *Nationale Menschenrechtsinstitutionen: Ein Beitrag Zur Nationalen Implementierung von Menschenrechten* (Lang 2003) 69.
[10] Anna-Elina Pohjolainen, *The Evolution of Human Rights Institutions. The Role of the United Nations* (2006) 43.
[11] ibid 30.
[12] UN General Assembly Resolution 32/123. Observance of the thirtieth anniversary of the Universal Declaration of Human Rights, 16 December 1977, A/RES/32/123 para 2(b).

national institutions.[13] The seminar, supported later on by the UN General Assembly (UN GA),[14] was particularly representative and productive.[15] Aside from the adoption of the first set of international guidelines on national institutions, the institutions gained 'a considerable amount of international attention' and 'a growing number of governments became interested' in the creation of such structures.[16]

However, during the '80s, the UN Secretary-General (UN SG) prepared five reports on National Human Rights Institutions;[17] these have not contributed to the development of the concept substantially. At the beginning of the '90s, democratisation wave swept over the world and many states transformed from authority to democracy, so that human rights and their institutional protection became important.[18] Several institutions were established in the course of these political changes, especially in two regions that are important to the present study, namely Eastern Europe and Latin America.

The breakthrough in the NHRI-concept resulted from the first international workshop of national institutions for the promotion and protection of human rights in Paris in 1991. In the course of this gathering, representatives of different types of National Human Rights Institutions – but mainly national human rights commissions –, governments, the UN and its agencies, intergovernmental and non-governmental organisations[19] agreed upon the so-called Paris Principles.

[13] UN Commission on Human Rights Resolution 23 (XXXIV). National institutions in the field of human rights 49/, 8 March 1978, E/CN.4/RES/1978/23 (XXXIV).
[14] UN General Assembly Resolution 33/46. National institutions for the promotion and protection of human rights, 14 December 1978.
[15] Philip Alston, *The United Nations and Human Rights: A Critical Appraisal* (Clarendon Press 1992) 184.
[16] Pohjolainen (n 10) 47.
[17] UN Secretary-General Report, Alternative approaches and ways and means within the United Nations system for improving the effective enjoyment of human rights and fundamental freedoms: national institutions for the promotion and protection of human rights, 9 October 1981, A/36/440 and 24 October 1983, A/38/416; UN Secretary-General Report, National institutions for the promotion and protection of human rights, 9 October 1984, A/39/556; UN Secretary-General Report, National institutions for the protection and promotion of human rights, 27 October 1986, E/CN.4/1987/37; UN Secretary-General Report, National institutions for the protection and promotion of human rights, 16 December 1988, E/CN.4/1989/47 and Add. 1, 15 February 1989.
[18] Morten Kjaerum, 'Schutz Und Förderung Der Menschenrechte Durch Nationale Menschenrechtsinstitutionen: Eine Lokale Verpflichtung Mit Globaler Bedeutung', *Jahrbuch Menschenrechte* (2006) 67.
[19] UN Secretariat, Further promotion and encouragement of human rights and fundamental freedoms, including the question of the programme and methods of work of the Commission on Human Rights: national institutions for the promotion and protection of human rights: note, 23 January 1992, E/CN.4/1992/43/Add.1.

1.2 The normative status of the Paris Principles in international law

From the beginning, the UN policy-making bodies have a crucial role to play in the promotion of the Paris Principles. Namely, the international community started to encourage the UN member states increasingly through standard-setting, capacity building, network facilitating and membership granting[20] to establish and strengthen national institutions in the spirit of the Paris Principles.

As a first step in the early '90s, the CHR and the UN GA endorsed the Paris Principles in resolutions.[21] In 1993, also the World Conference on Human Rights reaffirmed the essential and constructive role of NHRIs and recognised the value of the Paris Principles as a benchmark for the establishment and strengthening of national institutions. Its final act, the Vienna Declaration and Programme of Action encouraged the UN member states to establish and strengthen NHRIs under the Paris Principles:

> 'The World Conference on Human Rights reaffirms the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights. The World Conference on Human Rights encourages the establishment and strengthening of national institutions, having regard to the "Principles relating to the status of national institutions" and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level.'[22]

Since recording the Paris Principles in the Annex of the UN GA resolution, the UN GA, the UN SG, and the successor of the CHR, the UN Human Rights Council (HRC) have been referring to the Principles regularly.[23]

The Paris Principles gained considerable recognition in the public attention also through the acts of various international organisations, which have expressly welcomed the Paris

[20] Sonia Cardenas, 'Emerging Global Actors: The United Nations and National Human Rights Institutions' (2003) 9 Global Governance 23.
[21] UN Commission on Human Rights Resolution 1992/54. National institutions for the promotion and protection of human rights, 3 March 1992, E/CN.4/RES/1992/54 paras 10, 17; UN General Assembly Resolution 48/134. National institutions for the promotion and protection of human rights, 20 December 1993, A/RES/48/134 (n 1).
[22] Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, 12 July 1993, A/CONF.157/23 para 36.
[23] Some of the latest examples: UN General Assembly Resolution 72/181. National institutions for the promotion and protection of human rights, 29 January 2018, A/RES/72/181; UN Secretary-General Report, National institutions for the promotion and protection of human rights, 14 August 2018, A/HRC/39/20; UN Human Rights Council Resolution 39/17. National human rights institutions, 8 October 2018, A/HRC/RES/39/17.

Principles and encouraged governments worldwide to consider them.[24] UN bodies, first of all, the United Nations Development Programme (UNDP) and the Office of the High Commissioner for Human Rights (OHCHR) have been assisting NHRIs in their establishment phase and promote their strengthening as independent institutions that comply with the Paris Principles.[25]

While earlier the assistance provided by the UNDP and the OHCHR covered the promotion of the development of autonomous and effective NHRIs in the member states, lately, they put more emphasis on the enhancement of the cooperation between NHRIs and international human rights monitoring mechanisms. The OHCHR and the UNDP consider NHRIs as crucial partners in ensuring the effective implementation of international human rights standards and its monitoring at the national level; therefore, the engagement with them has become a priority area for both organisations.[26] They provide states and national institutions direct support, including expert advice, technical assistance and material support. NHRIs are also objectives of the technical cooperation programme of the UN, providing them with funding and training on the international human rights system.[27] All these international efforts emphasise the value of the Paris Principles and promote the institutions' compliance with them.

At the international level, not merely policy-making bodies and UN organisations, but the UN Charter-based and the UN Treaty-based Bodies recognise the importance of national institutions and increasingly refer to the Paris Principles. Beyond the HRC, the Universal Periodic Review (UPR) and the Special Procedures have attached growing attention to Paris Principles-conform NHRIs. As essential stakeholders, Paris Principles-conform NHRIs are involved in the UPR that is a monitoring process of the human rights records of all UN member states once every four years.[28] They can submit information for the summary prepared by the OHCHR, attend the sessions of the Working Group, make general comments before the HRC adopts the Working Group's report, and follow-up the

[24] Pohjolainen (n 10) 9.
[25] In 1995, the OHCHR published a detailed Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights in its professional training series interpreting the requirements within the Paris Principles: UN Centre for Human Rights (n 3).
[26] United Nations Development Programme, 'Strategic Plan 2008-2011' para 90; Office of the UN High Commissioner for Human Rights, 'Management Plan 2012-2013. Working for Results' 10.
[27] Office of the UN High Commissioner for Human Rights, *Advisory Services and Technical Cooperation in the Field of Human Rights, Fact Sheet No. 3 (Rev. 1).* (1996); UN Commission on Human Rights, Advisory services in the field of human rights, Technical cooperation in the field of human rights, 25 February 1997, E/CN.4/1997/86.
[28] UN General Assembly Resolution 60/250. Human Rights Council, 3 April 2006, A/RES/60/251 para 5(e).

implementation of the recommendations. Beyond their participatory rights, NHRIs themselves are often subject to scrutiny.[29] Outcome reports regularly promote the need of the establishment of NHRIs in full compliance with the Paris Principles, the enhancement of the independence and the mandate of NHRIs or the increase of their human and financial resources.

Similarly, the Special Procedures, which have the mission to address either human rights situations in specific countries and territories (country mandates) or major phenomena of human rights violations worldwide (thematic mandates)[30] pay attention to the work of NHRIs. Mandate holders and specialised working groups often frame recommendations in their country reports concerning the status and functioning of NHRIs in the respective states. They usually refer to the Paris Principles while pointing out the need for the establishment of an institution or the demand for greater independence and adequate funding of the existing ones.[31]

Likewise, the UN Treaty Bodies often address NHRIs directly and promote their work in their concluding observations,[32] which are reports containing the collective assessment of states' human rights records and recommendations for enhanced implementation of rights in question.[33] Concluding observations encourage especially the establishment of independent NHRIs in accordance with the Paris Principles in the states parties,[34] welcome the creation of institutions[35] and request states parties to provide information on the establishment progress[36] or more details on the functioning of their national institution.[37] In

[29] According to the statistics provided by the UPR Info, recommendations relating to NHRIs are the fifteenth frequently raised issue during the UPR (www.upr-info.org/database/statistics).
[30] UN Human Rights Council Resolution 5/1. Institution-building of the United Nations Human Rights Council, 18 June 2007; UN Human Rights Council Resolution 5/2. Code of Conduct for Special Procedures Mandateholders of the Human Rights Council, 18 June 2007.
[31] Report of the Working Group on Enforced or Involuntary Disappearances Addendum, Mission to Nepal, 6-14 December 2004, 28 January 2005, E/CN.4/2005/65/Add.1 para 58; Report of the Working Group on Enforced or Involuntary Disappearances Addendum Missions to Colombia and Nepal: follow-up to the recommendations made by the Working Group, 13 February 2012, A/HRC/19/58/Add.4 para 26.
[32] Carver, 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law' (n 6) 11.
[33] Michael O'Flaherty, 'The Concluding Observations of Human Rights Treaty Bodies' (2006) 6 Human Rights Law Review 27.
[34] For instance: UN Human Rights Committee, Concluding observations: Sweden, 7 May 2009, CCPR/C/SWE/CO/6 para C.4.
[35] For instance: UN Human Rights Committee, Concluding observations: Slovakia, 22 August 2003, CCPR/C/78/SVK para 7.
[36] For instance: ICESCR Committee, Concluding observations: Jordan, 1 September 2000, E/C.12/1/Add.46 para 26.
[37] For instance: UN Committee on the Elimination of Racial Discrimination, Concluding observations: Rwanda, 19 April 2001, CERD/C/304/Add. 97 para 20(c).

many cases, Treaty Bodies are concerned about the independence of the institutions and request information from states parties in this regard.[38] For the effective functioning, they emphasise that states should provide NHRIs increased powers and adequate resources as required in the Paris Principles.[39] Furthermore, General Recommendation and Comments adopted by Treaty Bodies refer to the Paris Principles as benchmarks, which should be taken into account by states since the obligation to implement their respective treaties also implies the establishment of national institutions in line with the Paris Principles.[40]

As it was demonstrated, a reference to the Paris Principles emerges first of all in the body of law that has been developed by international organisations and their organs under international treaty regimes, which are considered to be secondary international law.[41] However, there is a new achievement in the history of the Paris Principles. The first examples when clear references to the Paris Principles are provided directly in the text of international human rights treaties have appeared. Both the Optional Protocol to the Convention against Torture (OPCAT) and the Convention on the Rights of Persons with Disabilities (CRPD) require states parties to take into account 'the principles relating to the status and functioning of national institutions for protection and promotion of human rights',[42] namely the Paris Principles. The OPCAT requires that states parties set up, designate or maintain one or more national preventive mechanisms (NPMs) to visit places of detention[43] – in addition to the simultaneous establishment of the Subcommittee on Prevention at the UN level.[44] The international community realised that the Subcommittee

[38] For instance: UN Committee on the Elimination of Discrimination against Women, Report, 30 June – 18 July 2003, A/58/38, Supplement No. 38 paras 373, 374; UN Committee on the Elimination of Racial Discrimination, Concluding observations: Côte d'Ivoire, 3 June 2003, CERD/C/62/CO/1 para 18.
[39] UN Committee on the Elimination of Discrimination against Women, Report, 12-30 January 2004, A/59/38, Supplement No. 38 para 345.
[40] UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 17: Establishment of national institutions to facilitate implementation of the Convention (25.03.1993) para 1; UN Committee on the Rights of the Child, General Comment No. 2: The role of independent national human rights institutions in the promotion and protection of the rights of the child, 15 November 2002, CRC/GC/2002/2 para 4; UN Committee on the Rights of the Child, General Comment No. 9: The rights of children with disabilities, 27 February 2007, CRC/C/GC/9 para 24; UN Committee on the Elimination of Discrimination against Women, Statement by the Committee on the Elimination of Discrimination against Women on its relationship with National human rights institutions, 14 January 2008, CEDAW/C/2008/I/CRP.1 para 2.
[41] Mosler Hermann, 'Die Erweiterung Des Kreises Der Völkerrechtssubjekte' (1962) 22 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1, 45.
[42] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), New York, 18 December 2002, United Nations, Treaty Series, vol. 2375, p. 237 Article 18(4); Convention on the Rights of Persons with Disabilities (CRPD), New York, 13 December 2006, United Nations, Treaty Series, vol. 2515, p. 3 Article 33(2).
[43] OPCAT Article 3.
[44] ibid Article 2.

itself is not able to fulfil the monitoring obligation and visit all countries.[45] It also acknowledged that the establishment of 'a system of cooperation between international and national independent oversight mechanisms',[46] working as a two-pillar system might greatly enhance the effective implementation of the OPCAT. The OPCAT also requires State Parties to 'give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights'.[47] This Article may encourage states parties to consider establishing their NPMs within or connected to their existing NHRIs.[48] Some recommendations of the Convention against Torture (CAT) Committee also inspire states parties to consider designating their NHRIs as monitoring bodies.[49] In fact, many NHRIs have a visiting role as part of their mandate; however, they seldom have well-defined powers and resources to carry out a real NPM mandate.[50] Therefore, NHRIs often link their designation as NPMs with the recognition of their accredited status as NHRI. Some experts dispute this linking, as the adherence to the Paris Principles does not automatically mean that the institution has an impact in this field.[51] In practice, there are several examples for states designated their existing NHRIs as NPMs.[52] Some of them are suited for the role of NPM; indeed, others are not. Therefore, the suitability of an NHRI for the NPM role must be assessed on a state-by-state basis depending on the local legal and administrative context.[53] At the same time, this is beyond doubt that NHRIs are important partners to the Subcommittee and may play a significant

[45] Morten Kjaerum, 'The Protection Role of the Danish Human Rights Commission' in Bertrand G Ramcharan (ed), *The protection role of national human rights institutions* (Nijhoff 2005) 50; Elina Steinerte and Rachel Murray, 'Same but Different? National Human Rights Commissions and Ombudsman Institutions as National Preventive Mechanisms under the Optional Protocol to the UN Convention against Torture' (2009) 6 Essex Human Rights Review 54, 57.
[46] Amrei Müller and Frauke Lisa Seidensticker, *Role of National Human Rights Institutions in the United Nations Treaty Body Process* (Deutsches Institut für Menschenrechte 2007) 23.
[47] OPCAT (n 43) Article 18(4).
[48] Müller and Seidensticker (n 46) 26.
[49] For instance: UN Committee against Torture, Consideration of Reports submitted by States parties under Article 19 of the Convention. Conclusions and recommendations of the Committee against Torture. United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas para 5(m).
[50] Carver, 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law' (n 6) 28.
[51] Rachel Murray, 'National Preventive Mechanisms under the Optional Protocol to the Torture Convention: One Size Does Not Fit All' (2008) 26 Netherlands Quarterly of Human Rights 485, 498; Carver, 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law' (n 6) 28.
[52] Albania, Armenia, Austria, Azerbaijan, Bulgaria, Costa Rica, Croatia, Cyprus, Czech Republic, Ecuador, Finland, Georgia, Hungary, Kazakhstan, Lithuania, Maldives, Mali, Mauritania, Mauritius, Mexico, Montenegro, New Zealand, Nicaragua, Poland, Portugal, Serbia, Slovenia, Spain, Togo, Turkey, Ukraine, Uruguay (Source: Optional Protocol to the Convention against Torture Subcommittee on Prevention of Torture, 'National Preventive Mechanisms' <http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx>).
[53] OPCAT Team University of Bristol, *The Optional Protocol to the UN Torture Convention and the UN Convention on the Rights of People with Disabilities: Some Common Issues* (2009) 8.

role in facilitating the effective implementation of the OPCAT and support the work of both the Subcommittee and NPMs.[54]

The CRPD is the second international human rights instrument that mentions the Paris Principles. It requires states parties to 'take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights' when designating or establishing their framework, consisting one or more independent mechanisms, for the promotion, protection and monitoring the CRPD's implementation.[55] The reason for requiring the establishment of independent monitoring mechanisms at the national level, just as regarding the OPCAT, is that the international body established by the treaty often has difficulties in meeting local realities directly. Independent domestic mechanisms for the monitoring of the implementation of the CRPD, therefore, fill the gap between the international and national levels.[56] The characteristics of the required independent monitoring mechanisms and the reference to the Paris Principles in the CRPD point to a potential role for NHRIs. Therefore, such an independent mechanism can be either an existing NHRI or a new institution 'established with the explicit mandate to promote disability issues and monitor the implementation of CRPD'.[57] Although many NHRIs have extensive experiences in dealing with disability issues, it must be ensured 'that the entities best suited for the role of the National Framework in a particular jurisdiction are designated for this role'.[58] Nevertheless, NHRIs play a crucial role in promoting awareness, knowledge of and compliance with the CRPD, 'so that national-level implementation may become a reality'.[59]

Thereby, these international instruments are important steps towards 'assigning legal status to the Paris Principles under treaty law'[60] because they formally require national institutions to play a role in monitoring or implementing the State's treaty obligations.[61] Thus, also the question arises whether these references oblige States parties to have an

[54] ibid 9.
[55] CRPD Article 33(2).
[56] Gauthier de Beco, 'Article 33(2) of the UN Convention on the Rights of Persons with Disabilities: Another Role for National Human Rights Institutions?' (2011) 29 Netherlands Quarterly of Human Rights 84, 87.
[57] Müller and Seidensticker (n 46) 27 et. al.
[58] OPCAT Team University of Bristol (n 53) 13.
[59] Disabled Peoples' International, 'The Seoul Declaration' (2007) <http://dpi.org/document/world-assemblies-declaratio/seoul-declaration-september/index.html>.
[60] Tom Pegram, 'National Human Rights Institutions, Treaty Obligations and the Convention against Torture' 4.
[61] Carver, 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law' (n 6) 25.

NHRI in full compliance with the Paris Principles.[62] The majority of scholars consider these achievements as sole recommendations to states parties. Linos and Pegram stress that the OPCAT, for example, is likely to have 'contributed to ensuring that NHRIs have maintained and strengthened important institutional design features'.[63]

Not only the international community acknowledges the Paris Principles, but there are also several sources at the regional (European, American, African, and Asian) level attaching significance to the Paris Principles.

Within the Council of Europe (CoE) system, the Committee of Ministers adopted a recommendation on the Establishment of Independent National Institutions for the Promotion and Protection of Human Rights in the member states[64] and a resolution on Co-operation between NHRIs of member states and between them and the Council of Europe.[65] However, these documents do not mention the Paris Principles expressly; the recommendation on the establishment of NHRIs in the CoE member states promotes the Paris Principles when calling the member states' attention to 'the principles set out in Resolution 48/134 of the General Assembly of the United Nations and in the Vienna Declaration and Programme of Action, adopted in 1993'.[66] Further documents are pointing out the importance of the Paris Principles, especially regarding the assessment of independence and other attributions of national human rights bodies in the member states of the CoE.[67] Within the CoE, especially the Commissioner for Human Rights aims at

[62] de Beco (n 56) 105.
[63] Katerina Linos and Tom Pegram, 'Architects of Their Own Making: National Human Rights Institutions and the United Nations' (2016) 38 Human Rights Quarterly 1109, 1131.
[64] Council of Europe, Committee of Ministers Recommendation No. R (97) 14 (30 September 1997).
[65] Council of Europe, Committee of Ministers Resolution (97) 11 (30 September 1997).
[66] Council of Europe, Committee of Ministers Recommendation No. R (97) 14 (30 September 1997) (n 64).
[67] Thomas Hammarberg, 'Ombudsmen Need Independence to Speak Out for Human Rights' (2009) <http://www.theioi.org/downloads/42ga1/Stockholm Conference_10. Workshop 1_Thomas Hammarberg.pdf> accessed 24 March 2018; CoE Commissioner for Human Rights, 'Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality, CommDH(2011)2' (2011); CoE Venice Commission, 'Compilation on the Ombudsman Institution, CDL(2011)079' (2011); CoE, 'National Human Rights Structures Can Help Mitigate the Effects of Austerity Measures, Press Release - CommDH027(2012)' (2012); CoE Committee of Ministers, 'High Level Conference on the Future of the European Court of Human Rights Brighton Declaration' (2012); CoE Commissioner for Human Rights, 'Commissioner Muižnieks Calls on Swedish Parliament to Be Ambitious in Plans to Establish a National Human Rights Institution' <https://www.coe.int/en/web/commissioner/-/commissioner-muiznieks-calls-on-swedish-parliament-to-be-ambitious-in-plans-to-establish-a-national-human-rights-institution> accessed 15 January 2019.

cooperating with 'national, regional, local or thematic institutions which comply with the Paris Principles'.[68] His office also offers technical assistance for their establishment.

Recently, the Committee of Ministers recognised NHRIs along with civil society organisations (CSOs) as human rights defenders.[69] The Committee has been encouraging CoE member states to

> '[…] establish effective, independent, pluralistic and adequately funded NHRIs in compliance with the Paris Principles, or where they already exist, strengthen them for the protection and promotion of all human rights and fundamental freedoms, including in their role to protect and promote an effective environment for civil society, co-operate and seek assistance, when needed, from the European Network of National Human Rights Institutions (ENNHRI), as well as from regional and international bodies such as the Office of the United Nations High Commissioner for Human Rights (OHCHR), the ODIHR/OSCE, the Council of Europe Commissioner for Human Rights, and the Venice Commission; […]'.[70]

The Paris Principles are also recognised in the area of EU law. There is an explicit reference to the Paris Principles in the founding Regulation of the EU Agency for Fundamental Rights (FRA) on the composition of its Management Board.

> 'Given the particular functions of the Agency, each Member State should appoint one independent expert to the Management Board. Having regard to the principles relating to the status and functioning of national institutions for the protection and promotion of human rights (the Paris Principles), the composition of that Board should ensure the Agency's independence from both Community institutions and Member State governments and assemble the broadest possible expertise in the field of fundamental rights.' [71]

Some scholars raise the question of whether the FRA can be considered as the European National Human Rights Institution.[72] Besides that the name is controversial, as Europe is

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[68] CoE Commissioner for Human Rights, 'Co-Operation with National Human Rights Structures' <https://www.coe.int/en/web/commissioner/co-operation-with-national-human-rights-structures?desktop=true> accessed 13 November 2018.
[69] Council of Europe, Recommendation CM/Rec(2018)11 of the Committee of Ministers to member States on the need to strengthen the protection and promotion of civil society space in Europe.
[70] ibid, Annex (I)(h).
[71] Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights 2007 para 20.
[72] Manfred Nowak, 'National Human Rights Institutions in Europe: Comparative, European and International Perspectives' in Jan Wouters and Katrien Meuwissen (eds), *National Human Rights Institutions in Europe* (Intersentia 2013); Jan Wouters, Katrien Meuwissen and Ana Sofia de Barros, 'The European Union and National Human Rights Institutions' in Jan Wouters and Katrien Meuwissen (eds), *National Human Rights Institutions in Europe* (Intersentia 2013); Jan Wouters, Katrien Meuwissen and Ana Sofia de Barros, 'The European Union and National Human Rights Institutions' (2013) <https://ghum.kuleuven.be/ggs/publications/working_papers/2013/112woutersmeuwissenbarros> accessed

not a nation, so its agency cannot be national, the FRA cannot function as a Paris Principles-conform NHRI. Its founding law that does not grant either a broad human rights mandate and adequate powers, or an independent and pluralistic composition to the Agency.[73] Similarly to the CoE Commissioner for Human Rights, FRA works closely with national human rights bodies, namely Equality Bodies, NHRIs, and ombudsinstitutions of the EU Member States.[74]

The EU's Development Policy encourages and supports 'the establishment, and work, of national bodies for the promotion and protection of human rights, established in accordance with the Paris Principles […]'.[75] Considering the Paris Principles as relevant standards for the operational manner of national equality bodies, the European Commission proposed a detailed reference to the Paris Principles in the design of monitoring mechanisms related to the draft Equal Treatment Directive.[76] In 2009, the European Parliament called on the EU member states

> '[…] to take measures to endow the National Human Rights Institutions set up under the United Nations' "Paris Principles" with independent status vis-à-vis the executive and sufficient financial resources, taking account, in particular, of the fact that one of these bodies' tasks is to review human rights policies with the aim of preventing failings and suggesting improvements, on the understanding that effectiveness is measured primarily by the way in which problems are prevented rather than simply resolved; urges those Member states which have not yet done so to set up the above-mentioned National Human Rights Institutions […].'

The EU has put NHRIs high on its human rights agenda as well. In the New Action Plan on Human Rights and Democracy (2015-2019), the first actions are supporting and engaging NHRIs – in particular, those, 'which are in line with the Paris Principles', strengthening the involvement of NHRIs in consultation processes (human rights dialogues); strengthening A-status NHRIs and supporting the upgrade of B-status NHRIs, cooperating with their

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18 March 2019.

[73] Wouters, Meuwissen and Barros, 'The European Union and National Human Rights Institutions' (n 72).

[74] European Union Agency for Fundamental Rights, 'National Human Rights Bodies' <http://fra.europa.eu/en/cooperation/national-human-rights-bodies>. See FRA publications on this matter: European Union Agency for Fundamental Rights, *National Human Rights Institutions in the EU Member States* (Publications Office of the European Union 2010); European Union Agency for Fundamental Rights, *Handbook on the Establishment and Accreditation of National Human Rights Institutions in the European Union* (Publications Office of the European Union 2012); European Union Agency for Fundamental Rights, *Annex to the Handbook on the Establishment and Accreditation of National Human Rights Institutions in the European Union* (Publications Office of the European Union 2012).

[75] EU, 'Ensuring Protection – European Union Guidelines on Human Rights Defenders' (2008) para 14.

[76] European Commission, 'Proposal for a Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation, COM(2008) 426 Final of 2 July 2008' para 28.

regional and international networks; and facilitating cooperation between NHRIs in the EU Member States and NHRIs in partner countries.[77]

The Organisation for Security and Cooperation in Europe (OSCE) promotes the work of NHRIs concerning different areas with human rights dimension, including combating terrorism, improving the situation of Roma and Sinti, promotion of gender equality and promoting mutual respect and understanding. In its 2007 Resolution on Strengthening OSCE Engagement with Human Rights Defenders and National Human Rights Institutions, the OSCE Parliamentary Assembly refers to the Paris Principles and urges the OSCE member states to establish NHRIs in accordance with them.[78] In 2007, the OSCE's Office for Democratic Institutions and Human Rights (ODIHR) established a Focal Point for Human Rights Defenders and National Human Rights Institutions to support the creation and functioning of newly established institutions by providing them regional training aimed at increasing their independence and capacity.[79] In 2011, the OSCE held the first Supplementary Human Dimension Meeting dedicated to the topic of NHRIs.[80]

Beyond Europe, also the American, African, and Asian inter-governmental organisations promote the Paris Principles compliance of NHRIs in their member states. The General Assembly of the Inter-American Commission on Human Rights (IACHR) strengthens the national human rights systems of its member states and supports the work of national human rights bodies continuously by bearing in mind the Paris Principles.[81] In 2008, the member states of the Organization of American States (OAS) gave the participation and speaking rights to NHRIs at OAS human rights meetings.[82] In the African region, several sources are encouraging the establishment and improvement of national institutions for the

[77] Council of the European Union, *EU Action Plan on Human Rights and Democracy* (Publications Office of the European Union 2015) 16.
[78] OSCE Parliamentary Assembly Resolution on Strengthening OSCE Engagement with Human Rights Defenders and National human rights institutions, 5-9 July 2007, Kyiv.
[79] OSCE Office for Democratic Institutions and Human Rights, 'National Human Rights Institutions' <http://www.osce.org/odihr/national-human-rights-institutions> accessed 21 April 2018. See also: <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/droi_20100125_33fsosce_/droi_20100125_33fsosce_en.pdf>.
[80] OSCE, Supplementary Human Dimension Meeting, National human rights institutions (Ombudsinstitutions, commissions, institutes and other), 14-15 April 2011, Vienna 2011.
[81] Inter-American Commission on Human Rights, General Assembly Resolution, Strengthening of the National Human Rights Systems of the Member states and Support for the Work of Defenders of the People, Defenders of the Population, and Human Rights Attorneys or Commissioners (Ombudsmen), CP/CAJP-2373/06 rev. 3.
[82] Inter-American Commission on Human Rights, General Assembly Resolution, Strengthening the Role of National Institutions for the Promotion and Protection of Human Rights in the Organization of American States, adopted at the fourth plenary session, held on June 3, 2008, AG/RES. 2421 (XXXVIII-O/08).

promotion and protection of human rights. While the Banjul Charter[83] and the earlier resolutions of the African Commission on Human and Peoples' Rights[84] preceded the development of the Paris Principles, later documents grant participation rights in the work of the African Commission to those NHRIs which conform to the Paris Principles.[85] There are further official sources which refer to the independence and adequate financial resources of national institutions, [86] in accordance with the Paris Principles requirements. In lack of a uniform regional human rights mechanism, the Association of the Southeast Asian Nations (ASEAN) is devoted to cooperate and consult with national entities concerned with the promotion and protection of human rights, including NHRIs. However, none of these legal sources mentions the Paris Principles.[87]

Beyond inter-governmental organisations, international human rights NGOs and research think-tanks have also stressed the Paris Principles in their publications, targeting NHRIs and states and giving detailed analyses on its standards.[88]

Thus, according to their legal nature, the Paris Principles are non-binding benchmarks of international law. They are 'internationally agreed minimum standards'[89] for the establishment, operation and assessment of NHRIs, and determine guidelines towards which states can be steered when they wish to establish an institution or strengthen their existing body to an NHRI. Despite being soft law and limited in nature[90], the significance of the Paris Principles cannot be underestimated, as the compliance with them determinates

[83] African (Banjul) Charter on Human and Peoples' Rights 1981.
[84] African Commission on Human and Peoples' Rights, 2: Resolution on the Establishment of Committees on Human Rights or other similar Organs at National, Regional or Sub-Regional Levels 1989.
[85] African Commission on Human and Peoples' Rights, 31: Resolution on the Granting of Observer Status to National Human Rights Institutions in Africa 1989; African Commission on Human and Peoples' Rights, Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment In Africa 2008; African Commission on Human and Peoples' Rights, Rules of Procedure of the African Commission on Human and Peoples' Rights 2010.
[86] Grand Bay (Mauritius) Declaration And Plan Of Action 1999; African Commission on Human and Peoples' Rights, 40: Resolution on the Human Rights Situation in Africa 1999.
[87] The Asean Charter 2008 Article 41; ASEAN Human Rights Declaration 2012 para 39; Guidelines on the Operations of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2012 para 11.2.
[88] Amnesty International, *National Human Rights Institutions. Amnesty International's Recommendations for Effective Protection and Promotion of Human Rights* (2001) <https://www.amnesty.org/download/Documents/128000/ior400072001en.pdf> accessed 21 January 2018; The Asian NGO Network on National Human Rights Institutions (ANNI), *2017 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia* (2017); Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa* (Human Rights Watch 2001).
[89] Morten Kjaerum and Jonas Grimheden, 'NHRIs in the European Union: Status Quo Vadis?' in Eide Asbjørn, Jakob Th Möller and Ineta Ziemele (eds), *Making peoples heard: essays on human rights in honour of Gudmundur Alfredsson* (Nijhoff 2011) 364.
[90] C Raj Kumar, 'National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights' (2003) 19 American University International Law Review 259.

a range of rights and privileges for the institutions.[91] The significance of the Paris Principles will be further elaborated when discussing the institutions' interaction with international human rights mechanisms in section 1.7 below.

1.3 Standards within the Paris Principles

The Paris Principles determine NHRIs as key domestic bodies, which have a broad mandate and general competence to promote and protect human rights at the national level. The Paris Principles describe the mandate, the competencies and responsibilities, the composition, the guarantees of independence and pluralism, as well as the methods of operation of NHRIs.

1.3.1 Mandate on the promotion and protection of human rights

The Paris Principles specify that an NHRI must have a clearly defined and broad mandate. The mandate is clearly defined if the composition and the competencies of the institution are regulated and described in a statute or the constitution. The mandate must be 'as broad as possible'.[92] The broad human rights mandate is one of the most important features of NHRIs and one that usually distinguishes Paris Principles-compliant NHRIs and other 'national human rights structures' or 'bodies'. A broad mandate encompasses at least four requirements.

First, it must charge the institution with competencies for both the **promotion and protection** of human rights. Promotion serves the goal of making human rights and the related protection mechanisms visible and understandable. It can be achieved through a variety of activities, including human rights education and training, disseminating publications, organising seminars and workshops. Protection addresses, first and foremost, the elimination of human rights violations by monitoring human rights, conducting thematic inquiries and accepting and investigating individual complaints.[93]

Second, the mandate of the institution must involve both **national and international activities**. 'Although NHRIs are creations of domestic laws and processes, their existence

[91] Rachel Murray, 'The Role of National Human Rights Institutions' in Manisuli Ssenyonjo and Mashood A Baderin (eds), *International human rights law: six decades after the UDHR and beyond* (Ashgate 2010) 306.
[92] Paris Principles s 1 para 2.
[93] Office of the UN High Commissioner for Human Rights, *National Human Rights Institutions - History, Principles, Roles and Responsibilities* (United Nations Publication 2010).

is closely connected with the international human rights system […]'.[94] They have the mission to promote the national implementation of international human rights instruments, encourage the ratification of such tools, ensure the harmonisation of national legislation, regulations and practices with the international human rights standards, and interact with international human rights bodies.[95]

Third, a broad mandate covers the whole spectrum of human rights, including **civil, political, economic, social, and cultural rights**. However, an institution can ascertain its priorities and have a focus on a particular thematic area 'within its broad mandate where the major issues on national implementation of human rights emerge'.[96] Some institutions work as equality human rights commissions, focusing on human rights abuses related to discrimination,[97] some promote and protect women's and children's rights[98] and others specialise in business and human rights.[99]

Fourth, the broad mandate should enable the institution to investigate **human rights violations committed by legal persons**, including business enterprises. While the Paris Principles do not explicitly require that NHRIs engage directly with non-state abuses, they do encourage the action of NHRIs aimed at protecting and promoting human rights as they relate to private actors including business in more specific ways.[100]

1.3.2 Competencies and responsibilities

Regarding the institutions' competencies, the Paris Principles specify minimum duties, that the institutions must fulfil, and further tasks, from which the institutions can choose. States can confer extra assignments on the institutions that are compatible with the function of an independent NHRI.[101] Some of their competences relate to human rights promotion, some to human rights protection and others to both. Their main tasks are: (1) monitoring human

[94] Chris Sidoti, 'National Human Rights Institutions and the International Human Rights System' in Ryan Goodman and Thomas Pegram (eds), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (Cambridge University Press 2012) 93.
[95] Paris Principles (n 92) s 1.
[96] Haász, *National Human Rights Institutions in the UN Human Rights Framework* (n 2).
[97] For instance: Human Rights and Equal Opportunity Commission of Australia, Canadian Human Rights Commission, the Equality and Human Rights Commission of the United Kingdom.
[98] For instance: Afghan Independent Human Rights Commission, the National Human Rights Commission of India.
[99] For instance: The Danish Institute for Human Rights, the Scottish Human Rights Commission.
[100] Meg Brodie, 'Pushing the Boundaries: The Role of National Human Rights Institutions in Operationalizing the "Protect, Respect and Remedy" Framework' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights. Foundations and Implementation* (Nijhoff 2012).
[101] Haász, *National Human Rights Institutions in the UN Human Rights Framework* (n 2).

rights and their implementation, (2) political consulting, (3) investigating human rights violations, (4) awareness-raising, including human rights education and training, (5) and cooperation with other institutions having competence in the areas of human rights protection and promotion at the national, regional, and international levels.

An institution's **monitoring function** is one of its core duties, which is a precondition for carrying out other tasks. 'Monitoring is an important way to ensure that legislative and policy initiatives are being successfully implemented'.[102] It describes the 'activity of observing, collecting, cataloguing and analysing data'.[103] While the Paris Principles do not mention the term 'monitoring' explicitly, some of the competencies therein are monitoring activities by nature. Based on their mandate, NHRIs can examine the domestic legislation and administrative provisions in force, as well as bills, proposals and the administrative praxis, to see whether they comply with international human rights standards.[104] The aim is 'to promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments'.[105]

In the course of their **consultancy capacity**, the institutions submit to the government, parliament, administrative authorities or courts – at either request or *ex officio* – advisory opinions and recommendations on any matters concerning the promotion and protection of human rights and prepare reports on their findings.[106] This advisory function aims to ensure that internationally recognised rights find a home within national legislation, regulation and practice.[107] Encouraging the ratification of international human rights instruments, ensuring the effective implementation of the already ratified treaties[108] and contributing to the reporting activity of the state under its international human rights obligations is part of this advisory function.[109]

The NHRIs' **investigative function** constitutes the core element of their protection mandate. Investigations can be initiated by individual human rights complaints or carried

[102] United Nations Development Programme and Office of the UN High Commissioner for Human Rights, *UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions* (2010) 38 <http://www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf> accessed 10 December 2017.
[103] ibid 113.
[104] Paris Principles (n 92) s 1 para 3(a)(i).
[105] ibid s 1 para 3(b).
[106] ibid s 1 para 3(a).
[107] ICCPR Committee, General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13 para 13.
[108] Paris Principles (n 92) s 1 para 3(c).
[109] ibid 3(d).

out as thematic investigations or public inquiries. The Paris Principles do not require NHRIs to have **complaint-handling competence**. It is merely an additional principle concerning the status of commissions with quasi-judicial competence.[110] The fact that human rights ombudsinstitutions (from Latin America) were underrepresented at the Paris meeting may explain this minor significance in the Paris Principles. Since the awareness among participants about the existence and features of human rights ombudsinstitutions were low and mainly European classic ombudsinstitutions contributed to the meeting, participants have believed that ombudsinstitutions in general 'were not well suited to address human rights concerns'[111] and thus, have no place in the Paris Principles. 'Accordingly, there are several institutions that are not authorised to hear or consider complaints and petitions concerning individual situations but are still in compliance with the Paris Principles.'[112] Nevertheless, recent research has shown that institutions with the ability to receive and process complaints are more effective than NHRIs lacking in this competence.[113] The complaint-handling function may contribute to the institutions' advisory role since complaints serve as an indicator of emerging problems that should feed into policy processes.[114] NHRIs may launch **public inquiries**. Thematic investigations are a proactive way of protecting vulnerable groups, who live with a particular human rights threat potential and are often unaware of their rights and the protection mechanisms.[115] However, relatively few institutions have the power to issue enforceable orders, with some assistance of other national, regional and international players, they can have an impact. NHRIs complement and supplement judicial mechanisms that often cannot carry the burden of addressing all alleged abuses or the victims cannot afford costly, lengthy, inflexible and formal judicial procedures. NHRIs often play a mediator role by seeking amicable settlements, bringing matters to the attention of courts or prosecutors' offices, providing legal counselling or instituting petition or inquiry procedures before national parliaments.

[110] ibid 4.
[111] Katerina Linos and Tom Pegram, 'The Language of Compromise in International Agreements' (2016) 70 International Organisation 587, 599.
[112] Haász, *National Human Rights Institutions in the UN Human Rights Framework* (n 2).
[113] Linos and Pegram, 'The Language of Compromise in International Agreements' (n 111).
[114] CoE Commissioner for Human Rights, 'National Human Rights Structures Can Help Mitigate the Effects of Austerity Measures' (2012) <http://www.coe.int/en/web/commissioner/-/national-human-rightsstructures-%0Acan-help-mitigate-the-effects-of-austerity-measur-1>.
[115] Anne Gallagher, 'Making Human Rights Treaty Obligations a Reality: Working with New Actors and Partners' in Philip Alston and James Crawford (eds), *The Future of the UN Human Rights Treaty Monitoring* (Cambridge University Press 2000).

Closing their investigations, most NHRIs formulate legally non-binding recommendations. The topic of **lack of enforcement power** – especially in relation to ombudsinstitutions – is often subject of academic research. Some argue that oversight bodies should have the right to issue legally binding decisions,[116] other research findings and international practice show that an oversight body with 'recommendation power' is not necessarily less effective than that with 'binding decision power'.[117] Ombudsmen and commissioners can achieve improvements when exploring systematic human rights violations or dysfunction of the legal system and the implementation practice[118] by naming and shaming. As we will see in the case of ombudsinstitutions, flexibility and informal procedure are one of their strengths. Having the competence of issuing binding decisions that require formal procedures would eliminate this flexibility.[119]

In the course of their **promotion mandate**, the institutions carry out research, education and training. Research serves as a basis for all other activities and is uniquely complementary to the monitoring and advisory functions. While awareness-raising makes the wider public and victims aware of their human rights, education and training address mainly practitioners, among other things, teachers, legal professions, members of the judiciary, the police, and the armed forces in order to develop and promote their human rights knowledge, skills, and competences. NHRIs raise awareness about human rights by producing and spreading information material on human rights issues.

According to the Paris Principles, one of the functions of NHRIs is to **cooperate** with other actors working in the field of human rights promotion and protection at the national, regional, and international level.[120] At the national level, NHRIs should cooperate with parliamentary human rights commissions, human rights departments of ministries, human rights NGOs, and other similar bodies.[121] At the regional level, NHRIs cooperate in four main geographical groups under umbrella organisations (Network of African National

[116] Napichchaya Kansanoy, 'The Legal Enforcement of The Ombudsman in Thailand' (2017) 13 Journal of Applied Security Research 111; Laura Neuman, 'Enforcement Models: Content and Context' (2009); Megan Carter and Lv Yanbin, 'Access to Government Information in Europe and China: What Lessons to Be Learned?' (2007); Donald C Rowat, 'Freedom of Information: The Appeal Bodies under the Access Laws in Canada, Australia and New Zealand' (1993) 52 Australian Journal of Public Administration 215.
[117] Sara Holsen and Martial Pasquier, 'More Power to You? A Case Against Binding Decisions as the Ultimate Access to Information Enforcement Tool' (2015) 95 Administration & Society 1.
[118] Colleen M Flood and Kathryn May, 'A Patient Charter of Rights: How to Avoid a Toothless Tiger and Achieve System Improvement' (2012) 184 Canadian Medical Association Journal 1583.
[119] Bernadette Somody, 'Az Ombudsman-Típusú Jogvédelem Című Doktori Értekezésének Tézisei' (2009) <https://www.ajk.elte.hu/file/AJKDI_SomodyBernadette_tez.pdf> accessed 24 June 2017.
[120] Paris Principles (n 92) s 1 para 3(e).
[121] Haász, *National Human Rights Institutions in the UN Human Rights Framework* (n 2).

Human Rights Institutions,[122] *Red de Instituciones Nacionales para la Promoción y Protecctión de los Derechos Humanos del Continente Americano*,[123] Asia Pacific Forum,[124] European Network of National Human Rights Institutions[125]). Each regional group, led by coordinating committees holds regular meetings in order to develop human rights dialogues, networks, and practical programs of support and foster knowledge and information exchange between their member institutions. These regional coordinating mechanisms are well-positioned to ensure a consistent approach to international human rights standards among national institutions[126] and enable them to have a collective voice at the regional and international level.[127] It is also more handy for regional inter-governmental organisations and the UN to liaise with these regional networks than reaching out to individual institutions.

There are further regional networks organised along with common interests or features,[128] such as the Commonwealth Forum of National Human Rights Institutions,[129] the Francophone Association of National Human Rights Commissions,[130] or the South East Asia National Human Rights Institutions Forum. Similarly, ombudsinstitutions group on the basis of regional location and thematic priorities, such as: the European Network of Ombudsmen,[131] the Association of Ombudsmen and Mediators of Las Francophonie (AOMF),[132] the Association of Mediterranean Ombudsmen (AOM),[133] the International Ombudsman Institute (IOI),[134] the African Ombudsman & Mediators Association, the

[122] 'Network of African National Human Rights Institutions' <http://www.nanhri.org> accessed 26 January 2018.
[123] The American institutions do not have a registered network.
[124] 'Asia Pacific Forum' <http://www.asiapacificforum.net> accessed 26 January 2018.
[125] 'European Network of National Human Rights Institutions' <http://ennhri.org> accessed 26 January 2018.
[126] Carver, 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law' (n 6) 31.
[127] Kirsten Roberts, 'National Human Rights Institutions as Diplomacy Actors' in Michael O'Flaherty and others (eds), *Human rights diplomacy* (Nijhoff 2011) 230.
[128] For more regional and other groupings see: Orest JW Nowosad, 'National Human Rights Institutions into the 21st Century' in Rikke F Jørgensen and Klaus Slavensky (eds), *Implementing human rights. Essays in honour of Morten Kjærum* (The Danish Institute for Human Rights 2007) 174 et. al.
[129] 'Commonwealth Forum of National Human Rights Institutions' <http://cfnhri.org> accessed 26 January 2018.
[130] 'The Francophone Association of National Human Rights Commissions' <http://afcndh.org> accessed 26 January 2018.
[131] 'European Network of Ombudsmen' <http://www.eoi.at> accessed 26 January 2018.
[132] 'Association of Ombudsmen and Mediators of Las Francophonie (AOMF)' <http://www.aomf-ombudsmans-francophonie.org> accessed 26 January 2018.
[133] 'Association of Mediterranean Ombudsmen (AOM)' <http://www.ombudsman-med.org/?lang=en> accessed 26 January 2018.
[134] International Ombudsman Institute (IOI), 'Bylaws' <http://www.theioi.org/downloads/fnutr/IOI_Bylaws_Final Version_EN_20121113.pdf> accessed 22 February 2018.

United States Ombudsman Association;[135] the European Network of Ombudsmen in Higher Education (ENOHE),[136] the International Conference of Ombudsinstitutions for Armed Forces (ICOAF),[137] the European Network of Ombudspersons for Children (ENOC)[138].

The Paris Principles emphasise the necessity of cooperation of NHRIs with the UN and any other organisation in the UN.[139] At the international level, national institutions group in the already mentioned Global Alliance of National Human Rights Institutions (GANHRI), previously called the International Coordinating Committee of NHRIs (ICC). Beyond being the leading facilitator of the institutions' cooperation with the UN Human Rights Council and Treaty Bodies, as well as the promoter of information sharing among NHRIs worldwide, the GANHRI undertakes the institutions' accreditation in accordance with the Paris Principles. The accreditation procedure will be discussed in detail in section 1.5 below.

1.3.3 Methods of operation

To fulfil their tasks, the Paris Principles indicate certain powers, which NHRIs can and must be entrusted with. The main rule is that national institutions should '[f]reely consider any questions falling within [their] competence' and must be authorised not only on the proposal of the government but without referral to a higher authority.[140]

Their information and investigative powers are the requirements for performing their tasks meaningful. Such powers include entering any premises, hearing any person, accessing any official documents, or filing a legal action.[141] Unfortunately, many institutions lack the legal authority to access and monitor places of detention or have their powers limited due to national security reasons. Indeed, the scope of the mandate of NHRIs may be restricted for national security reasons and they do not always have the authority to investigate the actions of officers and personnel of the military, police, and special security forces. 'While

[135] 'United States Ombudsman Association' <http://www.usombudsman.org> accessed 26 January 2018.
[136] 'European Network of Ombudsmen in Higher Education (ENOHE)'.
[137] 'International Conference of Ombuds Institutions for Armed Forces (ICOAF)' <http://www.icoaf.org> accessed 26 January 2018.
[138] 'European Network of Ombudspersons for Children (ENOC)' <http://enoc.eu> accessed 26 January 2018.
[139] Paris Principles (n 92) s 1 para 3(e).
[140] ibid s 3(a).
[141] UN Centre for Human Rights (n 3) para 259.

this limitation is not inherently contrary to the Paris Principles, it should not be unreasonably or arbitrarily applied and should only be exercised under due process.'[142]

Closing their inquiries, national institutions must be able to publicise their findings and formulate opinions, reports, recommendations or proposals.[143] Furthermore, the institutions must manage themselves, for instance, meet regularly and where appropriate, establish working groups and regional sections.[144]

1.3.4 Independence and pluralism

Beyond having a broad human rights mandate, and the competencies mentioned above, the Paris Principles prescribe two requirements towards NHRIs – or better to say towards the establishing states: independence and pluralistic composition. Both are essential characteristics of NHRIs.

Independence must be ensured in its functional, personal, and financial sense. One of the guarantees of functional independence is the establishment of the institution in a legislative or constitutional text. The establishment at the constitutional or statutory level increases the stability of the institutions so that the government cannot easily amend the mandate, and contributes to a more transparent functioning. Functional independence and functional immunity are interrelated. Functional immunity is a frequent concern during the accreditation procedure, especially concerning NHRIs under threat. Furthermore, the OPCAT also require from NPMs to 'be accorded such privileges and immunities as are necessary for the independent exercise of their functions'.[145] Ensuring functional immunity enhances the institutions' ability 'to engage in critical analysis and commentary on human rights issues, safeguard the independence of senior leadership, and promote public confidence in the NHRI'.[146] Appointment or election and dismissal of the executive

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[142] Global Alliance of National Human Rights Institutions, 'General Observations of the Sub-Committee on Accreditation' (2018) para 2.7 <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General Observations 1/GeneralObservations_adopted 06.03.2017_EN.pdf> (hereinafter referred to as SCA General Observations.

[143] Paris Principles (n 92) s 3(c) and s 1 para 3(a).

[144] ibid 3(e).

[145] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), New York, 18 December 2002, United Nations, Treaty Series, vol. 2375, p. 237 (n 42) Article 35.

[146] Global Alliance of National Human Rights Institutions, *A Practical Guide to the Work of the Sub-Committee on Accreditation (SCA)* (2018) 21 <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/GANHRI Manual_online(1).pdf?Mobile=1&Source=%2FEN%2FAboutUs%2FGANHRIAccreditation%2F_layouts%2Fmobile%2Fview.aspx%3FList%3Dce4e3021%252Dbcd2%252D40cd%252D806d%252Db5201e98d815%2

members on the top of the institutions must be regulated in an official act as well, determining these procedures, the appointment criteria, the duration of the mandate, and the grounds of dismissal.[147] An NHRI can function independently in financial terms if the institution is provided with adequate funding and sovereignty in budgetary matters.[148] The financial sources should stem first of all from public funds; however, third-party donor funding can supplement it.[149]

The Paris Principles require composition and appointment based on a procedure that ensures pluralist representation of the society.[150] According to the Sub-Committee on Accreditation, this can be reached in four different ways. (1) If the members of the institution's decision-making body represent different segments of the society. (2) If diverse social groups are involved in the appointment procedure, for example, by suggesting or recommending candidates. (3) If the NHRI effectively cooperates with various societal groups. (4) If staff members come from different segments of society.[151]

1.4 Types of NHRIs

According to the Vienna Declaration, each State had the right 'to choose the framework which is best suited to its particular needs at the national level' when establishing an NHRI.[152] Indeed, there is no universal or ideal model of institutions. 'They are established in different forms and with various mandates in each state.'[153] The Paris Principles serve merely as general guidelines and 'NHRIs are situated within a particular national context'[154] according to the needs and legal tradition of the respective state.

Because of this institutional diversity, the question arises whether and how can we categorise NHRIs. The traditional literature suggests a classification, which distinguishes according to the structure between human rights commissions, which are composed of

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6View%3Dd07956> accessed 16 March 2019.

[147] United Nations Development Programme and Office of the UN High Commissioner for Human Rights (n 102) 248.

[148] Paris Principles (n 92) s 2 para 2.

[149] Global Alliance of National Human Rights Institutions, 'General Observations of the Sub-Committee on Accreditation' (n 142) para 1.10.

[150] Paris Principles (n 92) s 2 para 1.

[151] Global Alliance of National Human Rights Institutions, 'General Observations of the Sub-Committee on Accreditation' (n 142) para 1.7.

[152] Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, 12 July 1993, A/CONF.157/23 (n 22) Part I para 36.

[153] Haász, *National Human Rights Institutions in the UN Human Rights Framework* (n 2).

[154] Deutsche Gesellschaft für Technische Zusammenarbeit and Deutsches Institut für Menschenrechte, 'Nationale Menschenrechtsinstitutionen / National Human Rights Institutions (NHRIs)' (2011) 3.

more commissioners and ombudsinstitutions, which are governed by one individual.[155] This grouping became old-fashioned (NHRI archetypes[156]), since the number of newly established and accredited institutions; thus, the diversity of institutional forms have increased.

Another division is based on historical or geographical developments. National institutions show obvious similarities in Hispanic, Francophone and Commonwealth countries. The Hispanic tradition prefers ombudsinstitutions; the Francophone countries established advisory committees; meanwhile, most of the Commonwealth members chose the commission style. This classification reflects regional differences but does not provide a precise division, since there is often great variety within regions.

The present dissertation follows the grouping of NHRIs according to their primary functions, and tries to label each group with one collective name; however, the name can be misleading.[157] Only by reading the enabling law and the mandate of an institution carefully, it can be determined which type of NHRI a national human rights body belongs to.[158]

Based on their activity, the following types of national institutions are distinguished: (1) human rights commissions and equality commissions, (2) human rights ombudsinstitutions, (3) advisory committees and councils, and (4) human rights institutes and centres.[159]

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[155] UN High Commissioner for Human Rights, 'Fact Sheet No. 19: National Institutions for the Promotion and Protection of Human Rights' (1993) 3; UN Centre for Human Rights para 3; International Council on Human Rights Policy, *Performance & Legitimacy: National Human Rights Institutions* (2000) 3; Thomas Pegram, 'Diffusion Across Political Systems: The Global Spread of National Human Rights Institutions' (2010) 32 Human Rights Quarterly 729, 733; Orest JW Nowosad, 'National Institutions and the Protection of Economic, Social and Cultural Rights' in Betrand G. Ramcharan (ed), *The protection role of National Human Rights Institutions* (Nijhoff 2005) 183, 184; Linda C Reif, 'Building Democrativ Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 Harvard Human Rights Journal 1, 6.

[156] Linos and Pegram, 'The Language of Compromise in International Agreements' (n 111) 597.

[157] For instance, some advisory bodies are called commissions (National Consultative Commission in France: *La Commission nationale consultative des droits de l'homme*), and some commissions or centres are structured more like an ombudsman office (National Human Rights Commission in Mexico: *Comisión Nacional De los Derechos Humanos*, Center for Human Rights of Moldova: *Centrul pentru Drepturile Omului din Moldova*).

[158] United Nations Development Programme and Office of the UN High Commissioner for Human Rights (n 102) 2.

[159] Aichele (n 9) 102; European Union Agency for Fundamental Rights, *National Human Rights Institutions in the EU Member States* (Publications Office of the European Union 2010) 24.

1.4.1 Human rights commissions and equality commissions

Human rights commissions are collective bodies consisting of a relatively large professional staff of full- or part-time members who are the sole decision-makers. Human rights commissions are concentrated mainly in Africa, Asia-Pacific and Commonwealth countries with common law traditions. They usually focus on investigations of human rights abuses and often consider individual complaints.[160] The information obtained during inquiries is used in relation to other activities, such as human rights advocacy or education. Some human rights commissions have the authority to make or seek enforceable orders through tribunals or courts.[161] Several human rights commissions have a mandate focusing on equality rights and anti-discrimination. Such equality commissions consider complaints only in the area of equality and discrimination law,[162] and still, most of them are NHRIs in compliance with the Paris Principles.[163] Equality can be the main activity area not only for commissions but other types of institutions (for example, the Equality Ombudsman of Sweden).

1.4.2 Human rights ombudsinstitutions

Ombudstype institutions constitute the second largest group of NHRIs.[164] They have proliferated in all continents, but they represent countries, especially in Latin America and Eastern Europe. There is a vast diversity in names within the category: advocate, commissioner, defender, defensor/defensoria del pueblo, ombudsman, procurador/procuraduría, protector, provedor/provedoria. Still, their basic features and nature of the activity are the same. One single person heads human rights

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[160] For instance, Afghanistan Independent Human Rights Commission, 'A Brief Introduction of AIHRC and Its Programs and Activities' <https://www.aihrc.org.af/home/introduction> accessed 19 March 2019; Kenya National Commission on Human Rights, 'Legal Services' <https://www.knchr.org/Our-Work/Legal-Services> accessed 19 March 2019; Human Rights Commission (New Zealand), 'Make a Complaint' <https://www.hrc.co.nz/enquiries-and-complaints/> accessed 19 March 2019.

[161] For instance, the Uganda Human Rights Commission.

[162] Examples of this are found in many Commonwealth countries, including Australia (Australian Human Rights Commission), Canada (Canadian Human Rights Commission), Great Britain (Equality and Human Rights Commission), Ireland (Irish Human Rights and Equality Commission), and New Zealand (Human Rights Commission).

[163] The ones, which are currently not in full compliance with the Paris Principles: Bulgaria (Commission for Protection Against Discrimination) – B status, Hong Kong Special Administrative Region of China (Equal Opportunities Commission) – C status.

[164] Office of the UN High Commissioner for Human Rights, *Survey on National Human Rights Institutions. Report on the Findings and Recommendations of a Questionnaire Addressed to NHRIs Worldwide* (OHCHR 2009) 9; OSCE Office for Democratic Institutions and Human Rights, *Handbook for National Human Rights Institutions on Women's Rights and Gender Equality* (2012) 20 <https://www.osce.org/odihr/97756?download=true> accessed 23 January 2018.

ombudsinstitutions, who is the chief decision-maker. As important actors of individual legal protection, they mainly consider and hear individual complaints. Their investigatory procedure usually results in recommendations and legislative proposals.

The literature often distinguishes between classic, human rights and hybrid models.[165] This division is no longer useful typology.[166] First, the so-called classic ombudsman model must be treated completely separately, especially in the context of NHRIs. Classic ombudsmen have no human rights mandates in their enabling legislation. They are autonomous national institutions that may touch on human rights issues in their work, but they are not NHRIs. Second, there are no significant differences between hybrid and human rights ombudsman models, as both has its origin in the classic model and is mandated to promote and protect human rights. Authors regard the hybrid institutional model as a mixture of classic ombudsman and human rights commission.[167] Accordingly, they are mandated to monitor government administration and prevent corruption or maladministration, as well as to promote and protect human rights. Likewise, the so-called human rights ombudsinstitutions promote and protect human rights and investigate allegations of human rights abuses. Third, concrete institutions are very often classified in one category by one author and in another by the other.[168] This practice indicates confusion and makes this separation unnecessary. The present dissertation applies a simple classification, which considers human rights ombudsman and hybrid models as one category under the name of human rights ombudsinstitutions. The classic and the human rights model will be discussed in detail in the Chapter Two.

1.4.3 Advisory committees and councils

Advisory bodies have their focus on political consulting. They advise the government or parliament on various human rights issues. Advisory councils are especially found in Europe, Africa, in the Middle East and in those countries that share a Francophone

[165] United Nations Development Programme and Office of the UN High Commissioner for Human Rights (n 102); Reif, 'Building Democrativ Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (n 155); Linda C Reif, 'The Ombudsman and the Protection of Children's Rights' (2009) 17 Asia Pacific Law Review 27; Linda C Reif, 'Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman' (2011) 31 B.C. Third World L.J. 269.
[166] Victor O Ayeni, 'Ombudsmen as Human Rights Institutions' (2014) 13 Journal of Human Rights 498, 508.
[167] Reif, 'Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman' (n 165).
[168] For instance, the Office of the Public Defender of Georgia is human rights ombudsman in United Nations Development Programme and Office of the High Commissioner for Human Rights 24 and a hybrid model in Reif, 'The Ombudsman and the Protection of Children's Rights' (n 165) 39.

tradition.[169] Such committees or councils do not usually investigate individual complaints. They pay more attention to policy-level and major issues that are of national significance.

1.4.4 Human rights institutes and centres

Human rights institutes and centres have their focus on the sectors of political consulting, human rights education and research.[170] Since they are focused more on the theoretical background of human rights issues, they usually do not consider individual complaints.[171] A board consisting of a large professional staff with a diverse social science background leads human rights institutes and centres.

1.5 The accreditation of NHRIs

NHRI-like public institutions have been established long ago in various countries around the world. Not all of them can, however, be classified as NHRI conforming to the Paris Principles. Whether an institution meets these demands is examined in an international proceeding upon request by the institution itself. This peer-review procedure runs according to formal rules: the 'Rules of Procedure for the GANHRI Sub-Committee on Accreditation'[172] (hereinafter referred to as SCA Rules of Procedure) and the 'General Observations of the Sub-Committee on Accreditation'[173] (hereinafter referred to as SCA General Observations). The application may result in a letter-grade accreditation, deferral of the application for (re)accreditation or suspension of accreditation.

[169] For instance, National Consultative Commission of Human Rights (France, 1947), Consultative Commission of Human Rights (Luxembourg, 2000), Commission nationale consultative des droits de l'homme (Mali, 2009), Senegalese Committee for Human Rights (Senegal, 1997), High Committee for Human Rights and Fundamental Freedoms (Tunisia, 2008), National Committee for Human Rights (Qatar, 2002).
[170] For instance, Centre for equal opportunities and opposition to racism (Belgium, 1999), National Institute of Human Rights (Chile, 2009), The Danish Institute for Human Rights (Denmark, 2002), The German Institute for Human Rights (Germany, 2001), National Centre for Human Rights (Jordan, 2006), Netherlands Institute for Human Rights (the Netherlands, 2012), Romanian Institute for Human Rights (Romania, 2007), Slovak National Centre for Human Rights (Slovakia, 2002).
[171] The Centre for Equal Opportunities and Opposition to Racism in Belgium and the Netherlands Institute for Human Rights consider individual complaints.
[172] Global Alliance of National Human Rights Institutions, 'Rules of Procedure for the GANHRI Sub-Committee on Accreditation' (2017) <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/SCA Rules of Procedure/GANHRI_SCA_RulesOfProcedure_EN_06.03.2017.pdf> accessed 15 October 2018 (hereinafter referred to as SCA Rules of Procedure).
[173] SCA General Observations (n 142).

1.5.1 The Global Alliance of NHRIs (GANHRI)

In 1993, in the course of the second international workshop of NHRIs in Tunis, an international committee was established for the coordination of the activities of national institutions.[174] In 2016, the original name 'International Coordinating Committee of national institutions for the promotion and protection of human rights' (ICC) was replaced with a new name 'Global Alliance of National Human Rights Institutions' (GANHRI). The main task of the peer-network consists in strengthening NHRIs in accordance with the Paris Principles, providing a platform for interaction among its members, and facilitating the institutions' engagement with regional and international human rights mechanisms. The GANHRI is a non-profit legal entity, an association under Swiss law.[175] Those NHRIs become voting members of the GANHRI, which comply with all criteria laid down in the Paris Principles. The GANHRI is managed by the Bureau, which is composed of sixteen members, four members from each geographical region (Africa, The Americas, Asia-Pacific and Europe) – in order to ensure balanced regional representation.[176] The Bureau has its statutory seat in Geneva, where it holds meetings twice a year. Beyond its management committee, the GANHRI has a Secretariat that is the respective unit of the OHCHR, as well as a Chairperson and a Secretary elected from the members. Although the GANHRI cooperates with the OHCHR closely, it is not formally associated with it. This is due to the resolution of the institutions to maintain further their separation from 'the politicized arena' of the UN in order to sustain their independence, which protects them from state influence at the international level as well.[177] This separation needs to be emphasised, as institutions may believe that they become part of the international community through the accreditation. The Hungarian Ombudsman advertises, for instance, on its website that his office is 'a National Human Rights Institution of the UN'.[178]

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[174] UN Commission on Human Rights, Report of the second International Workshop on National Institutions for the Promotion and Protection of Human Rights, Tunis, 13-17 December 1993, 23 December 1993, E/CN.4/1994/45.

[175] UN Secretary-General Report, National institutions for the promotion and protection of human rights, 26 January 2009, A/HRC/10/54 para 56.

[176] Global Alliance of National Human Rights Institutions, 'Statute' (2018) <https://nhri.ohchr.org/EN/AboutUs/Governance/Statute/EN_GANHRI_Statute_adopted_22.02.2018_vf.pdf > accessed 25 March 2018 (hereinafter refrred to as GANHRI Statute.) Article 31.1.

[177] Valentin Aichele, *National Human Rights Institutions. An Introduction* (2010) 12.

[178] Office of the Commissioner for Fundamental Rights, 'On the New Badge of the Office of the Commissioner for Fundamental Rights' <https://www.ajbh.hu/en/web/ajbh-en/about-the-office?p_p_auth=CChdNeBL&p_p_id=101&p_p_lifecycle=0&p_p_state=maximized&p_p_mode=view&_101_struts_action=%2Fasset_publisher%2Fview_content&_101_returnToFullPageURL=%2Fen%2Fweb%2Fajbh-en%2Fabout-the-office&_101_> accessed 30 January 2018.

In 2000, the GANHRI established a Sub-Committee on Accreditation (SCA) and mandated it to examine whether the institutions under consideration comply with the Paris Principles and make recommendations for their accreditation status.[179] While the responsibility for the examination of application documentation lies with the SCA, the Bureau makes the final decision on accreditation, as mentioned before. According to the SCA Rules of Procedure, the SCA consists of one representative of each of the four regions, appointed for a term of three years renewable.[180] The SCA holds its meetings twice a year closely after the general meetings of the GANHRI in Geneva.

1.5.2 The accreditation process

In its early years, the accreditation of national institutions was rather a soft process without any written rules. Neither the ICC's nor the SCA's Rules of Procedure provided guidance for determining whether an applicant institution conforms to the Paris Principles. In the absence of clear guidelines, the SCA has been left to develop its own understanding. This vague praxis and the increased number of applications led to the need for a review of the accreditation process. In 2008, the findings of the examination were put down in a discussion paper[181] and built into the rules of procedure of the GANHRI and into that of the SCA. While the Paris Principles give the objective framework, the deliberations of the SCA provide the subjectivity.[182]

The procedure has four steps. First, the institution sends its application with supporting documents to the GANHRI Secretariat. Second, the OHCHR reviews the application and issues a summary that it shares with the SCA. Third, in the course of an accreditation session, the SCA makes deliberations and finally submits a recommendation on the accreditation status of the institution to the GANHRI Bureau. Fourth, the Bureau decides on the accreditation of the applicant institution.

The GANHRI provides information for national institutions on how to make an application,[183] i.e. what documentation is needed, what deadlines are to be considered, and

[179] UN Secretary-General Report, Effective functioning of human rights mechanisms: national institutions for the promotion and protection of human rights, 3 February 1999, E/CN.4/1999/95 para 49.
[180] SCA Rules of Procedure (n 172) para 3.1.
[181] ICC Working Group on Accreditation, 'Decision Paper on the Review of ICC Accreditation Procedures for National Human Rights Institutions (NHRI)' (2008).
[182] Skype interview with Jonas Grimheden, Senior Policy Mangager, European Union Agency for Fundamental Rights (FRA), 15 February 2019.
[183] GANHRI Statute (n 176) Article 10; SCA Rules of Procedure (n 172) para 6; Global Alliance of National

how the application process runs. Within their application, the institutions must answer questions regarding their establishment, independence, composition, appointment process, tenure, organisational infrastructure, working methods, general competences and responsibilities and relationship with relevant human rights stakeholders and other bodies.[184] The SCA receives information from other sources as well. Besides the application documentation and information gained from publicly available information (e.g. UPR reports), credible third parties, such as CSOs and the OHCHR, provide information that assists the SCA at its deliberations.[185] Interactive dialogues between the SCA and the applicant institutions takes place during the accreditation session, i.e. a telephone interview forms an integral part of the process.

The SCA works on schedule and depending on the number of applicants reviews approx. thirty institutions during its five-day session; the volume of applications changes continuously during the year. After deliberations, the SCA agrees on a recommended accreditation status for each applicant and forwards its decision to the national institutions with the opportunity to respond. After that, the recommendation is forwarded to the members of the GANHRI Bureau, who can approve or object to the recommendation. The decision of the GANHRI Bureau on accreditation is final.[186] The outcome of the process depends on changes in the circumstances of institutions regarding their Paris Principles-conformity. The approved accreditation status may result in obtaining a new accreditation classification in the case of first applications, or holding or altering the existing one, including losing or suspension.

1.5.3 The function and significance of accreditation

On the ground of compliance with the Paris Principles, the institutions are assigned in two different categories: A: Fully compliant with the Paris Principles; and B: Partially compliant with the Paris Principles. If an institution meets all of the requirements, it will receive an A-status and become a full member of the GANHRI. An institution will fall into category B if it does not comply with the Paris Principles in its entirety. These institutions

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Human Rights Institutions, 'Practice Note 3. Assessing the Performance of NHRIs' (2017) <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General Observations 2/PracticeNote3_AssessingPerformance_EN.pdf> accessed 30 October 2018.

[184] Template for the Statement of Compliance with the Paris Principles.

[185] Global Alliance of National Human Rights Institutions, *A Practical Guide to the Work of the Sub-Committee on Accreditation (SCA)* (n 146) 33.

[186] GANHRI Statute (n 176) Article 12; SCA Rules of Procedure (n 172) para 9.

gain membership in the GANHRI; however, they cannot be elected into its Bureau and do not have any right to vote at the meetings.[187]

Even though the GANHRI cannot make legally binding decisions under international law, its decisions on accreditation have had an increasing practical significance, as it has had severe implications in relation to the ability of the institutions to operate at the international level. Namely, NHRIs with A-status have dedicated seating at the sessions of the UN Human Rights Council, where they can make oral interventions and written statements on any item on the Council's agenda and submit documents under their own symbol number.[188] Participation in the accreditation process affects not only the place of institutions in the international sphere, but it increases the legitimacy and the credibility of the institutions since their independence is assessed and acknowledged by an international committee opposite to the political leadership of their respective State.

Because of this importance, the question of the reliability of the accreditation (procedure and status) often arises. Some approach the accreditation with scepticism. Critics consider the accreditation criteria, including the Paris Principles too weak.[189] Nevertheless, the Paris Principles are the only sources that contain key elements for measuring NHRIs at the moment. Therefore, the assessment of the institutions can and must be based on them. Aiming at a fair, transparent and consistent procedure, the GANHRI and the regional networks have been focusing substantial efforts on elaborating on the meaning of the Paris Principles and assisting their member institutions with their accreditation applications. Others note that the accreditation procedure places more emphasis on the scope of the institutions' mandate and the formal rules governing their establishment while overlooking the practical effectiveness of the institutions.[190] Also, the SCA's consistency is missing in some cases. Improving its formal practice, the SCA has placed more emphasis on the functional performance of NHRIs since the 2008 reform of the accreditation process. In particular, the SCA members channel practical views into their deliberations by involving additional information received from CSOs, representatives of the regional coordinating committees and UN field offices. The assistance of various participants helps the SCA to have a better understanding of the legal and political contexts in which NHRIs operate and

[187] GANHRI Statute (n 176) Articles 24.1 and 24.2; SCA Rules of Procedure (n 172) para 10.
[188] UN Commission on Human Rights, Human Rights Resolution 2005/74. National institutions for the promotion and protection of human rights, E/CN.4/2005/L.10 para 11.
[189] Kumar (n 90).
[190] Murray (n 91).

can contribute to a well-informed decision. It increases the credibility of the accreditation that this is a peer-review process, undertaken by practitioners; completely separated from the politics of the UN.[191] Besides, this is a periodic review, i.e. A-status institutions are reviewed every five years. As the members of the SCA rotate every three years, the diversity of evaluation views is also guaranteed. Furthermore, where the circumstances of an institution change in a way, which may affect its compliance with the Paris Principles, the GANHRI Bureau may carry out a review before the expiration of the five-year interval. The gatekeepers, the GANHRI and the OHCHR, have been making serious efforts to ensure that the gained accreditation status meaningfully reflects both the design and practice of the institutions under review.[192]

The most critical voices question the full compliance of A-status NHRIs with the Paris Principles.[193] The SCA itself admits that in reality 'no NHRI operates in perfect compliance with the Paris Principles'.[194] In the case of A-status institutions, the concerns formulated by the SCA 'are not of sufficient severity to impact the NHRI's ability to act in an effective and independent manner'.[195] That makes the difference. The SCA also admits that a B-status is not necessarily an indicator that an NHRI is not an effective body.[196] It also raises the question of whether Paris Principles non-compliant national institutions can be named NHRIs. As discussed earlier, most official UN documents grant participatory rights to A-status institutions. At the same time, the practice of the international organisations shows that they call national institutions that promote and protect human rights NHRIs – including those that do not fully comply with the Paris Principles – and promote their work and compliance with the Paris Principles. It is also a paradox that the SCA addresses recommendations to the institutions with respect to some activities that are not within the control of the institutions but rather the government or the parliament.[197]

It is beyond doubt that the GANHRI accreditation is not perfect. Still, we should not underestimate its role and importance. Sarugaser-Hug argues that the SCA, as a peer-

[191] Sidoti (n 94).
[192] Global Alliance of National Human Rights Institutions, *A Practical Guide to the Work of the Sub-Committee on Accreditation (SCA)* (n 146) 11.
[193] Carole J Petersen, 'Bridging the Gap?: The Role of Regional and National Human Rights Institutions in the Asia Pacific' (2011) 13 Asian-Pacific Law & Policy Journal 174.
[194] Global Alliance of National Human Rights Institutions, *A Practical Guide to the Work of the Sub-Committee on Accreditation (SCA)* (n 146) 36.
[195] ibid.
[196] ibid.
[197] Gauthier de Beco and Rachel Murray, *Commentary on the Paris Principles on National Human Rights Institutions* (Cambridge University Press 2015) 138.

review mechanism, has a direct impact on the implementation of international human rights standards through increasing the effectiveness and independence of institutions contributing to their implementation.[198] Authors suggest making the accreditation process 'as transparent and robust as possible', for instance by the expansion of the membership of the SCA and the availability of the accreditation documentation, including the deliberations.[199] Authors agree that the Paris Principles do not need any revision.[200] The strongest argument in favour of this may lie in the fact that they are products of NHRIs themselves and were not imposed externally[201] as it is usually the case with legal standards. Supporters of the GANHRI accreditation believe that the credibility of A-status designation must be ensured in the future.[202]

1.6 Distinction from other national actors for the promotion and protection of human rights

Some might argue that an independent judiciary and democratically elected parliament are sufficient means to ensure the promotion and protection of human rights, and it is not necessary to establish special national machinery for this reason. Unfortunately, history has taught us differently: a body that is separated from the responsibilities of executive governance and judicial administration is in a better position to take a leading role in controlling the executive and promoting and protecting human rights.[203]

Being national mechanisms, NHRIs work first of all at the national level. Therefore, they share some characteristics with other domestic human rights protection actors, such as public authorities, national courts and human rights non-governmental organisations (NGOs) and their roles overlap to a certain extent.[204] Nevertheless, they differ as well. Especially, the independence, broad mandate, pluralistic staff structure and special status of

[198] Sulini Sarugaser-Hug, 'How a Peer-Review Mechanism Can Influence the Implementation of International Human Rights Standards: Why the Work of the Sub-Committee on Accreditation of the International Coordinating Committee of National Institutions for the Promotion and Protection ' (2012) 18 Australian Journal of Human Rights 45.
[199] de Beco and Murray (n 197) 144–145.
[200] Julie Mertus, 'Evaluating NHRIs: Considering Structure, Mandate, and Impact' in Ryan Goodman and Tom Pegram (eds), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (Cambridge University Press 2012) 89; Ryan Goodman and Thomas Pegram, 'Introduction: National Human Rights Isntitutions, State Conformity, and Social Change' in Ryan Goodman and Thomas Pegram (eds), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (Cambridge University Press 2012) 7.
[201] Sidoti (n 94) 98.
[202] Roberts (n 127).
[203] Office of the UN High Commissioner for Human Rights, 'Fact Sheet No. 19: National Institutions for the Promotion and Protection of Human Rights' (n 155).
[204] Roberts (n 127) 228.

NHRIs emerge them from the other actors. In comparison to all of these domestic entities, NHRIs have a particular position and mission: they form a bridge and make a connection between the national and the international level.

1.6.1 Public authorities

Under public authorities, parliamentary human rights commissions, ministry departments, anti-discrimination agencies, and human rights commissioners will be considered. All of them are state-founded institutions like NHRIs. In relation to public authorities, the most significant difference lies in independence. While state instructions bind public authorities, NHRIs must remain free from state influence. Fundamental guarantees granted by the official enabling act of NHRIs, including provisions on the appointment, election and dismissal of the executive members on the top of the institutions, as well as adequate funding and sovereignty in budgetary matters, facilitate a greater scope of independent action to NHRIs. Where their mandate allows, NHRIs offer the victims alternative dispute resolution and human rights dialogue, conduct thematic inquiries, and advance proposals for legal reform. These are usually broader competencies than what public authorities may have. On the other hand, public authorities can apply exercise power, make binding decisions, impose punishment and administrative fines.

1.6.2 National courts

In democracies, the retroactive protection of individual human rights falls to the competence of courts. Therefore, the question often arises, why an NHRis needed besides the existing judiciary. It must be emphasised that NHRIs cannot replace national courts; they can only complete their activity. It is beyond doubt that an independent judiciary has a vital role in enforcing the rule of law.[205]

Considering the mandate of national courts in comparison to that of NHRIs, the most significant difference exists in the enforcement measures mentioned above. While the former exercise power and make binding decisions, the minority of NHRIs can enforce their recommendations directly, and a few of them can be enforced in the same manner as court judgements. For this reason, NHRIs are usually not considered as an effective domestic remedy in terms of admissibility criteria required in regional and international

[205] United Nations Development Programme and Office of the UN High Commissioner for Human Rights (n 102) 3.

legal procedures.[206] At the same time, some NHRIs have powerful court referral powers 'such as constitutional review, habeas corpus, and amicus curiae powers'.[207]

In contrast to national courts, which can intervene reactively after the human rights violation has occurred and the case had been filed with them, NHRIs can use their competencies proactively and prevent violations, for instance by initiating a thematic investigation *ex officio* or making use of their promotional activities. The goal, to eliminate human rights abuses *apriori*, shows another, a more forward-looking human rights-based approach. Besides, the advantage of the procedure of institutions with quasi-judiciary competences compared to the courts is that it is not so costly in terms of time and expenses, it is flexible, informal and because of these reasons, more available for groups in need.

1.6.3 NGOs

It is beyond doubt that human rights NGOs play an essential role in the promotion and protection of human rights at the national and international levels.[208] It is neither in question that 'some of the space that NHRIs occupy today has traditionally been that of NGOs'.[209] Despite their similar mission, they have several distinctive characteristics.

First of all, NGOs are private entities of the civil society without a public mandate, while an act of the State establishes NHRIs. Therefore, NHRIs have an official mandate, formal powers, and the law regulates their relationship to the State.[210] Their official status also allows them to access information and documents that are not easily accessible for NGOs. NGOs often work with a limited spread of issues or with specific groups of the society, while NHRIs have a broad human rights mandate. They have it in common that some NHRIs having protection component in their mandates might represent victims and participate in court procedures like human rights NGOs do.

Considering the nature of their work: NHRIs provide more than a negatively critical voice; they are constructively critical actors, who 'can contribute actively to solving the problems

[206] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Article 35(1).
[207] Pegram, 'National Human Rights Institutions, Treaty Obligations and the Convention against Torture' (n 60) 5.
[208] Haász, *National Human Rights Institutions in the UN Human Rights Framework* (n 2).
[209] Roberts (n 127) 228.
[210] Gauthier de Beco, *Non-Judicial Mechanisms for the Implementation of Human Rights in European States* (Bruylant 2010) 134.

rather than merely pointing them out'.[211] Their activities are primarily not from a combative nature, but rather constructive and supportive,[212] and instead of mere monitoring, they provide human rights impact assessments and proposals for government policies.[213]

Comparing their role within the international human rights framework, both are important stakeholders. Both can participate at the international level after being accredited by the appropriate committee. The basis of participation of NGOs has been laid down in Article 71 of the UN Charter, which acknowledges the potential contribution of NGOs to the work of the UN in economic and social matters.[214] It has also been elaborated in ECOSOC Resolution 1996/31 and in the Rules of Procedure of the functional commissions of ECOSOC. Based on these regulations, NGOs have access to the UN through the standing committee of the ECOSOC, the Committee on Non-Governmental Organizations.[215] Nota bene, the work of the Committee in granting and reviewing accreditation of NGOs was criticised for 'overpoliticization and lack of due process'.[216] Several authors formulated the demand for changing the practice and depoliticising the accreditation process of NGOs.[217] However, the legal status of NHRIs in their relations with UN human rights bodies have been set out only in resolutions and decisions, NHRIs have gained rights of participation at various international bodies, and these international actors increasingly value their contribution.[218] A particular advantage associated with NHRI submissions is that 'with the

[211] Lone Lindholt, 'Universities and National Human Rights Institutions: The Independent Human Rights Actors' in Rikke F Jørgensen and Klaus Slavensky (eds), *Implementing human rights. Essays in honour of Morten Kjærum* (The Danish Institute for Human Rights 2007) 149.
[212] Nowosad (n 128) 189.
[213] C Raj Kumar, 'National Human Rights Institutions and Economic, Social, and Cultural Rights: Toward the Institutionalization and Developmentalization of Human Rights' (2006) 28 Human Rights Quarterly 755, 760.
[214] Miko Lempinen, *Consultative Relationship between the United Nations and Non-Governmental Organizations* (Institute for Human Rights, Åbo Akademi University 1999) 2.
[215] UN Economic and Social Council, Resolution adopted 21 June 1946 (documents E/56/Rev. 1 and document E/84, paragraph 4, both as amended by the Council) (n 8) para 3; UN Economic and Social Council, Resolution 1996/31. Consultative Relationship between the United Nations and Non-Governmental Organizations, 25 July 1996.
[216] Steve Charnovitz, 'Nongovernmental Organizations and International Law' (2006) 100 American Journal of International Law 348, 359.
[217] UN General Assembly, Note by the Secretary-General, 11 June 2004, A/58/817 para 127. See also: Peter Willets, *Non-Governmental Organizations in World Politics: The Construction of Global Governance* (Routledge 2011) 61 et. al; Anton Vedder, *NGO Involvement in International Governance and Policy: Sources of Legitimacy* (Nijhoff 2007) 171; Caroline E Schwitter Marsiaj, *The Role of International NGOs in the Global Governance of Human Rights: Challenging the Democratic Deficit* (Schulthess 2004) 53; Peter R Baehr, *Non-Governmental Human Rights Organizations in International Relations* (Palgrave Macmillan 2009) 56; Ingrid Rossi, *Legal Status of Non-Governmental Organizations in International Law* (Intersentia 2010) 194.
[218] Meghna Abraham, *A New Chapter for Human Rights – A Handbook on Issues of Transition from the*

special status of national institutions, their positions are more difficult to sideline than those of NGOs'.[219]

Compared to all these similar actors, the most significant distinctive characteristic of NHRIs is their special status. Being an independent body established by the State, NHRIs can create human rights dialogue between civil society and public authorities and cooperate with international organisations and networks contributing to the implementation of international human rights standards at the national level.

1.7 Interaction with international human rights mechanisms

Beside that NHRIs are cornerstones of strong domestic legal systems,[220] they increasingly serve as liaisons between the state and the international human rights system. Already in 1995, the OHCHR envisaged the role of NHRIs to offer valuable advice on international issues while keeping their principal focus on the domestic situation.[221] Recently, there is a shift towards emphasising the international human rights law related competencies of NHRIs or at least connecting them strongly with activities done at the national level. Some authors argue that NHRIs become an 'international project'[222] rather because states tend to assign powers to national institutions to enforce international law at the national level.[223] Others consider the engagement of NHRIs in international issues an elementary contribution to human rights protection.[224]

The interaction of NHRIs with international human rights mechanisms bases on two main sources: the Paris Principles and the efforts of the UN to strengthen its cooperation with NHRIs – as described in the section on 'The normative status of the Paris Principles in international law'. Considering the list of competencies of NHRIs in the Paris Principles,

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Commission on Human Rights to the Human Rights Council (International Service for Human Rights, Friedrich Ebert Stiftung 2006) 98.

[219] Morten Kjaerum, 'National Human Rights Institutions Implementing Human Rights' 24, 17.

[220] Veronika Haász, 'Die Nationalen Menschenrechtsinstitutionen Als Grundsteine Starker Innerstaatlicher Rechtsschutzsysteme' (2009) 5 Zeitschrift für Menschenrechte 128.

[221] UN Centre for Human Rights (n 3) para 206.

[222] Cardenas (n 20); Carver, 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law' (n 6).

[223] Carver, 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law' (n 6) 8.

[224] Brice Dickson, 'The Contribution of Human Rights Commissions to the Protection of Human Rights' (2002) 5; Office of the UN High Commissioner for Human Rights, *Guidance Note on National Human Rights Institutions and Transitional Justice* (2008) 43 <http://nhri.ohchr.org/EN/Themes/Portuguese/DocumentsPage/NHRIs_Guidance Note TJ_Oct 08.pdf> accessed 1 April 2018.

four of the seven core responsibilities explicitly relate to international human rights. NHRIs can (1) encourage the ratification or accession to international human rights instruments, including advising the government to the precise nature of the obligations; (2) ensure the harmonization of national laws with international human rights standards, including monitoring domestic law whether it is already in conformity with standards contained in those instruments or whether additional legislative initiatives would be required; (3) engage with the international human rights system, in particular the HRC and its mechanisms (UPR, Special Procedures) and the UN Treaty-based Bodies, including contribution to the state report or compilation of parallel report, follow up at the national level to recommendations resulting from these procedures; (4) and cooperate with other international stakeholders.[225] It means that the drafters of the Paris Principles clearly saw a major role for NHRIs at the interplay between national human rights protection systems and international human rights bodies.[226]

Most of the international human rights instruments impose obligations on UN member states to ensure the implementation of international human rights standards at the national level. As oversight bodies, Charter-based and Treaty-based human rights monitoring mechanisms were created. The international community has realised that these international mechanisms alone are not able to ensure the effective implementation of human rights obligations; they do need domestic allies. Owing to the competencies granted by the Paris Principles for NHRIs and the considerable development in recognition of their status by the international community, NHRIs began to co-operate with and contribute to the work of international human rights organisations, policy-making organs and expert bodies.[227] It is a two-sided mutually reinforcing and symbiotic relationship. The international system relies on NHRIs because they can provide them with independent and objective information about human rights situations on the ground. National institutions benefit from their international engagement as it provides an appropriate legal basis for human rights debates at home, increases domestic accountability and enables them to learn best practices from other NHRIs.[228]

[225] Paris Principles (n 92) s 1 paras 3(b)(c)(d)(e).
[226] Carver, 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law' (n 6) 11.
[227] Pohjolainen (n 10) 2.
[228] Sidoti (n 94)100 et. al.

A considerable milestone was when the UN Commission on Human Rights granted participation rights (speaking rights, dedicated seating, and the right to issue documents under their own symbol number) to A-status NHRIs.[229] As demonstrated in this study before, the possibility of interaction was further increased by the UN Human Rights Council:[230] A-status institutions may interact with the HRC, the UN Special Procedures and contribute to the UPR. They are also allowed and welcome to cooperate with the UN Treaty Bodies. Each relationship has manifested first in NHRIs' contribution to reform processes (the HRC review process in 2006 and the UN Treaty Bodies strengthening process in 2012) with the aim of ensuring the institutions' position and opportunity for interaction in the international fora.[231] The opportunities of NHRIs are very similar concerning all mechanisms. As a bridge, they can 'work for' their governments, for the society and the international human rights bodies. What their States concern, they can advise governments on state reports, the significance of joining a treaty, accepting inquiry procedures and extending standing invitations for all Special Procedures. They can promote national consultations about state reports to be submitted with the international monitoring bodies. They can also give advice on the recommendations formulated by international actors (e.g. in the development of a national human rights policy) and contribute to and follow up their implementation (e.g. encouraging and advising the government in a periodic reporting).

In relation to the UN bodies, NHRIs can provide them with independent, reliable, and first-hand information on the human rights situation on the ground, that is elementary in every

[229] UN Commission on Human Rights, Human Rights Resolution 2005/74. National institutions for the promotion and protection of human rights, E/CN.4/2005/L.10 (n 188).
[230] UN Human Rights Council Resolution 5/1. Institution-building of the United Nations Human Rights Council, 18 June 2007 (n 30).
[231] The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'ICC Position Paper: National Human Rights Institutions and the UN Human Rights Council – Volume II: National Human Rights Institutions and the Special Procedures and Universal Periodic Review Mechanism', vol II (2006); The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Human Rights Council Review, Proposals for the Outcome Document' (2011) <https://nhri.ohchr.org/EN/IHRS/HumanRightsCouncil/Review/ICC Proposal for the outcome document Feb. 2011.pdf> accessed 19 March 2019; The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'ICC Position Paper: The Treaty Body Strengthening Process: Effective Participation of National Human Rights Institutions' (2012) <https://nhri.ohchr.org/EN/IHRS/TreatyBodies/Treaty Body Strengthening Process/TB reform process - ICC Advocacy Paper (FINAL).pdf> accessed 19 March 2019; The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'The Belfast Statement. The Response of National Human Rights Institutions to the United Nations High Commissioner for Human Rights Report on the Strengthening of the Human Rights Treaty Body System' (2012) <https://nhri.ohchr.org/EN/IHRS/TreatyBodies/Treaty Body Strengthening Process/ENGLISH BELFAST STATEMENT FINAL 101012.pdf> accessed 13 February 2019.

monitoring process. Similarly, they can report on the implementation process. They can share their findings and views during the sessions, and interact with working groups and special mandate holders before, during, and after their country visits. Using their promotional channels, NHRIs can disseminate the findings of the monitoring bodies and raise awareness among the society about the importance of international human rights instruments and their monitoring procedures in general. If individual communications are allowed, NHRIs can help victims to address the competent body in the right manner, assist victims at their complaints and follow-up their cases locally.

Assisting all these national and international actors, NHRIs gain benefits from these interactions. They can incorporate the findings of monitoring bodies in their own reports and work plans (e.g. organising events around country visits or report launches), and contribute to standard-setting and monitoring by joining drafting committees and taking up the role of national monitoring mechanisms.

Several guides help NHRIs to understand their roles in relation to the international human rights monitoring mechanisms, for example, the Information Note of OHCHR-GANHRI-UNDP, Guidelines of the GANHRI, and the UPR Good Practice Compilation of the Asia Pacific Forum.[232] Most of them were drafted after the publication of the OHCHR Survey in 2009 that mapped NHRIs, including their activeness in relation to the international human rights system. The survey results showed rather low participation.[233] From 2011 to 2014, the number of NHRIs participating in HRC sessions increased from 21 to 31 per year; in 2011 three of them and in 2014 twelve of them used video messages to transmit their

[232] Office of the UN High Commissioner for Human Rights; Global Alliance of National Human Rights Institutions; UNDP, *Information Note National Human Rights Institutions (NHRIs) Interaction with the UN Treaty Body System* (2011) <https://nhri.ohchr.org/EN/IHRS/TreatyBodies/Page Documents/NIRMS - NHRIs and the Treaty Bodies Infonote 2011.pdf> accessed 8 September 2018; Global Alliance of National Human Rights Institutions, 'Guidelines on the Participation of National Human Rights Institutions and National Independent Monitoring Mechanisms Appointed under Article 33.2 of the Convention in the Work of the Committee' <https://nhri.ohchr.org/EN/IHRS/TreatyBodies/PersonsDisabilities/Pages/Guidelines.aspx> accessed 1 February 2018; Müller and Seidensticker (n 46); 'Engaging with the International Human Rights System' (2016) <https://www.youtube.com/watch?v=PWHQySTXsj8&feature=youtu.be> accessed 20 January 2018; Asia Pacific Forum, *International Human Rights and the International Human Rights System: A Manual for NHRIs* (2015) <http://www.asiapacificforum.net/media/resource_file/International_HR_System_Manual_Web.pdf> accessed 25 January 2019; International Service for Human Rights, 'Promoting Participation: Why and How National Human Rights Institutions Should Be Allowed to Contribute at the United Nations' (2015) <http://www.asiapacificforum.net/media/resource_file/NHRI_participation_UN_mechanisms.pdf> accessed 10 June 2017; UN Human Rights Council, 'Information Presented by the Asia Pacific Forum of National Human Rights Institution (APF), A/HRC/14/NI/10' (2010).

[233] Office of the UN High Commissioner for Human Rights, *Survey on National Human Rights Institutions. Report on the Findings and Recommendations of a Questionnaire Addressed to NHRIs Worldwide* (n 164) 42, 43, 45, 57.

contribution.[234] NHRIs increasingly take advantage of their granted right to speak directly after the State under review during the adoption of UPR reports.[235] The report of the UN Secretary-General that covers the period of September 2016 and August 2017 gives an overview of the cooperation between UN human rights mechanisms and NHRIs.[236] It also shows higher participation rates. The highest interaction is with the Treaty Bodies, as out of the 124 reviewed states having NHRIs, 117 institutions submitted reports, provided briefings before the review or attended the sessions.[237] Literature suggests extending NHRIs' participatory rights to the UN General Assembly, its Committees and subsidiary bodies; as well as ECOSOC and its functional commissions, and all related UN fora.[238]

[234] UN Secretary-General Report, National institutions for the promotion and protection of human rights, 30 June 2014, A/HRC/27/39 para 83.
[235] UN Secretary-General Report, National institutions for the promotion and protection of human rights, 2 April 2013, A/HRC/23/27 para 81; UN Secretary-General Report, National institutions for the promotion and protection of human rights, 30 June 2014, A/HRC/27/39 (n 234).
[236] UN Secretary-General Report, National institutions for the promotion and protection of human rights, 3 August 2017, A/72/277.
[237] ibid Annex III.
[238] International Service for Human Rights (n 232).

2.

Ombudsinstitutions as NHRIs – A SWOT Analysis

Chapter Two presents ombudsinstitutions as one type of National Human Rights Institutions (NHRIs). The description goes from a normative and descriptive analysis introducing the definition, the origin, the basic types, and the supranational organisations of ombudsinstitutions to a more practice-oriented SWOT analysis discovering the strengths, the weaknesses, the opportunities, and the threats of the institutions. The aim is to get a clear picture about ombudsinstitutions and understand their characteristics, possibilities and boundaries.

2.1 The definition, origin, and types of ombudsinstitutions

2.1.1 The definition of ombudsinstitutions

The ombudsman concept has evolved over many years. Scholars and practitioners have attempted to formulate definitions in order to describe this new phenomenon as precise as possible. The 1972 edition of the Encyclopaedia Britannica provides a basic definition stating that an ombudsman 'is a legislative commissioner for the investigation of citizens' complaints of bureaucratic abuse.'[239] In this description, all fundamentals of the institution appear. The ombudsman is a commissioner, who is elected by the legislative power. He or she investigates citizens' complaints about abuses done by the public administration. Further interpretations[240] attempt to answer the questions: what are the ombudsman's competences and what are his or her attributes. The emphasis is on the following features: the ombudsman office

- is established by the constitution or a statute,
- is responsible to the legislature or the parliament,
- receives and investigates complaints,
- is against the public administration,
- makes recommendations and issues reports.

[239] Encyclopaedia Britannica, 'Ombudsman' <https://www.britannica.com/topic/ombudsman> accessed 19 June 2018.

[240] International Bar Association, 'Resolution at Vancouver Meeting of Official Delegates of Member Organisations, "Ombudsman and Other Complaint Handling Systems" X (1980-1)1' (1974); American Bar Association, *Standards for the Establishment and Operation of Ombuds Offices* (2004) <https://www.prearesourcecenter.org/sites/default/files/library/abaadoptedbythehouseofdelegatesfeb92004.pdf> accessed 20 March 2018.

The description is usually enriched by adding further attributes, special characteristics that are typical for ombudsinstitutions and distinguish them from other oversight bodies. Gottehrer classifies these fundamental characteristics of ombudsinstitutions in three categories:

a. essential ones that are needed to the effective functioning, e.g. public awareness of the ombudsman, accessibility of the office; powers of investigation; power to propose adequate remedies; securing compliance with findings or recommendations
b. irreducible minimum ones without those it is not an ombudsman, e.g. independence; impartiality and fairness; credible review process; confidentiality
c. creating ones in written law, e.g. name; constitutional basis; establishment of the office; appointment process, qualifications, term, benefits, removal process; hiring staff, deputy ombudsman, delegation of responsibilities, benefits; powers of the office; investigations; reports; privileges, immunities, protections and penalties; miscellaneous provisions.[241]

The literature[242] consistently mentions three essential characteristics of ombudsinstitutions: **independence**, **impartiality** or neutrality, and **confidentiality**. The ombudsman is an independent actor of public administration that is unprejudiced towards its clients and other public institutions. According to the Swedish constitutional lawyer, Hans-Gunnar Axberger, independence is the 'backbone' of ombudsinstitutions.[243] This means that ombudsinstitutions might differ in many ways, but independence is the characteristic they all must have in common.[244] The American Bar Association defined the following twelve requirements for ombudsman independence:

- the ability to criticise government officials,
- no control from above,
- appointment by the legislature,
- a lengthy term in office (5 or more years),
- a high salary,
- the authority to employ staff,

[241] Dean M Gottehrer, 'Fundamental Elements of An Effective Ombudsman Institution' (2009) <http://www.theioi.org/downloads/934ch/Stockholm Conference_15. Plenary Session II_Dear Gottehrer.pdf> accessed 24 March 2018.
[242] ibid 9.
[243] Hans-Gunnar Axberger, 'The Original Recipe: 200 Years of Swedish Experience' (2009) 8 <http://www.theioi.org/downloads/144gi/Stockholm Conference_23. Back to the Roots_Hans Gunnar Axberger.pdf> accessed 2 March 2018.
[244] ibid.

- investigative powers,
- access to public records,
- the authority to probe into government inquiries,
- discretion to pick and choose complaints,
- authority to elicit prior response to criticism from public employees, and
- immunity from civil liability as a result of official action.[245]

The Hungarian constitutional lawyer, Bernadette Somody defines the following factors that may influence the independence of ombudsinstitutions: legal background, selection and appointment, re-election, positions after terminating the office, incompatibility rules, immunity, salary, the prohibition of instructions, the office, budgetary independence, employee rights.[246]

Impartiality derives from the institution's special standing between the government and its representative public administration on the one hand and the citizens on the other hand. In the course of his or her investigations, the ombudsman can guarantee **confidentiality** if the client requests it, or otherwise, the circumstances require him or her to do so.[247] Some sources add a fourth characteristic: **credibility**.[248] The ombudsman must be credible in his or her personality and review processes so that citizens trust the institution and are willing to use its services.[249]

Criteria for institutional membership of international organisations also indicate the main characteristics of ombudsinstitutions. The Asian Ombudsman Association (AOA) adopted the core principles of ombudsmanship in 2010. These include the clarity of mandate, independence, accountability, accessibility, and effectiveness.[250] The International Ombudsman Institute (IOI) formulated the so-called International Ombudsman

[245] Dean M Gottehrer and Michael Hostina, 'The Classical Ombudsman Model' in Roy Gregory and Philip Giddings (eds), *Righting wrongs: the ombudsman in six continents* (IOS Press/IIAS 2000).
[246] Bernadette Somody, 'Jogállami Paradoxon - A Sikeres Ombudsmani Jogvédelem Sajátosságai [Rule of Law Paradox - Features of the Successful Protection Provided by the Ombudsman]', *Az ombudsman intézménye és az emberi jogok védelme Magyarországon [Ombudsinstitution and human rights protection in Hungary]* (OBH 2008).
[247] Gottehrer (n 241) 9.
[248] OSCE Office for Democratic Institutions and Human Rights, 'Ombudsman and Human Rights Protection Institutions in OSCE Participating States' (1998) 9 <https://www.osce.org/odihr/16635?download=true> accessed 25 January 2019.
[249] Gottehrer (n 241) 9.
[250] Asian Development Bank, *Strengthening the Ombudsman Institution in Asia. Improving Accountability in Public Service Delivery through the Ombudsman* (2011) 51–52.

Standard.[251] Beyond listing the features mentioned above and emphasising the necessity of having sufficient powers and means to operate, ombudsinstitutions need to have **adequate funding** to fulfil their functions – according to the IOI.[252] The International Handbook of the Ombudsman adds one further distinctive characteristic stating that even if the ombudsman is an appeal body,[253] he or she is **not a judge** or a tribunal, and he or she has no power to make orders or to reverse administrative actions.[254]

Johnson collects the following 'essential elements' of the ombudsman: independence, impartiality, investigator, powers of recommendation, jurisdiction, confidentiality, delegation, communications, referrals, discretion, no fees, access to state-run facilities (e.g. prisons, mental hospitals), access to government files, public reporting, and review.[255]

Some categorisations go further and describe the desired model of the ombudsman.[256] Bernard Frank states that the ombudsman 'operates with objectivity, competence, **efficiency** and fairness'.[257] That might be fitting to some institutions, but this is definitely excessive in many cases. Larry B. Hill adds further interesting essentials. According to him, the classic ombudsman is **client-centred** but not anti-administration, and both popularly **visible** and **accessible**.[258] Visibility and accessibility are of fundamental importance. Descriptions hardly mention, but the ombudsman is a service provider. If he or she is not visible or is visible but not accessible, his or her clients, namely the complainants, cannot use his or her services.

Some qualities can be attached to the ombudsperson him- or herself, which make him or her be able to perform the ombudsman tasks successfully. He or she is usually described as an **expert** of the field of law, mainly constitutional law or international human rights law. Volio mentions the **moral standing** of the ombudsman, which she connects together with

[251] International Ombudsman Institute (IOI), 'Bylaws' (n 134) Article 2.
[252] ibid Article 2(2).
[253] Donald C Rowat, 'A Worldwide Survey of Ombudsmen' (1997) <http://www.theioi.org/downloads/bbde5/IOI Canada_Occasional Paper 60_Donald Rowat_Worldwide survey of OM_1997.pdf> accessed 24 March 2018.
[254] Gerald E Caiden (ed), *International Handbook of the Ombudsman* (Greenwood Press 1983) 13.
[255] Harley Johnson, 'Ombudsman - Essential Elements' in Kamal Hossain and others (eds), *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (Kluwer Law International 2001).
[256] Larry B Hill, 'The Selfperseptions of Ombudsmen: A Comparative Survey' in Gerald E Caiden (ed), *International Handbook of the Ombudsman: Evolution and Present Function* (Greenwood Press 1983) 43.
[257] Bernard Frank, 'The Ombudsman Revisited' [1975] International Bar Journal 48.
[258] Larry B Hill, 'Institutionalization, the Ombudsman, and Bureaucracy' (1974) 68 The American Political Science Review 1075, 1077.

efficacy to the credibility of the office.[259] McLeod highlights personal characteristics, such as persuasiveness, empathy, passion for work, service delivery, respect of parties, and common sense.[260] Beyond having regard to the national legislation, international standards, and the principle of justice, the ombudsman must act in accordance with his or her oath and the principles of his or her own conscience.[261] The ombudsperson's **creativity** and **proactivity** also enhance the ombudsman from the other actors of public administration. It is desirable that he or she interprets his or her mandate as broad as possible and acts on own motion in cases if possible. The literature distinguished aggressive (nowadays rather proactive) and reactive attitudes.[262] Hill acknowledges the following values: political independence, investigative objectivity and thoroughness, as well as operational informality.[263]

The name of the ombudsinstitution is often affiliated with **democracy**; the ombudsman concept is genuinely part of the democratic vision[264]. Not only because it is a constitution-based, democratically elected mandate holder but considering his or her mandate (fighting maladministration, protecting fundamental and human rights) and the tools he or she has (recommendations, legislative proposals). The ombudsman has 'a fundamental role to play in furthering democracy'[265] as he or she is an 'interlocutor of democratic aspirations'[266] and can contribute to 'preventing the exploitation of the state by self-interested political actors'[267]. According to Abraham, the ombudsman can act 'in a spirit of co-operation and partnership'[268] while having the 'mandate of influence'[269]. It is his or her duty to reduce the risk that citizens lose faith in complaining about central government departments. The ombudsman needs to have the ability to convince citizens that channelling their complaints

[259] Lorena González Volio, 'The Institution of the Ombudsman. The Latin American Experience' (2003) 37 Revista IIDH 219, 248.
[260] Ron McLeod, 'Twenty Five Years of the Commonwealth Ombudsman' [2002] AIAL Forum 15 <http://www5.austlii.edu.au/au/journals/AIAdminLawF/2003/2.pdf>.
[261] Nina Karpachova, 'The Ombudsman Institution as a Determining Factor in the Transition to Democracy' (2009) 3 <http://www.theioi.org/downloads/954ki/Stockholm Conference_31. Back to the Roots_Nina Karpachova.pdf> accessed 24 March 2018.
[262] Hill, 'The Selfperseptions of Ombudsmen: A Comparative Survey' (n 256) 44.
[263] Larry B Hill, 'The Ombudsman Revisited: Thirty Years of Hawaiian Experience' (2002) 62 Public Administration Review 24.
[264] Gerald E Caiden, Niall Macdermot and Ake Sandler, 'The Institution of Ombudsman' in Gerald E Caiden (ed), *International Handbook of the Ombudsman: Evolution and Present Function* (Greenwood Press 1983) 7.
[265] Volio (n 259) 248.
[266] Jorge Santiestevan de Noriega, 'El Defensor Del Pueblo En Iberoamérica' [2002] Gaceta Jurídica S.A.
[267] Anna Grzymala-Busse, *Rebuilding Leviathan* (Cambridge University Press 2007).
[268] Ann Abraham, 'Commentary: The Future in International Perspective: The Ombudsman as Agent of Rights, Justice and Democracy' (2008) 61 Parliamentary Affairs 681, 690.
[269] ibid 687.

to the ombudsman is a valid right to reasoned decisions and is a tool of exercising their democratic voice.[270] This role is of high importance in a democratic state because public accountability is 'a key attribute of both democracy and democratic quality, as well as an essential ingredient in democracy's long-term viability'.[271] At the end of the day, accountability is 'the critical feature that makes democracies respect human rights'.[272]

Maladministration is a term that is used in relation to the ombudsman in many descriptions. Maladministration occurs when a public body fails to act in accordance with a rule or principle, which is binding upon it.[273] In many cases – especially concerning the practice of ombudsinstitutions in Central and Eastern Europe, these are administrative and procedural rules. The Parliamentary Commissioner in the United Kingdom identified the following administrative shortcomings as maladministration:

1. assorted mistakes, errors, and oversights;
2. ailing to impart information or provide adequate explanations;
3. giving inaccurate information and misleading advice;
4. misapplication of departmental rules and instructions;
5. peremptory or inconsiderate behaviour on the part of officials;
6. unjustifiable delay.[274]

The European Ombudsman believes that the failure to respect the principles of good administration or human rights can also result in maladministration.[275]

Beyond the basic description and the characteristics listed above, ombudsinstitutions have similar procedures. Regardless of the type or the geographical location, they follow the same procedural steps. In line with their enabling legislation, the offices have written rules of procedures. These regulate who can submit a complaint with the office, what are the

[270] ibid 693.
[271] Andreas Schedler, Larry Jay Diamond and Marc F Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers 1999) 2.
[272] Bruce Bueno de Mesquita and others, 'Thinking Inside the Box: A Closer Look at Democracy and Human Rights' (2005) 49 International Studies Quarterly 439, 439.
[273] The European Ombudsman, 'Annual Report for 1997' (1998) 23.
[274] Roy Gregory and Peter Hutchesson, *The Parliamentary Ombudsman. A Study in the Control of Administrative Action* (George Allen & Unwin Ltd 1975) 281–282.
[275] Emily O'Reilly, 'Protecting Rights and Freedoms' in International Ombudsman Institute (IOI) and Linda C Reif (eds), *The International Ombudsman Yearbook, Volume 7* (Nijhoff 2003) 29; The European Ombudsman, 'Speech of the European Ombudsman - Public Hearing on the Draft Charter of Fundamental Rights of the European Union, Preliminary Remarks' (2000) <https://www.ombudsman.europa.eu/activities/speech.faces/en/355/html.bookmark> accessed 2 March 2018; European Parliament resolution of 24 November 2016 on the annual report on the activities of the European Ombudsman in 2015, 2016/2150(INI)) para K.

necessary elements of a complaint, when is the complaint ineligible, what happens if the complaint falls outside of the ombudsman's competences, and what are the steps of the investigation. Ombudsinstitutions usually follow the same procedural steps, namely contacting the public authority that allegedly violated the complainant's right, mediating in case of disagreement between the parties, and closing the investigation with recommendations towards the public authority.

Considering their competences, ombudsinstitutions usually have the ability 'to advance the cause of [fundamental or] human rights, to control the public bureaucracy, to remedy individual grievances against public administration, and to draw public attention to administrative maladies'.[276] Nowadays, ombudsinstitutions settle individual disputes caused by unlawful decisions, and supervising the legality of administrative activities is only a part of this activity.[277] Awareness-raising, international human rights related formulations in the recommendations gain space in more and more ombudsmen's practice.

Summing up, despite differences in structures, mandates, jurisdictions, and names (ombudsman, commissioner, médiateur, defensor del pueblo, provedor de justice), the basic idea is the same: the ombudsman is an independent public official, who considers and investigates complaints against public authorities, makes recommendations, and submits reports for the electing authority that is usually the parliament. This original function has transformed during the years of the proliferation of the institution and according to the geographical-historical-political factors of the given country, where it was set up.

2.1.2 The origin and proliferation

The institution of the ombudsman originates in **Sweden**, where the first parliamentary ombudsman was elected in 1809. However, King Karl VII established the office of the King's Chancellor of Justice already in 1713 intending to prosecute on the King's behalf and observe laws and royal decrees. The King's Chancellor of Justice being a servant of the King was considered not to be sufficiently independent.[278] After the end of the dynasty and the so-called 'age of freedom' in 1809, the constitution was adopted, and the institution

[276] Caiden, Macdermot and Sandler (n 264) 5–9.
[277] Jacob Söderman, 'How to Become a Good Ombudsman' (2003) <http://www.theioi.org/downloads/a38c1/IOI Canada_Occasional paper 80_Jacob Söderman_How to be a Good Ombudsman_EN.pdf> accessed 24 March 2018.
[278] Alfred Bexelius, 'The Swedish Ombudsman' (1967) 17 The University of Toronto Law Journal 170.

of the ombudsman was born.[279] Its mission was to supervise public authorities to ensure that they act in accordance with national law. According to Söderman,[280] this was not a new function. The novelty of this new type of institution lies within its mandate; a person who is independent of the executive plays a supervisory role without being part of the judiciary. It is interesting to note that the first justice ombudsman was not a lawyer by profession. He was appointed on political merits being one of the authors of the constitution.[281] His office had the competence to act as a prosecutor, as well as supervise judges. From 1915, the parliamentary ombudsman did not have the power to investigate the military because, for that purpose, the office of the military ombudsman was introduced.[282]

The Swedish model is based on the universal – and already discussed – principles of accessibility, credibility and independence. It sought to address the need to maintain the citizen's right to just and fair treatment from the state and its agencies.[283] The partnership element appears as well, as Swedish civil servants considered the ombudsman 'as their friend' taking off burden from the civil servants' shoulders since in the course of his actions he or she explained to the citizens why the given ministry could not act in the case – usually for valid reasons.[284] The Swedish example also shows that the level of development of the administration affects the ability of the ombudsperson to exploit his or her mandate. It is not without any significance what kind of rules apply to the administration. Sweden was not only the first country to introduce the institution of the ombudsman, but it was progressive in introducing access to public administration files. This degree of openness of the public administration has existed in the country since 1766, thus, well before the office of the ombudsman was established.[285] Such an atmosphere, where the administrative culture is at a higher level, and the citizens bear with higher rights awareness, makes the ombudsman's work smoother.

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[279] Axberger (n 243).
[280] Söderman (n 277).
[281] Axberger (n 243).
[282] Bexelius (n 278) 172.
[283] Brian Elwood, 'The Ombudsman Travels to the Anglo-Saxon World' (2009) <http://www.theioi.org/downloads/44gi2/Stockholm Conference_26. Back to the Roots_Brian Elwood.pdf> accessed 24 March 2018.
[284] Charles S Ascher, 'Review: The Grievance Man or Ombudsmania' (1967) 27 Public Administration Review 174, 178.
[285] Hans Gammeltoft-Hansen, 'The Introduction and Development of the Swedish Justitieombudsman in Denmark' (2009) 9 <http://www.theioi.org/downloads/248h2/Stockholm Conference_24. Back to the Roots_Hans Gammeltoft Hansen.pdf> accessed 24 March 2018.

The success of the ombudsman led to the adoption of this structure in further Nordic countries. The second country in the row was **Finland** in 1919. However, the administrative practice in Finland was similar to the Swedish one, the Russian control over the country and the language barrier could be the reasons for this rather later adoption.[286] The competences of the ombudsman were extended to the control of any kind of maladministration except for controlling the judiciary. Compared to the Swedish prototype, the powers were reduced to investigations, making recommendations, and reporting to the parliament. It is interesting to note that already in that time, the constitution prescribed for the ombudsman to 'supervise the implementation of fundamental rights and international human rights' while performing his duties.[287] Despite this, 'the ombudsman was seen as a new remedy of democratic control, rather than an institution of legal protection'.[288]

Finland was followed by **Denmark** that established the ombudsman office in 1953. The Swedish model influenced the wording of the Danish Ombudsman Act. Nevertheless, the two legal bases are not entirely identical. The Swedish ombudsman's authority does not cover the acts and omissions of Swedish ministers, who are not responsible for the state administration as such. At the same time, the Swedish ombudsman supervises the courts, while its Danish counterpart does not.[289] Another significant difference between the Swedish and the Danish model is that the Swedish Ombudsman is allowed to make the representatives of the public administration personally responsible, i.e. act as a prosecutor, while the Danish Ombudsman limits himself to 'institution and system control' by formulating criticism towards the authorities.[290]

Norway established an ombudsman for military affairs in 1952 first, and probably its success led the decision-makers to adopt also an ombudsman for civil affairs in 1962.[291] While Finland is closer to the Swedish model, Norway followed the Danish model. It

[286] Hing Yong Cheng, 'The Emergence and Spread of the Ombudsman Institution' (1968) 377 American Academy of Political and Social Science 20, 21.
[287] Constitution 1919 - Finland, adopted on 17 July 1919 para. 49(2).
[288] Gabriele Kucsko-Stadlmayer, 'The Spread of the Ombudsman Idea in Europe' (2009) 6 <http://www.theioi.org/downloads/34chi/Stockholm Conference_25. Back to the Roots_Gabriele Kucsko Stadlmayer.pdf> accessed 24 March 2018.
[289] Gammeltoft-Hansen (n 285) 3.
[290] ibid 4.
[291] Cheng (n 286).

means that the ombudsman is rather an investigator than a prosecutor, who does not have the authority to examine the decisions of ordinary courts.[292]

In the '60s and '70s, the Nordic model spread all over the world outwards from the Nordic countries. First, **New Zealand** adopted the institution based on the success of the Danish Ombudsman in 1962. The New Zealand precedent opened the gates of other English speaking countries (the United Kingdom, 1967) to the ombudsman concept.[293] Then the liberal democracies of Western Europe,[294] North America,[295] the Caribbean,[296] Australasia,[297] the Pacific region,[298] the Indian sub-continent,[299] Africa,[300] and the Middle East[301] were on the row. Christopoulos and Diamandouros picture the establishment of rights protection mechanisms in Western democracies as a result of a four-stage process. First, the constitutional state was formed, then international human rights protection mechanisms and their monitoring activity emerged. This necessary entailed the creation of mediation institutions, such as the ombudsman, and the rise of non-governmental organisations.[302]

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[292] Jan-Erik Lane, 'The Ombudsman in Denmark and Norway' in Roy Gregory and Philip Giddings (eds), *Righting wrongs: the ombudsman in six continents* (IOS Press/IIAS 2000).
[293] Otiende Amollo, 'Challenges for Ombudsman Work Resulting from Multiple Mandates' (2016) 207 <http://www.theioi.org/downloads/bddl7/33. Breakout Session V Dr. Otiende Amollo _ Challenges for Ombudsman Work Resulting from Multiple Mandates %28Paper%29. Breakout Session V Dr> accessed 24 March 2018.
[294] United Kingdom (1967), Zurich (1971), France (1973), Tuscany (1974), Rhineland-Palatinate (1974), Austria (1976), The Netherlands (1981), Ireland (1981), Iceland (1987), Antwerp (1991), Flanders (1992), Hamme (1994), Greenland (1994), Belgium (1995), Wallonia (1995), Schleswig-Holstein (1995), the European Union (1995), Louvain (1995), Bruges (1996), Ghent (1996), Malines (1996).
[295] Canada: Alberta (1967), New Brunswick (1967), Quebec (1969), Manitoba (1970), Nova Scotia (1971), Saskatchewan (1973), Ontario (1975), Newfoundland (1975), British Columbia (1979), Yukon (1996); the United States: Hawaii (1969), Jamestown (1970), Dayton (1971), Seattle (1971), Nebraska (1971), Iowa (1972), Wichita (1972), Jackson County (1973), Anchorage (1974), New Jersey (1974), Detroit (1974), Lexington (1974), Berkeley (1975), Alaska (1975), Guam (1978), New York City (1979), Florida (1980), Arizona (1996).
[296] Guyana (1966), Trinidad and Tobago (1976), Jamaica (1978), Puerto Rico (1978), Barbados (1987), Antigua and Barbuda (1994).
[297] South Australia (1972), Western Australia (1972), Victoria (1973), Queensland (1974), New South Wales (1975), Tasmania (1978), Commonwealth of Australia (1976), Northern Territory (1978), Australian Capital Territory (1989), Cook Islands (1990).
[298] Fiji (1972), Papua New Guinea (1975), The Philippines (1979), Solomon Islands (1980), Hong Kong (1989), Western Samoa (1989), Vanuatu (1990).
[299] Maharashtra (1972), Bihar (1973), Rajasthan (1973), Uttar Pradesh (1976), Sri Lanka (1981), Andhra Pradesh (1983), Assam (1985), Karnataka (1985), Gujarat (1986), Seychelles (1991), Punjab (1995).
[300] Tanzania (1966), Ghana (1969), Mauritius (1970), Zambia (1973), Nigeria (1975).
[301] Jerusalem (1967), Israel (1971), Haifa (1974), Tel Aviv (na).
[302] Dimitris Christopoulos and Nikiforos Diamandouros, 'Traditional Human Rights Protection Mechanisms and the Rising Role of Mediation in Southeastern Europe' (2006) <http://www.theioi.org/downloads/830d1/IOI Canada_Occasional Paper 78_Dimitris Christopoulos %26 Nikiforos Diamandouros_Traditional Human Rights Protection Mechanism and the Rising Role of Mediation in Southeastern Europe.pdf> accessed 2 March 2018.

In the '80s, new institutions were starting to rise in connection to regime transformations in new emerging democracies in sub-Saharan Africa,[303] in Pacific East Asia,[304]as well as Southern Europe,[305] and later in Latin America[306]. Adopting the Swedish model, **Spain** introduced the figure of the defensor del pueblo in 1978, which – similar to its Swedish predecessor – had a significant influence, especially in Latin American states – due to the Spanish legal heritage there. Portugal and Spain were the first countries where the ombudsmen were given a formal role in protecting fundamental human rights and holding laws unconstitutional.[307] This development was due to the fact that these states have been passing through a period of transition to democracy, and thus, there was a particular sensitivity to the protection of fundamental rights recognised under the new political dispensation.[308] Thus, the Hispanic ombudsman was a product of the necessity for human rights protection in countries emerging from a long period of dictatorship. This Hispanic model was the prototype of **Latin American** ombudsinstitutions[309] because similar political changes occurred in the Latin American countries. The institution of the ombudsman has played a significant role in the consolidation of democracy in Latin America. Merino summarises their main functions in promoting transparency and access to public information, ensuring the neutrality of public officials in the electoral process, intervening in social conflicts, and supervising public policies in the interests of the more vulnerable members of the society.[310]

Most authors classify the establishment of ombudsinstitutions in **Eastern Europe**[311] of the '90s to this later third wave. The reason is that serious political changes and regime transformations occurred in these countries as well when the communist regimes fell one by one. Nevertheless, these changes were different from those happening in Spain and

[303] Zimbabwe (1982), Uganda (1986), Namibia (1990), Senegal (1991), Madagascar (1992), Tunisia (1992), Cameroon (1992), Malawi (1994), Burkina Faso (1995), Lesotho (1995), Sudan (1995), South Africa (1996), Botswana (1997), Ethiopia (na), Gabon (na), Mauritania (na), Togo (na).
[304] Taiwan (1992), South Korea (1994), Thailand (1999).
[305] Portugal (1976), Liguria (1976) and further 11 Italian regions (1979-1989), Catalonia (1979), Spain (1981), Andalucía (1983), Aragon (1985), Basque Country (1985), The Canary Islands (1985), Galicia (1985), Cyprus (1991), Castile (1994), Malta (1995).
[306] Volio (n 259).
[307] Beatriz Merino, 'Protecting the People: The Latin American Approach to Ombudsmanship' (2009) 3 <http://www.theioi.org/downloads/64oj2/Stockholm Conference_28. Back to the Roots_Beatriz Merino.pdf> accessed 20 February 2018.
[308] Amollo (n 293) 207.
[309] Guatemala (1985), Colombia (1991), Costa Rica (1992), El Salvador (1992), Mexico (1992), Argentina (1993), Brazil (1995), Honduras (1995), Peru (1995), Paraguay (1995), Venezuela (na).
[310] Merino (n 307) 7.
[311] Poland (1987), Hungary (1993), Croatia (1993), Lithuania (1994), Slovenia (1995), Bosnia-Hercegovina (1995), Mecklenburg-Vorpommern (1995), Latvia (1996), Russia (1996), Romania (1997).

Latin American countries. Democratic transition means different situations in the case of countries experiencing military dictatorships and those going through decades of real socialism. In Eastern Europe, the democratisation involved setting up constitutional institutions (ombudsmen and constitutional courts), who can safeguard the fundamental rights and freedoms listed in the national constitutions – beyond fighting maladministration that was and remained the first priority of these institutions for a long time. While in Latin America, ombudsinstitutions were a consequence of democratisation, in the Eastern European region they contributed to the much slower process of democratisation.[312] Another significant difference is the harm what the regimes caused, and thus, what the newly established institutions needed to handle. While Latin American ombudsinstitutions investigated complaints based on massive and large scale human rights violations, their European counterparts considered complaints based on mainly singular violations of citizens' rights by state officials. The nature of violations gave a 'different tone' to the mandate of the institutions: Latin American ombudsinstitutions control the executive and the judiciary as well, while Europeans usually do not.[313] The scale of terror and the type of human rights abuses, the lack of justice commissions in the Eastern European region show different problems and different answers.

Summing up, the institution of the ombudsman has been spreading all over the world since the 19th century in four waves. Nordic countries were the first one who appointed public officials in order to control the public administration from a legal point of view. There were slight differences between the countries whether the ombudsman was mandated to supervise the judiciary and the military or not. (First wave) In the '60s and '70s, the ombudsman idea was spreading among the English speaking countries, starting from New Zealand, and further in Western European countries. (Second wave) The '80s brought the proliferation of the institution in Southern Europe, with special regard to Spain that has an elementary effect on the institution-building in Latin America. These countries were the first ones that turned the Swedish model to a human rights-oriented institution. (Third wave) The latest institution-building process went through in the '90s in Eastern Europe, where the newly elected parliaments opted for the ombudsman as guardian of the new constitutions. (Fourth wave)

[312] Defensor del Pueblo (Spain), *The Book of the Ombudsman* (1998) 189 <https://www.defensordelpueblo.es/en/wp-content/uploads/sites/2/2015/06/The_book_DP_Ingles.pdf> accessed 25 February 2019.
[313] Fredrik Uggla, 'The Ombudsman in Latin America' (2004) 36 Journal of Latin American Studies 423, 425.

2.1.3 Ombudsinstitutions at the supranational level

Parallel to national developments, the ombudsman idea has been spreading through the supranational level as well. Recommendations of international organisations have been of high importance as they expressed acknowledgement and supportive words that encouraged their member states to establish ombudsman offices. In 1975, the Council of Europe (CoE) endorsed Recommendation No. 757[314] that promoted ombudsmen seeing them as an additional and more straightforward, quicker, less expensive, more flexible guarantee in comparison to the existing judicial remedies of the member states. It further endorsed ombudsman offices in the '80s[315] and the '90s.[316] The CoE has been advocating for a broader mandate and the empowering of classic ombudsmen from an early stage in order to human rights matters also fall within their general competence, and to initiate investigations and give opinions in cases where human rights are affected.[317] In early 2000, it started to connect the role of ombudsinstitutions with human rights protection considering that human rights are included 'in the standards to be respected by a good administration', they are 'fundamental to the concept of good administration', and those 'administrative actions which do not respect human rights cannot be lawful'.[318] In June 2017, the European Commission for Democracy through Law (better known as Venice Commission) decided to codify 'a set of constitutional and legal principles' specifically devoted to ombudsinstitutions. The final text of the so-called **Venice Principles** was published on 19 March 2019.[319] The Venice Principles (an apparent reference to the Paris Principles in the name) is an 'international reference text' listing the legal principles that are essential to the establishment and functioning of ombudsinstitutions.[320] Similarly to the Paris Principles, the Venice Principles also require legal foundation,[321] clear rules regarding the election, appointment, tenure and dismissal,[322] a broad mandate that covers the

[314] Council of Europe, Recommendation 757 (1975), Conclusions of the meeting of the Assembly's Legal Affairs Committee with the Ombudsmen and Parliamentary Commissioners in Council of Europe member states.
[315] Council of Europe, Committee of Ministers Recommendation No. R (85) 13 (23 September 1985).
[316] Congress of Local and Regional Authorities of Europe, Resolution 80 (1999) on the role of local and regional mediators/ombudsmen in defending citizens' rights.
[317] Council of Europe, Committee of Ministers Recommendation No. R (85) 13 (23 September 1985) (n 315).
[318] CoE Parliamentary Assembly, Recommendation 1615(2003), The institution of Ombudsman para 3 and 10.3.
[319] CoE Venice Commission, Principles on the Protection and Promotion of the Ombudsman Institution ('The Venice Principles'), 18 March 2019, CDL-AD(2019)005 (hereinafter referred to as Venice Principles).
[320] CoE Venice Commission, '25 "Venice Principles" - Democratic ABCs for Ombudsman Institutions' (2019) <https://www.venice.coe.int/webforms/events/?id=2732> accessed 20 March 2019.
[321] Venice Principles (n 319) para 2.
[322] ibid paras 6-11.

'prevention and correction of maladministration, and the protection and promotion of human rights and fundamental freedoms',[323] extensive investigatory powers,[324] power to present recommendations related to the implementation of ratified international instruments on human rights and fundamental freedoms,[325] sufficient and independent budgetary resources,[326] sufficient staff and own recruitment,[327] as well as functional immunity[328]. The Venice Principles require CoE member states to ensure the proper, timely and effective implementation of the Principles.[329]

The CoE and the EU established their own ombudsinstitutions, the Commissioner for Human Rights and the European Ombudsman.

A. The Council of Europe's Commissioner for Human Rights

The CoE created the office of the Commissioner for Human Rights in 1999. It is a non-judicial institution mandated to 'promote education in, awareness of, and respect for human rights, as embodied in the human rights instruments of the Council of Europe'.[330] The Commissioner is elected for a non-renewable term of office of six years by the Parliamentary Assembly by a majority of votes cast from a list of three candidates drawn up by the Committee of Ministers upon the submissions of the Member States addressed to the Secretary-General.[331] The Commissioner acts independently and impartially,[332] he or she is answerable to the Council of Europe's Committee of Ministers and Parliamentary Assembly, to which he submits annual reports.[333] The Commissioner closely cooperates with human rights structures in the member states and with other international institutions for the promotion and protection of human rights. He or she acts upon information sent to him or her by governments, national parliaments, national ombudsinstitutions, or similar bodies; however, he or she is not authorised to handle individual complaints.[334] The

[323] ibid para 12.
[324] ibid para 16.
[325] ibid para 18.
[326] ibid para 21.
[327] ibid para 22.
[328] ibid para 23.
[329] ibid para 25.
[330] Council of Europe, Committee of Ministers Resolution (99) 50 on the Council of Europe Commissioner for Human Rights (7 May 1999) Article 1.
[331] ibid Articles 9 and 11.
[332] ibid Article 2.
[333] ibid Article 3.
[334] ibid Article 5.

Commissioner issues recommendations, opinions and reports.[335] As discussed before, the CoE Commissioner for Human Rights cooperates with national, regional, local or thematic institutions which comply with the Paris Principles and promotes their establishment in the CoE member states.[336]

B. The European Ombudsman

The European Council meeting in Rome in 1990 concluded that '[c]onsideration should be given to the possible institution of a mechanism for the defence of citizens' rights as regards Community matters ("ombudsman")'.[337] It was the Danish Government who proposed the creation of a European Ombudsman, based on the Danish model.[338] The 1992 Maastricht Treaty promulgated the European citizens' right to apply to the Ombudsman (Article 8d) and established the institution (Article 138e). The European Parliament designates the Ombudsman by majority vote for a five-year renewable term. The European Ombudsman is mandated and empowered to investigate maladministration in activities of the EU institutions except for the jurisdiction of the Court of Justice of the European Union. Any EU citizen being a natural or legal person may initiate the Ombudsman's procedure by submitting a complaint to him or her.[339] The Ombudsman conducts inquiries and makes recommendations if discovering maladministration in the activities of Community institutions and bodies.[340] The European Ombudsman reports to the European Parliament annually. Performing his or her duties, the Ombudsman shall be completely independent.[341] Apparently, the European Ombudsman has a mandate that is comparable to that of a classic ombudsinstitution, namely to carefully examine the practice of the EU administration.[342]

As illustrated, the concept of ombudsman went a long way while it has spread all over the world. Due to the flexibility of the concept, ombudsinstitutions adapt to the local circumstances and create a diverse group that can be categorised in many ways.

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[335] ibid Article 8.
[336] CoE Commissioner for Human Rights, 'Co-Operation with National Human Rights Structures' (n 68).
[337] 'European Council, Presidency Conclusions (Rome, 14-15 December 1990)'.
[338] Defensor del Pueblo (Spain) (n 312) 192.
[339] Treaty on the Functioning of the European Union Article 228(1).
[340] European Ombudsman Statute Article 3(1).
[341] Treaty on the Functioning of the European Union (n 339) Article 228(3).
[342] Lisa Ginsborg and others, 'Policymakers' Experiences Regarding Coherence in the European Union Human Rights Context' (2016) 73 <http://www.fp7-frame.eu/wp-content/uploads/2016/09/Deliverable-8.3.pdf> accessed 21 March 2019.

2.1.4 The types of ombudsinstitutions

Scholars often stress the difficulty of the unambiguous classification of ombudsinstitutions. Many offices combine elements of different types of control institutions,[343] they adapt to the local conditions and circumstances,[344] and the ombudsperson's personality is highly influential to the character of the office, therefore, categorising them in one or another group is rather ambitious. The classification in the present dissertation relies on the observations of other scholars – mainly but not merely – based on desk research analysing the legal and historical background of the institutions, and on empirical research, including personal experiences and observations.

Typology can be made on different considerations, such as the type of cases that the office handles, the level of functioning, the direction of competences, or the sector of competences. According to these, we can distinguish between (A) general and specialised ombudsinstitutions, (B) national and supranational ombudsinstitutions, (C) in-house or external ombudsinstitutions, (D) public or private-sector related ombudsinstitutions.[345] General ombudsmen' mandate covers a wide range of fundamental and human rights. Thus, citizens can approach a general ombudsman with any right violation. While specialised ombudsmen focus on one specific type of right or a group of people, whose rights fall under their protection (for example, child rights ombudsmen, discrimination cases) and reject or transfer cases falling outside of their competences. National ombudsmen handle complaints of their own nationals or people residing in their territories. Supranational ombudsmen, such as the European Ombudsman, consider complaints against institutions of the supranational organisation, or complaints from the staff of the institution's employees, such as the Office of the United Nations Ombudsman and Mediation Services (UNOMS)[346] and the Office of the Ombudsperson of the Organization of American States[347]. In-house ombudsinstitutions belong to the structure of the given organisation and handle complaints regarding internal issues. Such 'complaint departments' take over some burden from (parliamentary) ombudsmen, who can instead

[343] Kucsko-Stadlmayer (n 288) 11.
[344] Gottehrer (n 241) 9.
[345] Roy Gregory and Philip Giddings, 'The Ombudsman Institution: Growth and Development' in Roy Gregory and Philip Giddings (eds), *Righting wrongs: the ombudsman in six continents* (IOS Press/IIAS 2000) 8–11.
[346] The United Nations (UN), 'Office of the United Nations Ombudsman and Mediation Services (UNOMS)' <http://www.un.org/en/ombudsman/> accessed 9 July 2018.
[347] The Organization of American States (OAS), 'Office of the Ombudsperson' <http://www.oas.org/en/ombuds/> accessed 9 July 2018.

focus on systematic problems as an external and more independent body. Private-sector related ombudsmen handle complaints regarding one sector of services; usually, those that were public before but having been privatised, such as the insurance industry, telecommunications and other utilities, including water, gas, and electricity.[348] The investigation processes of public and private-sector related ombudsmen are similar. They differ in other ways: a public ombudsman usually reports to the parliament, makes recommendations, and is funded from the state budget. Private ombudsmen do not report to any public body, even if established by law, they may issue binding decisions, and they receive funding from the industry sector in which they operate.

Sources also distinguish according to the organ that established the institution between legislative/parliamentary or executive/governmental ombudsman.[349] This distinction raises the question of independence. Parliamentary ombudsmen are usually considered more independent, thus, enjoy higher credibility than governmental ombudsmen. However, as we will see with ombudsinstitutions in the Nordic region, this picture is modulated by the national specialities of the public administration.

Kessing categorises ombudsinstitutions by focusing on the substance-matter, which the institution deals with and the way it carries out its function. According to this, he distinguishes between (1) court-like (e.g. in Denmark), (2) prosecutor-disciplinary (e.g. in Sweden), (3) mediation (e.g. in France), (4) specialised (e.g. in Sweden), and (5) hybrid/human rights complaints models (e.g. in Latin America).[350] He adds that when considering the establishment of an ombudsinstitution, the choice of the most suitable model should be based on the 'vision behind the establishment', i.e. what is the mission of the institution, on the one hand, and the 'situation, context, and legal environment in the country'[351], on the other hand. While the first consideration is a desire, the second one gives the reality check and tells what is feasible and what is not.

Tai uses a different grouping and categorises ombudsinstitutions in 6 ombudsman and human rights models (OHRM): (1) the classical, (2) the implicit, (3) the explicit, (4) the

[348] Brian Thompson, 'Must Ombudsmen Retain Remit over Privatised Services?' (2012) <http://www.theioi.org/downloads/7uvpf/Wellington Conference_53.Working Session L_Brian Thompson Paper %26 Slides.pdf> accessed 24 March 2018.
[349] Peter Vedel Kessing, 'Implementation of the Western Ombudsman Model in Countries in Democratic Transition' in Birgit Lindsnaes, Lone Lindholt and Kristine Yigen (eds), *National Human Rights Institutions. Articles and working papers* (The Danish Institute for Human Rights 2000) 126.
[350] Kessing (n 349).
[351] ibid 133.

co-existing, (5) the extended, and (6) the hybrid OHRM. He considers the classical ombudsman model as pre-OHRM.[352] The first three types of ombudsman fight maladministration. Going from the classical to the hybrid model, the degree of utilising human rights norms in implementing the ombudsman's duties increases. Co-existing OHRM refers to the situation when both an ombudsman and a National Human Rights Institution exists in a country. Extended OHRMs are explicitly granted with a human rights mandate. The author connects the appearance of the hybrid model with the needs of new democratic states, which have been under totalitarian rule for some time.[353]

The American Bar Association distinguishes (1) legislative, (2) executive, (3) organisational, and (4) advocate ombudsinstitutions. The legislature establishes the legislative ombudsman in order to receive complaints from the general public or internally and address government agencies', officials', public employees', or contractors' actions or failures. The definition of executive ombudsman differs from the previously discussed government-related category. According to the American Bar Association, the executive ombudsman's mandate is identical with that of the legislative one, with the difference that the executive ombudsman may be both public or private sector-based. An organisational ombudsman deals with internal concerns of the given organisation. An advocate ombudsman 'serves as an advocate on behalf of a population'.[354]

As presented, the categorisations and types of ombudsinstitutions are quite diverse but overlapping in some cases. Kucsko concludes that '[…] there is no »patent model« of an ombudsman. Every ombudsman has his or her own political background and his or her own history. The establishment of every ombudsman institution was influenced by already existing institutions, while new solutions corresponding to each country's particular legal order were always sought. The models vary in scope and focus even within the outlined categories.'[355]

For the aim of the present dissertation, two models will be described in more detail: the classic model and the human rights model. Their presentation is not a novel attempt, as these are the most discussed models in the literature. Still, this choice was made because it

[352] Benny YT Tai, 'Models of Ombudsman and Human Rights Protection' (2010) 1 International Journal of Politics and Good Governance 1.
[353] Iván Bizjak, 'The Role and Experience of an Ombudsman in a New Democracy', *International Ombudsman Yearbook 2* (1998).
[354] American Bar Association (n 240) paras G-J.
[355] Kucsko-Stadlmayer (n 288).

is indispensable to draw clear lines between the two distinct but very often conflated models because of the NHRI focus and the latter case studies of the dissertation. Considering the adoption of the classic and the human rights model, research has shown that it matters how much a country is linked to world polity and the international human rights regime. The more it is linked, the more likely it is that it establishes a classical or a human rights ombudsman. While the level of democracy and the transition to it positively influence the adoption of a classic ombudsman, the countries' human rights record and Western heritage are irrelevant. More democratic regimes and those with better human rights records are more likely to opt for the human rights model. The adoption of one model does not facilitate the establishment of the other.[356]

A. Classic model

The classic ombudsman model is a purely national concept that is rooted in the Swedish institution. Gregory and Giddings describe the classic ombudsman as 'an independent and non-partisan officer of the legislature […] who deals with complaints from the public' against administrative injustice, discrimination, lack of procedural fairness, and maladministration[357]. He or she has the power 'to investigate, criticise and publicise, but not to reverse administrative action'.[358] Closing his or her investigation, he or she formulates recommendations by using legal standards to prove constitution-conformity of the public administrative practice. However, the respective authority is not obliged to accept the ombudsman's recommendation but has the general obligation to reply. This definition summarises very well the opportunities and boundaries of the institution.

In most cases, the classic model's mandate covers fundamental rights constituted in the national legislation. The legal status enables the institution to investigate legal infringements that occurred in the public administration, but not actions of private or legal persons.[359] Classic ombudsinstitutions do not have an express human rights mandate; however, in practice, they tend to refer to human rights.[360]

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[356] Jeong-Woo Koo and Francisco O Ramirez, 'National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966–2004' (2009) 87 Social Forces 1321.
[357] Gregory and Giddings (n 345) 3.
[358] Donald C Rowat, *The Ombudsman. Citizen's Defender* (Allen and Unwin 1968) xxiv.
[359] de Beco (n 56) 91.
[360] Linda C Reif, 'Human Rights Ombudsman Institutions as GANHRI Accredited National Human Rights Institutions (NHRIs): Benefits, Challenges and Limitations' (2016) 94 <http://www.theioi.org/downloads/c9h6l/11. Breakout Session II Prof. Linda C. Reif - Human Rights and

In those countries, where such an administration supervising model is in place; thus, human rights fall outside of its radar, another institution, typically the NHRI provides the non-judicial protection of human rights.[361] This model can be found – among others – in Belgium,[362] in Denmark,[363] in Ireland,[364] in the Netherlands,[365] in Norway;[366] and as discussed, the European Ombudsman can be rated as a classic model as well.

B. Human rights model

While the classic ombudsman model was not concerned directly with human rights, the human rights model has its primary function in the promotion and protection of human rights.[367] Human rights ombudsmen are tasked to handle individual complaints on alleged human rights violations; monitor state behaviour, including the implementation of obligations for the promotion and protection of human rights; review existing or proposed legislation, and advocate new laws to protect human rights; engage with the international human rights system, including draft shadow reports; issue recommendations, as well as promote awareness of human rights by offering human rights education and training.[368]

The emergence of the human rights model has happened in two ways, either by establishment or by transformation. Those institutions that gained a human rights mandate at the time of establishment originate from the classic model as well, but they have a clear human rights mandate from the beginning. The other way of the emergence of the human rights model is when a classic ombudsman is transformed into a human rights ombudsman, mainly by receiving multiple mandates or merging more institutions resulting in the creation of a human rights ombudsman. It is typical for the Central and Eastern European region. According to Reif, the process of democratisation; the wave of public institution

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Ombudsman Institutions as GANHRI Accredited NHRIs Benefits%2C Challenges and Limitations. Breakout Session II Prof.pdf> accessed 24 March 2018.

[361] For instance, Centre for Equal Opportunities and Opposition to Racism, Belgium, http://www.diversiteit.be/?setLanguage=3; Danish Institute for Human Rights, Denmark, http://www.humanrights.dk; Dutch Equal Treatment Commission, the Netherlands, http://www.cgb.nl/english Irish Human Rights Commission, Ireland, http://www.ihrc.ie; Norwegian Centre for Human Rights, Norway, http://www.jus.uio.no/smr/english.

[362] Federal Ombudsman, Belgium, http://www.federalombudsman.be

[363] Danish Parliamentary Ombudsman, Denmark, http://en.ombudsmanden.dk

[364] Office of the Ombudsman, Ireland, http://www.ombudsman.gov.ie/en

[365] National Ombudsman, the Netherlands, http://www.nationaleombudsman.nl/english

[366] Parliamentary Ombudsman, Norway, http://www.sivilombudsmannen.no/front-page/category511.html

[367] Linos and Pegram, 'Architects of Their Own Making: National Human Rights Institutions and the United Nations' (n 63) 1114.

[368] Domenico Zipoli, '"Think Global, Act Local": Refocusing Priorities for NHRI Evaluation in the Context of the Iberoamerican Defensor Del Pueblo' (Lund University 2014) <http://lup.lub.lu.se/student-papers/record/4586560/file/4586564.pdf> accessed 14 October 2018.

building; significant comparative law influences; the continuous adoption of international human rights treaties and the efforts of national states to implement them; as well as the welcoming and encouraging attitude of regional and international organisations towards the establishment of NHRIs are the responsible forces for the growth of human rights ombudsinstitutions.[369] As discussed elsewhere, democratic transitions brought the need for new institutional models that can prevent human rights abuses and bureaucracy left behind by the prior regimes.[370] Human rights ombudsinstitutions were elements of this institution-building, especially in Latin America. Pegram argues that the earlier diffusion of human rights ombudsmen was rather influenced by regional developments than the promotional activity of the international community, i.e. states copied each other.[371]

The mandate of human rights ombudsmen moved apart from the that of the original classic model. The human rights mandate clearly overcomes the classic mandate because human rights ombudsmen tend to opt for fighting corruption or protection of human rights than addressing not so urgent and attractive maladministration cases.[372] Some hold the view that human rights ombudsinstitutions have more in common with human rights commissions than with the classic ombudsman model.[373] These opinions consider human rights ombudsinstitutions as a hybrid model – where 'hybridisation'[374] refers to the process and end effect of mixing the mandate of a classic ombudsman with that of a human rights commission.

In the literature discussing ombudsinstitutions, some confusion can be observed that results in mixing the classic and the human rights ombudsman models. Authors promoting the expansion of the classic ombudsman model in the international human rights sphere, state that the competences of all ombudsinstitutions – including the classic model – cover human rights.[375] Reif bases her argument on the theories about the relationship between international law and national law. She argues that human rights originated in international law become part of national legal orders both in monist legal systems, where international

[369] Reif, 'Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman' (n 165) 272.
[370] Pegram, 'Diffusion Across Political Systems: The Global Spread of National Human Rights Institutions' (n 155).
[371] ibid.
[372] Amollo (n 293) 205.
[373] Koo and Ramirez (n 356) 1325.
[374] Reif, 'Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman' (n 165) 284.
[375] Linda C Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Nijhoff 2004) 106; Riitta-Leena Paunio, 'The Ombudsman as Human Rights Defender' (2009) <https://www.oikeusasiamies.fi/documents/20184/38855/The+Ombusdman+as+Human+Rights+Defender> accessed 13 February 2019.

legal norms are part of national law automatically and in dualist legal systems, where international rules become directly applicable owing to a state act. Thus, in Reif's interpretation, classic ombudsmen may also apply international human rights law, whereas they apply constitutional and other legislative frameworks.[376] According to her, in this way, human rights protection and promotion became automatically 'an express function' of many classic ombudsmen.[377] Also, the IOI mixes the different functions when it says that the ombudsman's role goes beyond legality and compliance. Thus, it promotes both human rights and good administration, and all ombudsinstitutions should use a human rights-based approach when considering cases.[378] The literature mentions the ombudsinstitutions of Latin America and Eastern Europe on the same page in this regard.[379] Carver stands on the other side when says that 'the mere doctrinal statement that international law forms the part of the internal legal order is not a complete answer to the problem of how to implement or enforce [international human] rights domestically'.[380] It is rather a reference point to ombudsinstitutions.

Several factors deepen this confusion, such as:

- doubts about the credibility of the NHRI accreditation,
- attributing competences of the human rights model to the classic model, including the NPM and NMM mandates,
- the practice of the CoE,
- the increasing human rights character of individual complaints,
- the membership of ombudsinstitutions in the same international organisations, and
- historic-geographic typology confusion.

Reif criticises the NHRI accreditation procedure and scores it to the GANHRI that classic ombudsinstitutions are not considered to be NHRIs.[381] The Paris Principles classify classic

[376] Reif, *The Ombudsman, Good Governance and the International Human Rights System* (n 375) 103.
[377] ibid 393.
[378] International Ombudsman Institute (IOI), 'Developing and Reforming Ombudsman Institutions: An IOI Guide for Those Undertaking These Tasks' (2017) 7–8 <http://www.theioi.org/downloads/3qf9s/IOI Policy Paper_Principles for establishing OM schemes_20160922.pdf> accessed 22 February 2018.
[379] Philip Giddings, Vladimir Sladecek and Laura Díez Bueso, 'The Ombudsman and Human Rights' in Roy Gregory and Philip Giddings (eds), *Righting wrongs: the ombudsman in six continents* (IOS Press/IIAS 2000) 442.
[380] Richard Carver, 'National Human Rights Institutions in Central and Eastern Europe: The Ombudsman as Agent of International Law' in Ryan Goodman and Tom Pegram (eds), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (Cambridge University Press 2012) 192.
[381] Reif, 'Human Rights Ombudsman Institutions as GANHRI Accredited National Human Rights Institutions (NHRIs): Benefits, Challenges and Limitations' (n 360) 97.

ombudsinstitutions as 'other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular ombudsmen, mediators and similar institutions)'.[382] The author argues that in the practice of the GANHRI institutions with 'limited formal human rights protection mandate' engaging in human rights promotion in practice and having a small number of minor deficiencies may receive an A status accreditation. While those institutions, which do not have the formal mandate for the promotion of human rights, thus, do not comply with the Paris Principles, cannot receive an A-status.[383] Indeed, here Reif is right; not only the formal mandate but the practice and the real impact of the institutions should be taken into account when measuring their Paris Principles conformity. Nevertheless, since ombudsinstitutions are usually characterised and managed by one single person, it is of crucial importance that the institutions have a clear written mandate for the promotion and protection of human rights.

Reif also advocates for classic ombudsinstitutions that have been designated as National Preventive Mechanisms (NPM) under the OPCAT and National Monitoring Mechanisms (NMM) under the CRPD to be considered as having been transformed into human rights ombudsinstitutions.[384] Undoubtedly, holding an NPM or NMM function is an essential step towards a human right mandate, but it does not guarantee a broad human rights mandate as required by the Paris Principles. Also classic ombudsinstitutions usually have the role of visiting prisons and custody, but the NPM mandate differs from investigating cases of detainees. The latter is a reactive attitude, while the former one is a more comprehensive and preventive approach. An NPM seeks 'to identify patterns and detect systemic risks of torture, rather than investigating or adjudicating complaints concerning torture or ill-treatment'.[385]

As already stressed, the CoE has been supporting the combination of the classic and the human rights models for a long time. The Parliamentary Assembly confirmed the importance of ombudsinstitutions within national systems of protection of human rights and the promotion of the rule of law.[386] Also the Human Rights Commissioner refers to

[382] Paris Principles (n 92) s 3 para (f).
[383] Reif, 'Human Rights Ombudsman Institutions as GANHRI Accredited National Human Rights Institutions (NHRIs): Benefits, Challenges and Limitations' (n 360) 97.
[384] ibid 94.
[385] Office of the UN High Commissioner for Human Rights, 'Preventing Torture. The Role of National Preventive Mechanisms. Practical Guide. Professional Training Series No. 21' (2018) 5 <https://www.ohchr.org/Documents/HRBodies/OPCAT/NPM/NPM_Guide.pdf> accessed 10 June 2017.
[386] CoE Parliamentary Assembly, Committee on Legal Affairs and Human Rights, The institution of Ombudsman Report, Doc. 9878 (16 July 2003).

ombudsinstitutions as national human rights structures along with NHRIs.[387] Only the Steering Committee for Human Rights holds the opinion that ombudsinstitutions 'with functions in the fields of human rights should comply with the Paris Principles'.[388] The UN General Assembly also noted functional and structural differences between NHRIs, on the one hand, and the ombudsman and mediator institutions, on the other.[389] Nevertheless, ombudsinstitutions can be encouraged to operate, as appropriate, in accordance with the Paris Principles.[390]

Additionally, two further changes can be observed: more and more ombudsinstitutions receive and examine complaints about human rights, and some of them consider violations of administrative rights as human rights violations.[391] Purgslove points out that there are matters, such as prison conditions, complaints against the police, child welfare, education and equal opportunities, when the administrative aspects of the case can be considered only within its human rights context.[392] Beyond this, the author also mentions that there is a significant content overlap between fundamental rights established by national constitutions and human rights declared in international conventions.[393]

It may also confuse the boundaries between the classic and the human rights model that ombudsinstitutions are members of different ombudsorganisations at the regional and international levels. It means that classic and human rights mandate holders often sit together at the same table. It is because even if there are no universal models, there are universal issues that connect ombudsinstitutions belonging to the classic or the human rights model.

[387] CoE Commissioner for Human Rights, 'Co-Operation with National Human Rights Structures' (n 68).
[388] CoE Ministers' Deputies, The institution of the Ombudsman - Parliamentary Assembly Recommendation 1615 (2003). Reply adopted by the Ministers' Deputies on 16 June 2004, CM/AS(2004)Rec1615 Appendix III to reply para 7.
[389] UN General Assembly Resolution 67/163. The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights, 7 March 2013, A/RES/67/163 para 4.
[390] UN General Assembly Resolution 69/168. The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights, 12 Febuary 2015, A/RES/69/168 para 6(a); UN General Assembly Resolution 65/207. The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights, 28 March 2011, A/RES/65/207 para 6(a).
[391] OSCE Office for Democratic Institutions and Human Rights, 'Ombudsman and Human Rights Protection Institutions in OSCE Participating States' (n 248) 14.
[392] Peter Pursglove, 'National Human Rights Institutions – The Ombudsman Model, Commonwealth Conference of National Human Rights Institutions, London, 26-28 February 2007' (2007) 2–3.
[393] ibid 6.

There is another, historic-geographic element in the conflation of the two models. Namely, there is an overwhelmingly dominant view in the literature that the human rights model is prevalent in Latin America and Eastern Europe.[394] As argued before, the two regions do not share the same kind of authoritarian past, and prosecutions happened completely differently. Also ombudsinstitutions have played different roles in the two legal systems. While Latin American ombudsinstitutions promoted transparency, including reviewing electoral processes, investigated large scale human rights abuses, such as enforced disappearances, killings, and intervened in social conflicts, Central and Eastern European ombudsinstitutions coped with maladministration from an early stage. There are multiple reasons, why the Central and Eastern European ombudsinstitutions cannot be considered as human rights model by default as the Latin American institutions.

First, from a legal theory perspective, the ombudstype legal protection mechanisms in Europe are primarily and traditionally subjects of constitutional law and fundamental rights law.[395] It is well reflected, for example, in the name of the new Hungarian ombudsinstitution (2013): Commissioner for Fundamental Rights. Law school curricula do not discuss ombudsinstitutions in relation to international law. Studying Hungarian constitutional law, including about the Parliamentary Commissioner for Fundamental Rights (the predecessor of the Commissioner for Fundamental Rights), the human rights concept was never mentioned in relation to this constitutional institution. In any case, the differences between constitutional law and international human rights law cannot be left out of account. The differentiation is based on the fact that the two statutory bodies originate from diverse legal sources. It also results in that they operate with different legal protection mechanisms. '[H]uman rights refer not only to those enshrined in the constitution but also those rights provided for in the human rights treaties that the State has ratified.'[396] Within the ombudsman practice, it means that human right ombudsmen must raise the awareness of complainants expressly on regional and international protection mechanisms at their disposal on the one hand. They also work closely with these international mechanisms. On the other hand, beyond establishing maladministration, their annual reports must reflect on whether the infringement practice violates the state's international commitments.

[394] Reif, 'Human Rights Ombudsman Institutions as GANHRI Accredited National Human Rights Institutions (NHRIs): Benefits, Challenges and Limitations' (n 360).
[395] Somody, 'Az Ombudsman-Típusú Jogvédelem Című Doktori Értekezésének Tézisei' (n 119).
[396] de Beco and Murray (n 197) 42.

Second, analysing the practices of Central and Eastern European ombudsinstitutions, their recommendations tend to protect fundamental rights and freedoms outlined in national constitutions without reacting directly to violations of human rights declared in international human rights conventions.[397] They do not refer to the results of implementing human rights obligations by the state in their annual reports. Constitutional law based classic ombudsinstitutions' reference points are instead the rules of public administrative law and specific (procedural) regulations connecting to the given case. The practice of referring to provisions of domestic law that relate to human rights, such as non-discrimination, or the vulnerable position of the child, does not make the investigator be a human rights ombudsman.

Third, the human rights characteristic is rather novel in the Central and Eastern European context – mainly due to the tendency of the institutions' accreditation as NHRIs. It should be assumed that those ombudsinstitutions that have been accredited as NHRIs with A-status are human rights ombudsmen. The present dissertation argues that this is not always the case, with special regard to the fact that the NHRI accreditation is not equivalent to the transformation from classic ombudsman to human rights ombudsman. The scepticism derives from the observation of the practice of the transformed institutions and the results of comparing institutions that have a long history of holding human rights mandate before having been accredited with those, who have been accredited basically in their capacity as classic ombudsinstitutions. Since we should assume that holding a broad human rights mandate results in accredited A-status, it might be paradoxical to raise the question of whether a classic ombudsman is suitable for the NHRI role immediately after accreditation. The case study analysis of Chapter Three attempts to answer this question.

The historic and the legal dogmatic background, the referencing practice, and the NHRI accreditation are dwarfed by a fourth consideration. Being a human rights ombudsman means an entirely different mindset, a human rights-based approach with all its necessities, such as strong knowledge on international human rights law, proactivity, preventive approach, educational approach, language skills needed for participation and interaction in the international human rights scene. Based on observations, ombudsmen of the Central and Eastern European region often lack in this human rights mind-setting – even after having been accredited as NHRI.

[397] Walter Kälin and Jörg Künzli, *Universeller Menschenrechtsschutz* (Helbing Lichtenhahn 2008) 37.

It is without saying that not only the institutional design (whether classic or human rights model) determines the degree of intensity of human rights issues, the ombudsman may deal with. The human rights situation in the country, the historical, political, constitutional and cultural environment, the ombudsperson's self-consciousness and self-perception, as well as the practices of the predecessors in office[398] influence the appearance of human rights in the ombudsman's practice.[399] All these models work if they are capable of operating independently of the actual or perceived influence from government.[400]

[398] Peter Kostelka, 'Reaching Out to Citizens' (2009) 2 <http://www.theioi.org/downloads/b3cdh/Stockholm Conference_17. Plenary Session II_Peter Kostelka.pdf> accessed 24 March 2018.I
[399] Tai (n 352) 1.
[400] Johnson (n 255) 786.

2.2 SWOT Analysis

The second part of the chapter attempts to give a general analysis of ombudsinstitutions by adopting the method of SWOT analysis. The so-called SWOT analysis is an analytical tool used to evaluate an organisation's situation considering internal and external factors. It identifies the organisation's strengths, weaknesses, opportunities, and threats; provides an analytical scheme, within which the organisation's potential for development can be reviewed,[401] and thus, assists decision-makers. This planning method is mainly applied in business analytics,[402] however, it can be a useful tool for any kind of organisation or even for assessing personal growth. SWOT analysis is usually used for performance analysis, cause analysis, strategic planning and needs assessment, as well as evaluation.[403]

The acronym SWOT stands for strengths, weaknesses, opportunities, and threats. These are internal and external attributes (enhancers and inhibitors[404]) of an organisation, in the present case, ombudsinstitutions. Strengths are internal competitive advantages over others and answer the question, what the organisation is good at. Weaknesses are faults, defects or limitations that put the organisation at a disadvantaged position relative to others. Opportunities are favourable situations in the organisation's environment, which the organisation can take benefit of. Threats are any unfavourable situations in the environment that may hinder the organisation from competing successfully with others.[405] Each of them is an important indicator, which tells the organisation, where it performs well and where it needs to improve.

The internal factors, i.e. strengths and weaknesses, usually relate to the organisation's personal; finances; physical resources; activities and processes; mandate; reputation, and self-perception. The external factors, i.e. opportunities and threats, typically relate to the historical background and evolution; politics and economics; legislation; institutional design; and events.

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[401] Philip Giddings, 'The Future of the Ombudsman' in Roy Gregory and Philip Giddings (eds), *Righting wrongs: the ombudsman in six continents* (IOS Press/IIAS 2000) 459.
[402] Thomas H Davenport, Babette E Bensoussan and Craig S Fleisher, *The Complete Guide to Business Analytics (Collection)* (2012).
[403] Doug Leigh, 'SWOT Analysis' in Kenneth H Silber and others (eds), *Handbook of Improving Performance in the Workplace* (International Society for Performance Improvement 2010).
[404] ibid.
[405] Ifediora Christian Osita, Idok Onyebuchi R. and Nzekwe Justina, 'Organization's Stability and Productivity: The Role of SWOT Analysis an Acronym for Strength, Weakness, Opportunities and Threat' (2014) 2 International Journal of Innovative and Applied Research 23.

Sometimes, the borderline between strengths, weaknesses, opportunities, and threats is very thin, and the delimitation is challenging. Some characteristics can be listed on both sides, for example, in the case of ombudsinstitutions single leadership can be a strength (giving a face to a public institution and making the administration more human), but also a threat (lack of democratic decisions, abusing power). The passage between the categories is possible. Strengths can be used to take advantage of opportunities and avoid threats. Weaknesses can be overcome in order to take advantage of opportunities or can be minimised in order to avoid threats. The so-called TOWS matrix[406] reflects these connections by systematically assessing the interaction of the elements across the four different quadrants:

	Strengths (S)	**Weaknesses (W)**
Opportunities (O)	***SO strategies***: uses S to take advantage of O	***WO strategies***: overcomes W to take advantage of O
Threats (T)	***ST strategies***: uses S to avoid T	***WT strategies***: minimise W to avoid T

Table 1: TOWS matrix

For the current dissertation, the SWOT analysis will be applied uniquely. First, not one specific institution is analysed but a group of institutions (ombudsinstitutions) – along with their common characteristics. Second, it attempts to collect as many SWOTs of ombudsinstitutions as possible; however, the list is not exhaustive. Third, the categorisation of the collected features is made subjectively. Fourth, the collection will be put under scrutiny for one specific purpose. The analysis seeks to answer the question of whether ombudsinstitutions – considering their strengths, weaknesses, opportunities, and threats – are suitable for the NHRI role. With other words, whether and till what extent ombudsinstitutions' strengths, weaknesses, opportunities, and threats may able or disable ombudstype institutions to perform well as NHRIs.

If we want to demonstrate the value of ombudsinstitutions, an **evaluation** will be needed. The evaluation may serve various purposes, such as highlighting successes, pointing out

[406] Fred R David, *Strategic Management* (Prentice Hall College Div 1997).

shortcomings that need to be improved, documenting the need for changes[407] or assessing effectiveness. The evaluation can be made either by the ombudsman office itself (self-evaluation), by another ombudsinstitution (peer evaluation), or by an external evaluator (external evaluation).[408] Evaluating ombudsinstitutions is not an easy task, 'most evaluations of ombudsman offices are, at best, approximations'.[409] Stuhmcke underlines some natural obstacles that can be observed in the practice of ombudsinstitutions very well. The ombudsman works as a part of a complex multiplayer system. Thus, in the case of perfection or malfunction, it is difficult to determine the responsible organ. The ombudsman office usually works with an 'inherent subjectivity and informality' that makes the measurement more complicated as well. Even if we manage to collect some data, interpreting the data is tricky. Stuhmcke mentions some examples pointing to the asymmetry in ombudsman data. The reducing number of complaints may refer to both the effective functioning of the ombudsman and the obscurity or non-accessibility of the office. Less activity may refer to the good status of the public administration or the ombudsman's unwillingness to confront the executive. While high complaint rates may indicate injustice or poor administration, low complaint rates do not necessarily signify a just administration.[410] It is hard to evaluate ombudsinstitutions not only because of the nature of the institution and its procedures but because of the field, where it is active. One of the biggest challenges in international human rights law is to measure impact. There is a trend among international agencies and offices to develop indicators for this purpose.[411] In the absence of general measuring tools and guidelines, specific aspects of the work of ombudsinstitutions and NHRIs is usually considered in order to measure their impact.[412]

[407] Office of the ICANN Ombudsman, 'A Practitioner's Guide to Evaluating Ombudsman Offices' (2007) 2 <https://www.icann.org/en/system/files/files/guide-evaluate-ombudsman-offices.pdf> accessed 15 February 2018.
[408] ibid 17.
[409] Steven E Aufrecht and Marc Hertogh, 'Evaluating Ombudsman Systems' in Roy Gregory and Philip Giddings (eds), *Righting wrongs: the ombudsman in six continents* (IOS Press/IIAS 2000) 400.
[410] Anita Stuhmcke, 'Evaluating the Effectiveness of an Ombudsman: A Riddle, Wrapped in a Mystery inside an Enigma' (2012) <http://www.theioi.org/downloads/errdt/Wellington Conference_27. Working Session F_Anita Stuhmcke Paper.pdf> accessed 24 March 2018.
[411] For example, United Nations Development Programme, *Handbook on Planning, Monitoring and Evaluating for Development Results* (2009); Siobhán McInerney-Lankford and Hans-Otto Sano, *Human Rights Indicators in Development. An Introduction* (2010); Office of the UN High Commissioner for Human Rights, *Human Rights Indicators. A Guide to Measurement and Implementation* (United Nations 2012); European Union Agency for Fundamental Rights, *The Right to Political Participation for Persons with Disabilities: Human Rights Indicators* (Publications Office of the European Union 2014).
[412] Richard Carver, 'Measuring the Impact and Development Effectiveness of National Human Rights Institutions: A Proposed Framework for Evaluation' (2014) 16.

Assessing the effectiveness of National Human Rights Institutions went through an evolution in the last 30 years. In the 1990s, when the Paris Principles were drafted, the compliance with the Principles was seen as the guarantee of effectiveness. Evaluators strongly believed that the independence of the institutions required by the Paris Principles is 'the key determinant of positive impact' while connections to the executive authority were considered 'as one of the biggest obstacles to effectiveness.'[413] From 2000, the strong belief in the determining role of the Paris Principles compliance seemed to ease. Scholars realised that the Paris Principles in themselves, for example, do not make any distinction between the different – democratic and non-democratic – political systems and historical experiences in respecting human rights.[414] Livingstone and Murray argue that the effectiveness criteria go beyond the legal requirements of the Paris Principles, and propose a capacity-performance-legitimacy framework, in which capacity refers to the institutions' powers, resources, composition, and the context within which they operate; performance looks at how the institutions exercise their powers; and legitimacy considers the institutions' standing and relationships.[415] Ayeni suggests an analysis according to the institutions' mission and objective, mode of operation, powers and jurisdiction, structure and organisation.[416] Stuhmcke offers the following evaluating techniques: data analysis, descriptive analysis (e.g. case studies), social engagement, and promotion of trust.[417] In 2005, Richard Carver suggested to NHRIs to define 'standards against which they can assess themselves' (benchmarks) and 'specific measures that tell them how effectively they are working' (indicators).[418] Julie Mertus identified three broad approaches to assessing effectiveness: structural, mandate-based, and impact-based approaches. The structural approach refers to the traditional formal compliance with the Paris Principles. The mandate-based approach considers the formal substantive mandate of the institutions. The impact-based approach is closer to the newest trends because it uses formal indicators of social change and compliance with human rights norms, as well as charts socialisation of

[413] Carver, 'Measuring the Impact and Development Effectiveness of National Human Rights Institutions: A Proposed Framework for Evaluation' (n 412).
[414] International Council on Human Rights Policy (n 155).
[415] Stephan Livingstone and Rachel Murray, 'The Effectiveness of National Human Rights Institutions' in Patrick D Schmidt and Simon Halliday (eds), *Human Rights Brought Home: Socio-Legal Perspectives of Human Rights in the National Context* (Hart Publishing 2004).
[416] Victor O Ayeni, 'The Ombudsman Around the World: Essential Elements, Evolution and Contemporary Challenges' in Victor O Ayeni, Linda C Reif and Thomas Hayden (eds), *Strengthening Ombudsman and Human Rights Institutions in Commonwealth Small and Island States: The Caribbean Experience* (Commonwealth Secretariat 2000).
[417] Stuhmcke (n 410).
[418] Richard Carver, *Assessing the Effectiveness of -National Human Rights Institutions* (2005).

human rights understandings and practices.[419] In the light of these, the NHRI accreditation is a structural approach that recently has begun to have the mandate-based approach by increasingly looking at the way how NHRIs implement their given mandates. Nevertheless, the SCA is still not able to measure the impact, and 'determine what effect the NHRI's presence and work have had on the actual enjoyment of human rights.'[420]

The Office of the Ombudsman of Ontario, the second largest ombudsman office in North America, identified the following typical performance measurement criteria that ombudsinstitutions have developed around the world:

- number of complaints received,
- target times for initial responses to complaints,
- target times for assessing complaints,
- number of cases resolved informally,
- target times for disposing of complaints,
- targets for the number of cases to be disposed of by staff members in a given period,
- target times for completing investigations,
- effectiveness in keeping complainants updated about progress in dealing with their cases,
- effectiveness in advising complainants of the result of an investigation,
- effectiveness in dealing with root causes and systemic issues,
- number of systemic investigations,
- acceptance of recommendations,
- conviction rates,
- number of complaints received about how a case was handled,
- number of complaints about the conclusion reached,
- number of judicial reviews,
- number of outreach activities,
- awareness of the existence of the office among its constituents,
- composition of staff,
- staff training,

[419] Mertus (n 200).
[420] Carver, 'National Human Rights Institutions in Central and Eastern Europe: The Ombudsman as Agent of International Law' (n 380).

- impact of annual and special reports, and
- effectiveness in monitoring the implementation of recommendations.[421]

These indicators relate to the process. The ombudsinstitution adapted six performance-measurement principles focusing on impact, rather than on process. According to this, ombudsinstitutions should

- exist,
- measure the quality of investigations,
- measure what else matters,
- structure the operation to ensure value at every level,
- direct one's efforts to maximising moral suasion, and
- broadcast the results.[422]

Effectiveness is often connected to the name of ombudsinstitutions, as one of their desired features beyond visibility, accessibility, credibility, and accountability. Ombudsinstitutions being state founded bodies have a certain, well-defined territory to function. The borders are set by the legislative provisions, the operative practices adopted by the office, the available resources,[423] as well as the ombudsman's and his or her staff's skills. The ombudsperson's personality and perception about his or her role draw the sharp contour of the institution. The aspects of the administrative culture and political environment are also influential factors. The effectiveness of the institution can be measured within this territory. According to Paunio, the ombudsman's tasks and his or her real opportunities for action determine whether an ombudsman can promote human rights.[424] According to Dodson, the institution's effectiveness ultimately depends on two factors. It must gain respect among public officials on the one hand that enhances compliance with its resolutions, and it must be credible among the citizenry on the other hand.[425]

Reif lists 11 factors that influence the effectiveness of ombudsinstitutions:

1. democratic governance in the state (e.g. political factors may delay the activation of the institution after its establishment in the constitution);

[421] Asian Development Bank (n 250) 196–207.
[422] ibid 211–227.
[423] Mariana Sotto Maior, 'What Is or What Can Be the Role of the Ombudsman Regarding Human Rights?' (2012) <http://www.theioi.org/downloads/avbvv/Wellington Conference_20. Working Session D_Sotto Mairo Paper.pdf> accessed 24 March 2018.
[424] Paunio (n 375).
[425] Michael Dodson, 'The Human Rights Ombudsman in Central America: Honduras and El Salvador Case Studies' (2006) 3 Essex Human Rights Review 29, 30.

2. independence from the government;
3. jurisdiction of the institution (police, army, judiciary, private sector, international human rights);
4. the extent and adequacy of the powers (investigatory, enforcement, promotion);
5. accessibility;
6. the level of cooperation with other bodies;
7. operational efficiency (adequate financial resources, a sufficient number of qualified staff, appropriate internal working and evaluation procedures);
8. accountability and transparency;
9. personal character and expertise;
10. government's behaviour (no politicising, receptive attitude);
11. credibility.[426]

The CoE completes this list with further essential characteristics that echos the Paris Principles and the accreditation practice attached, such as establishment at constitutional level, transparent procedures for appointment, prohibition of engaging in any other remunerated activities, personal immunity, internal and external procedures, confidentiality, the competence to give opinions on proposed legislation, replies within a reasonable time, reporting annually, and – interestingly – the appointment of a deputy.[427]

Most of these factors will be considered in the present SWOT analysis as well.

Authors usually agree that the effectiveness means that the office completes investigations relatively quickly, secures remedial action that is adequate to the violation, and follows up its recommendations in order to secure the compliance with them.[428] In order to be able to do so, ombudsinstitutions need 'strong legal underpinning'[429] that cover appointment, tenure, and funding that ensure the potential for independent action.[430] Nevertheless, the legal background is not sufficient. Beyond the legal environment guaranteeing effective functioning to the institution, the ombudsman's personality, his or her philosophy about his

[426] Reif, *The Ombudsman, Good Governance and the International Human Rights System* (n 375) 396–397.
[427] CoE Parliamentary Assembly, Recommendation 1615(2003), The institution of Ombudsman (n 318).
[428] Gregory and Giddings (n 345) 6.
[429] Tom Pegram, 'Weak Institutions, Rights Claims and Pathways to Compliance: The Transformative Role of the Peruvian Human Rights Ombudsman' (2011) 39 Oxford Development Studies 229, 56.
[430] Erika Moreno, 'The Contributions of the Ombudsman to Human Rights in Latin America, 1982-2011' (2016) 58 Latin American Politics and Society 98, 148.

or her mandate, and his or her role perception are of high importance in relation to the institution's functioning and effectiveness. [431]

The next subchapters collect the strengths, weaknesses, opportunities, and threats of ombudsinstitutions in general based on the observations of scholars and the experiences of practitioners. Some features may not fit all type of ombudsinstitutions. Taking Gregory and Gidding's typology, the analysis was tailored for a general, national, external and public (parliamentary) ombudsman. Where possible, the passage between strengths, weaknesses, opportunities, and threats will be highlighted. In terms of rivals, others, or competitors, the non-ombudstype NHRIs are considered, such as human rights commissions, institutes, and councils. Since the analysis seeks to answer the question whether ombudsinstitutions – considering their strengths, weaknesses, opportunities, and threats – are suitable for the NHRI role, the whole analysis is done in light of the requirements of the Paris Principles and the General Observations of the GANHRI.

2.2.1 The strengths of ombudsinstitutions

1. Flexibility

The institution of the ombudsman proliferated worldwide relative quickly and easily – as illustrated when discussing the historical development of the institution. It is due to the institution's flexibility and capability to adapt to the different political and administrative circumstances in various countries,[432] including 'changes in the structure and activities of government'.[433] This also explains why there is no universal model of ombudsinstitutions. Flexibility also enables ombudsinstitutions to respond and meet the requirements set by the environment. For example, if the GANHRI accreditation results in recommendations towards an institution, it has good potential to adapt to them. Flexibility plays a role not only in the growth and improvement of the institutions but in their everyday functioning. Ombudspersons are usually free in choosing the way (actions and tools) to proceed and

[431] Somody, 'Jogállami Paradoxon - A Sikeres Ombudsmani Jogvédelem Sajátosságai [Rule of Law Paradox - Features of the Successful Protection Provided by the Ombudsman]' (n 246) 100–101.
[432] Amollo (n 293); Gregory and Giddings (n 345); Evgeny Finkel, 'Defending Rights, Promoting Democracy: The Institution of Ombudsman in Poland, Russia and Bulgaria' (2006) <http://www.eoi.at/d/EOI - Jahresberichte/Russland/Defendign rights, OM in Pol, Rus, BG.pdf> accessed 3 December 2018; Pegram, 'Diffusion Across Political Systems: The Global Spread of National Human Rights Institutions' (n 155).
[433] John McMillan, 'The Ombudsman's Role in Human Rights Protection – An Australian Perspective' (2009) 8 <https://www.ombudsman.gov.au/__data/assets/pdf_file/0025/34369/2-5-November-2009-The-Ombudsmans-role-in-human-rights-protection-an-Australian-perspective.pdf> accessed 12 February 2018.

remedy human rights violations. Launching investigations *ex officio* is also a flexible way of functioning that makes ombudsinstitutions outstanding from other public authorities.

2. Having a human face

It is sporadic in the public administration – except the high representatives of the government – that citizens can attach a human face to a mandate holder or a decision-maker. The ombudsman is usually the single head of the office, who represents it and takes full responsibility for the decisions made on behalf of the institution. By submitting a complaint with the ombudsman office, citizens have direct access to a public body.[434] The ombudsman is a citizen-oriented bureaucratic auditor.[435] Having a recognisable public representative is especially crucial in cases when citizens can complain 'in a dispute with the faceless bureaucracy'[436]. Thus, the ombudsman 'serves as personal representative of each citizen, more than any other parliamentary body'.[437] This high level of recognisability also supports the accessibility and credibility of ombudsinstitutions.

3. Handling individual complaints

Receiving and investigating individual complaints is usually the priority in the practice of ombudsinstitutions. The Paris Principles do not require that NHRIs have the ability to receive complaints or petitions; this is only an additional activity that 'commissions with quasi-jurisdictional competence'[438] may pursue. As explained before, the wording of the Paris Principles that it leaves ombudsinstitutions aside and refers to commissions; however, the practice unambiguously shows the dominance of ombudsinstitutions regarding this activity. The reason for this somewhat neglected role is due to the already mentioned fact that in time of drafting the Paris Principles, human rights ombudsmen from Latin America were underrepresented at the Paris meeting, and the statements of classic ombudsmen present at the meeting let participants believe that ombudsmen, in general, are not well suited to address human rights concerns.[439]

[434] Linos and Pegram, 'The Language of Compromise in International Agreements' (n 111) 601.
[435] Caiden, Macdermot and Sandler (n 264) 9.
[436] Söderman (n 277).
[437] Kostelka (n 398) 3.
[438] Paris Principles (n 92).
[439] Linos and Pegram, 'The Language of Compromise in International Agreements' (n 111) 599.

Recent research has reaffirmed that institutions with the ability to receive and process complaints are more effective than NHRIs lacking in this competence.[440] That is why it is easy to argue that complaint handling should be a mandatory requirement for NHRIs.[441] The complaint-handling function may contribute to the institutions' advisory role, as well as to the opportunity of facilitating systematic change and prevent human rights abuses since complaints serve as indicator of emerging problems.

The disadvantage of handling individual complaints is that ombudsinstitutions 'tend to be reactive rather than proactive'[442] and the flood of petitions may hinder the institutions to set other priorities, including those of proactive nature, such as human rights promotional activities.[443]

4. Protecting economic, social and cultural rights

The redress that ombudsinstitutions can provide plays a vital role in the way to the implementation of these rights at the national level.[444] McMillan argues, though, that there is less scope for ombudsinstitutions to safeguard aspirational rights, such as ESCR that cannot be simply reduced to enforceable legal standards. His main argument is that there are factors when ensuring the enjoyment of these rights that fall outside the ombudsman's competence and control, such as the allocation of budgetary resources.[445] It is right to state that ombudsinstitutions cannot implement these rights through their recommendations. Nevertheless, highlighting malfunctions or gaps by raising human rights concerns based on individual complaints frequently draws governments' attention to areas, which are

[440] The Danish Institute for Human Rights, 'Lessons from Research on National Human Rights Institutions – A Desk Review on Findings Related to NHRI Effectiveness' (2018) <https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/research/workingpaper_lessons_research_nhris_web_2018.pdf> accessed 22 March 2019; Katerina Linos and Tom Pegram, 'What Works in Human Rights Institutions?' (2017) 112 The American Journal of International Law 1; Network of African National Human Rights Institutions (NANHRI), 'A Mapping Survey of the Complaint Handling Systems of African National Human Rights Institutions' (2016) <https://nhri.ohchr.org/EN/ExternalPublications/English Mapping Survey on Complaints Haldling Systems Final.pdf> accessed 22 March 2019; The Danish Institute for Human Rights, 'NHRIs' Independence and Accountability' (2013) 35 <https://www.humanrights.dk/files/media/dokumenter/udgivelser/nhris_independence_and_accountability_publication.docx.pdf> accessed 22 March 2019.

[441] UN Committee on the Rights of the Child, General Comment No. 2: The role of independent national human rights institutions in the promotion and protection of the rights of the child, 15 November 2002, CRC/GC/2002/2 (n 40).

[442] Viktor J Pickl, 'Investigating Complaints: A Comment' in Gerald E Caiden (ed), *International Handbook of the Ombudsman: Evolution and Present Function* (Greenwood Press 1983) 91.

[443] Carver, *Assessing the Effectiveness of -National Human Rights Institutions* (n 418).

[444] Milan Ambroz, 'The Mediating Role of the Ombudsman in the Protection of Human Rights' (2005) 14 International Journal of Social Welfare 145, 2.

[445] McMillan (n 433) 2.

incredibly relevant for individuals' life and do not function in accordance with the State's commitments in the fields of education, housing, health care, and other social services.[446]

Protecting ESCRs is also a requirement in the Paris Principles. Pointing to the necessity of a broad human rights mandate means that strong NHRIs are required to promote and protect ESCRs as well.[447]

5. *Accessibility*

The ombudsman is 'a low-threshold complaints body'[448] that complements the court system. While the use of courts requires lots of efforts from citizens, such as time, knowledge, and money, the procedures of ombudsinstitutions are fast, cheap, informal, thus, more accessible.[449] Ombudsinstitutions have a 'non-confrontational and cooperative approach'[450] that does not require the active participation of the plaintiff[451] and their investigations result reasonably quickly. According to Volio, Latin American ombudsmen are 'often more effective than the courts in protecting human rights', and they contribute effectively to the resolution of conflicts.[452]

Accessibility is an especially important question in the case of disadvantaged groups. They are more likely to have problems with formulating their complaints and transmit it to the right forum. However, ombudsinstitutions cannot be equally accessible to all citizens, they can actively increase access.[453] Both the Paris Principles[454] and the SCA General Observations[455] encourage NHRIs to enhance their accessibility by establishing regional offices. Local presence or appearance of ombudsinstitutions outside the headquarter offices enables people to get to know the institutions and submit their complaints to them.

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[446] Navanethem Pillay, 'Current Challenges to the Protection and Promotion of Human Rights' (2009) 5 <http://www.theioi.org/downloads/2081/Stockholm Conference_05. Plenary Session I_Navanethem Pillay.pdf>.
[447] Paris Principles (n 92) s 1 para 2.
[448] Hammarberg (n 67) 3.
[449] Philip A Joseph, 'Parallel Universes: Ombudsman and Courts' (2012) 2 <http://www.theioi.org/downloads/2ob3s/Wellington Conference_06. Plenary II_Philip Joseph Paper %26 Slides.pdf> accessed 24 March 2018.
[450] Gregory and Giddings (n 345) 16.
[451] Gregory and Giddings (n 345).
[452] Volio (n 259) 223–224.
[453] Baroness B Serota, 'The Evolution of the Role of the Ombudsman - Comparisons and Perspectives' in Gerald E Caiden (ed), *International Handbook of the Ombudsman: Evolution and Present Function* (Greenwood Press 1983) 37.
[454] Paris Principles (n 92) para C(e).
[455] SCA General Observations (n 142) G.O. 1.10.

Presence in the media serves also enhanced visibility that is part of being accessible – as stressed before.

6. Discretion

Ombudspersons have the possibility and tools to extend their authority – '[m]ore than almost any other government agency'.[456] The office of the ombudsman may also work with official administrative deadlines similar to other public bodies, and it relies very often on other authorities' actions. Nevertheless, the ombudsperson can develop his or her own understanding of the office and focus on specific aspects of his or her mandate.[457] As touched upon at flexibility, the ombudsman has considerable freedom in deciding the direction of his supervisory activity. Whether he or she launches a public investigation and what he or she focuses on during his investigation. An ombudsman can 'go beyond the law' if a lawful but unreasonable, unjust, oppressive or improperly discriminatory, all in all, plain wrong action or decision occurs. His or her conclusions conform not only to the law, but he or she can reach 'a sensible conclusion' considering the more significant scope of the case.[458] The ability to decide on the priorities and actions is both a strength and a weakness because the ombudsperson itself can make the institution inconspicuous.

7. Bridging role

Ombudsinstitutions have multiple bridging roles. They can interact with all three state powers, namely the legislature, executive, and judiciary in a co-operative, supportive and constructive manner.[459] Usually, ombudsinstitutions are mandated to formulate legislative proposals or amendments to executive decrees, and refer cases to national courts or join court procedures. As a grievance mechanism that promotes good administration, ombudsinstitutions overarch the gap between the government and people[460] and act 'as an intermediary between the people and the state and local administration'.[461] In the case of

[456] Kostelka (n 398) 2.
[457] ibid.
[458] McLeod (n 260) 24.
[459] Abraham, 'Commentary: The Future in International Perspective: The Ombudsman as Agent of Rights, Justice and Democracy' (n 268) 684; Trevor Buck, Richard Kirkham and Brian Thompson, *The Ombudsman Enterprise and Administrative Justice* (Ashgate Publishing 2011).
[460] Cheng (n 286) 20.
[461] CoE Venice Commission, 'Opinion on the Possible Reform of the Ombudsman Institution in Kazakhstan Adopted by the Venice Commission at Its 71st Plenary Session, Venice, 1-2 June 2007, CDL-AD(2007)020' (2007) para 12.

parliamentary democracies, they help the parliaments 'to supervise the executive policies and the administration'.[462]

In the network of human rights ombudsinstitutions, NGOs and international actors are also relevant stakeholders. Effective ombudsinstitutions connect state and non-state actors. This unique standing is typical to NHRIs as well, as they can be considered neither as government bodies nor as members of the civil society.[463]

8. The champion of good governance

Despite being an authority and part of the public administration, ombudsinstitutions are unique because they are designed to comply with all criteria of good governance that they promote with their actions. Otherwise, their credibility would be questioned. They are close to citizens and allow their full participation, they promote the rule of law, they are consensus-oriented and mediate between different interests, they promote equity and inclusiveness by offering services to all members of the society, they follow the principles of effectiveness and efficiency, they are responsive and accountable, and their procedures are transparent.[464]

2.2.2 The weaknesses of ombudsinstitutions

Weaknesses are very often inherent typical characteristics of ombudsinstitutions. As such, it is doubtful that they can be easily abolished. Depending on the nature of the weakness, some weaknesses can be minimised, though, to avoid threats, and some can be overcome to take advantage of opportunities. Mostly, it is a matter of strategic thinking.

1. One person on the top of the institution

As shown before, the single head leadership on the top of the institution has its advantages (having a human face), but it also entails disadvantageous implications. Ombudsinstitutions need to fulfil a double independence criterion. Both the institution and the ombudsperson need to be independent. If the ombudsman is corruptible or is a

[462] Leonard FM Besselink, 'Types of National Institutions for the Protection of Human Rights and Ombudsman Institutions: An Overview of Legal and Institutional Issues' in Kamal Hossain (ed), *Human rights commissions and ombudsman offices: national experiences throughout the world* (2000) 161.
[463] Global Alliance of National Human Rights Institutions, 'General Observations of the Sub-Committee on Accreditation' (n 142) para 1.5.
[464] United Nations The Economic and Social Commission for Asia and Pacific, 'What Is Good Governance?' (2009) <https://www.unescap.org/sites/default/files/good-governance.pdf> accessed 2 January 2019.

'maladministrator' himself – for example – that weakens the whole institution as it may lose credibility in the eyes of the public. It is an interesting methodological question, how to measure if the ombudsman is rather passive, remains silent in cases where he or she would have competence.[465]

The ombudsperson's eligibility and professional competence for the post are of high relevance as well. In lack of a multi membered decision-making body, the head of the office, namely the ombudsman him- or herself, makes most decisions. Therefore, if the person is not prepared for such a responsible position, that jeopardises the effectiveness of the institution.

Beyond professional competence, the ombudsman's role perception and level of (pro)activity also matter. Since staff members usually cannot act without the ombudsman's approval, the ombudsman's final decisions and actions will determine the messages what the institution represents.

2. Lack of pluralism

Pluralism in the composition of an organisation refers to the broader representation of the society within the organisation. Pluralistic staff structure involves diversity considering gender, ethnicity or minority background. A diverse staff body enhances the appreciation of the institution, promotes its accessibility for more citizens, and increases the institution's capacity to engage in many human rights issues that affect the society.[466]

Some authors argue that ombudsinstitutions, being one-person organisations, are not able to fulfil the pluralism requirement of the Paris Principles.[467] Indeed, in comparison to other types of NHRIs (commissions, institutes, councils), the representation of the different segments of the society in the person of one single individual is hardly possible. For such cases, when the broader representation of society in the composition of the decision-making body is not an option, the GANHRI recommends different solutions.[468] Pluralism

[465] Skype interview with Bernadette Somody, Senior lecturer, Faculty of Law, Eötvös Loránd University, 19 February 2019.
[466] Global Alliance of National Human Rights Institutions, 'General Observations of the Sub-Committee on Accreditation' (n 142) para 1.7.
[467] Saskia Eckhardt, *Die Akteure Des Außergerichtlichen Grundrechtsschutzes in Der Europäischen Union* (Lang 2010) 90–91.
[468] Global Alliance of National Human Rights Institutions, 'General Observations of the Sub-Committee on Accreditation' (n 142) para 1.7.

can be achieved in two ways: representation or cooperation.[469] Pluralism can be ensured during the appointment procedure of the ombudsperson if diverse societal groups are allowed to suggest or recommend candidates. Cooperating with diverse groups of the civil society and their representatives in the procedures of the institution can also channel different views into the activity of the institution. Ombudsinstitutions can guarantee pluralism through their staff representing various components of society.

The case studies have shown that the NPM offices within the ombudsinstitutions do comply with the pluralistic composition. It is due to the particular tasks, NPMs need to fulfil that requires 'a gender balance and the adequate representation of ethnic and minority groups'[470] in the NPM, as well as 'the diversity of background, capabilities and professional knowledge' including 'relevant legal and health-care expertise'.[471]

3. Lack of promotional activities

Provisions on human rights set up universal standards for fair treatment of the individual. Since ombudsinstitutions handle individual complaints, the ombudsman office can play a significant role in human rights promotion.[472] Promoting human rights includes such activities that aim at creating a society where human rights are respected by strengthening legal knowledge and awareness, strengthening those whose legal capacity is weak, and improving the human rights culture.[473] Such functions typically include human rights education and training, public outreach, and advocacy.[474] These are usually not the priority functions of ombudsinstitutions.

It is almost an automatic reflection in the recommendations of the SCA to encourage ombudsinstitutions that seek an NHRI accredited status to advocate for amendments in their enabling legislation for powers necessary to fulfil a broad promotion mandate.[475] Not

[469] de Beco and Murray (n 197) 68.
[470] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), New York, 18 December 2002, United Nations, Treaty Series, vol. 2375, p. 237 (n 42).
[471] UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Guidelines on national preventive mechanisms, 9 December 2010, CAT/OP/12/5 para 20.
[472] Eva Letowska, 'The Polish Ombudsman and the Protection of Human Rights' in Franz Matscher (ed), *Ombudsmann in Europa: institutioneller Vergleich = Ombudsman in Europe* (N P Engel Verlag 1994) 59.
[473] Somody, 'Az Ombudsman-Típusú Jogvédelem Című Doktori Értekezésének Tézisei' (n 119).
[474] Global Alliance of National Human Rights Institutions, 'General Observations of the Sub-Committee on Accreditation' (n 142) para 1.2.
[475] For example, The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 18-22 November 2013' para 3.2.

only the SCA but other supranational bodies recommend to states to empower their ombudsinstitution with a broad mandate to promote and protect human rights.[476] For example, a resolution of the Association of Ombudsman of the Mediterranean (AOM) underlined the importance of fulfilling the Paris Principles and called for the enlargement of powers of ombudsmen, namely in what refers to the promotion and protection of human rights.[477]

In the course of the Human Dimension Seminar on Ombudsman and National Human Rights Protection Institutions (so not particularly NHRIs) of the OECD in 1998, it has been stressed that it is a difficult decision to set priorities between the promotion and the protection of human rights, as well as between handling individual complaints and conducting own initiatives or systematic investigations.[478] Neither the Paris Principles nor the recommendations of the SCA provide guidance on how to balance the case handling mandate with others.[479] Interviews conducted with ombudsinstitutions also confirmed this struggle of the institutions. Undoubtedly, this is one of the biggest practical challenges of ombudsinstitutions how to combine the daily complaint handling activities – especially in light of backlog of cases – with any other activity.

It is also interesting to note that including promotional activities in the daily work of ombudsinstitutions has a turbulence effect. The more promotion an institution does, the more complaints it will receive. At the same time, considering its preventive character promoting human rights should decrease the number of human rights violations in the long run.

4. Political vulnerability

Ombudspersons' independence should be respected and their impartiality encouraged by the political leadership because without these they are unable to carry out their actual function, and also compromise the institution's credibility.[480]

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[476] For example, Opinion on the Draft Law on the Human Rights Defender of Armenia adopted by the Venice Commission at its 54th Plenary Session Venice, 14-15 March 2003, CDL-AD(2003)006 Article 11.
[477] Resolution of the 6th AOM meeting 2012.
[478] 'Human Dimension Seminar on Ombudsman and National Human Rights Protection Institutions, Warsaw, 25-28 May 1998, Consolidated Summary' 8 <https://www.osce.org/odihr/19773?download=true> accessed 23 June 2018.
[479] de Beco and Murray (n 197) 138.
[480] Marie Jean-Bernard, 'National Systems for the Protection of Human Rights' in Janusz Symonides (ed), *Human rights: international protection, monitoring, enforcement* (Ashgate 2003) 266.

Ombudspersons would need the support and acknowledgement both the parliament and the government. Unfortunately, parliaments tend to consider the annual reports of ombudsinstitutions inadequately, i.e. they are seldom discussed in full sessions.[481]

Interference in their work from the side of the government jeopardises the credible and independent functioning of an ombudsman office. Political interference in the life of ombudsinstitutions usually happens through the process of selection and appointment and budgetary matters.[482] The SCA is very often concerned about the selection and appointment procedure of ombudsinstitutions, in which political influence can be observed. Merit-based selection, transparent and participatory processes are lacking in many cases.[483] Avoiding political representation in the institutions' decision-making body is also a valid requirement in the Paris Principles.[484] Government representatives' and parliament members' participation in the institution's work raises the danger of political interference and results in losing the institution's independence and credibility.

Some governments have fear from ombudsinstitutions as control bodies, who may formulate critiques towards them from time to time. The political leadership that does not consider the ombudsinstitution as a partner but as an opponent starts to obstruct the institution already before its establishment. Even if the enabling legislation has been passed, the political power may use different tactics to weaken the institution to be born, such as delaying the institution's introduction, limiting its powers, appointing a 'yes-man' who is a professional, neutral, but presumably harmless and easy to manipulate functionary.[485] The tendencies of re-election, especially in the Eastern European region show that if an ombudsperson is laud, he or she will not be re-elected, and a more passive or silent ombudsperson succeeds.

Provided that the institution has been established and the enabling legislation and practices guarantee its independence, the ombudsinstitution needs to find a balance in its relationship with the government and collaboratively approach the government because

[481] Carver, 'National Human Rights Institutions in Central and Eastern Europe: The Ombudsman as Agent of International Law' (n 380).
[482] Uggla (n 313) 436.
[483] For example, The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Sub-Committee on Accreditation (SCA), Geneva, 19-23 November 2012' para 3.8.
[484] Paris Principles (n 92) s 2 para 1(e).
[485] Evgeny Finkel, 'The Authoritarian Advantage of Horizontal Accountability: Ombudsmen in Poland and Russia' (2012) 44 Comparative Politics 291, 296.

that helps the better implementation of its recommendations.[486] Having a proactive and constructive engagement with the government may serve as a basis for an accusation of bias.[487] Those institutions that refrain from confronting with the government – usually in order to secure their existence – are weak, marginalised, and unfunctional.[488] Earlier, ombudsinstitutions were concerned about their independence and the formal side of their procedures. Nowadays, attention is focusing more on the content of the work and the essence or goal of ombudsinstitutions. Here, functional immunity must be mentioned. As it was discussed in Chapter One (1.3.4) in connection to the independence requirement of the Paris Principles towards NHRIs, functional immunity enables the institutions to point out malfunctioning in a critical way and formulate recommendations freely.[489] It is of elementary importance in the functioning of ombudsinstitutions as well. In this respect, most institutions seem to be concerned about defending themselves against criticism and emphasising that they aim to assist public authorities in their work.[490] Ombudsinstitutions need to maintain objectivity and protect their independence by avoiding bias and marginalisation by using outreach to preserve a balanced perspective.[491] Challenging the government can be successful only in possession of a solid mandate and strong powers, high prestige, as well as in partnership with stabile allies.[492]

5. Relationship to courts

In relation to courts, two questions arise. One, whether courts have jurisdiction over ombudsinstitutions, who examine procedures of organisations themselves and may declare acts or omissions illegal and determine the violation of rights; two, whether ombudsinstitutions have jurisdiction over courts, which supposed to be last resorts in the justice system.

Since the investigations and recommendations of the ombudsman office may breach procedural rules or other jurisdictional limits, the judicial scrutiny over ombudsinstitutions seems to be justified. This subordinate position may evoke some doubts questioning the

[486] Dwight L Bishop, 'Effective Ombudsman Service Delivery' (2012) <http://www.theioi.org/downloads/fpv5c/Wellington Conference_09. Working Session A_Dwight Bishop Paper.pdf> accessed 24 March 2018.
[487] ibid 2.
[488] Finkel (n 485) 297.
[489] Global Alliance of National Human Rights Institutions, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 13-17 November 2017' para 2.6.
[490] Buck, Kirkham and Thompson (n 459).
[491] Bishop (n 486) 2.
[492] Finkel (n 485) 297.

efficacy of the ombudsman's role in the row of redress mechanisms.[493] These voices need to remember that even lower courts have their superiors at higher instances that does not minimise the importance and strength of those lower courts.

The second, maybe more disputable concern is that cases pending or decided by courts are usually excluded from the control of ombudsinstitutions.[494] Usually, the deadlines to turn to courts are so tight that it is also not an option to submit a complaint with the ombudsman first and then turn to the court. The primary justification for this lack of competence is the separation of powers. The CoE, for example, is in the view that ombudsinstitutions should have 'strictly limited powers of supervision over the courts'.[495] However, even within the CoE, there is no agreement regarding this competence. According to the Venice Commission, the powers of ombudsinstitutions 'to have access to constitutional courts or supreme courts should not be limited' and they 'should be empowered to seek the annulment of norms, not only their interpretation'.[496] Ombudsmen mostly have jurisdiction only concerning the actions of the executive. However, the exception proves the rule, in Sweden and Finland complaints about the courts are dealt with by the ombudsinstitutions.

According to the Paris Principles, it belongs to the methods of operation of NHRIs to 'maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights […]'.[497] Considering their quasi-judicial function, NHRIs need to be able to refer their findings to the courts and seek enforcement through them.[498] This later desire is very rarely the case with ombudsinstitutions.

6. Lack of power to enforce recommendations

[493] Anand Satyanand, 'Growth of the Ombudsman Concept' (1999) 3 Journal of South Pacific Law 6 <https://www.usp.ac.fj/index.php?id=13144> accessed 28 January 2019.
[494] Gabriele Kucsko-Stadlmayer, 'The Legal Structures of Ombudsman-Institutions in Europe - Legal Comparative Analysis' in Gabriele Kucsko-Stadlmayer (ed), *European Ombudsman-Institutions* (Springer 2008) 25; Besselink (n 462) 158.
[495] CoE Parliamentary Assembly, Recommendation 1615(2003), The institution of Ombudsman (n 318).
[496] CoE Ministers' Deputies, The institution of the Ombudsman - Parliamentary Assembly Recommendation 1615 (2003). Reply adopted by the Ministers' Deputies on 16 June 2004, CM/AS(2004)Rec1615 (n 388) Appendix I to reply para 12.
[497] Paris Principles (n 92).
[498] Global Alliance of National Human Rights Institutions, 'General Observations of the Sub-Committee on Accreditation' (n 142) para 2.9.

Ombudsinstitutions have minimal coercive capabilities.[499] It is already reflected during their investigations. By operating soft procedures, ombudsinstitutions often rely on the good faith of the authority complained against. In order to give weight to investigations and ensure a response from the relevant authorities, some legislations contain cooperation obligation for the authorities involved under the investigation.

Ombudsinstitutions usually do not issue legally binding and thus enforceable decisions. They close their investigations by formulating recommendations. Those who are sceptical about the efficiency of this type of institution, highlight the lack of their authority to make binding decisions and consider this as the primary deficiency of ombudsmen.

In the lack of power to enforce recommendations, ombudsinstitutions need to take follow-up steps to ensure compliance with their recommendations. Analysing merely the number of acceptances and rejections is not sufficient to measure the efficiency of the office. Quantitative observations should be supplemented with qualitative analysis. For example, opinion surveys are appropriate tools to measure both the satisfaction of complainants and the actions and possibilities of those against whom allegations have been made.[500] The unwillingness of public institutions to follow the ombudsman's recommendations may show imperfections in the functioning and signal no confidence if the ombudsman's recommendations are often rejected. It is also problematic if the recommendations are never rejected as it might mean that they are too soft.[501]

In practice, many ombudsinstitutions have such a heavy caseload that they are generally unable or unwilling to monitor responses to their recommendations and instead move on to new cases. Nevertheless, we can find counter-examples as well, e.g. the Hungarian Commissioner for Fundamental Rights.

The ombudsman has 'the power to persuade'[502] and the rights protection activity of ombudsinstitutions 'bases on the power of publicity'.[503] Some defend this character of the institution. Marten Oosting, a former president of the IOI, stressed that 'what might at sight

[499] Larry B Hill, *The Model Ombudsman: Institutionalizing New Zealand's Democratic Experiment* (Princeton University Press 2015).
[500] Carver, *Assessing the Effectiveness of -National Human Rights Institutions* (n 418) 35.
[501] Emily O'Reilly, 'Setting up an Ombudsman Institution or National Human Rights Institution' (2007) 8 <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=327430&SecMode=1&DocId=1096172&Usage=2>.
[502] Satyanand (n 493).
[503] Kucsko-Stadlmayer (n 494).

appear to be a weakness is, in fact, the key to the significance of the ombudsman'.[504] The European Ombudsman, Emily O'Reilly, believes that if the ombudsman had the power to make binding decisions, the institution would lose its user-friendliness and the informality that characterises its procedures.[505] Similarly, the CoE considers that the moral pressure limited enforcement powers preserve the neutrality and the respect of the institution. Also, for this reason, the 'ombudsmen's access to administrative and constitutional courts should be limited to applications for interpretative judgments on legal questions relating to the mandate or particular investigations […].[506]

Making binding decisions is not a requirement in the Paris Principles towards NHRIs either. They require NHRIs to 'submit to the Government, Parliament and any other competent body, […] recommendations […] on any matters concerning the promotion and protection of human rights; […]'.[507] The Principles highlight the case of commissions with quasi-judicial competence when they say that they have the ability to '[make] recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights'.[508] Recognising the power of publicity, the Paris Principles explicitly require the institutions to ensure the publication of recommendations 'directly or through any press organ'.[509] The media, as the partner of ombudsinstitutions, will be discussed among the opportunities of ombudsinstitutions when considering communication.

7. Lack of human rights knowledge and mindset change

As argued before, one of the distinctive characteristics of human rights ombudsinstitutions in comparison to classic ombudsinstitutions is their different mindset, another, a more human rights-focused approach to cases. Ombudsinstitutions, especially those, who aspire to be an effective NHRI need to familiarise themselves with the regime of international human rights. Carver, for example, sees a role for ombudsinstitutions in elaborating on the content of human rights, to what they need appropriate knowledge. Even without aiming at

[504] Marten Oosting, 'The Ombudsman and His Environment: A Global View' in Linda C Reif (ed), *The International Ombudsman Anthology* (Kluwer Law International 1999) 10.
[505] O'Reilly (n 501) 6.
[506] CoE Parliamentary Assembly, Recommendation 1615(2003), The institution of Ombudsman (n 318).
[507] Paris Principles (n 92) s 1 para 3(a).
[508] ibid s 4 para (d).
[509] ibid s 3 para (c).

the NHRI accredited status, – as discussed before – maladministration can encompass human rights issues, and promoting respect for human dignity and protecting individuals facing public authorities can go hand in hand.[510] Therefore, ombudsmen and their staff often need to analyse complaints from a broader human rights perspective that requires specific knowledge.

Furthermore, as the Paris Principles require the ability 'to evaluate the compliance of draft and existing legislation with human rights treaties', staff members need to gain 'sound knowledge of international human rights law and be acquainted with the jurisprudence of human rights bodies'.[511] Public servants working in ombudsman offices often lack this knowledge and expertise.[512]

8. The backlog of cases and bureaucracy

While handling individual complaints is a strength of ombudsinstitutions, cumulating backlogs and severe delays in solving cases is a weakness. It is mainly caused by the large number of cases, especially if it matches with lacking financial and human resources, and the fact that ombudsinstitutions need to cooperate with other public authorities, whose functioning is often bureaucratic and time-consuming.

Somody calls the institution 'paradox of the rule of law'. It belongs to the 'ombudsman spirituality' that the ombudsman has relatively great freedom in interpreting its mandate. At the same time, the institution has a secretariat in the background that has the characteristics of bureaucracy.[513] It hinders the institutions sometimes to be as accessible, speedy, cheap, informal, transparent, understandable, and highly professional as they could be.

2.2.3 The opportunities contributing to the effectiveness of ombudsinstitutions

Analysing the literature and the practice of ombudsinstitutions, it is evident that the institutions have several opportunities that would increase their effectiveness. Ombudsinstitutions should take the chance to use their strengths and take advantage of their opportunities. The next collection of opportunities is neither an exhaustive list nor an order of importance.

[510] O'Reilly (n 501) 29.
[511] de Beco and Murray (n 197) 50.
[512] O'Reilly (n 275) 29.
[513] Somody, 'Jogállami Paradoxon - A Sikeres Ombudsmani Jogvédelem Sajátosságai [Rule of Law Paradox - Features of the Successful Protection Provided by the Ombudsman]' (n 246).

1. *Prevention*

Ombudsinstitutions can use their strength of handling individual complaints for preventive purposes, as individual cases often indicate unlawful tendencies in legal acts or in the administrative practice that can be hindered if recognised on time. Beyond determining maladministration, granting compensation – if mandated, suggesting amendments to regulations – if necessary, ombudsmen can highlight the core issue or issues of the given case and generate general debate about it. Ombudsinstitutions can launch thematic investigations and draft special reports on the findings. Formulating legislative proposals or turning to the constitutional court with the request to review and abolish a legal act also serves the aim of preventing future malfunctions. All these activities require the ombudsman's willingness and some additional efforts that might go beyond the strict procedural steps of the office that entails the investigation of complaints and the formulation of recommendations.

Ombudsmen can use their 'normal' actions for preventive purposes as well by letting their side effects or indirect effects[514] go. For example, the dissemination of recommendations can attract other's than the addressee public authority's attention to the findings of the recommendation. It will help if the ombudsman approaches the whole investigation in such a strategic manner from the beginning.

2. *Facilitating systematic change (Indirect impact)*

We can observe a shift of the primary purpose in the history of the development of ombudsinstitutions. First, it was an office where individuals could submit their complaints and seek redress. Based on similar patterns of cases, ombudsinstitutions started to provide 'administrative audit' and promote a better public administration, administrative reforms by identifying systematic faults of public administration.[515] Systematic change can also be stimulated by encouraging public authorities to be more client-oriented and to aim at improving their service delivery[516] by establishing general principles as benchmarks.[517] For example, the European Ombudsman adopted a guiding document on good administrative

[514] Kerstin André, 'Inspections as a Pro-Active Method of Combating Maladministration' (2009) 8 <http://www.theioi.org/downloads/c3ge1/Stockholm Conference_18. Plenary Session II_Kerstin Andre.pdf> accessed 24 March 2018.
[515] Caiden, Macdermot and Sandler (n 264) 8.
[516] McMillan (n 433) 9.
[517] Serota (n 453) 39.

practice, the European Code of Good Administrative Behaviour.[518] While courts grant relief or redress, ombudsinstitutions can go further and focus on securing systematic improvements in the quality of public services.[519] In other words, ombudsinstitutions have the opportunity to consider not only the substantive law issues raised by the individual complaint but deal with various areas and issues relating to procedural and behavioural aspects of the case that very often fall outside the scope of courts.[520]

Thus, the remedy provided by ombudsinstitutions after investigation can be 'twin-headed': dissolving the individual injustice and improving administrative methods.[521] It is the ombudsman's task to recognise structural deficits beyond the individual cases.[522] Recommending improvements in the system aimed at minimising the risk of the same mistake being repeated.[523] According to Satyanand, this evolution went so far that their actions were geared 'towards the accountability of the system rather than towards upholding the rights of the single individual'.[524]

Later, ombudsinstitutions started to put a more significant emphasis on society at large and promote human rights by raising awareness about fundamental and human rights by taking up educational roles. They need to examine complaints beyond a case-by-case basis towards a more comprehensive educational and preventive function.[525] Ombudsinstitutions were able to go through on this development due to the flexibility and discretion of the institution. However, as discussed before, these promotional activities often compete with other daily activities of ombudsinstitutions and fall behind handling individual complaints.

The pattern of individual cases, such as the same issue or same legal act as the subject, the same authority as the perpetrator, the same procedural rules, complainants with the similar background may motivate the ombudsman to launch a general investigation at the authority

[518] The European Ombudsman, *The European Code of Good Administrative Behaviour* (2015) <https://www.ombudsman.europa.eu/pdf/en/3510> accessed 27 March 2019.
[519] O'Reilly (n 501) 4.
[520] Gammeltoft-Hansen (n 285) 7.
[521] Serota (n 453) 38.
[522] Evelyn Messner, 'Erfahrungen Der Österreichischen Volksanwaltschaft Beim Schutz von Grundrechten' in Franz Matscher (ed), *Ombudsmann in Europa: institutioneller Vergleich = Ombudsman in Europe* (N P Engel Verlag 1994) 110–111.
[523] Roy Gregory and others (eds), *Practice and Prospects of the Ombudsman in the United Kingdom* (Edwin Mellen Press 1995) 48.
[524] Anand Satyanand, 'The Ombudsman Concept and Human Rights Protection' (1999) 29 Victoria University Wellington Law Review 19, 22.
[525] de Beco and Murray (n 197) 109.

concerned.[526] It requires proactivity and going beyond solving the individual cases solely; the ombudsman needs to be fearless, open, curious and devoted.[527]

3. Communication

In order to be able to use the ombudsman's services, citizens need to know about the ombudsman's existence, role, and competences, therefore, ombudsinstitutions must actively present themselves and their services to the general public.[528] The ombudsman can use its strength of having a human face that makes the institution more recognisable and unmistakable with other public bodies to reach out. Having good media connections enable the institution to call attention to its work. On a personal note, based on private conversations with students, friends, and others with various educational background over the years, the awareness about the institution of the ombudsman is surprisingly low.

In the lack of enforceable orders and binding decisions – as discussed – the ombudsman's weapon is the publicity. The communication function covers the distribution and dissemination of the ombudsman's annual reports and his findings in high-profile cases. The annual report needs to be widely circulated and presented to the parliament, where a meaningful discussion, consideration and exchange must take place.[529] Since annual reports are usually lengthy and substantial, compact press releases and briefing materials are handier to inform the public. Using the written and audio-visual media can help to focus attention also on situations where the government has resisted implementing the ombudsman's recommendations. The media can be a partner in human rights education as well. The wide distribution of the ombudsman's findings also supports the efforts of the office to prevent rights abuses. Thus, outreach and well-targeted communication are of high importance from many perspectives.[530]

Since ombudsinstitutions have a human profile by definition, social media tools fit the ombudsman's role very well. The strategic use of social media increases the institutions' visibility, productivity, evidence gathering ability, stakeholders' relations, and interaction

[526] André (n 514) 4.
[527] Gregory and Giddings (n 345).
[528] Ambroz (n 444) 4.
[529] Skype interview with Jonas Grimheden, Senior Policy Mangager, European Union Agency for Fundamental Rights (FRA), 15 February 2019 (n 182).
[530] Ann Abraham, 'Maximising the Ombudsman's Influence, Impact and Effectiveness in a Difficult and Constantly Changing Environment' (2012) 3 <http://www.theioi.org/downloads/drncd/Wellington Conference_24. Plenary III_Ann Abraham Paper %26 Slides.pdf> accessed 24 March 2018.

with the traditional media. Using social media also raises the reputation of the institution 'as an innovative, approachable, and effective office'.[531]

While social media tools also increase access to the institution, so does its local presence. Personal meetings with citizens, the ombudsman's participation in community events[532] enable people to turn to the ombudsman, especially those whose capabilities are weak to let their voice be heard.

4. Cooperation

As it was discussed among the strengths of ombudsinstitutions, the status and the mandate of the ombudsman enables the office to form a bridge between different actors at the national level. It depends on the ability and willingness of the institutions to build alliances with state and non-state actors. Stakeholders for ombudsinstitutions may be (1) other similar bodies, (2) CSOs, (3) the judiciary, and (4) the parliament.

Ombudsinstitutions may seek cooperation with other similar bodies and with CSOs – the two actors mentioned by the Paris Principles. The GANHRI and the SCA suggest to NHRIs to 'develop, formalise and maintain regular, constructive and systematic working relationships with other domestic institutions and actors established for the promotion and protection of human rights' in order 'to ensure the full realisation of human rights nation-wide'.[533] Thus, these interactions should be not ad hoc and temporary but operate based on formal platforms and processes for long-term engagement, so that they are regular and meaningful. It can be achieved through a clearly defined framework agreed to by both actors. [534]

Collaboration is also necessary in order to avoid duplication. Practices such as memoranda of understanding, regular meetings, adoption of policies covering referrals of issues, and joint activities may serve this goal.[535] The SCA General Observations mention examples of how to interact with each other, including knowledge sharing through co-authored research

[531] André Marin, 'Old Watchdog, New Tricks: How Social Media and Technology Can Transform the Modern Ombudsman' (2012) 6 <http://www.theioi.org/downloads/u3qv/Wellington Conference_56. Working Session M_Andre Marin Paper.pdf> accessed 24 March 2018.
[532] Bishop (n 486) 2.
[533] Global Alliance of National Human Rights Institutions, 'General Observations of the Sub-Committee on Accreditation' (n 142) para 1.5.
[534] Commonwealth Human Rights Initiative, 'A Partnership for Human Rights: Civil Society and National Human Rights Institutions' (2011) 50 <http://www.humanrightsinitiative.org/programs/CHOGM/CHRI 2011 CHOGM Report.pdf> accessed 15 February 2019.
[535] de Beco and Murray (n 197) 119.

studies, organising training programmes, and sharing best practices as well as information on data regularly.[536] Ombudsinstitutions have the opportunity to strengthen their cooperation with CSOs by facilitating NGO forums or promoting the organisations' involvement in the legislation processes. CSOs may participate in the appointment process concerning ombudsinstitutions, take part in the consultative or advisory bodies of ombudsinstitutions, and promote their NHRI accreditation.[537]

Similarly, the Paris Principles require and the GANHRI encourages NHRIs to interact with the international human rights system – even if within the limitations of the assessment of domestic priorities and available resources. [538] This cooperation already requires specific knowledge on international human rights matters and actors that ombudsinstitutions do not always possess.

5. Skilled staff

As it was discussed within the weaknesses of ombudsinstitutions, public servants working in the ombudsman office often lack specific knowledge that would enable them to examine cases in a broader human rights perspective. It is part of their independence that ombudsmen can determine the staffing structure and the skills required to fulfil the posts within the office, to set other criteria (for example, to ensure pluralism in the office), and to select their staff in an open, transparent and merit-based selection process.[539]

Having a skilled staff enables the institution to take international law-related tasks, channel in international standards in its work, and it also enhances the quality, credibility and efficiency of the ombudsman's investigations.[540]

Bishop suggests building specific purpose teams within the office that enables interested and capable colleagues to learn and gain experiences through extraordinary tasks.[541] Similarly, working in project teams provides the opportunity to develop further skills of staff; however, it is challenging to combine it with the daily complaint handling function – as mentioned before.

[536] SCA General Observations (n 142).
[537] Catherine Renshaw, 'National Human Rights Institutions and Civil Society Organizations: New Dynamics of Engagement at Domestic, Regional, and International Levels' (2012) 18 Global Governance 299.
[538] SCA General Observations (n 142) G.O. 1.4.
[539] Global Alliance of National Human Rights Institutions, 'General Observations of the Sub-Committee on Accreditation' (n 142) para 2.4.
[540] Bishop (n 486) 3.
[541] ibid 4.

Fluctuation among staff is typical for ombudsinstitutions. It is because handling individual complaints follow the same pattern that results very often in automatic problem solving and lack of professional challenges. This makes especially young professionals leave the office and face new assignments. Project work and participation in conferences, training abroad may decrease this fluctuation as it makes everyday work more diverse.

6. Self-assessment and accountability

For the effective functioning, not only a well-structured office and skilled staff are needed but clear internal accountability and assessment processes that ensure high standards within the office. These encompass written operational and administrative policies, as well as regular management level reviews.[542] As champions of good governance, ombudsinstitutions need to set an excellent example of manifesting high standards in the office because that is what the ombudsman expect from public authorities he investigates upon.[543] Nevertheless, ombudsinstitutions need to deliberate whether formulating and using performance indicators and standards takes resources away from other core activities or that they 'generate expectations they may not be able to meet'.[544]

There are other, more practice-oriented tools and exercises that can help to improve effectiveness. Ombudsinstitutions would need to prioritise their tasks and develop a coherent strategy to manage their work. Regular staff meetings can be a useful tool for familiarising the whole office about the achievements and challenges of the different departments and collecting feedback on the activity and plans. Regular self-assessments – beyond highlighting the achievements of the office – answer the question where the shortcomings of the institution fall. Followed by strategic planning that sets long-term and short-term objectives and activities of the office with allocated human and financial resources, the institution can increase its effectiveness. The European Ombudsman developed a complex system of self-measurement that might serve as a good example. In 2014, the office drafted a long term strategic plan, containing objectives and priorities for the next five years. Yearly, the office presents an operational plan of the implementation

[542] Bishop (n 486).
[543] ibid 3.
[544] Asian Development Bank (n 250) 210.

(annual management plan). The implementation of the strategy is monitored and presented yearly in the annual activity report.[545]

The primary tool to make ombudsinstitutions accountable is their annual report, that must be submitted to the parliaments. There is no specific rule regarding the form, however, it is a general experience that full annual reports of ombudsinstitutions are no longer read especially by parliamentarians.[546] If the parliament does not read the ombudsman's annual report, it will be challenging to decide whether it is the weakness of the ombudsman or the parliament. Therefore, the SCA promotes the establishment of concrete process on the circulation and discussion of the report in the enabling laws of NHRIs.[547] As mentioned under 'Communication', annual reports are not only accountability tools but essential means of outreach and awareness-raising. Ganora names 'the pressure of public opinion, relations with the press and the parliamentary debate over the annual report' as safeguards that preserve the objectivity of the ombudsinstitution and impose 'mental discipline' upon the ombudsman at the same time.[548]

7. International law-related tasks

Ombudsinstitutions are national entities dealing mainly with national laws and practices. Based on carrying out investigations, they possess unique data and knowledge about the fundamental and human rights situation of their home country. Considering this and their bridging role in the society, they can provide impartial and detailed information to international monitoring mechanisms provided having sufficient capacities and funding on their side, and recognition as an independent and capable body on the international community's side. Still, activities such as monitoring developments in international human rights law; promoting state participation in advocacy for and the drafting of international human rights instruments; and conducting assessments of domestic compliance with and reporting on international human rights obligations, for example, through annual and

[545] The European Ombudsman, 'The Role of the European Ombudsman' <https://www.ombudsman.europa.eu/en/our-strategy/home/en> accessed 20 August 2018.
[546] Baart Weekers, 'Planning and Maintaining Outreach and Accessibility While Undergoing Challenging Reforms' (2012) <http://www.theioi.org/downloads/3ufrf/Wellington Conference_57. Working Session M_Bart Weekers Paper.pdf> accessed 24 March 2018; Interview with Máté Szabó, Hungarian Parliamentary Commissioner for Fundamental Rights (2007-2013), Berlin, 18 May 2010.
[547] Global Alliance of National Human Rights Institutions, 'General Observations of the Sub-Committee on Accreditation' (n 142) para 1.11.
[548] Mario Fernando Ganora, 'The Introduction of the Institution of the Ombudsman in Latin America' (1992) 4 <http://www.theioi.org/downloads/7at85/IOI Canada_Occasional Paper 47_Dr. Mario Fernando Ganora_Introduction of the OM in Latin America_1992.pdf> accessed 24 March 2018.

special reports and participation in the Universal Periodic Review process[549] are missing in the practice of most ombudsinstitutions.

Even if there is no direct reference point for ombudsinstitutions neither in the Universal Declaration of Human Rights (UDHR) nor in the covenants,[550] they provide 'a sound moral basis for the ombudsman's criticism'[551] when channelling in international human rights standards in their recommendations. Nevertheless, this strategic use of international human rights instruments requires solid knowledge of human rights, skilled staff, and allocated time for fulfilling these tasks.

According to Walters, ombudsinstitutions need to feature the following skills and actions in order to be ready to cope with international law related duties:

1. must have a thorough understanding of the international and national human rights norms and the Paris Principles;
2. actively draw on these standards;
3. operate in accordance with the Paris Principles;
4. foster dialogue and facilitate cooperation with government and parliaments by advising the government on the ratification of international instruments and the removal of reservations;
5. advise the government;
6. act as an appropriate agency for the dissemination of international human rights instruments and help to make their contents widely known;
7. perform an important role in the treaty body process;
8. collaborate with international institutions, domestic and regional NHRI's and courts;
9. recognise that human rights are indivisible, interdependent and interrelated;
10. take the broadest possible view of their role and see it as encompassing two principal aims; i.e. promoting respect for human dignity and protecting individuals who are depending on public authority;
11. mainstream human rights into their activities and programmes within the framework of their mandates, e.g. complaint examination should have a human rights-based approach;

[549] SCA General Observations (n 142) G.O. 1.3.
[550] Satyanand (n 524) 22.
[551] Giddings, Sladecek and Díez Bueso (n 379) 442.

12. develop and conduct outreach activities at the national level, in collaboration with all relevant stakeholders, in order to raise awareness of the important role, functions and duties of the Ombudsman.[552]

Fulfilling international law-related tasks brings added value to the daily work of ombudsinstitutions, and it is beneficial for them. They can draw from the application of international human rights law standards to their case-handling, monitoring, and legislative proposer tasks. Their recognition and participatory rights at the international level strengthen the ombudsman's mandate and reinforce their recognition both at home by the government and the civil society, and at the international level.

Furthermore, those ombudsinstitutions that desire an NHRI accredited status need to undertake international law-related tasks. This is a remarkable observation that four of the seven core responsibilities in the list of competencies within the Paris Principles explicitly relate to international human rights.[553] As described in Chapter One, NHRIs shall (1) encourage the ratification or accession to international human rights instruments, including advising the government to the precise nature of the obligations; (2) ensure the harmonization of national laws with international human rights standards, including monitoring domestic law whether it is already in conformity with standards contained in those instruments or whether additional legislative initiatives would be required; (3) engage with the international human rights system, in particular the HRC and its mechanisms (UPR, Special Procedures) and the UN Treaty-based Bodies, including contribution to the state report or compilation of parallel report, follow up at the national level to recommendations resulting from these procedures; (4) and cooperate with other international stakeholders.[554] Thus, ombudsinstitutions that are accredited with A-status gain a significant role 'at the interface between the international human rights bodies and the national human rights protection system'.[555]

8. NPM mandate

[552] John Robert Walters, 'The Role of the Ombudsman in Promoting and Protecting Human Rights - Should It Become a National Human Rights Institution?' (2012) 7 <http://www.theioi.org/downloads/1q7ad/Wellington Conference_19. Working Session D_John R. Walters Paper %26 Slides.pdf> accessed 2 March 2018.
[553] Dickson (n 224) 6.
[554] Paris Principles (n 92) s 1 para. 3(b), 3(c), 3(d), and 3(e).
[555] Carver, 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law' (n 6) 11.

As discussed before, ombudsinstitutions may have the mandate to monitor the treatment of persons deprived of their liberty by detention facilities. Some ombudsinstitutions are designated explicitly as NPMs under the OPCAT[556] in order to strengthen detainees' protection against torture and other cruel, inhuman or degrading treatment or punishment.[557] The OHCHR calls ombudsinstitutions where the ombudsman's mandate has been expanded with NPM functions, or the ombudsman has built a coalition with other bodies in order to fulfil the NPM mandate 'Ombudsman plus models'.[558]

European states are often in the view that their ombudsinstitutions can perform the role of NPM with few internal changes and some additional resources.[559] This is not the case. Being an NPM requires specialised expertise on the subject matter and capacities, including human and financial resources to conduct the visits, as well as to report to the Subcommittee on Prevention of Torture in Geneva.

Ombudsinstitutions do have the opportunity to advocate for a proper NPM mandate. Fulfilling this task effectively also counts during the NHRI (re)accreditation process, as the SCA assesses information demonstrating the carrying out of this function and credits for such a mandate. The SCA proves primarily whether the NPM mandate is legally provided and broad enough, the staff is skilled, adequate resources are provided, and the NHRI pursues its task adequately.[560]

9. Competence over private companies

As it was discussed at the typology of ombudsinstitutions, private-sector ombudsinstitutions exist, and they differ from public ombudsmen. Whether public ombudsinstitutions need to have competence over private companies or not is disputable. The literature argues in favour of both. Thompson is on the view that 'it is not necessary for public services ombudsmen to retain remit over privatised services' because there might be other more suitable mechanisms, e.g. private sector/industry ombudsmen,

[556] Office of the UN High Commissioner for Human Rights, 'National Preventive Mechanisms' <https://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx> accessed 21 August 2018.
[557] Office of the UN High Commissioner for Human Rights, 'Preventing Torture. The Role of National Preventive Mechanisms. Practical Guide. Professional Training Series No. 21' (n 385) 4.
[558] ibid 8.
[559] Mark CA Thomson, 'The Role of the Ombudsman in Preventing Torture and Ill-Treatment: The OPCAT and Beyond' (2012) <http://www.theioi.org/downloads/6srhu/Wellington Conference_37. Plenary IV_Mark Thomson Paper.pdf> accessed 2 March 2018.
[560] Global Alliance of National Human Rights Institutions, 'General Observations of the Sub-Committee on Accreditation' (n 142) para 2.8.

consumer councils to provide redress.[561] On the contrary, for the sake of the consistent application of the principle of independent redress, Tyndall argues that 'all public services, whether publicly provided or not, should be in the remit of an ombudsman'[562] – being public or private. Nevertheless, the two authors agree to the necessity of guaranteeing independent redress to consumers. So does the IOI in its guide, stating that independent redress should be given 'regardless of how services are provided'.[563]

There are human rights ombudsinstitutions both in Europe and Latin America that have the competence to investigate the acts or omissions of private companies or other entities that provide public services (such as electricity) or mediate in such disputes. Reif points to ombudsman's role as Equality Bodies under the EU equal treatment legislation providing independent assistance to victims of discrimination also committed by private companies. Similarly, the NPM mandate and the NMM mandates may cover private sector facilities.[564]

A large-scale comparative research identified four approaches in examining the activities of non-legal entities by ombudsinstitutions. Some states empower their ombudsinstitution to control private legal entities that have public authority. The second approach focuses on the tasks of the entity; if it carries out public tasks or public services (e.g. post, telecommunication), the ombudsman may investigate its actions. According to the third approach, those private legal entities fall under the ombudsman's jurisdiction, which are dominated by the state in some way. The fourth approach covers those rare cases when private legal entities have no relation to the state.[565]

Having competence over private sector actors would profoundly enrich the ombudsman's clients. Considering that ombudsinstitutions have the strength to promote and protect social, economic, and cultural rights, this competence would enable them to use this strength fully.

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[561] Thompson (n 348).
[562] Peter Tyndall, 'Ombudsman and the Changing Face of Public Services' (2012) 5 <http://www.theioi.org/downloads/6urpv/Wellington Conference_54. Working Session L_Peter Tyndall Paper.pdf> accessed 24 March 2018.
[563] International Ombudsman Institute (IOI), 'Developing and Reforming Ombudsman Institutions: An IOI Guide for Those Undertaking These Tasks' (n 378) 3.
[564] Linda C Reif, 'The UN Guiding Principles on Business and Human Rights and Networked Governance: Improving the Role of Human Rights Ombudsman Institutions as National Remedies' (2017) 17 Human Rights Law Review 603, 619 <http://academic.oup.com/hrlr/article/17/4/603/4605227>.
[565] Kucsko-Stadlmayer (n 494) 23–25.

2.2.4 The threats to ombudsinstitutions

Human rights defenders, including ombudsinstitutions, may face threats. It is especially remarkable in nowadays Europe due to 'a rising trend of shrinking democratic space, including reduced respect for human rights and the rule of law'.[566] Those ombudsinstitutions that are facing difficult national circumstances and are accredited as NHRIs can expect regional and international support of the GANHRI.[567]

In the next analysis, the lack of those features of ombudsinstitutions that are elementary to their existence and functioning, such as sufficient powers and financial resources, is not considered as threats. It is evident that without these, the institutions could not only compete but they would not be able to function. However, threats can also endanger the stability and survival of the institutions.[568] It is also important to note that region specificities also affect what kind of threats the institutions must face. For example, working in conflict situations can bring harm, including serious assault, kidnapping, torture, murder or threats of these towards those who are involved in NHRIs' work.[569] These specific cases will not be listed either. Three threatening situations will be discussed, namely budget cuts, multiple mandates or multiple similar institutions, and the NHRI accreditation.

1. *Budget cuts*

Providing adequate funding to NHRIs is not only a requirement in the Paris Principles[570] but is evident that without sufficient financial resources, none of the institutions would be able to operate and provide the services they are tasked with. The budget must cover the expenses of the premises, salaries and benefits, infrastructure (e.g. internet, phone), mandated activities and additional responsibilities (e.g. NPM mandate).[571] In the lack of these, NHRIs are not able to use their strengths or take their opportunities. As Carver

[566] European Network of National Human Rights Institutions (ENNHRI), 'National Human Rights Institutions and Human Rights Defenders' (2018) <http://ennhri.org/IMG/pdf/ennhri_18_006-publication-04a-bat.pdf> accessed 1 March 2019.
[567] Telephone interview with Katrien Meuwissen, Senior Human Rights Officer, ENNHRI, 20 February 2019.
[568] Osita, Onyebuchi R. and Justina (n 405) 26.
[569] Veronika Haász, 'R2P and National Human Rights Institutions' (2017) 9 Global Responsibility to Protect 318.
[570] Paris Principles (n 92) s 2 para 2.
[571] Global Alliance of National Human Rights Institutions, 'General Observations of the Sub-Committee on Accreditation' (n 142) para 1.10.

observes '[a] lack of resources is never associated with a high effectiveness score, […]'.[572] Although the Paris Principles are applicable to NHRIs, the requirement of adequate funding relates to ombudsinstitutions as well. Ombudsinstitutions as other public bodies are the most vulnerable through their funding that not only affects their financial situation but may be a tool of interference in their independence from the side of the government. Since the term 'adequate funding' is rather vague, Meuwissen suggests the SCA determine the minimum percentage of the budget of the institutions that should be provided by the states – as it did regarding the number of secondments in staffing.[573]

Not only the regular budgeting terms may threaten ombudsinstitutions, but there are unexpected external financial situations resulting in downsizing of budgets that may affect them severely. After the financial crisis in 2008, several ombudsinstitution reported that they had become victims of austerity measures as their budget had been cut. The SCA has encouraged ombudsinstitutions to advocate for sufficient and sustainable state funding in several cases.[574] Also, the UN Secretary-General refers to the importance and necessity of ensuring adequate funding to ombudsinstitutions, mediators, and NHRIs in order to 'enable them to discharge their mandate in an efficient and effective manner'.[575]

Another typical way of decreasing budget is when the ombudsman office receives new functions, such as NPM mandate, without additional resources. It increases the office workload but hinders the institution to hire staff, thus, endangers its effectiveness.[576]

2. Multiple mandates or multiple institutions

As discussed before, some legal systems distinguish between general and specialised ombudsinstitutions. It is one of the most significant disputes in the literature, whether

[572] Carver, 'Measuring the Impact and Development Effectiveness of National Human Rights Institutions: A Proposed Framework for Evaluation' (n 412) 28.
[573] Katrien Meuwissen, 'NHRIs and the State: New and Independent Actors in the Multi-Layered Human Rights System?' (2015) 15 Human Rights Law Review 441, 457.
[574] For example, The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Resommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 13-16 May 2013' para 3.2; The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 23-27 May 2011' para 3.8.
[575] UN Secretary-General Report, The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights, 31 July 2017, A/72/230 para 23.
[576] CoE Commissioner for Human Rights, 'Human Rights Comment - Paris Principles at 25: Strong National Human Rights Institutions Needed More Than Ever' (2018) <https://www.coe.int/en/web/commissioner/-/paris-principles-at-25-strong-national-human-rights-institutions-needed-more-than-ever?inheritRedirect=true> accessed 22 February 2019.

states should have one (general) or more (specialised) ombudsinstitutions. We can find examples to both. Amollo defends the classic ombudsman role when saying that an institution with multiple mandates is more cost-effective, as well as due to the inter-dependence and clarity of functions is more efficient and effective. Nevertheless, he also admits the challenges that the multiple mandates carry, such as (1) being overburdened with too many responsibilities, (2) suffering from acute shortage of specialised staff, (3) the ombudsman function is in danger because more resources may be channelled to other priority areas, (4) having the potential of creating conflictual jurisdictions due to the different nature of the various mandates, and (5) blurring the concept of the single 'people's tribune' or 'public watchdog'.[577] Multiple mandates may involve a lack of sufficient financial and human resources.[578] Beyond being cost-effective, having one single institution excludes the danger of parallel investigations and duplication of work between more bodies. Reif also reasons for the establishment of human rights ombudsinstitutions instead of having a classic model and another institution with a broader human rights mandate. She argues that fewer financial and human resources are needed, duplication of operations and public confusion can be avoided, the professional expertise concentrates within one institution, and higher public profile can be reached by having a concentrated focus on one institution.[579] However, there are examples when the different institutions cooperate well based on a signed memorandum of understanding regarding fields where an overlap is may occur.[580] 'This reduces the possibility of duplication or inconsistency of approach and ensures the seamless transfer of information and intelligence to enable each entity to carry out its respective statutory role.'[581] The idea of one ombudsman also helps citizens to recognise the institution of the ombudsman, while in the case of 'ombudsman-inflation', the public focus is divided into too many directions. Nevertheless, the clear personalising of each institution can help to avoid confusion.

Supranational bodies seem to advocate for the one-institution system as well. The CoE expressly calls the Member States to 'refrain from multiplying ombudsman-type

[577] Amollo (n 293).
[578] SS Mafisa, 'Reconciling Multiple Mandates' (2009) 10 <http://www.theioi.org/downloads/40g2/Stockholm Conference_22. Workshop 5_S.S. Mafisa.pdf> accessed 2 March 2018.
[579] Reif, *The Ombudsman, Good Governance and the International Human Rights System* (n 375) 88.
[580] Beverley Wakem, 'Experiences of an Ombudsman That Adapted the OPCAT Model to Meet the Needs of Their Own State' (2012) 3 <http://www.theioi.org/downloads/1s7ie/Wellington Conference_38. Plenary IV_Beverley Wakem Paper %26 Slides.pdf> accessed 24 March 2018.
[581] International Ombudsman Institute (IOI), 'Developing and Reforming Ombudsman Institutions: An IOI Guide for Those Undertaking These Tasks' (n 378) 6.

institutions, if it is not strictly necessary for the protection of human rights and fundamental freedoms […]' in order to avoid the confusion of 'individuals' understanding of means of redress available to them […]'.[582] The Assembly calls on the Member States, which have already established multiple ombudsinstitutions, such as local, regional and specialised ones, to ensure appropriate coordination of these bodies on the one hand and individuals' easy and unimpeded access to them on the other hand.[583] The IOI also warns 'to avoid the unjustified proliferation' of ombudsinstitutions because it can confuse complainants. The IOI also adds that before establishing a new redress mechanism, the existing ombudsinstitution should be considered first as a possible appeal body.[584]

Weekers represents a forward-looking view as of the future of the ombudsinstitution. According to him, the institution is part of the 'formally organised informal power'; however, nowadays, the 'informally organised informal power' is becoming increasingly efficient. During the economic recession, public spending is coming under increasing scrutiny that effects ombudsinstitutions as well. He gets to the question of whether democracy still needs the 'formally organised informal power' of the ombudsmen. He foresees that the distinction between the general ombudsman and other bodies, as offices dealing with human rights or consumer issues, will disappear.[585]

3. NHRI accreditation

Applying for an accredited NHRI status is an excellent opportunity to those classic ombudsinstitutions, who want to step to the path of transforming to human rights ombudsinstitution. However, as mentioned, the accreditation in itself cannot be considered as the automatic pass to the human rights ombudsman model. Since governments and institutions sometimes use the application on impulse, in the present SWOT analysis, NHRI accreditation is discussed within threats (instead of opportunities).

Like any other international human rights commitment, the establishment and strengthening of NHRIs in line with the Paris Principles fall within the responsibilities of states. Not only the institutions but the governments can benefit from having an accredited

[582] CoE Parliamentary Assembly, Resolution 1959 (2013), Strengthening the institution of ombudsman in Europe para 4.3.
[583] ibid 5.
[584] International Ombudsman Institute (IOI), 'Developing and Reforming Ombudsman Institutions: An IOI Guide for Those Undertaking These Tasks' (n 378) 3.
[585] Weekers (n 546).

institution as well. In an ideal world, those institutions gain an A-status accreditation that comply with the Paris Principles fully. With some institutions, this works on the other way round. They choose the tactic to apply for accredited status, even if knowing that they do not fully comply with the Paris Principles, aiming at a B-status. They do so because they desire the accredited status and the belonging to the international community of NHRIs. It can be a valid desire if efforts to strengthen the mandate follows it. Unfortunately, this is not always the case.

Finkel points to cases when governments establish NHRIs, including ombudsinstitutions because this is a precondition to membership in an international organisation, or in order to secure foreign aid, or under the pressure of influential donors that view the institution as an essential component of good governance reforms.[586] In this sense, NHRI accreditation can be used for window dressing and does not necessarily serve the purpose of advancing and defending human rights at the national level, and bridging the implementation gap between the states' international human rights obligations and the actual enjoyment of human rights on the ground.[587] This practice has many consequences. First, it questions the credibility of the accreditation procedure and leads us to the necessity of its review. It may be misleading for potential cooperating partners if they believe that the accredited institution pursues valid NHRI goals. From the perspective of ombudsinstitutions, it carries the danger that the accredited status creates an increase of tasks, especially international activity kind of that the institution is not prepared to fulfil.

Since the OPCAT and the CRPD refer to the Paris Principles, NHRIs often use their accreditation as a reason for being designated as NPM or NMM.[588] As discussed previously, the gained mandate is not always supplemented with additional resources; therefore, designated institutions often struggle with their new functions.

Summing up, from general observations based on literature analysis, experiences of scholars and practitioners, it became obvious that the ombudsman is a welcomed concept. Collecting the features of the institutions, opportunities and strengths were much more present, than threats and weaknesses. It means that ombudsinstitutions have a huge potential in taking advantage of their strengths and opportunities and overcoming most of

[586] Finkel (n 485) 294.
[587] Global Alliance of National Human Rights Institutions, 'General Observations of the Sub-Committee on Accreditation' (n 142).
[588] de Beco and Murray (n 197) 28.

their weaknesses. Since their strengths and opportunities are echoed in the Paris Principles as well, successful institutions are most likely suitable for the NHRI role.

Strengths	Weaknesses
1. Flexibility 2. Having a human face 3. Handling individual complaints 4. Protecting economic, social and cultural rights 5. Accessibility 6. Discretion 7. Bridging role 8. The champion of good governance	1. One person on the top of the institution 2. Lack of pluralism 3. Lack of promotional activities 4. Political vulnerability 5. Relationship to courts 6. Lack of power to enforce recommendations 7. Lack of human rights knowledge and mindset change 8. The backlog of cases and bureaucracy
Opportunities	**Threats**
1. Prevention 2. Facilitating systematic change 3. Communication 4. Cooperation 5. Skilled staff 6. Self-assessment and accountability 7. International law-related tasks 8. NPM mandate 9. Competence over private companies	1. Budget cuts 2. Multiple mandates or multiple institutions 3. NHRI accreditation

Table 2: SWOT table

SO strategies: uses S to take advantage of O	**Strengths (S)**	**Opportunities (O)**
	Complaint handling	Systematic change
		Prevention
	ESCRs	Competence over companies
	Human face	Communication
	Bridging role	Cooperation
		International law-related tasks
		NPM mandate
	Champion of GG	Accountability
WO strategies: overcomes W to take advantage of O	**Weaknesses (W)**	**Opportunities (O)**
	Lack of HRs knowledge	International law-related tasks
		Skilled staff
	Lack of power to enforce recommendations	Communication
WT strategies: minimise W to avoid T	**Weaknesses (W)**	**Threats (T)**
	Political vulnerability	Budget cuts
OT strategies: take advantage of O to avoid T	**Opportunities (O)**	**Threats (T)**
	Communication	Budget cuts
	Cooperation	Budget cuts
	Self-assessment and accountability	Budget cuts
		NHRI accreditation

Table 3: TOWS on ombudsinstitutions

3.

Selected ombudsinstitutions of three regions – A comparative analysis

Chapter Three presents concrete ombudsinstitutions in seven countries of three different regions. The Austrian Ombudsman Board, the Hungarian Commissioner for Fundamental Rights, and the Polish Commissioner for Human Rights represent the Central and Eastern European region. The Swedish Equality Ombudsman and the Norwegian Parliamentary Ombudsman for Public Administration are introduced from the Nordic region. From Latin America, the *Defensoría del Pueblo de la República del Paraguay* and the *Institución Nacional de Derechos Humanos y Defensoría del Pueblo* in Uruguay were chosen.

After describing the regional – mainly historical and political – characteristics at the beginning of each regional subchapter, the analysis of the concrete institutions follows the same structure. Analysing them along the following ten factors brings us closer to understand their Paris Principles conformity or non-conformity.

1. *History and legal background*: Describing the history and legal background of the institutions positions them in a legal, historical, and political context that has influenced their establishment and functioning. Since the Paris Principles require the establishment of NHRIs in a legal text, preferably at constitutional rank, that clarifies the mandate, functions, powers, funding, as well as the appointment procedure, analysing the legal background answers this essential question.

2. *Organisation*: The organisation of the institutions will present different solutions, show the sizes and structure of the institutions, and highlight their accessibility. Here, the presence or lack of the pluralistic composition will also be considered, as well as the division of labour between the ombudsman and deputies and the different units of the offices.

3. *Selection, appointment, and tenure*: The selection, appointment, and tenure touch upon the issue of independence. According to the Paris Principles and the standards of the IOI[589], the ombudsperson's selection should take place in the course of a clear, transparent and participatory process. The appointment should be made preferably by the national democratic assembly (parliament) to which the ombudsman reports. Large qualified

[589] International Ombudsman Institute (IOI), 'Developing and Reforming Ombudsman Institutions: An IOI Guide for Those Undertaking These Tasks' (n 378).

majority voting helps to avoid political bias – provided the pluralistic composition of the assembly that is not always the case as we will see in the Central and Eastern European region. The staff of the institutions should be recruited in an open, transparent, and merit-based selection process as well[590] and the institutions should be provided with sufficient financial resources to be able to run their own recruitment processes. Regarding the ombudsman's term, the GANHRI recommends a term of between three and seven years with the option of one renewal.[591] In some countries (Norway and Paraguay), the term of the ombudsman in the office is linked to the life of the parliament, in others, there is no overlap between the two terms. The majority of the analysed jurisdictions prefer appointing a lawyer as ombudsman (Hungary, Norway, Poland, Sweden); however, leading persons of NHRIs often come from other backgrounds, such as international relations, political science, sociology. Although there is no international standard as to the status of an ombudsman, in all analysed countries, they are given an appropriately high rank.

4. *Independence and immunity*: Guaranteeing independence and immunity to the institutions shows a diverse picture both on paper and in practice in the analysed countries. According to the Paris Principles, the independence requirement encompasses also holding distance from the government.[592] It will be analysed closer in the Nordic region. Immunity is another crucial point of independent functioning. However, the Paris Principles do not refer to immunity; they require independent functioning. If an institution wants to consider questions falling within its competence freely,[593] the fearless and influence-free operation will be needed. For this reason, the ombudsman and his or her staff should be protected from criminal and civil liability for actions undertaken in their official capacity in good faith.[594] Immunity questions will be specially raised in the context of the functioning of the Polish institution.

5. *Funding*: Since ombudsinstitutions need adequate funding to the meaningful and effective functioning, the budgeting processes, especially the level of independence, will be presented as well. As discussed in Chapter Two, budget cuts are severe threats to the

[590] SCA General Observations (n 142) G.O. 2.4.
[591] ibid G.O. 2.2.
[592] Paris Principles (n 92) paras B.1 and B.2.
[593] ibid para C(a).
[594] SCA General Observations (n 142) G.O. 2.3.

institutions. According to the Paris Principles, adequate funding enabling the institutions to have their own staff and premises ensures independence from the governments.[595]

6. *Functions*: Under functions, it will be presented what the institutions are mandated for, i.e. what type of activities they pursue. Their priorities will also be highlighted. Talking about ombudsinstitutions, their complaint handling function – that is the quasi-judicial competence of NHRIs[596] – will be discussed in detail, namely, who can be a complainant, how can the complaint be submitted, whether there is any time limit. Since the Paris Principles require a broad human rights mandate that includes human rights promotional activities as well,[597] it will be considered how broad is the mandate of the institutions, whether it also includes the promotion of human rights, with special regard to awareness-raising. Whether the institutions encourage the ratification of or the accession to international human rights instruments and promote the harmonisation of national legislation and practice with these instruments – as required by the Paris Principles[598] – will be considered as well. Their additional mandates, such as Equality Body – under the EU's equal treatment legislation –, NPM or NMM, will also be listed.

7. *Competences and powers*: In relation to the competences of the institutions, especially the personal scope, will be analysed. In particular, which (1) public authorities fall within or outside of their jurisdiction, whether public authorities must cooperate with the ombudsinstitutions, whether the competence of the institutions covers (2) ordinary courts and (3) legal persons. In relation to (4) the legislation, it will be considered whether the institutions have the competence to submit legislative proposals that is an excellent opportunity to facilitate systematic change – as discussed in Chapter Two. The institutions' competencies relating to (5) other oversight bodies, such as constitutional courts and prosecutor offices, will also be highlighted. According to the Paris Principles, NHRIs with quasi-judicial competence need to be provided with necessary powers, such as gather information from witnesses or in the course of personal visits in order to adequately fulfil their mandate. The investigatory powers of the institutions will be presented as well. The limitations of their powers – mainly due to national security – will also be highlighted.[599]

[595] Paris Principles (n 92) para B.2.
[596] SCA General Observations (n 142) G.O. 2.9.
[597] Paris Principles (n 92) paras A.1 and A.2.
[598] ibid paras A.3(b) and (c).
[599] SCA General Observations (n 142) G.O. 2.6.

8. *NPM mandate*: Except for the Swedish and the Paraguayan ombudsinstitutions, all other institutions are designated as NPM under the OPCAT. Since according to the GANHRI this is a practice that directly promotes the institutions' Paris Principles compliance[600] and the NPM mandate also be as an opportunity for ombudsinstitutions in Chapter Two, it will be presented how the institutions fulfil their NPM mandate.

9. *Cooperation activities*: As stressed before, for effective functioning, regular, constructive, and systematic engagement with relevant stakeholders is essential.[601] The cooperation activities of the institutions have two main paths: internal (at the national level) and external (at the regional/international level). In order to see, whether the analysed ombudsinstitutions use their strength of 'bridging role' as highlighted in Chapter Two, it will be reviewed whether they maintain working relationships with other ombudsinstitutions, CSOs or the media. The modalities of the annual reporting to the parliaments will be discussed here as well. Externally, all institutions cooperate with regional ombudsorganisations, such as the IOI and the Iberoamerican Federation of Ombudsman (FIO). Those ombudsinstitutions that are accredited as NHRIs cooperate with the GANHRI and the regional networks as well. Despite that the Paris Principles give NHRIs the responsibility to interact with the international human rights system by contributing to country reports submitted to UN bodies or submitting their own reports,[602] only a few institutions are active in the international human rights fora, especially by submitting shadow reports to the UN HRC in the course of the UPR.

10. *NHRI accreditation*: Out of the seven analysed ombudsinstitutions, three institutions hold an accredited NHRI A-status, two institutions have B-status, and two of them is not accredited as NHRI at the time of writing the present dissertation. Their accreditation history and perspectives will be highlighted.

A summary analysis closes each region section. The summary discussion attempts to make a synergy between the statements regarding the analysed institutions and the SWOT analysis of Chapter Two.

[600] ibid G.O. 2.8.
[601] ibid G.O. 1.5.
[602] Paris Principles (n 92) paras A.3(d) and (e).

3.1 The Central and Eastern European region

There is no general agreement on the exact geographic area that constitutes Central and Eastern Europe. For the sake of the present study, the two regions are considered in the same subchapter but still separately. The reason for this is that their ombudsinstitutions share many similarities; however, the discussed countries and institutions went through on different (historical) evolutionary paths. At the end of the '80s, revolutions swept through Eastern Europe, causing elementary political, social, and economic changes. The one-party rule of the communist system came to an end, and the power transferred to pro-capitalist governments, *inter alia*, in Poland, Hungary, East Germany, Czechoslovakia, Romania, and Bulgaria. The process involved constitutionalism that resulted in the rejection of the Soviet political model and the opening towards the rule of law system.[603] While individual human rights and judicial remedies basically did not exist in communism,[604] the new constitutions listed citizen's fundamental rights and freedoms and promulgated the independent system of the judiciary, as well as created constitutional courts. Parallel to this, the way opened up to the ratification of regional and international human rights conventions guaranteeing the protection of human rights at the supranational level. The constitutional reforms reorganised the relationship between national and international law so that international human rights standards became directly applicable in most legal systems.[605]

The establishment of ombudsinstitutions was also part of this reform process. We can state that the ombudsman concept strongly relates to democratic values[606] and the democratisation and the establishment of ombudsinstitutions in Eastern Europe went hand in hand.[607] The countries of the region universally opted for the ombudsman type fundamental rights protection based on the Swedish prototype and granted constitutional rank to the institutions. While the political and economic transition undoubtedly involved human rights violations (e.g. police brutality during demonstrations, violation of social

[603] OECD, 'Constitutions of Central and Eastern European Countries and the Baltic States' (1995) <http://dx.doi.org/10.1787/5kml6gf26mvk-en> accessed 27 October 2018.
[604] Jean-Marie Henckaerts and Stefaan Van Der Jeught, 'Human Rights Protection under the New Constitutions of Central Europe' [1998] Loyola of Los Angeles International and Comparative Law Review 475 <https://digitalcommons.lmu.edu/ilr/vol20/iss3/4> accessed 27 October 2018.
[605] Carver, 'National Human Rights Institutions in Central and Eastern Europe: The Ombudsman as Agent of International Law' (n 380).
[606] Ulziibayar Vangansuren, 'The Institution of the Ombudsman in the Former Communist Countries' (2002).
[607] Robert Messner, 'Die Volksanwaltschaft Als Teil Des Österreichischen Rechtssystems - von Der Idee Bis Zur Praktischen Verwirklichung' (Universität Wien 1999) 51.

rights, mistreatment of ethnic minorities[608]), the role of the newly established institutions was not the investigation of these cases or that of the violations caused by the prior regimes – that would have been similar to the mission of ombudsinstitutions in Latin America as it will be discussed under Subchapter 3.3 – but rather to control compliance of the legislation and the practice of public administration with the law (rule of law compliance).[609] Thus, the institutions' influence on the improvement of social and economic rights was rather low, or at least not direct in the beginning.[610]

The mental heritage of the past era, namely 'the purely political vision of law and the inability to separate the legal from the political'[611] was present in the countries of the region, and it took time to come over it. According to the second Polish Commissioner, Poland did not manage to liberate itself from the influence of the Marxist understanding of law in the early '90s.[612] Furthermore, human rights ideology has especially weak roots in Eastern Europe. It is because the totalitarian state shaped the existing rules of conduct, and countries under transformation did not know 'the rules of the game in a pluralistic society'.[613] Western powers assisted these new democracies in developing their political systems and reforming their public administration. The Western mentorship was also present around the European integration process, with special regard to the enlargement of the EU. In countries under transition, there has been no tradition of borrowing from international law when dealing with a particular legal problem in national law either.[614] Post-communist states were typically dysfunctional for a while due to over-bureaucracy, inadequacies in the legal system, and government officials poorly educated in human rights law.[615] This, as well as the lack of human rights education and weak language skills, caused little referencing to the decisions of the European Court of Human Rights, the provisions of the European Convention on Human Rights, or observations of UN human rights monitoring mechanisms by judges and other practitioners of human rights protection. These might be the reasons why also ombudsinstitutions were somewhat reluctant to cooperate with international actors. They needed to cope with these anomalies

[608] Christopher Anderson and others, 'In the Eye of the Beholder? The Foundations of Subjective Human Rights Conditions in East-Central Europe' (2005) 38 Comparative Political Studies 771.
[609] Iván Bizjak, 'Special Features of the Role of the Ombudsman in Transition Conditions', *International Ombudsman Yearbook 5* (2001).
[610] ibid.
[611] Letowska (n 472) 66.
[612] Commissioner for Civil Rights Protection (Poland), 'Annual Report 1993' 101–102.
[613] Letowska (n 472) 61.
[614] ibid.
[615] Reif, *The Ombudsman, Good Governance and the International Human Rights System* (n 375) 163.

in their early years. By now, they are frequent participants of European and international conferences and workshops of mutual exchange. However, these might be rather PR activities that do not substitute the substantive monitoring and reporting work required by the Paris Principles.

Carver sees the role of these new institutions – *inter alia* – in relation to the already mentioned two achievements of the new constitutions, namely connecting national and international law, and referring cases to constitutional courts.[616] Carver's observation is correct, most ombudsinstitutions of the region are entitled to point out systematic malfunctioning of the public administration to the legislator, however, not necessarily by referring to international standards in their recommendations, but formulating legislative initiatives, and referring cases to the constitutional court that is empowered to annul unconstitutional statutes. While authors like to see these elements, namely submitting legislative initiatives and turning to the Constitutional Court, as NHRI attributes and put the NHRI stamp on these ombudsinstitutions, it would be early to do so – even if the mandate, powers, and guarantees of independence comply, at least on paper, with the requirements of the Paris Principles. It has a conceptual/historical explanation on the one hand and can be justified with testing the reactions of the institutions in recent political situations that jeopardise the rule of law concept on the other hand.

In the early '90s, the drafters of the constitutions in the Eastern European region were hardly aware of the Principles formulated in Paris in 1991. By establishing ombudsinstitutions, their leading concern was not the promotion and protection of human rights, but rather the consolidation of the new rule of law systems. In 1992, almost all states of the region ratified the European Convention on Human Rights. Still, it was rather the EU accession negotiations that drove the spotlight onto the importance of human rights promotion and protection at the national level. According to the Treaty on EU (TEU), the membership of the EU is open to 'any European State which respects the values referred to in Article 2 and is committed to promoting them […]'.[617] These values summarised in Article 2 of the TEU are the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. It is based on the 1993 'Copenhagen criteria', which declared that the EU

[616] Carver, 'National Human Rights Institutions in Central and Eastern Europe: The Ombudsman as Agent of International Law' (n 380).
[617] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal C 326 , 26/10/2012 P. 0001 - 0390, Article 49.

membership requires the candidate country to achieve 'stability of institutions guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities, […]'.[618] However, the negotiations on the accessions of Eastern European states started in early and mid-90s, the Eastern enlargement took place in 2004 and 2007. Thus, slowly, international and European human rights standards were incorporated into the restricted legal systems of the emerging post-communist constitutional democracies. According to Finkel, ombudsinstitutions were catalysts of the European integration process.[619] Majtényi formulates cynically when he says that ombudsinstitutions may have a double role: building democracy and dissembling the lack of democracy.[620] Indeed, 'because of its pliability, some scholars have warned that the institution could be used as a facade to cover up a regime's atrocities'.[621]

The timing of application for accredited NHRI status also dates back to the years of 2000 in the region. Some institutions acquired NHRI status already in 2000 (e.g. Slovenia), others only ten years later (e.g. Bulgaria). In August 2018, 9 Eastern European states (Albania, Armenia, Bosnia and Hercegovina, Croatia, Georgia, Hungary, Moldova, Poland, Serbia) had A-status, 6 (Azerbaijan, Bulgaria, Macedonia, Montenegro, Slovakia, Slovenia) had B-status, and 1 (Romania) had C-status ombudsinstitution. European NHRIs – including accredited ombudsinstitutions – gather in the European Network of NHRIs (ENNHRI) that is the youngest regional network of national institutions established in 2013 with a secretariat based in Brussels A-status NHRIs are voting members, B-status institutions are non-voting members of the not-for-profit association.[622] Central and Eastern European ombudsinstitutions are members of the International Ombudsman Institute (IOI) as well that is an umbrella organisation of ombudsinstitutions worldwide since 1978. The General Secretariat is based in Vienna with the Austrian Ombudsman Board.[623]

One might say that the recent years brought such scenarios that questioned the existence of democratic values in the Central and Eastern European region. As the CoE Commissioner

[618] Copenhagen European Council, Presidency Conclusions, 21-22 June 1993.
[619] Finkel (n 432).
[620] László Majtényi, 'A Független Ombudsmanintézményeket Helyre Kell Állítani, Az Alapvető Jogok Biztosától Pedig Továbbra Is Elvárható a Jogállami Jogvédelem [The Independent Ombudsinstitutions Need to Be Restored]' [2014] MTA Law Working Papers.
[621] Ayeni (n 416) 6.
[622] European Network of National Human Rights Institutions (ENNHRI), 'Constitution and Statutes' (2013) <http://ennhri.org/IMG/pdf/ennhri_statutes.pdf> accessed 5 November 2018.
[623] 'The International Ombudsman Institute (IOI)' <http://www.theioi.org/> accessed 5 November 2018.

for Human Rights put it: '[…] Europe is going through a worrying backlash against human rights, with populism and nationalism on the rise, and attempts to weaken other watchdogs such as the judiciary and civil society, […]'.[624] Having a look at the political map of the analysed countries of the Central and Eastern European region, namely Austria, Hungary, and Poland, we can catch this radicalisation. Right-wing oriented political parties with Christian democratic elements formed governments in recent years. A coalition government formed by the Christian democratic conservative Austrian People's Party (ÖVP) and the right-wing populist national-conservative Freedom Party of Austria (FPÖ) has led Austria since December 2017. The coalition of the centre-right national-conservative Alliance of Young Democrats (FIDESZ) and the Christian Democratic People's Party (KDNP) that has been holding a two-thirds majority in the Parliament since the 2018 elections governs Hungary. It is the second term of the coalition in which they can govern with a qualified majority. In Poland, the national-conservative Christian democratic Law and Justice (PiS) party won the 2015 parliamentary elections with an outright majority. Similar actions characterise these governments, such as rapid adoption of new constitutions, accelerated legislative procedures, radical (mainly anti-EU) statements, the weakening of checks and balances, such as undermining the position of the constitutional courts, changes relating to the national judicial systems and the media law. These result in 'assumptions that the separation of state powers, the freedom of press and media, as well as the independence of the judiciary are in danger'[625] and have serious, negative implications for human rights and the rule of law. Under such circumstances, the role of the ombudsinstitutions is especially welcome. The case studies will test the reactions of the ombudsinstitutions of the chapter: the Austrian Ombudsman Board, the Hungarian Commissioner for Fundamental Rights, and the Polish Human Rights Defender.

The selection was governed by the diversity of the three institutions, despite their geographical closeness. The Austrian Ombudsman Board is the oldest ombudsinstitution in Central Europe, established in 1977. Considering its collective structure, it is instead an atypical institution. It holds an accredited B-status as NHRI. The Hungarian ombudsman system went through on elementary structural changes in 2012 that influenced its NHRI accreditation as well. By now, the office holds an A-status. The Polish institution is the

[624] CoE Commissioner for Human Rights, 'Human Rights Comment - Paris Principles at 25: Strong National Human Rights Institutions Needed More Than Ever' (n 576).
[625] Chiara Altafin, Veronika Haasz and Karolina Podstawa, 'Assessing the Strategic Use of the EU Fundamental and Human Rights Toolbox' (2016) 51 <http://www.fp7-frame.eu/wp-content/uploads/2017/03/Deliverable-14.2.pdf> accessed 4 March 2019.

largest ombudsinstitution of the region, carrying out NHRI, Equality Body, and NPM functions at the same time. Beyond analysing the Paris Principles conformity of the three institutions, the discussion aims at demonstrating the reasons why the Central and Eastern European ombudsinstitutions cannot be considered as human rights model by default as the Latin American institutions.

3.1.1 The Austrian Ombudsman Board – Austria

History and legal background

After the second world war, Austria established the second republic and became a stable democracy. By the '70s, state spending increased and the administrative structure bureaucratised so much that in order to 'humanise' and 'personalise' bureaucracy[626] the ombudsinstitution was introduced – based on the Swedish example.[627] The Federal Law of 24 February 1977 (Federal Law Gazette 121) created the Ombudsman Board (*Volksanwaltschaft*) for the Republic of Austria.[628] The main features described by this original enabling legislation reflects the characteristics of the classic ombudsman model. Thus, anyone affected by a violation could turn to the institution by lodging a complaint against maladministration after having exhausted all legal remedies. The office could launch an investigation *ex officio* as well. The three members of the Ombudsman Board were selected for six years. Initially, the legislator created the institution only for one term, and the ombudsman act was applicable from 1 July 1977 to 30 June 1983. The institution proved to be necessary as in the meantime the Law on the Ombudsman Board has been incorporated as the Seventh Chapter of the Austrian Federal Constitution (BGBl No. 350/1981).[629] In 1982, the legal act that implements the constitutional provisions was also promulgated (Ombudsman Act 1982).[630] Both the constitutional provisions and the Ombudsman Act have been amended several times.

Organisation

Austria is a federal state[631] that affects the ombudsman system as well. The States (*Länder*) can choose either to create their own ombudsinstitutions for their own administrative

[626] Sonia Cardenas, *Chains of Justice: The Global Rise of State Institutions for Human Rights* (University of Pennsylvania Press 2014) 21.
[627] Fritz Schönherr, *Volksanwaltschaft : Das Bundesgesetz Vom 24. 2. 1977 Über Die Volksanwaltschaft, Erläutert Aus Den Materialien, Samt Früheren Entwürfen Und Erläuterungen Sowie Einer Kritischen Würdigung Der Verwirklichung Des Ombudsmann-Gedankens in Österreich* (Manz 1977).
[628] Federal Law of 24 February 1977 on the Ombudsman (121st Federal Law: Ombudsman), Federal Law Gazette No. 121/1977.
[629] Federal Constitutional Law of 1 July 1981 amending the Federal Constitutional Law as amended in 1929 (350th Federal Constitutional Law: Amendment of the Federal Constitutional Law in the version of 1929), Federal Law Gazette No. 350/1981 para 11.
[630] Announcement of the Federal Government of 10 August 1982, with which the Federal Law on the Ombudsman's Office is re-promulgated (433rd Declaration: Re-promulgation of the Federal Law on the Ombudsman's Office), Federal Law Gazette No. 433/1982 (hereinafter referred to as Ombudsman Act 1982).
[631] Bundesverfassungsgesetz, Verordnung des Bundeskanzlers vom 1. Jänner 1930, betreffend die Wiederverlautbarung des Bundes-Verfassungsgesetzes, Federal Law Gazette No. 1/1930 Article 2(1)

authorities or to declare the Austrian Ombudsman Board (AOB) in Vienna to be competent for their administrative authorities.[632] The States – except for Voralberg and Tyrol – have availed themselves of the option to declare the AOB competent for their authorities.[633] Voralberg and Tyrol created their own ombudsinstitutions, in these states the AOB examines complaints about the Federal administration only.

The Austrian Ombudsman Board is an atypical ombudsinstitution considering its structure, for more reasons. It is not a one-person led office – as most ombudsinstitutions –, but a collective body. The Board consists of three members, who are appointed by the political parties for six years.[634] The chairmanship rotates annually (at the end of June) between the members 'in the sequence of the number of mandates, in case of an equal number of mandates in the sequence of the number of votes possessed by the parties who have nominated them'.[635] The members of the Ombudsman Board agree on the allocation of their responsibilities and duties[636] at the beginning of their term of office. The Ombudsman Board also resolves the rules of procedure that govern the organisation in detail.[637] In important cases, the members proceed together as a collective body. Nevertheless, certain flexibility can be observed in the functioning of the AOB. According to the Standing Rules of Procedure, every member of the Board is entitled to request an investigation of maladministration also regarding matters assigned to another member's area of responsibility.[638] Furthermore, the Board members have unrestricted access to all files of the AOB.[639]

The Board has its office in Vienna, where 90 employees work divided according to the Board members' area of responsibility[640] and an administrative office complements it.[641]

(hereinafter referred to as Bundesverfassungsgesetz).
[632] Bundesverfassungsgesetz (n 631) Article 148(i).
[633] Kamal Hossain and others (eds), *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (Kluwer Law International 2001) 247–248.
[634] Bundesverfassungsgesetz (n 631) Article 148(g)(2).
[635] ibid Article 148(g)(3).
[636] Allocation of Responsibilities and Duties to the Ombudsman Board, its commissions and the Human Rights Advisory Council (July 2013) (hereinafter referred to as Allocation of Responsibilities and Duties).
[637] Bundesverfassungsgesetz (n 631) Article 148(h)(4).
[638] Standing Rules of the Ombudsman Board, its commissions and the Human Rights Advisory Council (August 2017) Article 2(2) (hereinafter referred to as Standing Rules of the AOB.).
[639] Standing Rules of the AOB (n 638) Article 2(3).
[640] ibid Article 11.
[641] ibid Article 15.

Each Board member may appoint a staff member as head of his or her responsibility. This person shall be a graduate of law.[642]

Another specification of the Austrian ombudsinstitution is that other collective bodies help its human rights work. Besides the Board and the colleagues in the Vienna office, the Ombudsman Board sets up a minimum of six commissions by region and creates the Human Rights Advisory Council that is seated in Vienna with the Board.[643] These bodies assist the Ombudsman Board in performing its duty to protect and promote human rights. First and foremost, by regularly visiting places of detention as defined in Article 4 of the OPCAT, by monitoring the behaviour of executive bodies and officers authorised to carry out coercive measures, and by visiting facilities designed to serve persons with disabilities.[644]

There are six regional commissions throughout Austria with a total of 42 part-time members, at least six members in each commission.[645] The positions that are advertised publicly require expert knowledge and willingness to deal with human rights. The Ombudsman Board strives independent, interdisciplinary, gender-balanced, multi-ethnic and pluralistic composition while appointing the members.[646] The members' term lasts for six years. The acts contain provisions regarding conflicts of interest[647] and cases of dismissal[648]. Each commission is headed by an eminent person in the field of human rights, who coordinates the commission's work.[649] The commissions and their members carry out visits and inspections on behalf of the Ombudsman Board.[650] They have all the necessary investigative powers, such as accessing documents and places, contacting persons.[651] They report on their findings to the AOB and make 'suggestions on determinations of cases of

[642] ibid Article 14(3).
[643] Bundesverfassungsgesetz (n 631) Article 148(h)(3).
[644] ibid Article 148(a)(3); Ombudsman Act 1982 (n 630) Article 11(1); Standing Rules of the AOB (n 638) Article 16.
[645] Ombudsman Act 1982 (n 630) Article 12(1).
[646] Standing Rules of the AOB (n 638) Article 18; Ombudsman Act 1982 (n 630) Article 12(2).
[647] Standing Rules of the AOB (n 638) Article 20.
[648] ibid Article 19(5); Ombudsman Act 1982 (n 630) Article 12(4).
[649] Standing Rules of the AOB (n 638) Article 21.
[650] Allocation of Responsibilities and Duties (n 636) Article 8(2); Ombudsman Act 1982 (n 630) Article 13(1); Standing Rules of the AOB (n 638) Article 22.
[651] Ombudsman Act 1982 (n 630) Article 11(3).

maladministration' and further recommendations.[652] The commissions meet regularly, at least once every quarter.[653]

Since 1 July 2012, the Human Rights Advisory Council (HRAC) advises the members of the AOB with respect to their responsibilities in the human rights sector. The HRAC supports the Ombudsman Board at defining monitoring priorities, making suggestions on 'how to guarantee uniform courses of action and monitoring standards', issuing maladministration statements and developing recommendations.[654] The HRAC consists of one chairperson, one deputy chairperson, fourteen members and fourteen substitute members.[655] The members, who are appointed by the Ombudsman Board must be experts in the field of human rights, while the chairperson and the deputy have to be eminent persons in the field of human rights having knowledge about the administration and possessing an academic qualification in constitutional law.[656] Various federal ministries and seven NGOs may propose members and substitute members. Similar to the selection of commission members, independence and pluralistic composition are the guiding principles of the Board's decision making. The HRAC members are appointed for six years.[657] The cases of conflicts of interest and dismissal are regulated in the legislation, as well as the decision-making procedures and the formalities of the meetings of the HRAC.

Selection, appointment, and tenure

Persons who are eligible for the National Council and have knowledge of the structure and functioning of the administration and knowledge on human rights can be elected as members of the Austrian Ombudsman Board.[658] The regulation sets neither specific professional background nor age limit as eligibility criteria for candidates. Under Article 148(g)(2) of the Federal Constitution, the members of the Ombudsman Board are elected by the National Council 'on the basis of a joint recommendation drawn up by the Main Committee [one of the parliamentary committees with specific remits] in the presence of at least half its members'. One member of this recommendation is nominated by each of the three parties with the largest number of mandates in the National Council. If this

[652] ibid Article 13(2).
[653] Standing Rules of the AOB (n 638) Article 23.
[654] Ombudsman Act 1982 (n 630) Article 14; Standing Rules of the AOB (n 638) Article 26(1).
[655] Ombudsman Act 1982 (n 630) Article 15(1); Standing Rules of the AOB (n 638) Article 27.
[656] Ombudsman Act 1982 (n 630) Article 15(2); Standing Rules of the AOB (n 638) Article 31(1).
[657] Ombudsman Act 1982 (n 630) Article 15(5); Standing Rules of the AOB (n 638) Article 28(3).
[658] Bundesverfassungsgesetz (n 631) Article 148(g)(5).

recommendation does not keep up with the expectations of the members of the National Council, it can reject the overall proposal for the AOB panel.[659] In case of an equal number of mandates, the number of votes cast in the last National Council election is decisive. For the National Council's decision on the recommendation, the presence of at least one-third of the members and the absolute majority of the votes cast is required.[660] Belonging to a general representative body or the European Parliament, being a member of the Federal or one of the State Governments, or practising any other profession are incompatible with the office.[661] The newly elected members of the Ombudsman Board make an oath to the Federal President before assuming the office.

The term of office for the Board members is six years with a one-term option of renewal.[662] If a member retires before the expiry of the term of office, the nominating party shall nominate a new member.[663] The current Board is in office till June 2019. Board members cannot be recalled during their term of office, but may voluntary step down from office. In this case, the chairperson informs the President of the National Council.[664]

The Federal President appoints public officials working in the office of the Ombudsman Board on the recommendation and with the countersignature of the Ombudsman Board's chairperson.[665]

Having a look at the mandate holders in the last three terms (2001-2019), their connection to their nominating political parties (SPÖ, ÖVP, FPÖ) is visible. They were not only representatives of their nominating parties but held high ranking positions in the political scene right before taking up the office in the AOB. We can find ministers, state secretaries, national secretaries or chairpersons of their parties, and members of committees in the National Council among the mandate holders. Thus, the political connection is easily recognisable.

Independence and immunity

[659] 'Re-Accreditation of the Austrian Ombudsman Board (AOB) to the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, May 2011' 4.
[660] Bundesverfassungsgesetz (n 631) Article 31.
[661] ibid Article 148(g)(5).
[662] ibid Article 148(g)(1).
[663] ibid Article 148(g)(4).
[664] Ombudsman Act 1982 (n 630) Article 2.
[665] Bundesverfassungsgesetz (n 631) Article 148(h)(1).

The Federal Constitution stipulates that in exercising its authority, the AOB is independent.[666] The Ombudsman Act also declares that the Ombudsman Board 'rank equal with the State Secretary' – except for their salaries.[667] The members of the AOB do not enjoy immunity, in any case.[668]

From time to time, there are attacks against the AOB. In 2019, a politician of the Lower Austrian Land Government (*niederösterreichische Landesregierung*) suggested the abolishment of the AOB after the Board had pointed out shortcomings of an asylum accommodation for unaccompanied minor refugees in Lower Austria. However, the politician later mildened his statement,[669] in the light of the lack of immunity, this is a warning sign of disturbing the AOB's independent functioning.

Funding

According to the Federal Organic Budget Act, the Ombudsman Board is a body with an independent budget.[670] The Board itself drafts the institutional budget. The Federal Minister of Finance presents it together with the National Budget to the National Council for approval.[671] The three members of the Ombudsman Board are entitled to take part in the debate of the National Council and its committees during the discussions concerning the AOB's budget in the draft Federal Finance Act.[672] Thus, the Ombudsman Board's budget is funded from the National Budget. Occasionally, it receives international grants for expenses related to international activities.[673]

Functions

Three main activities describe the functions of the AOB: (1) monitoring the public administration, (2) providing support to the legislative authority, (3) protecting and promoting human rights.

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[666] ibid Article 148(a)(6).
[667] Ombudsman Act 1982 (n 630) Article 1(4).
[668] Brigitte Kofler, 'Österreich' in Gabriele Kucsko-Stadlmayer (ed), *Europäische Ombudsman-Institutionen: Eine rechtsvergleichende Untersuchung zur vielfältigen Urnsetzung einer Idee* (Springer 2008) 321.
[669] ORF, 'Waldhäusl Relativiert Aussagen' <https://orf.at/stories/3108212/> accessed 3 April 2019.
[670] Federal Organic Budget Act 2013, Federal Law Gazette No. 139/2009, Article 6(1).
[671] 'Re-Accreditation of the Austrian Ombudsman Board (AOB) to the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, May 2011' (n 659) 6.
[672] Bundesverfassungsgesetz (n 631), Article 148(d)(2); Federal Law on the Rules of Procedure of the National Council (Rules of Procedure Law of 1975), Federal Law Gazette No. 410/1975, Article 20(5).
[673] 'Re-Accreditation of the Austrian Ombudsman Board (AOB) to the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, May 2011' (n 659) 6.

The Ombudsman Board investigates – first and foremost – individual complaints. Anyone can lodge a complaint if he or she assumes to be the victim of maladministration – provided being personally affected by the violation and having exhausted all legal remedies previously.[674] Thus, there is no restriction regarding who has access to the legal aid provided by the Board.[675] Companies, businesspeople and associations can also lodge a complaint about the illegal action or omission of a public authority. It is interesting to note that there is no deadline for submitting a complaint with the AOB. The Ombudsman Board can be contacted by telephone, in writing or in person. On the website of the institution, an electronic complaint form facilitates the initiation of the AOB's procedure. The members of the Board hold consultation days regularly at places other than their official location in Vienna.[676] The Board often settles cases by advising the complainants; however, it does not have any legal obligation to do so.[677] In well-founded cases, based on the complaints, the Board conducts investigations and issues recommendations[678].

Beyond handling individual complaints, the Ombudsman Board is entitled to conduct investigation *ex officio* as well[679] if it obtains information on an alleged human rights violation – often from the different media platforms.[680]

The AOB's human right mandate is rather a novelty. The 2012 amendment of the Constitution introduced tasks in relation to the protection and promotion of human rights in Article 148(a)(3). Further references to human rights can be found in Articles 148(a)(1) and (2), where the expression 'especially because of an alleged violation of human rights' was inserted; and in Article 148(g)(5) that prescribes 'knowledge on human rights' as eligibility criterion of the ombudsperson position. The AOB describes itself as 'Human Rights House of the Republic of Austria'.[681] This title might be a bit excessive as the newly introduced human rights related tasks grant the Board solely NPM mandate and some tasks under the CRPD. These are highly essential fields of human rights; nevertheless, they do

[674] Bundesverfassungsgesetz (n 631) Article 148(a)(1).
[675] Nikolaus Schwäzler, 'The Ombudsman Institution in Austria' in Kamal Hossain and others (eds), *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (Kluwer Law International 2001) 251.
[676] ibid 256.
[677] ibid 252.
[678] Bundesverfassungsgesetz (n 631) Article 148(c).
[679] ibid, Article 148(a)(2).
[680] Messner (n 522) 114.
[681] Volksanwaltschaft, 'Human Rights House of the Republic of Austria (Flyer)' <http://volksanwaltschaft.gv.at/downloads/aha7o/> accessed 23 November 2018.

not encompass all kinds of human rights and do not grant the AOB a broad human rights mandate, as required by the Paris Principles.

The law describes the human rights promotional functions of the Board just in few words. It refers to human rights education when highlighting the possibility of cooperation between the AOB and scientific and academic institutions, and other educational institutions. It also says that the AOB shall inform the public of its activities.[682] The AOB promotes human rights by providing training to practitioners, who are involved in the detention of persons deprived of their liberty, such as prison guards and police officers.[683] The Ombudsman Board raise awareness about its own functioning as well. The main channel is the television programme: *Bürgeranwalt,* that represents concrete complaints with those affected. This activity has a preventive character, as well.[684]

Competences and powers

The AOB has a universal competence in legal matters.[685] Based on individual complaints and in procedures launched *ex officio,* it monitors all sectors of the public administration. All federal, provincial, and municipal authorities involved under the Board's investigations are obliged to support the Ombudsman Board and its commissions and the Human Rights Advisory Council in the fulfilment of their responsibilities by granting access to their files and providing any information upon request.[686]

Since 2008,[687] the Ombudsman Board has competence over the judiciary, in as much as the complaint relates to the excessive duration of a court procedure. In well-founded cases, the AOB may submit a proposal to the supreme court to set a deadline for the court, which is in default (*Fristsetzungsantrag*).[688] One may consider this competence of the AOB as interference in the separation of powers that raises doubts about the independence of the judiciary[689] but submitting a proposal can be interpreted rather as a signal than an order towards the supreme court.

[682] Ombudsman Act 1982 (n 630) Article 7(3).
[683] Austrian Ombudsman Board, 'Annual Report 2017' 23.
[684] ibid 25.
[685] Schwäzler (n 675) 249.
[686] Bundesverfassungsgesetz (n 631) Article 148(b).
[687] Amendment of the Federal Constitutional Law and adoption of a First Federal Constitutional Cleansing Act, Federal Law Gazette No. 2/2008 paras 38–40.
[688] Bundesverfassungsgesetz (n 631) Article 148(c).
[689] Sebastian Schmid and Klaus Wallnöfer, 'Volksanwaltschaft Und Gerichtsbarkeit' (2008) 16 Journal für

Since 2011, the AOB has been pointing out its lack of investigative competence in relation to non-sovereign administration of private companies providing public services and legal entities under public law.[690] The Federal Constitution grants the AOB and its commissions the possibility of visiting and investigating private entities that manage facilities of deprivation of liberty, as well as institutions for disabled persons.[691] The Board actively advocates for the expansion of its responsibilities to private companies providing public services in order to be able to grant full services to citizens.[692]Although there was wide agreement among almost all parties in the National Council, the decision was postponed in negotiations.[693]

Due to an amendment of the enabling legislation,[694] since 2012 the AOB has been entitled to contribute to the quality of legislation by reviewing drafts of laws and regulations [695] and suggesting amendments or adoption of laws.[696] Furthermore, the AOB may turn to the Constitutional Court in order to decide on the illegality of decrees and regulations issued by an administrative authority.[697] The Ombudsman Board can initiate law interpretation and apply at the Constitutional Court also if a disagreement arises between the AOB, the Federal Government or a Federal Minister on the interpretation of specific legal provisions.[698] Another indirect way of influencing the legislation is that the Ombudsman Board may assist in the settlement of petitions and citizens' initiatives addressed to the National Council.[699]

NPM mandate

Rechtspolitik 177, 178.
[690] Volksanwaltschaft, 'Annual Report of the Austrian Ombudsman Board to the National Council and the Federal Council 2011' (2011) 13 <http://volksanwaltschaft.gv.at/downloads/850m2/Annual Report - Summary 2011.pdf> accessed 31 October 2018.
[691] Bundesverfassungsgesetz (n 631) Article 148(a)(3).
[692] Tyndall (n 562) 5.
[693] Volksanwaltschaft, 'Annual Report 2014' 15 <https://volksanwaltschaft.gv.at/downloads/7ate5/VA_Jahresbericht_2014_-_internationale_Version_%28EN%29_-_FINAL.pdf> accessed 24 November 2018; Volksanwaltschaft, 'Annual Report 2016' 33 <https://volksanwaltschaft.gv.at/downloads/1k6na/va-jahresbericht-2016_en-version_neu.pdf> accessed 24 November 2018.
[694] Federal Act Implementing the Optional Protocol of 18 December 2002 to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT Implementation Act), BGBl. No. 1/2012 Article 2(5).
[695] Ombudsman Act 1982 (n 630) Article 7(1).
[696] ibid Article 7(2).
[697] Bundesverfassungsgesetz (n 631) Article 148(e).
[698] ibid Article 148(f).
[699] ibid Article 148(a)(5).

As discussed above, since 1 July 2012 the AOB has undertaken the responsibility of monitoring and controlling public and private institutions and facilities, where freedom is or can be restricted, including 'police stations and prisons, reception centres for asylum seekers, military barracks, psychiatric facilities, old people's and nursing homes, crisis centres and residential youth communities'.[700] Due to the former structure, in which the Human Rights Advisory Board was with the Ministry of Interior, and one of the six visiting commissions monitored the actions of police forces, the AOB is authorised to monitor the conduct of law-enforcement bodies when they execute coercive measures (e.g. police operations during demonstrations).[701]

The Ombudsman Board fulfils the role of NPM through – the already discussed – six independent regional commissions set up by it and with the assistance of the Human Rights Advisory Council. The AOB entrusts the commissions with visiting places of detention regularly and monitoring the behaviour of executive bodies and officers.[702] The heads of the commissions ensure the special composition of the visiting teams.[703] Additional experts and interpreters may be included if the budget allows.[704] Visits are conducted according to the Board's visiting priorities and the visiting programmes established by the commissions; ad hoc visits may also take place based on individual cases.[705] The commissions and the Board have a wide range of investigative powers, including analysing documents, entering places, and contacting detainees.[706] Objections to a visit of a certain place can be justified with reasons of national defence, public safety, natural disasters or severe disruptions of the order at the place to be visited.[707] The visiting teams report to the AOB.[708]

Cooperation activities

The AOB drafts a report on its activities and submits it to the National Council and the Federal Council annually.[709] Being a collective body, any Board member may attach a

[700] UN, International Human Rights Instruments, Common core document forming part of the reports of States parties Austria, 5 September 2017, HRI/CORE/AUT/2017 para 144.
[701] ibid.
[702] Bundesverfassungsgesetz (n 631) Article 148(a)(3); Ombudsman Act 1982 (n 630) Article 11(1); Standing Rules of the AOB (n 638) Article 16.
[703] Standing Rules of the AOB (n 638) Article 22(1).
[704] ibid Article 22(4).
[705] ibid Article 22(2).
[706] Ombudsman Act 1982 (n 630) Article 11(3).
[707] ibid Article 17(3).
[708] ibid Article 13(2); Standing Rules of the AOB (n 638) Article 22(5).
[709] Bundesverfassungsgesetz (n 631) Article 148(d)(1); Ombudsman Act 1982 (n 630) Article 3(1).

dissenting opinion in case of disagreement to the report.[710] The Board may also report on its observations on individual matters to the two bodies at any time. In the National Council, a special commission, the 'Ombudsman Board Committee' (*Volksanwaltschaftsausschuss*) is dedicated to treating the annual reports of the AOB.[711] The members of the Ombudsman Board are entitled to participate in the debates on the Board's annual reports in the National Council and the Federal Council and their committees.[712]

Since 2014, the AOB hosts a yearly NGO Forum. The first two years were devoted to consultations on the 'National Plan of Action for Human Rights', which puts the existing sectoral plans of action in the different areas of human rights within a common framework.[713] Taking advantage of its position and bridging role, the AOB functioned in this project as a catalyst by hosting the Forum and inviting representatives of the Federal Government and the civil society. The AOB channelled in the project proposals the different views, summarised it structurally, and forwarded it to the human rights coordinators of the Federal Ministries. The AOB publicised all proposals and suggestions on its website.[714] In February 2016, the group of CSOs (Amnesty International, Caritas Austria, Diakonie Österreich, and the Austrian League of Human Rights) left the consultation groups. They regretted that their proposals had been left out from the projects of the Action Plan, and the Action Plan had failed to consider also the observations of the international human rights monitoring mechanisms, as well as important human rights topics, such as economic and social rights, non-discrimination, or human rights education. They also suggested the greater involvement of the Parliament in the consultations on the Action Plan. This opting-out has not influenced the cooperation in the course of further NGO Forums. In 2016, the Forum was dedicated to the topic of inclusion of people with

[710] Ombudsman Act 1982 (n 630) Article 3(2).
[711] 'Volksanwaltschaftsausschuss' <https://www.parlament.gv.at/PAKT/VHG/XXVI/A-VO/A-VO_00001_00856/index.shtml#tab-Uebersicht> accessed 23 November 2018.
[712] Bundesverfassungsgesetz (n 631) Article 148(d)(2); Rules of Procedure of the Austrian Federal Council, Federal Law Gazette No. 361/1988 Articles 29(a) and 37(a).
[713] Austrian Federal Government, 'Work Programme of the Austrian Federal Government 2013-2018' (2013) 74 <https://www.genderportal.eu/sites/default/files/resource_pool/work_programme_austria2013-18.pdf> accessed 26 November 2018.
[714] Volksanwaltschaft, 'Nationaler Aktionsplan Menschenrechte' <http://volksanwaltschaft.gv.at/praeventive-menschenrechtskontrolle/nationaler-aktionsplan-menschenrechte-1#anchor-index-3344> accessed 26 November 2018.

disabilities in the media world, while in 2017 the protection of children and prevention of violence was in focus.[715]

As discussed elsewhere, the AOB has been operating the IOI General Secretariat since 2009.[716] It enables the institution to be in contact with ombudsinstitutions worldwide. Ombudsinstitutions hold workshops within Europe and even beyond Europe. In 2017, the AOB reported on accepting an invitation to a conference in South Korea, holding a training on the Ivory Coasts for NPMs of the African region, and to a complaint management training in the Caribbean.[717] As NPM, the AOB submits annual reports to the UN Subcommittee on Prevention of Torture[718] and may have meetings with the Committee.[719] Since October 2013, the AOB has been a member of the South-East Europe NPM Network. Member ombudsinstitutions from Albania, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Austria share knowledge and experiences in their capacity as NPM.[720] In its capacity as NHRI, the AOB takes part in the annual meeting of NHRIs, organised by the GANHRI in Geneva and maintains contact with the ENNHRI – also in its function as headquarters of the IOI General Secretariat.[721] The AOB played an active role in the preparations for the UPR in 2011 and 2015, both in Austria and at the international level, and submitted its own report to the Human Rights Council.[722]

NHRI accreditation

The AOB first submitted its application for accreditation as NHRI in April 2000. At that time, it was granted B-status because the Ombudsman Board did not have a specific human rights mandate. In 2011, the B-status was approved. The SCA highlighted concerns relating to the independence; the composition, selection, and appointment; the mandate; the AOB's relationship with the civil society, and its evolving NPM mandate. Despite of the Board's clarification that 'Austria is a representational democracy with special significance put to

[715] Volksanwaltschaft, 'NGO-Forum' <https://volksanwaltschaft.gv.at/ngo-forum> accessed 26 November 2018.
[716] International Ombudsman Institute (IOI), 'Bylaws' (n 134) Article 20.
[717] Austrian Ombudsman Board (n 683) 27–28.
[718] Ombudsman Act 1982 (n 630) Article 3(3).
[719] ibid Article 17(1).
[720] Volksanwaltschaft, 'SEE NPM Network - Chair 2016' <https://volksanwaltschaft.gv.at/en/preventive-human-rights-monitoring/see-npm-network-chair-2016> accessed 26 November 2018.
[721] Austrian Ombudsman Board (n 683) 30.
[722] Office of the UN High Commissioner for Human Rights, 'Universal Periodic Review Second Cycle - Austria - Reference Documents' <https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRATStakeholdersInfoS23.aspx> accessed 26 November 2018.

political parties, and that the Constitution regards the existence and diversity of political parties as components of the democratic system', the SCA feared that the fact that membership is composed of political representation eludes the principle of independence and non-interference. Being selected based on political representation, the composition and selection of members lack a pluralistic composition that the Paris Principles require.[723]

However, the Ombudsman Board's mandate was greatly expanded in 2012, international human rights bodies also raised concerns regarding the Paris Principles conformity of the institution. Pointing out issues regarding independence due to the method of appointment of the Board members, they have called the Austrian authorities to pursue the necessary efforts to bring the AOB into compliance with the Paris Principles.[724] In the course of both cycles of the UPR, NGOs also raised their concerns regarding the independence and the lack of A-status, and called the decision-makers to improve the AOB's mandate, as well as 'the transparency, political independence and criteria of appointment' of the Ombudsman Board[725] and 'provide full independence in line with the Paris Principles'.[726]

The 2012 amendments of the mandate brought elementary changes that have not been assessed by the SCA yet. The AOB has received a constitutional mandate that requires a new understanding of the office. While it previously concentrated on an ex-post control of the public administration based on handling individual complaints, the new AOB undertakes preventive monitoring tasks as well.[727] Now, it depends on the AOB whether it submits a new application for accreditation and let itself assessed in line with the Paris Principles.

[723] The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Review of the Accreditation Status of the Austrian Ombudsman Board (May 2011)'.
[724] CoE Commissioner for Human Rights, 'Report by Nils Muižnieks Commissioner for Human Rights of the Council of Europe Following His Visit to Austria from 4 to 6 June 2012, 11 September 2012, CommDH(2012)28' para 58; UN Committee on the Elimination of Racial Discrimination, Concluding observations: Austria, 23 October 2012, CERD/C/AUT/CO/18-20 para 8.
[725] Austrian NGO Platform on Human Rights, 'Joint Submission for the 23rd Session of the Universal Periodic Review, Austria' para 3.
[726] Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern, 'Universal Periodic Review – Austria, 23rd Session, November 2-13, 2015' para 2.1.
[727] Volksanwaltschaft, 'Annual Report of the Austrian Ombudsman Board to the National Council and the Federal Council 2011' (n 690) 6.

3.1.2 The Commissioner for Fundamental Rights – Hungary

History and legal background

After the fall of the communist system in 1989, the institution of the ombudsman was introduced into the Hungarian legal system by an amendment[728] to the Constitution.[729] The Parliamentary Commissioner for Civil Rights became responsible for investigating or initiating the investigation of cases involving the infringement of constitutional rights and initiating general or specific measures for their remedy.[730] A couple of years later in 1993, the Parliament adopted the Act on the Parliamentary Commissioner for Civil Rights[731] implementing the constitutional provisions. The Act coming into force on 1 January 1995 defined the legal status, competences, and procedures of the Parliamentary Commissioner for Civil Rights. The fact that almost six years passed after the amendment of the Constitution and some two years passed after the adoption of the relevant Act before the appointment of the Parliamentary Commissioner is probably explained by the lack of historical preliminaries, the resulting uncertainties and the workload then borne by the legislative organ.[732]

Both the Constitution and the implementing Act introduced a division of tasks between more ombudspersons following the Swedish model; however, the Hungarian Commissioners were responsible to the Parliament and not to the Government. The Parliamentary Ombudsman for the Rights of National and Ethnic Minorities (Minority Ombudsman) was responsible for investigating cases on the infringement of the rights of national or ethnic minorities.[733] The Minority Ombudsman was referred to in the Act on the Rights of National and Ethnic Minorities as well.[734] The 1993 Ombudsman Act provided that for the protection of certain fundamental rights, the Parliament may elect independent special ombudspersons.[735] The Parliament elected a General Deputy Ombudsperson,[736] and from 1992, the Commissioner for the Protection of Personal Data joined the common

[728] Act No. 31 of 1989 on the amendment of the Constitution of Hungary.
[729] Act No. 20 of 1949 on the Constitution of Hungary.
[730] ibid 32/B(1).
[731] Act No. 59 of 1993 on the Parliamentary Commissioner for Civil Rights.
[732] Parliamentary Commissioner's Office, *Ten Years of Ombudsmen 1995-2005* (2005) 4–5 <https://www.ajbh.hu/documents/14315/15713/ten_years_of_ombudsmen.pdf/22e08e42-0634-431e-85c0-b255aeb2bbbd> accessed 5 January 2019.
[733] Act No. 20 of 1949 on the Constitution of Hungary (n 729).
[734] Act No. 77 of 1993 on the Rights of National and Ethnic Minorities para 20(2).
[735] Act No. 59 of 1993 on the Parliamentary Commissioner for Civil Rights (n 731).
[736] ibid 2(1).

office.[737]According to the Data Protection Act, anybody could contact the Data Protection Commissioner if, in his or her opinion, he or she suffered injury in connection with the handling of his or her personal data or the exercising of his or her 'rights of access to data of public interest, or if a direct danger thereof' existed.[738] The latest special ombudsman in the row was established by an amendment of the 1993 Ombudsman Act in 2007 that also abolished the office of the General Deputy.[739] The Parliamentary Commissioner for Future Generations (Green Ombudsman) took up his office in May 2008. The designation might be misleading, since it may sound like being the guardian of children's rights; however, the rights of 'future generations' refers to rights established by the Act on Environment Protection.[740] According to the enabling legislation, the Green Ombudsman follows, estimates and controls the emergence of the provisions of the law ensuring the sustainability and improvement of the situation of environment and nature in order to ensure the protection of the fundamental right to a healthy environment.[741]

This divided ombudsman system evolved until 2011 when it was abolished and replaced by one single ombudsinstitution. The new constitution (The Fundamental Law of Hungary)[742] entering into force on 1 January 2012 endorsed the institution of the Commissioner for Fundamental Rights (CFR).[743] The CFR is the legal successor of the Parliamentary Commissioner for Civil Rights, the Parliamentary Commissioner for the Rights of National and Ethnic Minorities, and the Parliamentary Commissioner for Future Generations.[744] The Minority and the Green Ombudsman positions became deputy positions in the new system. The third specialised ombudsman position, the Data Protection Commissioner was terminated,[745] and replaced by a new separated independent authority, the National Authority for Data Protection and Freedom of Information.[746]

[737] Act No. 63 of 1992 on the Protection of Personal Data and the Publicity of Data of Public Interest ch IV.
[738] ibid 27(1).
[739] Act No. 145 of 2007 on the amendment of the Act No. 59 of 1993 on the Parliamentary Commissioner for Civil Rights.
[740] Act No. 53 of 1995 on Environment Protection.
[741] Act No. 59 of 1993 on the Parliamentary Commissioner for Civil Rights (n 731), Articles 27/A(1) and 27/B(1).
[742] The Fundamental Law of Hungary of 25 April 2011.
[743] The Fundamental Law of Hungary Article 30.
[744] ibid Article 16; Act No. 111 of 2011 on the Commissioner for Fundamental Rights Section 45(1).
[745] The Fundamental Law of Hungary (n 743) Article 17.
[746] ibid Article 17; Act No. 112 of 2011 on the Right of Informational Self-Determination and on Freedom of Information Article VI.

The constitutional changes involved the codification of a new establishing legislation for the new ombudsinstitution.[747] The Ombudsman Act[748] came into force on 1 January 2012. It describes the status, mandate, competences, and proceedings of the ombudsinstitution. The new legislation left the original character of the ombudsman unchanged; namely, the CFR is an independent institution protecting fundamental rights. Nevertheless, the transformation brought some significant changes as well. For instance, the institution has a broader mandate encompassing the supervision of the implementation of the CRPD, as well as NPM tasks under the OPCAT. Thus, the paradigm shift in 2012 and the legislative changes that have taken place since then have strongly shifted the ombudsinstitution from the classic model towards the human rights model.[749] The ombudsperson's proactivity in 2010 and 2011, and the later broadening of the institution's mandate led to the accreditation of the office of the Parliamentary Commissioner for Civil Rights as B-status NHRI in 2011, and the upgrading of its successor, the office of the CFR to A-status institution in 2014.

Since the establishment of the new ombudsinstitution, the dispute about the appropriate structure has intensified in the literature and among practitioners. Authors compare the old and the new Hungarian system along with examples of the monocratic one-person system (e.g. the new Hungarian system), the collective body structure (e.g. Austria), and the multiple ombudspersons system (e.g. the old Hungarian system or Sweden). Some scholars argue that the remodelling was necessary as the cooperation between the independent ombudspersons was not satisfactory, and there was no uniform procedure for or classification of complaints.[750] Others see dangers in the internal hierarchy between the CFR and his or her deputies and raise the question of the independence of the deputy status.[751] Indeed, it is the CFR who proposes their appointment, and he or she exercises the

[747] The Fundamental Law of Hungary (n 743) Article 30(5).
[748] Act No. 111 of 2011 on the Commissioner for Fundamental Rights (hereinafter referred to as Ombudsman Act).
[749] Lilla Berkes, 'Az Ombudsman Indítványozási Tevékenységének Háttere [The Background of the Ombudsman's Power of Motion to the Constitutional Court]' in Lilla Berkes and Lóránt Csink (eds), *Az ombudsmani rendszer és az alkotmánybíráskodás átalakulása [The transformation of the ombudsman system and the constitutional court]* (Pázmány Press 2015) 29.
[750] Máté Szabó, 'Changes in the Institutional Context of the Ombudsman System in the Republic of Hungary in 2012' [2012] Beijing Law Review 112 <https://file.scirp.org/pdf/BLR20120300005_29464610.pdf> accessed 5 December 2018; Albert Takács, 'Az Ombudsman-Eszme És Megvalósulásának Formái [The Ombudsman Idea and the Forms of Its Realisation]' [2015] Pro publico bono - Magyar közigazgatás: a Nemzeti Közszolgálati Egyetem közigazgatás-tudományi szakmai folyóirata 39.
[751] Csaba Cservák, 'Az Alapvető Jogok Biztosa Nemzetközi Összevetésben [The Commissioner for Fundamental Rights in International Comparison]' (2017) 13 Polgári Szemle 259.

employer's rights.[752] The deputies do not have autonomous investigative competences;[753] they are basically constitutional advisors.[754] At the same time, the selection of the deputies is based on their professional qualifications and the possibility of good cooperation between them and the Commissioner – instead of a political agreement between the different parties. Where political agreement is needed, there is the danger of appointing persons, who cannot harm or cannot work together smoothly.[755] Probably, the dispute cannot be decided as arguments can be listed in favour and against each solution. It might be useful to analyse the renewal of this constitutional institution in a broader context. According to the Venice Commission, the domestic specific situation determines the institutional arrangements. The structure may change at different stages of the democratic evolution of a state. The leading principle must be that the 're-organisation does not entail a lowering of the existing level of guarantees for the protection and promotion of rights in the fields of national minority protection, personal information protection and transparency of publicly relevant information'.[756] Since the transformation of the ombudsman system in Hungary was part of a tendency affecting and fading basically all checks and balances by violating their independent legal status, this institutional transformation raises the question of necessity and its effect on the independence of the ombudsinstitution.[757] The debate was coloured by an infringement procedure, in which the Court of Justice of the EU decided[758] that the way how the position of the Data Protection Commissioner was abolished, namely before the expiry of the Commissioner's mandate, breached EU law – precisely the independence requirement of the supervisory authority under Directive 95/46/EC[759]. Two years have passed since the abolishment, and the setting up of the new Data Protection Authority and the Data Protection Commissioner received an apology and compensation.[760]

[752] Ombudsman Act (n 748), Section 4(2).
[753] Majtényi (n 620).
[754] Takács (n 750) 57.
[755] Somody, 'Jogállami Paradoxon - A Sikeres Ombudsmani Jogvédelem Sajátosságai [Rule of Law Paradox - Features of the Successful Protection Provided by the Ombudsman]' (n 246).
[756] CoE Venice Commission, 'Opinion on the New Constitution of Hungary Adopted by the Venice Commission at Its 87th Plenary Session, Venice, 17-18 June 2011, CDL-AD(2011)016' (2011) para 115.
[757] Skype interview with Bernadette Somody, Senior lecturer, Faculty of Law, Eötvös Loránd University, 19 February 2019 (n 465).
[758] *Case C-288/12 Commission v Hungary [2014] ECR I-237*.
[759] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data Article 28(1).
[760] Máté Dániel Szabó and Fanny Hidvégi, 'Két Ítélet És Végrehajtásuk [Two Decisions and Their Implementation]' [2014] Fundamentum: az emberi jogok folyóirata 69.

Organisation

The Commissioner and the two Deputies function in the same building. The Office managed by the Secretary-General does the administrative and preparatory work related to the tasks of the Commissioner and the Deputies.[761] There are three thematic investigatory departments: (1) for General Inquiries and National Minority Rights, (2) for Equal Opportunities and Children's Rights, and (3) for Administrative Cases and Environmental Protection. The Department for Public Law monitors national legislation and drafts constitutional initiatives. The Department for the Protection of Public Interest and Client Service, the OPCAT-NPM Department, and the Department for International and Public Relations serve as outreach departments. An IT and Administration and the Management and HR Departments assist the work of the Office.[762]

The internal hierarchy – discussed above – has been faded as the activities of the CFR's Deputies are based on internal professional cooperation and coordination that has developed over the years. While in 2012 all competences were with the Commissioner, in 2013 he issued common recommendations with the Deputies, and since 2014 the Deputies need only to coordinate their work with the Commissioner. The Deputies monitor the enforcement of the dedicated fundamental rights, regularly inform the Commissioner on their findings, call his or her attention to the danger of violation of fundamental rights of a larger group of people, may propose *ex officio* proceedings, and initiate the Commissioner's procedure at the Constitutional Court.[763] The Commissioner must act if one of the deputies proposes 'to institute proceedings *ex officio* or to turn to the Constitutional Court'.[764] Since 2015, the Deputies have been managing the Unit for National Minority Rights and the Unit for Environment Protection.[765]

Selection, appointment, and tenure

[761] Ombudsman Act (n 748).
[762] Office of the Commissioner for Fundamental Rights (Hungary), 'Organisation of the Office of the Commissioner for Fundamental Rights' <http://www.ajbh.hu/documents/14315/130159/Organisation_20170317.pdf/92443341-9b8c-48f8-b20a-d0dcea905792> accessed 3 April 2019.
[763] Szabó (n 750) 116.
[764] Ombudsman Act (n 748) Section 3(3).
[765] 4/2014. (XII.23.) Instruction of the Commissioner for Fundamental Rights on the amendment of the 1/2012. (I.6.) Instruction on the Organizational and Operational Rules of the Office of the Commissioner for Fundamental Rights Article 30(2)(3).

The President of the Republic proposes persons for Commissioner for Fundamental Rights,[766] while the Commissioner makes a proposal for the Deputies.[767] Any Hungarian citizen can be elected as Commissioner provided holding a law degree, having the right to stand as a candidate in the elections of the Members of Parliament (being adult Hungarian citizen[768]), having outstanding theoretical knowledge or at least ten years of professional experience, having reached the age of thirty-five years, and having considerable experience in conducting or supervising proceedings concerning fundamental rights or in the scientific theory of such proceedings.[769] The Deputies need to prove their outstanding theoretical knowledge or at least ten years of professional experience, as well as considerable experience in proceedings affecting the rights of nationalities living in Hungary or future generations respectively.[770] Aiming at bias-free operation, the regulation is strict. It contains retroactive eligibility criteria as well. Thus, four years prior to the proposal of election as (Deputy) Commissioner membership in the (European) Parliament, the Government, local government body, nationality self-government, professional membership of the Hungarian Defence Forces, the law-enforcement organs, as well as the positions as President of the Republic, state secretary, permanent state secretary, deputy state secretary, mayor, deputy mayor, and employee or officer of a political party exclude the candidature.[771] Here, the difference between the Austrian and Hungarian institutions is sharp. The Commissioner's and the Deputies' legitimacy is the same: a qualified majority in the Parliament elects the three mandate-holders[772] for six years.[773] The Commissioner and the Deputies may be re-elected once.[774] Whereas the two-thirds majority rule seems to be a strong guarantee but what if the two-thirds is in one hand, as it was the case in 2012 when the new institution stood up.

The CFR and his or her Deputies may not be 'affiliated to any political party or engage in any political activity',[775] and cannot hold another state, local government, social or

[766] The Fundamental Law of Hungary (n 743) Article 9(3)(j); Ombudsman Act (n 748) Section 6(1).
[767] Ombudsman Act (n 748) Sections 4(1) and 7(1).
[768] The Fundamental Law of Hungary (n 743) Article XXIII(1).
[769] Ombudsman Act (n 748) Section 5(1)-(2).
[770] ibid Section 5(3)-(4).
[771] ibid Section 5(5).
[772] Lóránt Csink, 'Az Ombudsman [The Ombudsman]' in András Jakab and György Gajduschek (eds), *A magyar jogrendszer állapota [The state of the Hungarian legal system]* (MTA Társadalomtudományi Kutatóközpont 2016) 602.
[773] The Fundamental Law of Hungary (n 743) Articles 1(2)(e) and 30(3).
[774] Ombudsman Act (n 748) Sections 6(5) and 7(6).
[775] The Fundamental Law of Hungary (n 743) Article 30(3).

political mandate;[776] pursue 'any other gainful occupation, nor accept pay for their other activities, with the exception of scientific, educational, artistic activities, activities falling under copyright protection, or proof-reading or editing activities'.[777] After their election, the Commissioner and his or her deputies take an oath before the Parliament.[778]

Independence and immunity

The Ombudsman Act declares that the CFR is independent and may not be given instructions regarding his or her activities.[779] The Commissioner is allowed to inquire into any improprieties relating to constitutional rights, as well as to select the course of action that he or she deems to be the most appropriate. The Commissioner and his or her Deputies enjoy the same immunity as the members of the Parliament.[780] It means that during and after his or her mandate, the Commissioner and the Deputies 'shall not be impeached at court or at other authority for the vote cast or the fact or opinion communicated by him or her in the course of exercising and in connection with his or her mandate'.[781] Some criminal offences are exceptions of this immunity, including misuse of confidential data.[782] Criminal or misdemeanour procedure against the Commissioner and the Deputies 'can only be instituted or conducted, and a coercive measure under criminal procedure can only be applied […] with the prior consent of the National Assembly [Parliament]'.[783]

Funding

The Office of the CFR is a budgetary organ belonging to the central subsystem of the National Budget and having a separate chapter (Chapter IV) in the central budget.[784] It does not fall under the control and supervision of the Government.[785] Nevertheless, the Parliament reserves the right to reduce the total amount of expenditure and revenue estimates of budgetary organs, including the Office of the CFR.[786] The Office does not have third party contributions. The budget of the institution is around the same level (1300

[776] Ombudsman Act (n 748) Section 8(1).
[777] ibid Section 8(2).
[778] ibid Section 10(2).
[779] ibid Section 11.
[780] ibid Section 14(1)-(2).
[781] Act No. 36 of 2012 on the National Assembly Article 73(1).
[782] ibid Article 73(2).
[783] ibid Article 74(1).
[784] Ombudsman Act (n 748) Section 41(4).
[785] Act No. 195 of 2011 on the National Budget Article 1(11).
[786] Act No. 50 of 2018 on the Central Budget of Hungary in 2019 Article 18(3)(a).

million Hungarian Forint) each year; however, there is a continuous decrease in the last three years.

Functions

According to an earlier interpretation of the Hungarian Constitutional Court, 'parliamentary control bodies, including the parliamentary commissioners, are institutions of parliamentary scrutiny of today's parliamentarian system that are responsible for ensuring the rule of law and the protection of citizens' rights in the activities of the executive'.[787] The main task of the CFR is, indeed, to protect fundamental rights.[788] He or she does so by investigating any abuses of fundamental rights he or she comes aware of and by initiating general or special measures for their remedy.[789] As Csink points out, the Fundamental Law indicates a classic ombudsman function with two keywords: 'investigating' and 'initiating'.[790] Thus, the Hungarian Commissioners' task is not to control the public administration in the sense of making authorities responsible for their activities and omissions – like it will be the case with the Swedish institution. The administrative error is considered on that basis that it encompasses the infringement of a legal norm and violation of a fundamental right.[791] In the Hungarian legal system and literature, fundamental rights are equivalent to constitutional rights and rights guaranteed by international conventions. Thus, legality covers both good administration and the implementation of fundamental and human rights in general.[792]

According to the law, the Commissioner pays special attention to specific groups of the society, such as children, future generations, nationalities living in Hungary, and vulnerable social groups.[793] While the rights of nationalities living in Hungary and those of future generations have special attention through the functioning of the two dedicated deputies, children and other vulnerable groups were the subjects of the Commissioner's 'Human dignity' projects between 2008 and 2013.[794]

[787] Hungarian Constitutional Court, Decision No. 17/1994 (III.29.).
[788] The Fundamental Law of Hungary (n 743) Article 30(1).
[789] ibid Article 30(2).
[790] Csink (n 772) 608.
[791] Cservák (n 751).
[792] Paunio (n 375).
[793] Ombudsman Act (n 748) Section 1(2).
[794] Office of the Commissioner for Fundamental Rights, 'Projects' <http://www.ajbh.hu/en/web/ajbh-en/projects> accessed 13 December 2018; Máté Szabó, 'Activities of the Commissioner for Fundamental Rights Regarding Vulnerable Groups in Hungary' (2013).

The CFR investigates a violation of fundamental rights both at the request of any person and *ex officio*.[795] Anyone can request the Commissioner's procedure. The Ombudsman Act sets admissibility criteria, in any case. The complainant needs to exhaust all available administrative, legal remedies [796] and turn to the Commissioner within one year from the notification of the administrative decision of the final instance.[797] In the course of his or her proceedings, the Commissioner and his or her colleagues are governed by the principles of independence, professionalism, objectivity, impartiality, flexibility, and must conduct investigations within a reasonable time and take into account the interests of the complainant.[798] In line with the SCA General Observation saying that the institutions must not only monitor, investigate and report on the human rights situation in the country but should also undertake rigorous and systematic follow up activities to promote and advocate for the implementation on its recommendations and findings,[799] the Office of the CFR conducts so-called 'follow-up investigations' (*utóvizsgálatok*) that are renewed investigations into the implementation of the Commissioner's recommendations. There is no specific rule regarding conducting a follow-up investigation; it depends on the administrators' individual work method and plan.

Where to put the emphasis within the mandate depends on the ombudsperson's consciousness as well. Since the establishment of the office, the ombudsman has a broad toolbox of promotional activities. The first ombudsperson, Katalin Gönczöl (1995-2001), actively lived up with these opportunities that was rather novel in the early 90s. She interpreted maladministration in a broad sense, her office visited closed institutions, promoted economic, social and cultural rights, and conducted comprehensive investigations.[800] Despite this proactive beginning, the functioning of the institution was not deliberated enough, different functions and competencies mixed and has been mingling since then.[801] The present ombudsman in office, László Székely (2013-2019), has changed the profile in a declared way.[802] Moving away from the maladministration focused

[795] Ombudsman Act (n 748) Section 18(4).
[796] ibid Section 18(1).
[797] ibid Section 18(5).
[798] 3/2015. (XI.30.) Instruction of the Commissioner for Fundamental Rights on the professional rules and methods of the investigations of the Commissioner for Fundamental Rights ch I.
[799] SCA General Observations (n 142) G.O. 1.6.
[800] Skype interview with Bernadette Somody, Senior lecturer, Faculty of Law, Eötvös Loránd University, 19 February 2019 (n 465).
[801] Bernadette Somody, *Az Ombudsman-Típusú Jogvédelem [Ombudsman-Type Protection]* (ELTE Ötvös Kiadó 2011).
[802] Skype interview with Bernadette Somody, Senior lecturer, Faculty of Law, Eötvös Loránd University, 19

watchdog role that was represented by his predecessor, Máté Szabó (2007-2013), Székely is instead the people's advocate (*a nép ügyvédje*), handling more individual complaints. As Csink points out, four factors indicate this role change: the number of complaints, the number of *ex officio* investigations, the number of projects, and the number of applications to the Constitutional Court.[803]

	2012	2013	2014	2015	2016	2017	2018
the number of complaints / solved	7049 5346	6977 7757	5471 5454	8240 5440	8399 7426	6058 5003	4990 3929
the number of *ex officio* investigations	210	109	87	53	118	148	247
the number of projects	4	3	0	0	0	0	0
the number of applications to the Constitutional Court	37		4		5	2	0

Table 4: Indicators of changing ombudsman role

Despite the declared people's advocate role, after some growth in the number of registered individual complaints, it has been decreasing by now. Nevertheless, further circumstances influence the change in the number of complaints on the one hand, and the numbers do not show the number of those 'substantive cases' that required investigations. It is also visible that the current ombudsperson conducted less *ex officio* investigations in his first years; by now, this number has been increasing. Apparently, the Commissioner in office has no projects on his agenda and does not turn to the Constitutional Court that often. Against the working method of the previous ombudsman, the current ombudsperson does not ensure proactivity by initiating projects but on *ex officio* investigations, whereby the input very often comes from the investigator administrator of the given case. Since the Ombudsman's profile change has happened consciously, the question arises: why? Why did the ombudsman become from proactive to reactive, almost passive – in many cases? Notably, in light of a rather broad mandate.

The CFR is declared to promote 'the enforcement and protection of fundamental rights' by engaging in social awareness-raising and various information activities.[804] Awareness-

February 2019 (n 465).
[803] Csink (n 772).
[804] Ombudsman Act (n 748) Section 2(5).

raising activities seem to be rather ad-hoc in the Commissioner's practice, for example, the colleagues of the Commissioner's Office are regular participants of the 'civil village' of the Sziget Fesztivál, where they raise awareness on fundamental rights by disseminating information on human rights topics and the activity of the ombudsinstitution. The Office has outreach county visits as well.

In its annual report from 2005, the Minority Ombudsman announced its connection to the international Equinet project.[805] Thus, the institution became Equinet member, and as a legal successor, the Ombudsman Office is still a member of the organisation.[806] In Hungary, another institution, the Equal Treatment Authority is the dedicated Equality Body.[807] The majority of cases concerning equal treatment land with the Authority, the Commissioner, or better to say, the Deputy Commissioner for the Rights of National Minorities handles predominantly cases concerning minorities' rights. Despite this modest competence, the Commissioner's Office is an active Equinet member, especially concerning Roma issues, and participates in the Equinet Working Groups on Policy Formation, Gender Equality and Communication Strategies and Practices.[808]

In the course of its fight against corruption and in order to increase public confidence in the functioning of state organs, the Parliament adopted the Act on Complaints and Public Interest Disclosures.[809] The CFR has been authorised to establish and operate an electronic system handling and registering public interest disclosures. Thus, as of 1 January 2014, public interest disclosures may also be submitted through the secure electronic system operated by the CFR on the website of the Office.[810] The number of public interest disclosures submitted through the system stagnates around 300 (233 in 2014, 347 in 2015, 313 in 2016, 332 in 2017, 300 in 2018).

As of 1 February 2015, in accordance with the stipulations of the Act on National Security Services,[811] the CFR gained new competencies: he or she may examine the National Security Service review procedure in order to establish the violation of fundamental rights

[805] 'Annual Report of the Parliamentary Commissioner for National and Ethnic Minority Rights 2005' para 3.3 <http://www.kisebbsegiombudsman.hu/hir-270-annual-report-of-the-parliamentary.html> accessed 8 February 2019.
[806] 'Equinet Members - Hungary' <http://www.equineteurope.org/-Hungary-> accessed 8 February 2019.
[807] Act No. 125 of 2003 on Equal Treatment and Promotion of Equal Opportunities Article 13.
[808] Skype interview with Tamás Kádár, Deputy Director, Equinet, 8 February 2019.
[809] Act No. 165 of 2013 on Complaints and Public Interest Disclosures.
[810] ibid Articles 4-10.
[811] Act No. 125 of 1995 on National Security Services Article 72/C.

regarding the ordering or conducting of the review procedure.[812] In 2015, 2016, and 2017 three, in 2018, zero complaints were submitted to the CFR in this regard.

Since the remodelling of the ombudsinstitution system, the Commissioner has the mandate to act as NPM under the OPCAT[813] and to supervise the implementation of the CRPD,[814] however, not in the capacity as NMM but by conducting *ex officio* proceedings. The Commissioner functions as a fundamental rights database as well, since he or she needs to survey and analyse the situation of fundamental rights in Hungary and prepare statistics on fundamental rights violations[815] that are published in the Office's website.

Competences and powers

While the complainant can be anyone, the organs against which the Commissioner's proceeding can be initiated is restricted. Organs performing public duties can be subjects of the Commissioner's investigation. The Ombudsman Act contains the exhaustive list of organs performing public duties, such as public administration organs, local governments, nationality self-governments, public bodies with mandatory membership, the Hungarian Defence Forces, law enforcement organs, any other organs with public administration competence, acting in this capacity, investigation authorities or investigation organs of the Prosecution Service, notaries public, bailiffs at county courts, independent bailiffs, or organs performing public services.[816] The Act specifies which organs perform public services: organs performing state or local government tasks and/or participating in the performance thereof, public utility providers, universal providers, organisations participating or acting as an intermediary in granting state or European Union subsidies, organisations performing activities described in a legal regulation as public service, and organisations performing a public service which is described in a legal regulation as mandatory.[817]

The Act names those organs as well that are excluded from the Commissioner's investigative competences. Thus, he or she cannot conduct inquiries into the activities or omissions of the Parliament, the President of the Republic, the Constitutional Court, the

[812] 3/2015. (XI.30.) Instruction of the Commissioner for Fundamental Rights on the professional rules and methods of the investigations of the Commissioner for Fundamental Rights (n 798) Sections 62-65.
[813] Ombudsman Act (n 748) Section 2(6).
[814] ibid Section 1(3).
[815] ibid Section 2(1).
[816] ibid Section 18(1).
[817] ibid Section 18(2).

State Audit Office, the courts, and the Prosecution Service.[818] The Commissioner has no competence for inquiry if the complainant contests the content of a judicial decision or court proceedings, or if the complainant started judicial proceedings[819] or another party in the case has started judicial proceedings.[820] Nevertheless, if the activity or omission of the organ not qualifying as authority gravely infringes the fundamental rights of a larger group of natural persons, the CFR may proceed exceptionally.[821] The Ombudsman cannot conduct inquiries into private law entities unless their operation gravely infringes the fundamental rights of many citizens.[822] If the Commissioner is not competent in the given case, he or she assists the complainant by transferring the petition to the competent organ.[823]

In the course of his or her inquiries, the Commissioner may request any data, participate in a public hearing, conduct on-site inspections,[824] during that he or she may enter premises, inspect all documents, and hear any persons.[825] On-site inspections are restricted in as much as they concern premises and documents belonging to the Hungarian Defence Forces, the military national security services, law-enforcement organs, organs of the National Tax and Customs Administration performing customs authority tasks, the Directorate General of Criminal Affairs of the National Tax and Customs Administration.[826] If the Commissioner considers it necessary to have access to such premises and documents, he or she may request the competent minister to have those documents inspected and inform him or her on the outcome of the inquiry.[827] Otherwise, the competent ministers may determine in a decree the rules governing the Commissioner's entry, stay and exit into, in and from the zones serving the operation of the Hungarian Defence Forces, military national security services, law-enforcement organ, and organs of the National Tax and Customs Administration.[828] All organs under the Commissioner's scrutiny, such as the (head of the) authority subject to inquiry and its employees, the head

[818] ibid Section 18(3).
[819] ibid Section 18(7).
[820] Szabó (n 750) 119.
[821] Ombudsman Act (n 748) Section 39.
[822] Szabó (n 750) 114.
[823] Ombudsman Act (n 748) Section 20(5).
[824] ibid Section 21(1).
[825] ibid Section 22(1).
[826] ibid Sections 22(2) and 23.
[827] ibid Section 23(7).
[828] ibid Section 43(1)(2)(3).

of the supervisory organ of the authority subject to inquiry,[829] shall cooperate with the Commissioner for Fundamental Rights. The persons or organisations not qualifying as an authority, as well as the authorities not affected by the inquiry, are obliged to cooperate.[830] On-site inspections cannot be obstructed in substance.[831]

The Commissioner works closely with other national authorities during his or her inquiries and when suggesting measures. In the case of unlawful order of coercive measures, the Commissioner informs the competent prosecutor through the Prosecutor General.[832] He or she can initiate through the Prosecutor General the competent prosecutor's proceedings for the supervision of legality.[833] If there is a well-founded suspicion of having been committed a crime, a regulatory offence or a disciplinary offence, the Commissioner may initiate criminal, regulatory offence or disciplinary proceedings.[834] In the case of the judicial review of an administrative decision relating to the state of the environment, the CFR may participate as an intervener.[835] If the Commissioner notices impropriety related to the protection of personal data or the right of access to data of public interest, he or she is obliged to report it to the National Authority for Data Protection and Freedom of Information.[836] The Commissioner can propose to make law or issue a public law instrument if he or she discovers superfluity or ambiguity of a legal rule.[837]

Similar to other ombudsinstitutions, the Commissioner has strong investigative powers, but rather weak opportunities for action.[838] Closing his or her inquiry, the Commissioner addresses a recommendation to the supervisory organ of the authority subject to the inquiry[839] and initiates redress.[840]

The Commissioner is one of those entities that may initiate the review of legal rules as to their conformity with the Fundamental Law[841] and with international treaties,[842] as well as

[829] ibid Section 25(1).
[830] ibid Section 26(1).
[831] ibid Section 22(3).
[832] ibid Section 24(2).
[833] ibid Section 33(1).
[834] ibid Section 35(1).
[835] ibid Section 33(3).
[836] ibid Section 36.
[837] ibid Section 37.
[838] Bernadette Somody, 'Ombudsman' in András Jakab and Balázs Fekete (eds), *Internetes Jogtudományi Enciklopédia [Online Legal Science Encyclopedia]* (2017) para 32.
[839] Ombudsman Act (n 748) Section 31(1).
[840] ibid Section 32(1).
[841] Act No. 151 of 2011 on the Constitutional Court Section24(2).
[842] ibid Section 32(2).

the interpretation of the Fundamental Law[843] at the Constitutional Court.[844] An ex-post control of norms is especially justified if there is a constitutional concern regarding the implementation of constitutional rights or principles, the rights of persons under special protection are violated, the violation is striking, or a large number of persons is affected by the violation.[845] Beyond submitting own petitions, the Commissioner may also transfer civil petitions to the Constitutional Court.[846] It was the Venice Commission, who proposed the maintenance of 'some limited elements of *actio popularis*' by having 'an indirect access mechanism through which individual questions would reach the Constitutional Court for adjudication […]'.Taking into account the Hungarian constitutional tradition and legal culture and the previous practice of the ombudsinstitution, the Venice Commission proposed the Ombudsman in this intermediary role.[847] Some authors see huge potential in this competence and attach importance to it. Namely, due to the re-regulation of the law on the Constitutional Court[848] coming into force on 1 January 2012, the possibility of initiating the post norm control of the Constitutional Court by anyone, the so-called *actio popularis,* disappeared from the competences of the Court, or better to say from the rights of citizens. Thus, the Ombudsman's role in this context grades up. Considering that mainly political actors can initiate the Constitutional Court's action, we can state that the CFR is the key to the fulfilment of a constitutional function.[849] This CFR competence became independent from other competencies or actions, and it does not relate to concrete investigations or fundamental rights anomalies. It became especially obvious with the Ombudsman's motion to the Constitutional Court in March 2012 requesting the Court 'to examine whether the Transitional Provisions to the Fundamental Law comply with the requirements of the rule of law'.[850] The Constitutional Court accepted the motion and annulled the transitional provisions based on the Commissioner's petition. Unfortunately, this power is rarely exercised recently – as showed in the table above.[851] The current Commissioner often refers to concrete decisions of the Constitutional Court and relies on

[843] ibid Section 38(1).
[844] Ombudsman Act (n 748) Section 2(3).
[845] 3/2015. (XI.30.) Instruction of the Commissioner for Fundamental Rights on the professional rules and methods of the investigations of the Commissioner for Fundamental Rights (n 798) Article 56(2).
[846] Szabó (n 750).
[847] CoE Venice Commission, 'Opinion on the New Constitution of Hungary Adopted by the Venice Commission at Its 87th Plenary Session, Venice, 17-18 June 2011, CDL-AD(2011)016' (n 756) para 66.
[848] Act No. 151 of 2011 on the Constitutional Court (n 841).
[849] Skype interview with Bernadette Somody, Senior lecturer, Faculty of Law, Eötvös Loránd University, 19 February 2019 (n 465).
[850] Hungarian Constitutional Court, Decision on the Annulment of certain provisions of the Transitional Provisions to the Fundamental Law, No. 45/2012. (XII. 29.).
[851] Parliamentary Commissioner's Office (n 732) 6.

the legal explanations of the constitutional body in his inspection reports and position statements. At the same time, he does not turn directly to the Constitutional Court for ex-post norm control or asking for interpretations.[852] Nevertheless, he involved himself in a recent political issue as he formulated a motion for the interpretation of the Hungarian Constitution that related to the execution of migration quotas. The political shade of the issue is that previously the constitutional amendment on the same subject was not passed through the Parliament. Based on the Commissioner's motion, the Court declared the priority of the Fundamental law of Hungary over the rules of the EU when declaring that '[the] constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood'.[853]

The Commissioner may 'give an opinion on the draft legal rules affecting his or her tasks and competences' and 'make proposals for the amendment or making of legal rules affecting fundamental rights and/or the expression of consent to be bound by an international treaty'.[854] We see a decreasing tendency in the number of such procedures. While the previous Commissioner made 117 legislative proposals in 2012, in 2018 this number was only 40 (see the tendency: 2013: 90, 2014: 48, 2015: 41, 2016: 55, 2017: 46).

NPM mandate

In 2008, after having participated in an international conference in France and familiarised himself with the French NPM example, the Hungarian Commissioner proposed the designation of his office as NPM to the Hungarian decision-makers.[855] The Act promulgating the OPCAT in Hungary introduced the Chapter on the NPM tasks into the Ombudsman Act.[856] The NPM Office stood up in January 2015. The Commissioner authorises at least eleven staff members, who are experts holding a graduate degree, having knowledge in the field of treatment of persons deprived of their liberty or having at least

[852] ibid 34–35.
[853] 'Hungarian Constitutional Court, Decision on the Interpretation of Article E)(2) of the Fundamental Law, No. 22/2016. (XII. 5.)' <http://public.mkab.hu/dev/dontesek.nsf/0/1361afa3cea26b84c1257f10005dd958/$FILE/EN_22_2016.pdf> accessed 28 February 2019.
[854] Ombudsman Act (n 748) Section 2(2).
[855] Katalin Haraszti M., 'A "Nemzeti Megelőző Mechanizmus" Mint a Kínzás És Más Kegyetlen, Embertelen Vagy Megalázó Bánásmód Megelőzésének Eszköze [The NPM as Tool for Preventing Torture and Other Cruel, Inhuman or Degrading Treatment]' (2009) 20 Acta Humana 3.
[856] Act No. 143 of 2011 on the Promulgation of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Article 9.

five years of professional experience to perform the tasks related to the NPM mandate.[857] In order to ensure the highest competency possible, the Minority Ombudsman shall propose one person, and other members should hold a degree in law, medicine, and psychology.[858] There are no provisions concerning the cooperation of the NPM Office with the Subcommittee on Torture.

The Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as Subcommittee) undertook its first regular visit to Hungary from 21 to 30 March 2017. The Subcommittee addressed observations and recommendations regarding the structure and independence, as well as the human and financial resources of the Commissioner's Office.[859] The Subcommittee stressed that while it belongs to the operational autonomy of an NPM to recruit its own staff, the Hungarian NPM is not able to recruit medical personal due to a 'legal caveat' that excludes doctors from holding civil servant status.[860]

Regarding funding, the Subcommittee determined that no sufficient resources have been allocated to the CFR that would enable it to perform its additional NPM role.[861] It emphasised that an NPM's funding 'should be provided through a separate line in the national annual budget referring specifically to the NPM (see CAT/C/57/4 and Corr.1, annexe, sect. III) and not through the general budget of the Office of the CFR'.[862] The Subcommittee formulated a recommendation regarding the more direct and independent engagement of the CFR in its capacity as NPM with CSOs, including through 'increased participation in mechanism visits, internal training, outreach activities, report-writing and dialogue with the domestic authorities'.[863]

However, the NPM Office integrated well in the CFR Office, and it gets all the administrative support from the CFR Office,[864] the NPM Office and other units of the ombudsinstitution would need better coordination in order to avoid parallel investigations.

[857] Ombudsman Act (n 748) Section 39/D(3).
[858] ibid Section 39/D(4).
[859] UN Subcommittee on Prevention of Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, 'Visit to Hungary Undertaken from 21 to 30 March 2017: Observations and Recommendations Addressed to the National Preventive Mechanism'.
[860] ibid 21.
[861] ibid 22.
[862] ibid 24.
[863] ibid 29.
[864] Interview with Gergely Fliegauf, Head of NPM Office, Office of the Commissioner for Fundamental

Cooperation activities

According to the Ombudsman Act, the CFR cooperates with organisations and other national institutions aiming at the promotion of the protection of fundamental rights.[865] The forms of cooperation with civil society are diverse. Civil society organisations can be complainants; they can submit petition initiating the Commissioner's procedure in relation to the Constitutional Court; they can co-organise and co-host events with the ombudsinstitution, or work in projects together.[866] In 2010, the Parliamentary Commissioner for Civil Rights established a standing advisory group, the Civil Consultative Body in order to make use of the skills, high-level theoretical knowledge, and experiences of specialists.[867] From 2014, the consultative body transformed and was filled up with experts in the field of the treatment of persons deprived of their liberty in order to assist the Commissioner in the fulfilment of its NPM tasks.[868] In 2012, a new position, the Civil Contacts Coordinator was established within the ombudsman office, aiming at the coordination of all interactions between the Commissioner and civil organisations.[869] By today, this function has been wasted. There are well-working relationships with CSOs; only the in-house coordination is missing.

The annual reports of the CFR have traditionally a chapter on the press coverage of the Office that illustrates in detail the appearances of the CFR (both the Commissioner and the Deputies) in all kinds of media platforms. Despite the several mentioning of the CFR (4209 in 2018),[870] the current Hungarian Commissioner is not a media player; he is less known among Hungarian people.

The CFR presents an annual report on his or her activities to the Parliament until 31 March of the calendar year following the reporting year.[871] The provisions are not that strict

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Rights, Budapest, 13 March 2019.
[865] Ombudsman Act (n 748) Section 2(5).
[866] Tímea Csikós and László Tóth, 'Mediation and Partnership – Cooperation with Civil Society Organizations in the New Type of Practice of the Commissioner for Fundamental Rights' (2012) <http://www.eoi.at/d/Sonderberichte - Broschueren/Ungarn/hu-spec-OCFR-Mediation and Partnership - Cooperation with Civil Society Organizations.pdf> accessed 5 December 2018.
[867] Office of the Commissioner for Fundamental Rights, 'Report on the Activities of the Commissioner for Fundamental Rights of Hungary in the Year 2012' (2013) 147.
[868] 3/2014. (IX.11.) CFR directive on the Civil Consultative Board and its rules of procedure.
[869] Office of the Commissioner for Fundamental Rights, 'Report on the Activities of the Commissioner for Fundamental Rights of Hungary in the Year 2012' (n 867) 146.
[870] Alapvető Jogok Biztosának Hivatala, 'Beszámoló Az Alapvető Jogok Biztosának És Helyetteseinek Tevékenységéről 2018 [Report on the Activities of the Commissioner for Fundamental Rights and His or Her Deputies 2018]' (2019) 51.
[871] The Fundamental Law of Hungary (n 743) Article 30(4); Ombudsman Act (n 748) Section 40(1).

towards the Parliament when saying that during the year, 'the Parliament shall debate the report'.[872] In the absence of consequences of non-debate, the Parliament happened to fail to debate the Commissioner's report.[873]

The enabling legislation contains provisions relating to the Commissioner's cooperation at the international level. He or she has the duty to 'participate in the preparation of national reports based on international treaties relating to his or her tasks and competences' and otherwise monitors and evaluates the enforcement of these treaties.[874] While the Office of the Commissioner does not participate in the first cycle of the UPR, it did so in the second cycle by highlighting fundamental rights issues having been raised in the practice of the ombudsinstitution.[875]

NHRI accreditation

According to Cardenas, it was the UPR pressure in 2011 that made the Parliamentary Commissioner for Civil Rights submit its NHRI-accreditation application to the OHCHR in October 2010.[876] In reality, the NHRI accreditation was the ombudsperson's entirely personal decision after having familiarised himself from the literature with the category of NHRIs[877] and the procedure of accreditation[878]. The application was motivated by the hope of an added prestige and protection for the institution that an NHRI status may mean.[879] Despite the ongoing adoption of the new constitution and the reconstruction of the ombudsman system, the SCA considered the applicant institution according to its enabling legislation in force in 2011. The SCA made a proposal for B-status and urged the Hungarian ombudsman to comply with the Paris Principles.[880] The second accreditation of the ombudsman office took place in November 2013. According to Article 10 of the ICC

[872] Ombudsman Act (n 748) Section 40(3).
[873] Interview with Máté Szabó, Hungarian Parliamentary Commissioner for Fundamental Rights (2007-2013), Berlin, 18 May 2010 (n 546).
[874] Ombudsman Act (n 748) Section 2(4).
[875] Summary prepared by the OHCHR in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Hungary, 18 February 2016, A/HRC/WG.6/25/HUN/3.
[876] Cardenas (n 626) 259.
[877] Veronika Haász, 'Nemzeti Emberi Jogi Intézmények Európában – Pódiumbeszélgetés [National Human Rights Institutions - Podium Discussion]' (2010) 15 Európai Tükör 102.
[878] Interview with Máté Szabó, Hungarian Parliamentary Commissioner for Fundamental Rights (2007-2013), Berlin, 18 May 2010 (n 546).
[879] Júlia Sziklay, 'Az Ombudsman Nemzeti Emberi Jogi Intézményi (NHRI) Státusa [The NHRI Status of the Ombudsman]' [2011] Nemzet és Biztonság 86.
[880] The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 23-27 May 2011' (n 574).

Statute, the SCA considered the application of the new institution, the Office of the CFR as first application. It encouraged the Commissioner to continue its advocacy efforts for amendments to its enabling law and recommended to the ICC that consideration of the application be deferred to its second session in 2014 considering that draft amendments to the Ombudsman Act had been initiated with reference to the CFR's new functions as NPM. With a legislative amendment in 2013,[881] some declarations were incorporated in the Ombudsman Act, presumably with the purpose to have higher chances to the A status.[882] In October 2014, the GANHRI granted A-status to the Hungarian ombudsinstitution, while formulating further recommendations, including:

- advertising vacancies for the posts of Commissioner and Deputies widely and under broad consultations;
- continuing the CFR's interaction with the international human rights system;
- ensuring that all relevant information about its practices and procedures are easily accessible, and in relevant languages on its website (as interestingly it was available only in English, raising the question how much it was a window exercise);
- monitoring developments in international human rights law;
- promoting state participation in advocacy for and the drafting of international human rights instruments and taking a strategic approach in recommending ratification of or accession to international instruments.[883]

So even if the institution was reformed in the spirit of the Paris Principles, growing up to the NHRI mandate takes time. The re-accreditation of the institution is foreseen in November 2019, while the election of the new Commissioner and the Minority Deputy in September.

Beyond investigating maladministration, the competences of the Hungarian Commissioner, such as sending a request to the Constitutional Court and to the prosecutor's office or submitting legislative proposals to the parliament, as well as undertaking NPM tasks and other international human rights law-related activities point beyond the mandate of a classic ombudsinstitution – at least on paper. At the same time, some functions are

[881] Act No. 223 of 2013 amending Act No. 111 of 2011 on the Commissioner for Fundamental Rights and Act No. 151 of 2011 on the Constitutional Court.
[882] Csink (n 772) 603.
[883] The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 27-31 October 2014' para 2.2.

featuring the human right model, which are not entirely fulfilled by the Hungarian ombudsinstitution. Extensive awareness-raising on human rights, in-depth research on human rights topics and compilation of specific reports to the parliament, to the international human rights monitoring mechanisms, and the public are recently missing in the practice of the institution.

The Hungarian institution is an excellent example of how much depends on the personality of the ombudsperson considering the fulfilment of the mandate and going proactively beyond it. During the last era, the proactivity was tangible. From building up the new office and taking up the new NPM task through extensive project work and cooperation with the civil society and setting up a Civil Consultative Body till the accreditation of the office as NHRI, the ombudsinstitution and its leading person have shown lots of efforts.[884] The present ombudsperson applies the tools of a proactive human rights commissioner in a modest way. Even the classic functions remain almost invisible for the wider public – presumably because of political reasons. The political influence can usually be reflected in an ombudsperson's actions and statements. While analysing actions (whether they have political angel, and if so, what kind of) is easier, measuring passivity (i.e. reluctance to act) is more complicated. It is a methodological question that goes beyond the scope of this dissertation. Still, we can assume that ombudsinstitutions have to serve vulnerable people and investigate rights violations even without input, i.e. complaints.[885] Therefore, their silence, especially in politically coloured cases, might raise the suspicion of political pressure. The migration crisis in Hungary in 2015 that culminated in riots at the Southern borders with Serbia between migrants and the police is a good example. While news portals reported about injuries affecting journalists, migrants, and police officers,[886] the Hungarian police issued a press release stating that the police had not arrested and beaten journalists, the measures were proportionate, and therefore it has not investigated the case.[887] The press was loud from several similar events, and the CFR, the advocate for human rights, remained silent.

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[884] Szabó (n 750) 117.
[885] Skype interview with Bernadette Somody, Senior lecturer, Faculty of Law, Eötvös Loránd University, 19 February 2019 (n 465).
[886] index, 'Több Külföldi Újságírót Is Megvertek És Elvittek Röszkén a Rendőrök [Several Foreign Journalists Were Beaten and Taken by Police in Röszke]' (2015) <https://index.hu/belfold/2015/09/17/gumibottal_vertek_fejbe_a_lengyel_ujsagirot_roszkenel_aztan_orizetbe_vettek/> accessed 1 March 2019.
[887] Rendőrség [Police], 'Közlemény 15 Óra 15 Perc [Announcement 15 o'clock 15 Minutes]' (2015) <http://www.police.hu/hirek-es-informaciok/legfrissebb-hireink/hatarrendeszet/kozlemeny-15-ora-15-perc>

3.1.3 The Commissioner for Human Rights – Poland

Surveys indicate that the ombudsinstitution in Poland (*Rzecznik Praw Obywatelskich*) is one of the best recognised and trustworthy institutions of the country[888] and a key entity in human rights protection.[889] The Office of the Commissioner for Human Rights (CHR) fulfils the task of ombudsinstitution, NPM, NHRI, Equality Body, and monitors the implementation of the CRPD. According to the Polish Constitution, it is a fundamental right 'to apply to the Commissioner for Human Rights for assistance in the protection of one's freedoms or rights infringed by organs of public authority'.[890]

History and legal background

Poland was the first ex-communist European country establishing an ombudsinstitution. The institution of the Commissioner for Civil Rights Protection (or Human Rights Defender or Commissioner for Human Rights) was created yet during the communist regime in 1987, but successfully survived the transition to plural democracy after 1989.[891] The institution was established in order to safeguard citizens' rights and freedoms guaranteed by the constitution and other legal acts and infringed by public authorities.[892] But first, it had to face issues stemming from the heritage of the previous legal order causing defects in the new democratic system. Such as the instability of law (e.g. old constitution in force, rapidly changing laws) and the inconsistent application of regulations by public officials.[893] Beyond that, it was difficult to change the mentality and mindset shaped by the totalitarian regime both among citizens and public officials. Owing to the political and social circumstances, the Polish ombudsinstitution had to face similar difficulties to that of its Latin American counterparts. Thus, the first ombudsperson, Ewa Letowska (1987-1992) had the mission to educate Polish people about the rule of law, the separation of powers, namely the basics of the democratic state structure, and the place of the ombudsinstitution in it. Poland is an excellent example of increasing the role of individual rights step by step and empowering individuals how to enforce their rights.

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accessed 1 March 2019.

[888] Aleksandra Gliszczynska-Grabias and Katarzyna Sekowska-Kozlowska, 'NHRI in Poland: As Good as It Gets?' in Jan Wouters and Katrien Meuwissen (eds), *National Human Rights Institutions in Europe* (Intersentia 2013) 80.

[889] ibid 68.

[890] The Constitution of the Republic of Poland of 2 April 1997, Article 80.

[891] Howard Elcock, 'The Polish Commissioner for Citizens' Rights Protection: Decaying Communism to Pluralist Democracy Through An Ombudsman's Eyes' (1997) 75 Public Administration 359, 359.

[892] Reif, 'Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman' (n 165) 286.

[893] Elcock (n 891).

Letowska's successor, Tadeusz Zieliński (1992-1996) was chairman of the human rights commission in the Senat (the upper house of the parliament) and an expert of labour and social security.[894] Scholars and authors consider the evolution of the Polish ombudsinstitution and its role in the democratisation process as a success and see Poland as a model for the development of an ombudsinstitution in a new democracy.[895] Whether the institution still fulfils this role, will be analysed below. As said, the CHR is a constitutional institution; its organisation and tasks are defined in a Statute.[896]

Organisation

The Office assists the Commissioner in fulfilling its mandate. It is managed by the Commissioner [897] and represented by the General Director in civil law matters, property law, budgetary, administrative and employment relationships.[898] The Commissioner may appoint up to three deputies and determine their responsibilities,[899] as well as establish local representatives upon the Sejm's approval.[900] Beyond the headquarter in Warsaw, local representatives (regional offices) in Gdańsk, Katowice and Wrocław, and citizen information points in Bydgoszcz, Częstochowa, Kielce, Koszalin, Kraków, Lublin, Łódź, Poznań, Słupsk, Szczecin, and Wałbrzych are functioning ensuring a geographically balanced representation of the ombudsinstitution in the country of 38 million people (2017). The Office undertakes monthly visits to the different regions of the country as well. In 2017, the Commissioner visited 58 towns in 9 voivodeships.[901]

Within the Office, there are also expert committees and social councils.[902] Expert committees specialise in the protection and promotion of rights of one specific vulnerable group of the society. At the moment expert committees function on people with disabilities, on deaf persons, on elderly people, on health, on mental health protection, on migrants, on

[894] Vangansuren (n 606) 13.
[895] Finkel (n 432).
[896] The Statute of the Office of the Commissioner for Human Rights, Ordinance No. 45/2015 of the Commissioner for Human Rights of 19 November 2015.
[897] ibid, Annex, Article 2.
[898] ibid, Annex, Article 5.
[899] Act of 15 July 1987 on the Commissioner for Human Rights, Article 20.
[900] ibid, Article 22.
[901] Commissioner for Human Rights (Poland), 'Summary of the Report on the Activity of the Commissioner for Human Rights in 2017, with Comments on the Observance of Human and Civil Rights and Freedoms' 75 <https://www.rpo.gov.pl/sites/default/files/Summary_2016_EN.pdf> accessed 8 January 2019.
[902] The Statute of the Office of the Commissioner for Human Rights, Ordinance No. 45/2015 of the Commissioner for Human Rights of 19 November 2015 (n 896), Annex, Article 8(2).

homeless people, and on the NPM role.[903] These expert committees monitor the legislative processes, whether equal treatment prevails. They have an outstanding role in formulating legislative proposals and recommendations on law amendments, as well as drafting speaking points for the Commissioner's public appearances. The Social Council is an outreach body of the Commissioner since it maintains contacts with public authorities and with NGOs.[904] The Office also contains 17 statutory organisational units with departments and sections within them.[905] In overarching matters, which demand collaboration between the different organisational units, the Commissioner may appoint main coordinators.[906] The regulations on the employees of governmental offices apply to the deputies and the employees of the Commissioner's Office.[907]

Selection, appointment, and tenure

The candidate of the Commissioner position must have Polish citizenship, legal knowledge, professional experience, and high authority based on moral qualities and social sensitivity.[908] The Sejm (the lower house of the parliament) appoints the Commissioner[909] with prior approval of the Senate based on the motion of the Sejm's spokesperson or a group of 35 deputies.[910] The Institute for Law and Society (INPRIS), an independent Polish think-tank focusing on law, formulated serious concern within its monitoring activity regarding the lack of public consultations in the context of the ombudsperson's selection.[911] Interestingly, the SCA expressed its concern on the silence of the enabling legislation regarding advertising the ombudsperson position or involving civil society in the selection process in the reaccreditation process taking place in 2012 but did not mention this circumstance during the reaccreditation in 2017. The reason might be because the candidacy of the present Ombudsman, Adam Bodnar, was supported by 65 human

[903] Commissioner for Human Rights (Poland), 'Summary of the Report on the Activity of the Commissioner for Human Rights in 2017, with Comments on the Observance of Human and Civil Rights and Freedoms' (n 901).
[904] Commissioner for Human Rights (Poland), 'Social Council at the Office of the Commissioner' <https://www.rpo.gov.pl/en/content/social-council-office-commissioner> accessed 8 January 2019.
[905] The Statute of the Office of the Commissioner for Human Rights, Ordinance No. 45/2015 of the Commissioner for Human Rights of 19 November 2015 (n 896), Annex, Article 6.
[906] ibid, Annex, Article 8(1).
[907] Act of 15 July 1987 on the Commissioner for Human Rights (n 899), Article 20(5).
[908] ibid, Article 2.
[909] The Standing Orders of the Sejm of the Republic of Poland, Resolution of 30 July 1992 as published in Monitor Polski, item 32, Article 29.
[910] The Constitution of the Republic of Poland of 2 April 1997 (n 890), Article 209(1); Act of 15 July 1987 on the Commissioner for Human Rights (n 899), Article 3(1).
[911] INPRIS, 'OMX: Civic Monitoring of Candidates for Public Offices' <www.inpris.pl/en/projects/omx-monitoring-eng> accessed 6 January 2019.

rights NGOs.[912] The Commissioner makes an oath before the parliament, and the non-compliance with it may result in dismissal.[913]

The tenure of the ombudsperson is five years and independent from the term of the parliament; there is the possibility of being re-elected once.[914] However, one term seems to be a tradition, and the re-election for a second term is rather a theory as it has never happened.

The position of the CHR is incompatible with any other position or professional commitments, except for being a university professor. Also, the Commissioner is not allowed to be affiliated with any political party or trade union or 'perform any public activities, which could not reconcile with the dignity of his office'.[915] The Constitution expressly says that the mandate of the CHR cannot be held jointly with that of the Deputy of the Senate.[916] The enabling legislation does not contain any restriction for the time after the termination of the mandate; the Commissioner can choose a position without legal obstacles.[917]

Independence and immunity

The CHR is autonomous and independent from other state bodies. He or she is responsible only for the Sejm.[918] Article 211 of the Constitution provides that the Commissioner shall not be subject to penal liability nor deprived of liberty without the earlier consent of the Sejm. Also, if his detention is indispensable to secure correct proceedings, the Sejm may order immediate release.[919] At the same time, the staff of the Office does not enjoy legal immunity for actions undertaken in their official capacity. During the re-accreditation of the institution as NHRI in 2012, the SCA criticised this deficit and encouraged the Commissioner 'to continue to advocate for additional provisions to protect the officers and staff members [...] from legal liability for actions undertaken in their official capacity'.[920]

[912] Central European University, 'News - Adam Bodnar Elected as Ombudsman for Poland' (2015) <https://legal.ceu.edu/article/2015-08-19/adam-bodnar-elected-ombudsman-poland> accessed 8 January 2019.
[913] Act of 15 July 1987 on the Commissioner for Human Rights (n 899), Article 7(2).
[914] ibid, Article 5.
[915] The Constitution of the Republic of Poland of 2 April 1997 (n 890), Article 209(2)-(3).
[916] ibid, Article 103(1).
[917] Act of 15 July 1987 on the Commissioner for Human Rights (n 899), Article 6.
[918] The Constitution of the Republic of Poland of 2 April 1997 (n 890), Article 210.
[919] ibid, Article 211.
[920] The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Sub-Committee on Accreditation (SCA), Geneva, 19-

In January 2016, the Commissioner requested the OSCE Office for Democratic Institutions and Human Rights (ODIHR) to review a draft act amending the Act on the Commissioner. The ODIHR opinion raised concerns regarding the draft act because it lacked in 'sufficient safeguards to protect the Commissioner and his or her staff from civil, administrative, and criminal liability for words spoken or written, decisions made, or acts performed in good faith in their official capacities ("functional immunity")'.[921] The ODIHR explained the rationale behind when saying that '[…] the functional immunity aims at protecting the institution and not an individual, it is attached to the actions performed on behalf of the NHRI or in an official capacity and not to the status of the individual having performed them'.[922] As no changes have happened, the SCA raised the issue in its 2017 re-accreditation recommendation again and encouraged the Commissioner to advocate for additional provisions in the enabling legislation that protect the officers and staff members of the Commissioner's Office from legal liability for actions undertaken in their official capacity.[923]

The lack of legal safeguards has its practical consequences. In February 2019, the Commissioner is facing a civil action brought by a Polish public TV station against him in his personal capacity for a statement made in his professional capacity as Ombudsman on a web portal with regard to the murder of the late mayor of Gdańsk.[924] Considering the recent political changes and the shrinking space for human rights defenders, including ombudsinstitutions and NHRIs in Europe, ENNHRI is focusing on promoting the Rule of Law in the region.[925] Within this strategic objective, ENNHRI supports its member institutions under threat, including experiencing a reduction in formal independence, funding or the mandate, political pressure, reputation attacks, or the removal, arrest or attacks of NHRI representatives.[926] ENNHRI and GANHRI issued a joint statement standing in solidarity with the Polish Commissioner and calling upon all organs of the

23 November 2012' (n 483) para 3.9.
[921] OSCE/ODIHR, Final Opinion on the Draft Act on the Commissioner for Human Rights of Poland, 16 February 2016, NHRI-POL/282/2016 [AlC] para 9.
[922] ibid 43.
[923] Global Alliance of National Human Rights Institutions, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 13-17 November 2017' (n 489) para 2.6.
[924] Commissioner for Human Rights (Poland), 'Information about the Lawsuit Filed by TVP SA Addressed to the ROP Office' (2019) <https://www.rpo.gov.pl/pl/content/informacja-o-pozwie-tvp-skierowanym-do-biura-rpo> accessed 13 February 2019.
[925] Telephone interview with Katrien Meuwissen, Senior Human Rights Officer, ENNHRI, 20 February 2019 (n 567).
[926] European Network of National Human Rights Institutions (ENNHRI), 'Guidelines on ENNHRI Support to NHRIs under Threat' (2016) <http://www.ennhri.org/IMG/pdf/guidelines.support.nhris.threat.march16.pdf> accessed 22 February 2019.

Republic of Poland to apply their powers to protect the Commissioner. The NHRI organisations pointed out that such a lawsuit is incompatible with Poland's international commitments to protect institutional independence and functional immunity.[927]

Funding

The functioning of the CHR is financed from the central budget.[928] Inadequate funding of the institution was raised by the Commissioners in their annual reports, during the UPR in 2012 and 2017,[929] by Treaty Bodies,[930] by the CoE Commissioner for Human Rights, and by the SCA in the re-accreditation processes. The inadequate funding is caused by the allocation of additional tasks without inherent funds on the one hand, and by budget cuts, on the other hand.

Since 1 January 2011, the CHR has become an independent body for equality in the meaning of EU directives. While the implementing act[931] laid down new tasks for the Commissioner, the legislator has not foreseen the need to secure funds that would be adequate to the tasks. Accordingly, the 2011 Budget Act did not grant any funds for this activity to the ombudsinstitution.[932] In 2011, this scenario was repeated regarding the NPM task and the failure to ensure necessary funds to that function.[933] The CRPD Committee also called the Polish Government to allocate the ombudsinstitution sufficient resources

[927] European Network of National Human Rights Institutions (ENNHRI), 'Joint Statement by ENNHRI and GANHRI in Support of Adam Bodnar, the Polish Commissioner for Human Rights'.
[928] Act of 15 July 1987 on the Commissioner for Human Rights (n 899), Article 21.
[929] UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Poland, 9 July 2012, A/HRC/21/14 para 27; Summary of other stakeholders' submissions on Poland, Report of the Office of the United Nations High Commissioner for Human Rights, 21 February 2017, A/HRC/WG.6/27/POL/3 para 6.
[930] UN Human Rights Committee, Concluding observations: Poland, 23 November 2016, CCPR/C/POL/CO/7 paras 5–6; UN Committee on Economic, Social and Cultural Rights, Concluding observations: Poland, 26 October 2016, E/C.12/POL/CO/6 paras 8–9; UN Committee on the Elimination of Racial Discrimination, Concluding observations: Poland, 19 March 2014, CERD/C/POL/CO/20-21 para 9; UN Committee on the Elimination of Discrimination against Women, Concluding observations: Poland, 14 November 2014, CEDAW/C/POL/CO/7-8 para 14; UN Committee against Torture Concluding observations: Poland, 23 December 2013, CAT/C/POL/CO/5-6 para 16.
[931] Act of 3 December 2010 on the implementation of some regulations of European Union regarding equal treatment, Journal of Laws of 2010, No. 254, item 1700.
[932] Human Rights Defender (Poland), 'Summary of Report on the Activity of the Human Rights Defender (Ombudsman of the Republic of Poland) in 2010' (2011) 13–14 <https://www.rpo.gov.pl/sites/default/files/SUMMARY of Report on the Activity of the Human Rights Defender in 2010.pdf> accessed 8 January 2019.
[933] ibid 10.

and funding to be able to effectively and independently discharge its mandate to monitor the implementation of the CRPD.[934]

Beyond assigning new tasks to the institution without allocated funds, budget cuts prevented the Office to expand, for example, by establishing or maintaining regional offices.[935] Some information points were closed down due to a budget cut in 2014.[936] During the UPR in 2012, NGOs expressed their concern about the significant reduction of the budget for the Office of the CHR. Their joint submission highlighted further human rights issues as the main argument for cutting the budget was the fact that the Office carried out antidiscrimination tasks, including promoting gender equality and protecting LGBT rights.[937] The CoE Commissioner for Human Rights also urged Poland to ensure that the Office of the Polish Commissioner enjoys full independence through adequate resources.[938] Also, the SCA encouraged the Commissioner to advocate for an improvement in the level of its funding. Accordingly, the Commissioners raised the issue in their annual reports. In 2012, the Sejm increased the budget that enabled the Commissioner to fulfil its NPM and Equality Body function more effectively.[939] In 2016, the situation worsened again as a result of a significant reduction of the Commissioner's budget.[940] In the 2017 reaccreditation process, the SCA encouraged the Commissioner again to advocate for the funding necessary to ensure that it can effectively carry out its mandate.[941] The current (2019) budget of the institution is less than its budget in 2012.[942]

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[934] UN Committee on the Rights of Persons with Disabilities, Concluding observations: Poland, 21 September 2018, CRPD/C/POL/CO/1 para 53(b).
[935] Skype interview with Roman Wieruszewski, Former Director, Poznan Human Rights Centre, 18 February 2019.
[936] Human Rights Defender (Poland), 'Summary of Report on the Activity of the Ombudsman in Poland in 2012 with Remarks on the Observance of Human and Civil Rights and Freedoms' <https://www.rpo.gov.pl/sites/default/files/HUMAN RIGHTS DEFENDER BULLETIN 2014%2C No 2 SOURCES.pdf> accessed 8 January 2019.
[937] 'Alternative Report Submitted by the Polish Coalition for Equal Opportunities for Consideration of the UN Human Rights Council in Reference to the Universal Periodic Review Session No. 27, Warsaw, 20 September 2016' 3 <https://www.upr-info.org/sites/default/files/document/poland/session_27_-_may_2017/js5_upr27_pol_e_main.pdf> accessed 8 January 2019.
[938] 'Council of Europe Contribution for the 27th UPR Session (April-May 2017) Regarding Poland' 4 <https://www.upr-info.org/sites/default/files/document/poland/session_27_-_may_2017/coe_upr27_pol_e_main.pdf> accessed 8 January 2019.
[939] Human Rights Defender (Poland), 'Summary of Report on the Activity of the Ombudsman in Poland in 2012 with Remarks on the Observance of Human and Civil Rights and Freedoms' (n 936).
[940] Commissioner for Human Rights (Poland), 'Summary of the Report on the Activity of the Commissioner for Human Rights in 2017, with Comments on the Observance of Human and Civil Rights and Freedoms' (n 901).
[941] Global Alliance of National Human Rights Institutions, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 13-17 November 2017' (n 489) para 2.6.
[942] Skype interview with Mirosław Wróblewski, Head of the Constitutional, International and European Law

Functions

The Commissioner for Human Rights is an organ of the state control defending 'human and civic freedoms and rights specified in the Constitution and other legal acts',[943] including the principle of equal treatment.[944] The Commissioner's principal task is to deal with cases of human rights violation committed by the public authorities.[945] Thus, he or she examines whether the acts or omissions of authorities, organisations and institutions violated the law and the principles of coexistence and social justice.[946] The Commissioner's approach is of a legal character, as he or she supervises the legality of administrative actions when taking cases to the Constitutional Tribunal and the Supreme Administrative Court, or legislative proposals to the Sejm[947] (this differs from the classic sense of maladministration).

The Commissioner proceeds at the request of citizens or their organisations, local government bodies, the Ombudsman for Children, or *ex officio*.[948] Non-Polish citizens under the authority of the Republic of Poland may also apply to the Commissioner, as well as legal persons and organisational units under the Act of 3 December 2010 on the implementation of some EU regulations regarding equal treatment.[949] Petitions do not need to fulfil any formal requirements – only stating the subject matter of the case, and there is no time bar on complaints.[950] The basis of the Commissioner's procedure can be any news he or she becomes aware of as well.[951] This flexibility pervades the Commissioner's procedures as well. High level of independence characterises the functioning of the Commissioner's Office. He or she can raise any human rights problems openly. The Commissioner pursues many local activities, where he seems to be able to solve local problems, e.g. homelessness, unemployment.[952] The Commissioner decides about selecting and implementing a particular legal measure solely based on his or her own evaluation of the case. The Commissioner is not bound by the Code of Administrative Procedure, for

Department, Office of the Commissioner for Human Rights (Poland), 27 February 2019.
[943] The Constitution of the Republic of Poland of 2 April 1997 (n 890), Article 208.
[944] Act of 15 July 1987 on the Commissioner for Human Rights (n 899), Article 1(2).
[945] Gliszczynska-Grabias and Sekowska-Kozlowska (n 888) 70.
[946] Act of 15 July 1987 on the Commissioner for Human Rights (n 899), Article 1(3).
[947] Elcock (n 891).
[948] Act of 15 July 1987 on the Commissioner for Human Rights (n 899), Article 9.
[949] ibid, Article 18.
[950] ibid, Article 10.
[951] ibid, Article 8(1).
[952] Skype interview with Roman Wieruszewski, Former Director, Poznan Human Rights Centre, 18 February 2019 (n 935).

instance, to meet the time limits of case examination. The internal standard is approximately two months.[953] The Commissioner either conducts his or her own investigation or requests the investigation procedure of the competent authorities, such as supervisory organs, the prosecutor's office, the Sejm, or the Supreme Audit Office.[954]

Legislative changes often motivate the Commissioner's *ex officio* investigations. As discussed in the introduction of Chapter 3, in recent years, legislative changes affected the judiciary, the Constitutional Tribunal, the police, the prosecutor's office, and the media.[955] The Commissioner lodged applications to the Constitutional Tribunal asking for constitutional conformity check in all these amendments.[956] However, these cases have not infringed human rights directly, the Commissioner is in the view that institutional changes affecting the judiciary and other democratic safeguards may violate people's right to an independent court, as a properly shaped institutional safeguard. The Commissioner regards it as his duty to assess whether the system of legal protection is efficient and independent – regardless of having been asked for it.[957]

Within its capacity as Equality Body, the Commissioner analyses, monitors and supports the equal treatment of all persons, as well as conducts independent research relating to discrimination, and issues reports and recommendations.[958] The Office of the Commissioner is designated as an independent authority to promote, protect and monitor the implementation of the provisions of the CRPD as well.[959]

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[953] Skype interview with Mirosław Wróblewski, Head of the Constitutional, International and European Law Department, Office of the Commissioner for Human Rights (Poland), 27 February 2019 (n 942).
[954] Act of 15 July 1987 on the Commissioner for Human Rights (n 899), Article 12.
[955] Altafin, Haasz and Podstawa (n 625) 54–57.
[956] Commissioner for Human Rights (Poland), 'Motion to the Constitutional Tribunal on Amendments to the Law on the Constitutional Tribunal, 8 January 2016' <https://www.rpo.gov.pl/pl/node/6523> accessed 4 March 2019; Commissioner for Human Rights (Poland), 'Application to the Constitutional Tribunal on the Amendment to the Act on the Police, II.519.109.2015.KLS/VV/AG, 18 February 2016' <https://www.rpo.gov.pl/sites/default/files/Application to the Constitutional Tribunal on the amendment to the Act on the Police.pdf> accessed 4 March 2019; Commissioner for Human Rights (Poland), 'Application to the Constitutional Tribunal on Media Law, VII.603.L2016.MW/AG, 24 March 2016' <https://www.rpo.gov.pl/sites/default/files/Application to the Constitutional Tribunal on media law.pdf> accessed 4 March 2019; Commissioner for Human Rights (Poland), 'Application to the Constitutional Tribunal on the Act on the Prosecutor's Office, 18 April 2016, II.501.5.2016.ST/KŁS' <https://www.rpo.gov.pl/sites/default/files/Application to the Constitutional Tribunal.pdf> accessed 4 March 2019; Commissioner for Human Rights (Poland), 'Application on the Constitutional Tribunal Act, VII.511.23.2016.MW, 2 August 2016' <https://www.rpo.gov.pl/sites/default/files/Wniosek RPO-ustawa o TK eng.pdf> accessed 4 March 2019.
[957] Skype interview with Mirosław Wróblewski, Head of the Constitutional, International and European Law Department, Office of the Commissioner for Human Rights (Poland), 27 February 2019 (n 942).
[958] Act of 15 July 1987 on the Commissioner for Human Rights (n 899), Article 17b.
[959] KSK Foundation, 'Alternative Report on the Implementation of the UN Convention on the Rights of

The enabling legislation does not mandate the institution with promotional activities. Nevertheless, the institution pursues such activities that are promotional from nature, such as participation in regional meetings, conducting strategic litigations, cooperation with social partners, pursuing educational activities.[960]

Competences and powers

The Commissioner has broad jurisdiction over the administration, including the armed forces, the security forces, police, prisons, local governments and the court system. Furthermore, the Commissioner deals not only with the functioning of administrative authorities but also with the activities performed by public bodies with so-called entrusted or administrative functions.

Solid competences concerning the judiciary characterise the Polish Commissioner. He or she is entitled to participate in ongoing court proceedings – including proceedings before the Constitutional Tribunal[961] – with rights equivalent to those of a prosecutor. He or she is also allowed to lodge complaints to administrative courts and participate in such proceedings.[962] The possibility for the Commissioner to join court proceedings is of strategic importance. The Commissioner finds out about pending court proceedings from various sources: from citizens, their proxies, the CHR's regional meetings, NGOs with which he cooperates, and the media.[963] These are strategic litigations because the judgements are significant not only to the parties of the case but to others who are in a similar situation. Thus, strategic litigation has a preventive character as it supports further litigations, and usually applies argumentation that is based on the jurisprudence of the European Court of Human Rights (ECtHR), and raises awareness about the issue by generating media attention and public debate.[964] For example, the Office joined a first

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Persons with Disabilities' (2015) para 185 <https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2FCRPD%2FNGO%2FPOL%2F21651&Lang=en> accessed 9 April 2019.

[960] Commissioner for Human Rights (Poland), 'Summary of the Report on the Activity of the Commissioner for Human Rights in 2017, with Comments on the Observance of Human and Civil Rights and Freedoms' (n 901) 74–83.

[961] Act of 15 July 1987 on the Commissioner for Human Rights (n 899), Article 16(2).

[962] ibid, Article 14.

[963] Commissioner for Human Rights (Poland), 'Summary of the Report on the Activity of the Commissioner for Human Rights in 2017, with Comments on the Observance of Human and Civil Rights and Freedoms' (n 901) 78.

[964] Commissioner for Human Rights (Poland), 'Summary of the Report on the Activity of the Commissioner for Human Rights in 2017, with Comments on the Observance of Human and Civil Rights and Freedoms' (n 901).

instance proceeding before the Common Regional Court at the national level, raising a journalist's right to freedom of speech, and to freely express his position as a journalist, as well as referring to previous ECtHR cases. The Regional Court accepted the individual's claim.[965]

Conducting proceedings, the Commissioner has a wide range of investigatory powers, including conducting site visits, hearing of persons, requesting court files and public prosecutor's files or information about cases, the examination of files, ordering expert opinions.[966] Closing his investigation, the Commissioner formulates opinions and conclusions and requests the actions of superior organs.[967] The authorities, organisations under investigation, are obliged to cooperate with the Commissioner, in particular by providing due assistance to him or her.[968]

The Commissioner may lodge an application to the Constitutional Tribunal[969] concerning the conformity of statutes and international agreements with the Constitution; the conformity of statutes with ratified international agreements; the conformity of legal provisions issued by central State organs with the Constitution, statutes, and ratified international agreements; the conformity of the purposes or activities of political parties with the Constitution; complaints concerning constitutional infringements.[970] Furthermore, the Commissioner may request the Supreme Court to issue a resolution that explains the legal provisions under review.[971] In 2017, the Commissioner addressed questions of law to the Supreme Court in three cases.[972]

Aiming at improving the law, the Commissioner may refer general petitions concerning specific problems to the competent state authorities (e.g. ministries) and submit proposals for legislative initiative or drafting and amending legal acts.[973]

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[965] European Network of National Human Rights Institutions (ENNHRI), 'National Human Rights Institutions and Human Rights Defenders' (n 566) 13.
[966] Act of 15 July 1987 on the Commissioner for Human Rights (n 899), Article 13.
[967] ibid, Article 15.
[968] ibid, Article 17.
[969] The Constitution of the Republic of Poland of 2 April 1997 (n 890), Article 191(1); Act of 15 July 1987 on the Commissioner for Human Rights (n 899), Article 16(2).
[970] The Constitution of the Republic of Poland of 2 April 1997 (n 890), Article 188.
[971] Act of 15 July 1987 on the Commissioner for Human Rights (n 899), Article 16(2).
[972] Commissioner for Human Rights (Poland), 'Summary of the Report on the Activity of the Commissioner for Human Rights in 2017, with Comments on the Observance of Human and Civil Rights and Freedoms' (n 901).
[973] Act of 15 July 1987 on the Commissioner for Human Rights (n 899), Article 16(2).

NPM mandate

The Office of the Commissioner has been fulfilling the task of NPM since 18 January 2008.[974] The designation of the Commission as NPM was a reasonable decision because the Commissioner has already been legally authorised to check the manner of treating detained persons regularly,[975] where he or she has been entitled to record sound and images and meet with detainees.[976] Thus, the Commissioner had statutory access to all information on the number of persons deprived of liberty in places of detention, no additional costs arose with the establishment of the NPM, and in the person of the Commissioner, functional and personal independence were guaranteed.[977]

The new task brought some difficulties as well, it was challenging to balance between the ombudsman function and the fulfilment of the NPM task, and the lack of financial means also worsen the situation. Nowadays, the Commissioner has an NPM team consisting of 13 members (one doctor, one psychologist) and three local teams with five employees.[978]

Cooperation

At the national level, the CHR cooperates with the Commissioner for Children's Rights in cases relating to children.[979] The Commissioner for Children's Rights (*Rzecznik Praw Dziecka*) was established by an Act implementing Article 72(4) of the Constitution in 2000 and mandated to 'safeguard the rights of children as set forth in the Constitution of the Republic of Poland, the Convention on the Rights of the Child and other regulations of law, with respect for the responsibility, rights and obligations of parents'.[980]

As most ombudsinstitutions, the Commissioner informs the Parliament (both the Sejm and the Senate) on its activity annually.[981] The Commissioner may participate in the sittings of the Sejm,[982] where he or she can take the floor.[983]

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[974] ibid, Article 1(4).
[975] ibid, Article 8(2).
[976] ibid, Article 13(1a).
[977] Irena Lipowitz, 'Working as NPM under the OPCAT' (2012) <http://www.theioi.org/downloads/s3iu/Wellington Conference_39. Plenary IV_Irena Lipowicz Paper.pdf> accessed 24 March 2018.
[978] ibid.
[979] Act of 15 July 1987 on the Commissioner for Human Rights (n 899), Articles 1(2a) and 16(3).
[980] Act of 6 January 2000 on the Ombudsman for Children, Article 1(2).
[981] The Constitution of the Republic of Poland of 2 April 1997 (n 890), Article 212; Act of 15 July 1987 on the Commissioner for Human Rights (n 899), Article 19.
[982] The Standing Orders of the Sejm of the Republic of Poland, Resolution of 30 July 1992 as published in

The enabling legislation stipulates that the Commissioner collaborates with associations, civic movements or other goodwill societies for the protection of the liberties and rights of a human and a citizen.[984] Within the Commissioner's Office, the Social Council assists the Commissioner to fulfil this statutory requirement and maintain contacts with NGOs. The NPM Team cooperates with the coalition of NGOs and academic circles called 'Agreement on the Implementation of the OPCAT' through meetings and dissemination activities.[985]

At the European level, the Commissioner contributed to the EU Eastern Partnership Countries' Ombudsman Cooperation Programme 2009-2013 that was a joint initiative of the CHR and the former Mediator of the French Republic. The programme targeted human rights protection institutions in countries of the Eastern Partnership, Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine and aimed at enhancing the capacity of ombudsmen, public administration bodies and NGOs of the partner countries to protect the rights of individuals and build a democratic state under the rule of law.[986] Being an NHRI, the Polish Commissioner is a member of the ENNHRI and the GANHRI, as well as Equinet in its capacity as Equality Body. The Commissioner has a bunch of bilateral cooperation agreements and memorandums with ombudsinstitutions worldwide.[987] Supporting its member institution in hardships, an IOI delegation visited Poland in 2016 in order to analyse the impact of the constitutional situation on the Office of the Commissioner and promote the ombudsman idea and formulated recommendations towards the government in the form of a report.[988] Regarding the Commissioner's appearance in the UN human rights fora, the presence of the Office is rather moderated. Concerning UN Treaty Bodies, it was present only in the session of the UN Human Rights Committee examining the Polish report in 2010. While it was involved in the preparation of the state report in the course of the UPR through providing comments on the preliminary draft of the national report concerning the part on the Commissioner for Civil

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Monitor Polski, item 32 (n 909), Article 170(3).
[983] ibid, Article 186(3).
[984] Act of 15 July 1987 on the Commissioner for Human Rights (n 899), Article 17a.
[985] Lipowitz (n 977); Human Rights Defender (Poland), 'Report of the Human Rights Defender on the Activities of the National Preventive Mechanism in Poland in 2009' (2010) 110 <https://www.rpo.gov.pl/sites/default/files/12821222200.pdf> accessed 9 January 2019.
[986] Irena Lipowitz, 'Working as a NPM under the OPCAT - Presentation' (2012) <http://www.theioi.org/downloads/s3iu/Wellington Conference_39. Plenary IV_Irena Lipowicz Paper.pdf> accessed 9 January 2019.
[987] Commissioner for Human Rights (Poland), 'Agreements on Co-Operation' <https://www.rpo.gov.pl/en/content/agreements-co-operation> accessed 9 January 2019.
[988] International Ombudsman Institute (IOI), 'IOI Fact Finding Mission to Poland' (2016) <http://www.theioi.org/ioi-news/current-news/ioi-releases-report-on-fact-finding-mission-in-poland> accessed 9 January 2019.

Rights,[989] the Office did not provide information included in the stakeholders' report neither in 2012 nor in 2017.

The present Polish Commissioner uses the power of publicity; he is very active in social media platforms, with special regard to Twitter with daily tweets to his almost 36 thousand followers[990].

NHRI accreditation

The Office of the CHR was accredited with A-status first in 2007. The full conformity with the Paris Principles was affirmed in 2012 and 2017 as well. In all three accreditation procedures, the SCA formulated concerns regarding the lack of human rights promotion in the Commissioner's legislative mandate. Nevertheless, the SCA acknowledged that the Commissioner pursue such activities that can be considered promotional in nature. Another frequent concern of the SCA was that the Polish Commissioner is not mandated to cooperate with the international human rights system, and it does not perform such activity; however, this is a core function of NHRIs. As mentioned the lack of functional immunity and budgetary cuts raised worries of the SCA as well.

Similar to the Hungarian Government, the Polish Government has adopted several legal reforms since 2016 that harms human rights, the rule of law, and democracy. The CHR has not remained silent (as his Hungarian counterpart). The Polish Commissioner 'issued legal opinions and public statements, joined constitutional complaints, intervened in parliamentary instances and cooperated with international organisations speaking out for human rights, democracy and the rule of law'.[991] The Government reacted and has been trying to undermine the work of the ombudsinstitution that must face both institutional (budgetary constraints) and individual (lifting functional immunity) threats.[992]

The current Commissioner, Adam Bodnar, is especially on outspoken ombudsman, who speaks out difficult issues, such as hate speech, media freedom, judges' independence and LGBTI rights. He and his Office were awarded the Rafto Prize for the important stance

[989] National Report submitted in accordance with paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: Poland, 7 March 2008, A/HRC/WG.6/1/POL/1 para 1.
[990] 'No Title' <https://twitter.com/adbodnar> accessed 8 April 2019.
[991] European Network of National Human Rights Institutions (ENNHRI), 'National Human Rights Institutions and Human Rights Defenders' (n 566) 18.
[992] Human Rights Watch, 'Eroding Checks and Balances: Rule of Law and Human Rights Under Attack in Poland' (2017) <https://www.hrw.org/report/2017/10/24/eroding-checks-and-balances/rule-law-and-human-rights-under-attack-poland> accessed 9 April 2019.

taken in the face of current political developments in Poland.[993] He is an independent critical voice in Poland, who draws to himself the Government's attention and is often a target. It also results in a controversial situation. In this situation, he has better chances to prove his necessity, but he is not in the position of effectively changing any governmental policy or decision because his opinion is not well received by the present Government.[994]

[993] The Rafto Foundation, 'Laureate 2018: Ombudsman Adam Bodnar' (2018) <https://www.rafto.no/the-rafto-prize/ombudsman-adam-bodnar> accessed 22 February 2019.
[994] Skype interview with Roman Wieruszewski, Former Director, Poznan Human Rights Centre, 18 February 2019 (n 935).

3.1.4 Summary analysis

The three analysed ombudsinstitutions were established almost ten years after each other; first the Austrian (1977), then the Polish (1987), and the Hungarian (1995). All three institutions originate in the classic Swedish model, but while the Polish institution shows human rights ombudsinstitution attitude already from an earlier stage, the Austrian and the Hungarian institutions went through on a transformation connected to their gained NPM status. While the Austrian institution is a collective body of 3 ombudsmen, the Hungarian and the Polish institutions are monocratic with one chief ombudsman on the top assisted by deputies. The ombudsinstitutions are accessible, they make regular county visits, and the Polish institution has regional offices as well. A common element in the enabling legislation and, thus, in the practice of the ombudsinstitutions is that the candidate for the ombudsman position usually has a legal professional background (Austria is an exception). This requirement stems from the nature of their mission, namely reviewing the legality of administrative decisions. One might say that ombudsinstitutions become 'legal factories'[995] in this way. The law declares the independence of the institutions; however, the SCA and NGOs keep criticising the transparency of the appointment procedures in all three countries. As of functional immunity, only the Hungarian institution has guaranties in the law. Mandate holders may be re-elected once, that seems to be a theoretical possibility in Hungary and Poland, where it has never happened. The institutions are declared to be independent in financial terms, as their budget is part of the national budget and they have budgetary autonomy; however, the budget of the Polish Commissioner was reduced on more occasions. All three ombudsinstitutions prioritise the complaint-handling function, whereby complaints are against the public administration. The institutions may conduct investigations *ex officio* and do possess broad investigatory powers; however, the Hungarian institution has restrictions in this regard. All enabling legislations prescribe cooperation obligation for public authorities involved in the investigations of the ombudsinstitutions. It is common that the institutions may submit or propose legislative initiatives to the legislator, and turn to the Constitutional Court for norm control or interpretation. The Polish institution has competence over the judiciary, and generally, its legal procedures related to participatory rights are comprehensive. As said, the human rights mandate of the institutions is rather a novelty, especially in the case of the AOB and the Hungarian Commissioner, and specific; the enabling legislations refer to NPM tasks in

[995] Vangansuren (n 606).

particular. Human rights promotional activities are modestly present in the practice of the ombudsinstitutions; however, they are not established by the enabling legislations or by strategic plans. It depends on the personality and proactivity of the ombudsperson how far he or she goes beyond his or her legislative mandate. The institutions have dedicated bodies for cooperation with CSOs, and all three institutions report annually to the parliament. They are modestly present at the international level during the different monitoring procedures. The Hungarian and the Polish institutions are EBs, and the Polish institution has NMM mandate as well. All three institutions are NPMs and NHRIs. While the AOB holds a B-status, the Hungarian and the Polish institutions have A-status at the moment.

	Austrian Ombudsman Board	**Commissioner for Fundamental Rights (Hungary)**	**Commissioner for Human Rights (Poland)**
History and legal background	1977 / 2012	1995 / 2012	1987
Organisation	• a collective body of 3 members • 6 commissions • Human Rights Advisory Council	• 1 Commissioner • 2 Deputies	• 1 Commissioner • deputies (optional) • local representatives • info points • expert committees • social councils
Selection, appointment, and tenure	• no requirement on professional background or age • incompatibility rules • appointed by political parties • term of 6 years • re-election once	• proposal of the President of the Republic • requirements: law degree, age limit, experience, retroactive eligibility criteria • incompatibility rules • term of 6 years • re-election once	• proposal of the Sejm's spokesperson or a group of 35 deputies • requirements: legal knowledge, experience • incompatibility rules • term of 5 years • re-election once
Independence and immunity	• independent • no immunity	• independent • as MPs	• independent • only criminal liability
Funding	• drafting own budget	• part of the national budget	• part of the national budget

	• part of the national budget	• parliamentary control	• funding in danger
Functions	• complaint-handling • complainants: anyone (also private entities) • ex-officio investigation • reporting (‘Ombudsman Board Committee’) • no deadlines • 6NPM, NHRI	• complaint-handling • complainants: anyone BUT strict eligibility criteria • ex-officio investigation • special attention to specific groups of the society • reporting • EB, NPM, NHRI	• complaint-handling • complainants: anyone (also private entities) • no requirements • ex-officio investigation • no timeframe in the procedure • reporting • EB, NMM, NPM, NHRI
Competences and powers	• competence over the judiciary (excessive duration of procedure) • cooperation obligation • no competence over private entities • legislation review and initiatives • turning to the Constitutional Court • modest human rights promotional competences	• list of authorities • no competence over the judiciary • on-site inspection restrictions • cooperation with other authorities • cooperation obligation • legislation review and initiatives • turning to the Constitutional Court	• competence over the judiciary, armed forces etc. • cooperation obligation • legislation review and initiatives • turning to the Constitutional Tribunal • EB tasks
NPM mandate	• since 2012 • 6 commissions • visit restrictions	• since 2015 • NPM Office with 11 staff members	• since 2008 • NPM Team with 13 staff members and 3 local teams
Cooperation activities	• NGO Forum • internationally	• Civil Consultative Body • Civil Contacts Coordinator	• Commissioner for Children’s Rights • Social Council • EU Eastern

			Partnership Countries' Ombudsman Cooperation Programme • bilateral cooperation agreements • modest internationally
NHRI accreditation	B-status since 2010	• B-status in 2012 • A-status since 2014	• A-status since 2007 • affirmed in 2012 and 2017

Table 5: Summary table (AT-HU-PL)

The three institutions have it in common that they originate from the classic ombudsman model (constitutional institutions). While the Polish institution fulfils human rights related tasks from an earlier stage, the Austrian and the Hungarian institutions have received an additional – enforced – NHRI role later. Promoting and protecting human rights became part of their mandate at a later stage of their development, and typically in connection to their NPM mandate and the gained accredited NHRI status. The complaints brought to them are not necessarily about the most important human rights issues, and they protect fundamental rights in their recommendations. The ombudsinstitutions do not have the capacity to conduct systematic monitoring of the implementation of international human rights standards. Carver also observes that Central and Eastern European ombudsinstitutions struggle with embracing standards of international law, namely approaching human rights broadly and systematically and providing a remedy for individual grievances at the same time.[996] Using a human rights-based approach depends a lot on the personality and the role perception of the mandate holder. It is a general observation that would be applicable in all regions, but it is especially remarkable in these three countries, where the legislation enables the institutions to act effectively as an NHRI. Still, proactivity, preventive and educational approaches are not always present in their practice. The AOB is mainly focusing on its role as IOI Secretariat, and apparently, there is no intention to absorb the SCA recommendations towards a possible A-status. While the current Hungarian Commissioner is rather passive in comparison to his predecessor and

[996] Carver, 'National Human Rights Institutions in Central and Eastern Europe: The Ombudsman as Agent of International Law' (n 380) 182.

therefore, it is very likely that the institution will lose its A-status at the re-accreditation in November 2019, the current Polish Commissioner seems to fulfil that active NHRI role that we can hope from an ombudsinstitution.

3.2 The Nordic region

In the Nordic countries, ombudsinstitutions are tools of parliamentarian control. Also, the Swedish prototype comes from the historical scenario when the Swedish King needed someone to control the functioning of public administration on his behalf while having been abroad (in Turkey) for years, he appointed the King's Chancellor of Justice. As a reply, taking the occasion of drafting the new constitution in 1809, the Swedish Parliament (*Riksdag*) established its own ombudsinstitution with similar powers to those of the King's Chancellor of Justice. The Ombudsman was mandated with the supervision of the King, his offices, and the courts. Before the establishment of the ombudsinstitution, in 1766, Sweden also adopted the first Freedom of the Press Act that contained provisions in relation to the public access to official documents.[997] The principle of publicity and the institution of the already existing King's Chancellor of Justice together served the same democratic purpose, namely 'ensuring justice in individual administrative cases' by fostering equality and stimulating 'debate on public policy' – usually on procedural rather than substantive questions.[998] Thus, Sweden was a developed and complex state with an advanced democratic culture already in the eighteenth century.[999] This solid legal tradition has an effect on Swedish people's thinking about the functioning of their democratic institutions nowadays as well.

The evolution of the Nordic ombudsinstitution model was demonstrated in detail in Chapter 2 when discussing the origin and proliferation of the ombudsinstitution worldwide. Therefore, here merely the differences between the ombudsinstitutions of the four Nordic countries (Denmark, Finland, Norway, and Sweden) will be highlighted. All the other Nordic countries followed the Swedish example. In 1919, Finland established its institution for the control of the entire public administration. Denmark's institution distinguishes from the previous two examples, as the ombudsinstitution, established in 1953 had no competence over the judiciary and no role as a prosecutor. For historical reasons, Norway established first its military ombudsman in 1952, and the so-called civil ombudsman followed only ten years later in 1962.

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[997] Claes Eklundh, 'The Swedish Parliamentary Ombudsman System' in Kamal Hossain and others (eds), *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (Kluwer Law International 2001) 423.
[998] Stanley V. Anderson, 'Public Access to Government Files in Sweden' (1973) 21 The American Journal of Comparative Law 419, 449.
[999] Dodson (n 425) 29–30.

By today, multiple ombudsinstitutions exist in all four countries. The using of the word 'ombudsman' is quite frequent in the Nordic region. Trade unions, banks, insurance companies, health institutions usually all have an independent person called ombudsman[1000] (*Ombudsmannen* in Swedish and in Norwegian, *Ombudsmanden* in Danish, Ombudsman in Finish), who represents the interests and rights of clients, patients. To illustrate the widespread use of the word with a further interesting example: the highest representative of the Danish government in Greenland is called Royal Ombudsman (*Rigsombudsmanden*)[1001].

Aside from these functionaries, there are specialised ombudsinstitutions appointed by the Nordic governments for the supervision of the implementation of sector-specific acts. Finland has a Parliamentary Ombudsman,[1002] the Chancellor of Justice,[1003] an Ombudsman for Equality,[1004] a Non-Discrimination Ombudsman,[1005] an Ombudsman for Children,[1006] a Data Protection Ombudsman,[1007] a Consumer Ombudsman,[1008] the Finnish Financial Ombudsman Bureau,[1009] and the Office of the Bankruptcy Ombudsman[1010]. Denmark has a Parliamentary Ombudsman[1011] and a Consumer Ombudsman[1012]. The ombudsinstitutions of Sweden and Norway will be discussed in detail below.

Based on competences, the Nordic model of ombudsinstitutions can be divided into two further sub-models: the Swedish prosecutor model and the Danish investigator model.

[1000] Ulf Lundvik, 'Sweden' in Gerald E Caiden (ed), *International Handbook of the Ombudsman: Country Surveys* (Greenwood Press 1983) 179.
[1001] 'Rigsombudsmanden i Grønland' <http://www.stm.dk/_p_7864.html> accessed 20 January 2019.
[1002] 'The Parliamentary Ombudsman of Finland' <https://www.oikeusasiamies.fi/en/the-parliamentary-ombudsman-of-finland> accessed 20 January 2019.
[1003] 'The Office of the Chancellor of Justice (Finland)' <https://www.okv.fi/en/> accessed 20 January 2019.
[1004] 'Ombudsman for Equality (Finland)' <https://www.tasa-arvo.fi/web/en/ombudsman-for-equality> accessed 20 January 2019.
[1005] 'Non-Discrimination Ombudsman (Finland)' <https://www.syrjinta.fi/web/en/ombudsman> accessed 20 January 2019.
[1006] 'Ombudsman for Children (Finland)' <http://www.lapsiasia.fi/en/ombudsman/> accessed 20 January 2019.
[1007] 'Data Protection Ombudsman (Finland)' <https://tietosuoja.fi/en/home> accessed 20 January 2019.
[1008] 'The Consumer Ombudsman (Finland)' <https://www.kkv.fi/en/about-us/the-consumer-ombudsman/> accessed 20 January 2019.
[1009] 'The Finnish Financial Ombudsman Bureau' <https://www.fine.fi/en/frontpage.html> accessed 20 January 2019.
[1010] 'The Office of the Bankruptcy Ombudsman (Finland)' <https://www.konkurssiasiamies.fi/en/> accessed 20 January 2019.
[1011] 'The Danish Parliamentary Ombudsman' <https://en.ombudsmanden.dk/> accessed 20 January 2019.
[1012] 'Danish Consumer Ombudsman' <https://www.consumerombudsman.dk/about-us/> accessed 20 January 2019.

Swedish model	Danish model
prosecutor role	investigator role
complementary redress role	chief complaints handling body
competence over the entire public sector	restricted competence
participation in legal procedures	not participating in legal procedures
also operating with criminal law	using standards of public law
reports as the basis for legal action	reports containing recommendations
followed by Finland	followed by Norway

Table 6: The Swedish and the Danish models

The different characteristics, such as being complementary in the row of institutions providing redress or being the chief complaint handling body; having competences covering the whole administration or having restrictions in this regard; participating in legal procedures or not; using criminal law or only public law; issuing reports that may serve as basis for legal action or reports containing merely recommendations draw a line between the two models, the Swedish prosecutor and the Danish investigator model. Finland follows the Swedish model, while Norway is closer to the Danish model.[1013]

Another difference between the Western (Norway and Denmark) and the Eastern (Sweden and Finland) regions is the type of NHRIs they have. While Sweden and Finland designated their ombudsinstitutions as NHRIs, Denmark and Norway opted for establishing a separate institution. In these two countries parliamentary ombudsinstitutions and NHRIs, the Danish Institute for Human Rights (*Institut for Menneskerettigheder*) and the Norwegian National Human Rights Institution (*Norges institusjon for menneskerettigheter*) function parallel to each other.

This chapter discusses one example of each Nordic sub-model. From the multiple ombudsinstitutions of Sweden, the Swedish Equality Ombudsman has been chosen because at the moment this institution is accredited as NHRI with the GANHRI, however, holding a B-status only. It makes it possible to point out the shortcomings of the ombudsinstitution as NHRI. The Norwegian subchapter introduces the Parliamentary Ombudsman for Public Administration in Norway, while it also highlights the decision-

[1013] Lane (n 292) 144.

makers' choice of establishing a separate institution as NHRI, the Norwegian National Human Rights Institution.

3.2.1 The Swedish Equality Ombudsman – Sweden

History and legal background

As discussed before, the Swedish Parliamentary Ombudsman (*Justitieombudsmannen*, JO) was created in 1809 as the counterpart of the King's Chancellor of Justice in order to control the legality of civil servants', military officers', and judges' actions. He or she could initiate judicial actions, including prosecution and disciplinary measures, resulting in demanding punishment such as suspension or dismissal of civil servants who break the law and sometimes damages.[1014] Based on the experiences of the first years of the Parliamentary Ombudsman, authors report that public officials did fear to be criticized by the Ombudsman.[1015] The Ombudsperson was elected by the Parliament (*Riksdag*) for four years, thus, independent from the Government. His or her investigative competencies covered nearly all state and local government authorities, including the court system, except for members of the Parliament and the Cabinet, and the Chief Justice Office (*Justiekanslern*).[1016] Beyond ensuring that the courts and public authorities respect the constitutional requirements of objectivity and impartiality in their proceedings, the ombudsman's supervision aimed at preventing that these entities violate citizens' fundamental rights and freedoms.[1017]

In the beginning, the mandate of the Ombudsman also covered the military administration. Since the caseload has been growing on the Ombudsman's shoulders and 'public opinion demanded a more efficient control especially since compulsory military service made some citizens, for long periods, subject to conditions differing from those of other citizens' and 'antimilitaristic propaganda had gained ground and caused widespread distrust of the military administration'[1018] when Sweden reformed its military defences in 1914, the Parliament created a separate office for the control of the armed forces, the Military Ombudsman (*Militieombudsmannen*). In 1968, the two ombudsinstitutions were merged under the name of Parliamentary Ombudsman.

[1014] ibid 146.
[1015] Tore Modeen, 'The Swedish and Finnish Parliamentary Ombudsman' in Roy Gregory and Philip Giddings (eds), *Righting wrongs: the ombudsman in six continents* (IOS Press/IIAS 2000) 318.
[1016] Alfred Bexelius, 'The Origin, Nature, and Functions of the Civil and Military Ombudsmen in Sweden' (1968) 377 The Annals of the American Academy of Political and Social Science 10, 12.
[1017] Karin Bengtsson, 'Sweep First in Front of Your Own Door: The Existence of a National Human Rights Institution in Sweden' (University of Lund 2010) 37 <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1693731&fileOId=1693732> accessed 17 January 2019.
[1018] Bexelius (n 1016) 12.

During its history, the Swedish democratic system was not shaped and characterised by revolutions or historic commitments to the bill of rights. Therefore, the Parliamentary Ombudsman has had a crucial role for more than 200 years: he or she is a person, who is independent of the Government and to whom people can reach out in case of rights violation.[1019] Orton describes the Swedish ombudsman and his or her activity as '[t]his is not very much prevention, and it is not very much human rights'.[1020]

From the '80s, specialised ombudsinstitutions started to grow: the Equal Opportunities or Gender Ombudsman (*Jämställdhetsombudsmannen*, JämO, 1980), the Ombudsman against Ethnic Discrimination (*Ombudsmannen mot etniska diskriminering*, DO, 1986), the Ombudsman for Children (*Barnombudsmannen*, BO, 1993), the Disability Ombudsman (*Handikappombudsmannen*, HO, 1994), and the Ombudsman against Discrimination on Grounds of Sexual Orientation (*Ombudsmannen mot diskriminering på grund av sexuell läggning*, HomO, 1999).[1021] Beyond their specific mandates, these institutions differed from the Parliamentary Ombudsman in respect of their subordination. Since the Constitution places state administrative authorities under the Government,[1022] 'it has been considered a natural consequence […], that the Swedish ombudsmen, except for the Parliamentary Ombudsman, have been and still are subordinated to the Government'.[1023]

The Swedish Equality Ombudsinstitution is the result of the merger of the four former equality ombudsinstitutions (JämO, DO, HO, HomO) in 2008 giving Sweden, for the first time, a complex single ombudsinstitution responsible for combating multiple-discrimination and promoting equal rights and opportunities regardless of any grounds. The Equality Ombudsman was established by the Discrimination Act (2008:567), but its tasks follow from two further acts: the Act on the Discrimination Ombudsman (2008:568) and the Parental Leave Act (1995:584). Also, the Instrument of Government – that can be considered equivalent to the constitutions of other countries – contains provisions that apply to the Swedish Equality Ombudsman. There is also a governmental Ordinance with

[1019] Telephone interview with Anna-Sara Lind, Professor, Department of Law, Uppsala University, 21 February 2019.
[1020] Frank Orton, 'Evolution and Perspectives of the Institution of the Ombudsman' in Linos-Alexandros Sisilianos (ed), *The prevention of human rights violations: contribution on the occasion of the twentieth anniversary of the Marangopoulos Foundation for Human Rights (MFHR)* (Sakkoulas 2001) 226.
[1021] Joachim Stern, 'Sweden' in Gabriele Kucsko-Stadlmayer (ed), *European Ombudsman-Institutions* (Springer 2008) 410.
[1022] The Instrument of Government (Sweden) Chapter 12 Article 1.
[1023] Diskrimineringskommittén (Discrimination Committee), *En Sammanhållen Diskrimineringslagstiftning Del. 2 (SOU 2006:22) [A Coherent Discrimination Legislation, Part 2]* (2006) 259–260.

Instruction for the Discrimination Ombudsman (2008:1401). The office took up its work on 1 January 2009.

In its early years, it was challenging to the newly formed institution to take stock of the institutional knowledge and experiences of combating discrimination gathered during 20-30 years by the previous four ombudsinstitutions and then based on this know-how to create an effective and comprehensive new organisation.[1024] The new institution faced high expectations towards protecting and promoting the rights of all groups of the society that may face discrimination.[1025] Due to this transformation, the accredited NHRI status received by the Equal Opportunities Ombudsman lapsed on 1 January 2009. The Swedish Equality Ombudsman was accredited with B-status upon its application in May 2011.

Organisation

The Ombudsman Office has approximately 100 employees, who are recruited by the Ombudsman through a transparent and standardised procedure[1026] that is not laid down in law, in any case. The institution is divided into eight units: Communication, HR, Staff, Development and Analysis, Process, Administration Unit, and two Legal Units, one in the area of employment, another in social life and education. The Ombudsman is the head of the Office[1027] in his or her administrative capacity as Director-General. The heads of units and the Ombudsman form the Management Team of the Office.[1028] An advisory body (the Council) assists the Ombudsman in his or her work by giving him or her advice and sharing its expertise. The members of the Council (maximum ten persons), who are appointed by the Ombudsman for a term of two years that is renewable represent different segments of the society ensuring pluralism in its composition and diverse views in its deliberations.[1029] The ombudsinstitution does not operate local or regional offices.

Selection, appointment, and tenure

[1024] European Union Agency for Fundamental Rights, *Annex to the Handbook on the Establishment and Accreditation of National Human Rights Institutions in the European Union* (n 74).
[1025] Telephone interview with Anna-Sara Lind, Professor, Department of Law, Uppsala University, 21 February 2019 (n 1019).
[1026] ICC Sub-Committee on Accreditation, 'New Accreditation of the Swedish Equality Ombudsman to the International Coordinating Committee of NHRIs - Summary, May 2011' para 4.2.
[1027] Ordinance with instruction for the Discrimination Ombudsman (2008:1401) Article 3.
[1028] Diskrimineringsombudsmannen, 'Organisation' <http://www.do.se/om-do/organisation/> accessed 15 January 2019.
[1029] Ordinance with instruction for the Discrimination Ombudsman (2008:1401) (n 1027) Article 5.

There are no specific provisions concerning the selection, the appointment, and the tenure of the Equality Ombudsman in the enabling legislation of the institution. Being a state official, a Director-General in the system of public administration, the Equality Ombudsman's selection, appointment, and tenure are subjects to the Public Employment Act (1994:260) and the Instrument of Government. The latest declares that '[a]ppointments to posts at administrative authorities coming under the Government are made by the Government or an authority designated by the Government' and that the state officials' appointment is based on objective factors, such as merits and competences.[1030] While competence is the primary consideration, Swedish citizenship is an eligibility requirement as well – according to the Public Employment Act.[1031] The Equality Ombudsman is employed on a fixed-term contract and may be transferred to another state post that is subject to the same appointment terms.[1032] This selection and appointment process does not meet the Paris Principles requirements as articulated through the General Observations of the GANHRI that emphasise 'transparency, broad consultation and advertisement, and maximisation of the number of potential candidates from a wide range of societal groups'. Furthermore, there are 'no avenues for broad participation or representative input into the selection process'.[1033]

Independence and immunity

The Instrument of Government declares that neither the Parliament nor any public authority may determine how an administrative authority, thus, the Equality Ombudsman shall decide in a particular case.[1034] Nevertheless, being a government authority, the Equality Ombudsman may receive instructions form the Government to take on specific tasks or to report certain information.[1035] Furthermore, the Equality Ombudsman is subject to the supervision of the Parliamentary Ombudsman.[1036] The Ombudsman and his or her

[1030] The Instrument of Government (Sweden) (n 1022) Chapter 12 Article 5.
[1031] Public Employment Act (1994:260) Section 4.
[1032] ibid Section 33.
[1033] Meg Brodie, 'Progressing Norm Socialisation: Why Membership Matters. The Impact of the Accreditation Process of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights' (2011) 80 Nordic Journal of International Law 143, 173.
[1034] The Instrument of Government (Sweden) (n 1022) Chapter 12 Article 2.
[1035] ibid Chapter 7 Article 2.
[1036] Administrative Directives for the Parliamentary Ombudsmen (Sweden), Annex, Area of responsibility 2.

staff are liable for prosecution under the Swedish Penal Code also for actions undertaken in their official capacity.[1037]

Already, the Governmental Commission of Inquiry for the establishment of the new Equality Ombudsman declared that 'an authority under the Government is in principle not self-governed or independent of the Government.'[1038] At the same time, the Commission also admitted that this is in line with the Swedish system of government and the division of powers. Despite this unusual backdrop, administrative authorities in Sweden do not lack independence and do not lag behind other European public authorities.[1039]

Funding

The Equality Ombudsman develops its annual budget independently and forwards it to the Ministry of Employment.[1040] The Government presents the draft budget and its proposals for funding allocation to the Equality Ombudsman in the Budget Bill to the Parliament.[1041] The Parliament decides the funding of Swedish administrative authorities upon the Government's proposal.[1042]

Functions

The Equality Ombudsman's main task is to monitor and identify discrimination, including structural discrimination, and to educate the Swedish society on non-discrimination and equal treatment. The role of the ombudsinstitution is, thus, 'not to promote access to human rights as such, but to prevent discriminatory practices'.[1043] First and foremost, the Equality Ombudsman supervises compliance with the Discrimination Act.[1044] He or she shall, in particular, ensure that 'discrimination associated with sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age does not occur in any areas of the life of society' and 'promote equal rights and opportunities'

[1037] ICC Sub-Committee on Accreditation (n 1026).
[1038] Diskrimineringskommittén (Discrimination Committee) (n 1023) 259.
[1039] Bengtsson (n 1017) 34.
[1040] ICC Sub-Committee on Accreditation (n 1026).
[1041] Bengtsson (n 1017) 53.
[1042] ibid.
[1043] Raoul Wallenberg Institute of Human Rights and Humanitarian Law, 'A Swedish National Human Rights Institution: Exploring Models and Options (Roundtable Report)' (2016) <https://rwi.lu.se/app/uploads/2017/03/Roundtable-on-A-Swedish-National-Human-Rights-Institution.pdf> accessed 17 January 2019.
[1044] Discrimination Act (2008:567) Chapter 4 Section 1.

regardless of the grounds mentioned above.[1045] The Equality Ombudsman does so by performing three main activities: (1) handling individual complaints, (2) promoting non-discrimination and equal treatment, and (3) contributing to the equal treatment legislation. Precisely, the Ombudsman provides advice and other support to anyone, who feels that he or she has been discriminated against.[1046]

In the course of his or her complaint handling function, the Ombudsman investigates the case, and in case of well-established violation, it does not formulate recommendations to the public authority in fault – as most ombudsinstitutions do – but brings the case to the competent court. Both enabling legislation contains a clear provision to this competence. According to the Discrimination Act, the Equality Ombudsman may bring a court action, as a party, on behalf of an individual who consents to this.[1047] In this case, no litigation costs occur with the applicant.[1048] According to the Parental Leave Act, the Equality Ombudsman has the right to bring an action before the labour court on behalf of an individual employee or job applicant, who has been mistreated in working life for reasons related to parental leave.[1049]

Apparently, the Equality Ombudsman has changed its priority working method. In reality, the Ombudsman brings a few cases to court.[1050] Activities focusing on general prevention and long-term changes are increasing, aiming at improving attitudes and people's future behaviour regarding discriminatory practices.[1051] More emphasis has been put on strategic monitoring and litigation. This decision indicates the Ombudsman's position. The Ombudsman focuses on selected cases and areas that they deem to be of strategic importance rather than aiming at providing redress of any kind of violations to all victims. The cases are selected against a set of criteria agreed beforehand.[1052] Key aspects that govern the Ombudsman at his or her choice are: (1) impact for many, (2) sanctioning serious or common infringements (upholding the duty of sanction), (3) aiming at clarifying unclear aspects of the law (promotion of legal certainty), (4) supervision focused on

[1045] Act on the Equality Ombudsman (2008:568) Section 1.
[1046] ibid Section 2.
[1047] Discrimination Act (2008:567) (n 1044) Chapter 4 Section 2 and Chapter 6 Section 2.
[1048] ibid Chapter 6 Section 7.
[1049] Parental Leave Act (1995:584) Section 25.
[1050] Raoul Wallenberg Institute of Human Rights and Humanitarian Law (n 1043).
[1051] European Network of Legal Experts in Gender Equality and Non-Discrimination, 'Country Report: Sweden' (2018) 13 <https://www.equalitylaw.eu/downloads/4796-sweden-country-report-non-discrimination-2018-pdf-2-49-mb> accessed 22 January 2019.
[1052] Skype interview with Tamás Kádár, Deputy Director, Equinet, 8 February 2019 (n 808).

structural aspects (including positive duties). Cases that are not selected for investigation will be closed.[1053] As a consequence of strategic litigation, the Ombudsman Office investigates fewer complaints and brings a smaller number of cases to court.[1054] This strategy indicates a more conscious approach towards creating case law on discrimination.[1055] A comprehensive investigation on how to protect better against discrimination in Sweden supports this approach.[1056]

The institution follows up its work, for example, through the continuous evaluation of development in society, and dialogue with key actors and CSOs. Furthermore, it engages with universities and researchers in order to get an opinion on the extent, key actors have knowledge about the legislation and implement it.[1057]

The Ombudsman undertakes general measures for the promotion of non-discrimination and equal treatment, especially in the fields of harassment and sexual harassment[1058] by keeping touch with actors of working and social life, including government agencies, enterprises, individuals and organisations; participating in public debates; keeping a clear profile in mass media; as well as following international developments, research and development work.[1059] The Ombudsman may propose legislative amendments or other anti-discrimination measures to the Government by sharing his or her opinion on new legislation and other Government proposals or submitting own initiative offering an opinion on existing statutes.[1060]

For the 2017-2020 period, the priorities of the ombudsinstitution are: (1) focus on employers' work with active measures, (2) access to housing without discrimination, (3) discrimination is social services.[1061]

[1053] Email exchange with Kerstin Jansson, International Coordinator, The Equality Ombudsman (Sweden), 19 March 2019.
[1054] Skype interview with Tamás Kádár, Deputy Director, Equinet, 8 February 2019 (n 808).
[1055] Telephone interview with Anna-Sara Lind, Professor, Department of Law, Uppsala University, 21 February 2019 (n 1019).
[1056] The investigation of better opportunities to counteract and Discrimination, 'Bättre Skydd Mot Diskriminering (SOU 2016:87) [Better Protection against Discrimination]' (2016) 33 <https://www.regeringen.se/4af295/contentassets/b42c019548304be987083fb37f73d74f/battre-skydd-mot-diskriminering-sou-201687> accessed 22 May 2019.
[1057] Email exchange with Kerstin Jansson, International Coordinator, The Equality Ombudsman (Sweden), 19 March 2019 (n 1053).
[1058] ibid.
[1059] Act on the Equality Ombudsman (2008:568) (n 1045) Section 3.
[1060] ibid Section 3.
[1061] Email exchange with Kerstin Jansson, International Coordinator, The Equality Ombudsman (Sweden), 19

The Swedish Equality Ombudsman is first and foremost an Equality Body. Both its mandate and activities point towards supervising compliance with the Discrimination Act. What is a narrow mandate from the Paris Principles compliance perspective, but a strong and clear one from the perspective of the EU Directives.

Competences and powers

The Equality Ombudsman has competence over public and private entities, as well as the military.[1062] Ministers fall outside the Ombudsman's jurisdiction. This limitation is less important in Sweden than it would be in most parliamentary countries, in any case.[1063] The most notable characteristic of the Swedish public administration is that the authorities are agencies led by fully independent public officials (agents) instead of ministers. These officials cannot be instructed by ministers when fulfilling their public functions. Thus, public officials act autonomously within their jurisdictions and bear full responsibility for their decisions.[1064] Consequently, ministers cannot be made responsible to the Parliament for the agencies' performance.[1065]

Natural and legal persons under the Ombudsman's supervision are obliged to cooperate with the Ombudsman during his or her inquiries, including providing information about circumstances and qualifications, giving him or her access to workplaces and other premises, and attending discussions with the Ombudsman.[1066] Non-compliance may result in a financial penalty.[1067] Against the Ombudsman's decisions, no appeal may be made – except for his or her decision ordering financial penalty.[1068]

When supervising compliance with the obligation ('active measures') of employers, the Ombudsman may apply to the Board against Discrimination for issuing compensations.[1069] The Board against Discrimination – established by the Discrimination Act[1070] – examines applications for damages, as well as appeals against the Ombudsman's decision ordering

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March 2019 (n 1053).
[1062] ibid.
[1063] Stig Jägerskiöld, 'The Swedish Ombudsman' (1961) 109 University of Pennsylvania Law Review 1077, 1083.
[1064] Modeen (n 1015) 316.
[1065] Kucsko-Stadlmayer (n 288).
[1066] Discrimination Act (2008:567) (n 1044) Chapter 4 Section 3.
[1067] ibid Chapter 4 Section 4.
[1068] ibid Chapter 4 Section 6.
[1069] ibid Chapter 4 Section 5.
[1070] ibid Chapter 4 Sections 7-17.

financial penalty.[1071] If the Board against Discrimination orders compensation, the Equality Ombudsman brings the proceedings for the imposition of the compensation before the district court.[1072]

The European Commission against Racism and Intolerance (ECRI) noted that the Discrimination Act, and therefore, also the mandate of the Equality Ombudsman, do not fully cover all actions of public authorities; for example, '[s]ubstantial aspects of the work of law enforcement agencies' are not covered.[1073] Therefore, ECRI recommended the investment of adequate powers and expertise in the ombudsinstitution, and encouraged the Parliamentary Ombudsman 'to work in consultation with the Equality Ombudsman in these cases'.[1074]

NPM mandate

Sweden ratified the OPCAT in 2005. The OPCAT Ratification Bill[1075] included a proposal for the designation of two existing institutions as Sweden's NPM: the Parliamentary Ombudsman and the Chancellor of Justice. Although both entities protested against their designation – mainly because of lacking adequate financial and human resources, the Parliament has adopted the bill, and the Parliamentary Ombudsman's Act was amended accordingly in 2011.[1076] Thus, the Equality Ombudsman does not perform any NPM tasks.

Cooperation activities

The Equality Ombudsman has a legislative obligation to have contacts with government agencies, enterprises, individuals and organisations, as well as international organisations.[1077] The Ombudsman cooperates with CSOs by carrying out consultations with them, whereby they identify problems and develop solutions. CSOs are essential information sources for the ombudsinstitution when it comes to discriminatory structures in society. They also disseminate information among their members about the

[1071] ibid Chapter 4 Section 7.
[1072] ibid Chapter 4 Section 17.
[1073] CoE ECRI Secretariat and Directorate General II - Democracy, 'ECRI Report on Sweden (Fifth Monitoring Cycle)' (2017) para 15.
[1074] CoE ECRI Secretariat and Directorate General II - Democracy (n 1073) Recommendation No. 4.
[1075] OPCAT Ratification Bill (2004/05:107).
[1076] Association for the Prevention of Torture (apt), 'OPCAT Country Status Ratification and Implementation' (2010) 145 <http://unipd-centrodirittiumani.it/public/docs/NPM.Status[1].pdf> accessed 22 January 2019.
[1077] Act on the Equality Ombudsman (2008:568) (n 1045) Section 3.

Discrimination Act and the Equality Ombudsman.[1078] CSOs and the Equality Ombudsman also collaborate in the course of co-organising conferences and project works.[1079] The Equality Ombudsman interacts with other ombudsinstitutions, universities and international organisations when relevant.[1080] The media is also an important platform for the Ombudsman when it comes to publishing reports, campaigns, decisions and opinions, deciding about bringing a case to court, or monitoring companies and schools accused of discrimination.[1081]

In its capacity as Equality Body, the Swedish Equality Ombudsman is an active member of Equinet, and as accredited NHRI, it is a non-voting member of ENNHRI and GANHRI.

NHRI accreditation

From 1999 to 2008, the Ombudsman against Ethnic Discrimination was accredited as A-status NHRI 'on behalf of the Swedish Ombudsmen with human rights responsibilities'.[1082] It meant that the different ombudsinstitutions represented Sweden in the ICC meetings until the Equal Opportunities Ombudsman (EOO) took the lead in Sweden's engagement with the ICC and was foreseen to undergo re-accreditation in March 2007. The institution requested a deferral that the ICC granted.[1083] In the next session, the EOO withdrew its application anticipating the ongoing national effort to merge the four specialised ombudsinstitutions.[1084] The SCA further deferred the re-accreditation application to its fall 2008 session.[1085] At this meeting, the SCA decided about the lapse of the EOO's accreditation status and invited the newly merged ombudsinstitution to apply for accreditation.[1086] In its Action Plan on Human Rights (2006-2009), the Government

[1078] Email exchange with Kerstin Jansson, International Coordinator, The Equality Ombudsman (Sweden), 19 March 2019 (n 1053).
[1079] Accreditation session of the Sub-Committee on Accreditation, Geneva, May 2011.
[1080] Email exchange with Kerstin Jansson, International Coordinator, The Equality Ombudsman (Sweden), 19 March 2019 (n 1053).
[1081] ibid.
[1082] Brodie (n 1033) 169.
[1083] The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Sub-Committee on Accreditation, Geneva, 22 March 2007' para 1.3.
[1084] The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Sub-Committee on Accreditation, Geneva, 22-26 October 2007' para 3.16.
[1085] The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Sub-Committee on Accreditation, Geneva, 21-23 April 2008' para 3.10.
[1086] The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation,

appointed a Delegation on Human Rights and mandated it to support 'central government agencies, municipalities and county councils in the long-term work of ensuring full respect for human rights in their activities', and to spread 'information and knowledge about human rights among the general public' and stimulate 'public debate on human rights'.[1087] In in its final report of 2010, the Delegation made a recommendation for the establishment of an NHRI.[1088] Since the establishment of the new NHRI would take time, the merged Equality Ombudsman applied for accreditation.[1089] It might seem to be an 'inconsistency between the Government's acknowledgement of the validity of the Paris Principles[1090] and the decision to put forward a non-compliant institution for consideration'[1091] , but the stake was not to lose Sweden's representation in the ICC.[1092]

The accreditation application of the Equality Ombudsman was reviewed in 2011, and it received a B-status that it has been holding since then. The ICC's concern was that the EO's mandate is not broad enough as it is restricted to matters of equality. Furthermore, there are no provisions in the enabling legislation on appointment and dismissal procedures; therefore, these are not transparent enough; and the possibility of transferring the ombudsperson to another position is endangering the independence of the institution. The ICC was also concerned by the fact that the Equality Ombudsman is accountable to the Government, from which it may receive instructions, and not to the Parliament. The SCA even labelled the institution as 'government authority' and 'administrative agency'. Summing up, the institution is lacking in independence required by the Paris Principles.[1093]

Since then, Sweden has been urged by almost all UN Treaty Bodies,[1094] the Human Rights Council,[1095] and the CoE Commissioner for Human Rights[1096] to establish an NHRI in full

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Geneva, 3-6 November 2008' para 4.11.

[1087] 'Summary of the Swedish Government Communication (2005/06:95). A National Action Plan for Human Rights 2006–2009' Measure 103.

[1088] Slutbetänkande av Delegationen för mänskliga rättigheter i Sverige, 'Ny Struktur För Skydd Av Mänskliga Rättigheter (SOU 2010:70) [New Structure for the Protection of Human Rights]' (2010) 199 <https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2010/10/sou-201070/> accessed 15 January 2019.

[1089] Email exchange with Kerstin Jansson, International Coordinator, The Equality Ombudsman (Sweden), 19 March 2019 (n 1053).

[1090] 'UN Human Rights Committee, Replies to the List of Issues (CCPR/C/SWE/Q/6) to Be Taken up in Connection with the Consideration of the 6th Periodic Report of the Government of Sweden (CCPR/C/SWE/6), 3 February 2009, CCPR/C/SWE/Q/6/Add.1' para 11.

[1091] Brodie (n 1033) 182.

[1092] Email exchange with Kerstin Jansson, International Coordinator, The Equality Ombudsman (Sweden), 19 March 2019 (n 1053).

[1093] Accreditation session of the Sub-Committee on Accreditation, Geneva, May 2011 (n 1079).

[1094] See the latest: UN Committee on the Elimination of Racial Discrimination, Concluding observations: Sweden, 6 June 2018, CERD/C/SWE/CO/22-23 para 9; UN Committee on Economic, Social and Cultural

compliance with the Paris Principles. In the course of the UPR in 2015, Sweden received recommendations from 19 countries in relation to the establishment of a Paris Principles conform NHRI.[1097] In its responses, Sweden accepted these recommendations.[1098] Sweden committed itself for the establishment of an NHRI in compliance with the Paris Principles also in relation to the implementation of the Sustainable Development Goal (SDG) 16 that covers peace, justice and strong institutions as an indicator on NHRIs.[1099]

The issue was raised in the Government's latest human rights strategy (2017).[1100] The Government is on the view that '[a] national human rights institution in accordance with the Paris Principles ought to be established in Sweden' and '[t]he Riksdag ought to be the principal for such an institution.'[1101] The Government admitted that there are government agencies in the country – especially ombudsinstitutions, whose mandates correspond partly with the requirements of the Paris Principles. It highlighted the Parliamentary Ombudsman in particular, whose competence covers the rights and freedoms established by the Instrument of Government, as well as the European Convention; and the Ombudsman for Children, who is tasked with monitoring Sweden's international human rights commitments under the CRC.[1102] The Government foresees an institution that fulfils 'a supplementary role in relation to the work' of the already existing ombudsinstitutions.[1103] The Government is convinced that an NHRI in accordance with the Paris Principles would strengthen the Swedish foreign policy and development cooperation [1104] and that the

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Rights, Concluding observations: Sweden, 14 July 2016, E/C.12/SWE/CO/6 para 10; UN Human Rights Committee, Concluding observations: Sweden, 28 April 2016, CCPR/C/SWE/CO/7 para 9; UN Committee on the Elimination of Discrimination against Women, Concluding observations: Sweden, 10 March 2016, CEDAW/C/SWE/CO/8-9 para 21; UN Committee on the Rights of Persons with Disabilities, Concluding observations: Sweden, 12 May 2014, CRPD/C/SWE/CO/1 para 62.

[1095] UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Sweden, 13 April 2015, A/HRC/29/13.

[1096] CoE Commissioner for Human Rights, 'Commissioner Muižnieks Calls on Swedish Parliament to Be Ambitious in Plans to Establish a National Human Rights Institution' (n 67); CoE Commissioner for Human Rights, 'Report by Nils Muiznieks Commissioner for Human Rights of the Council of Europe Following His Visit to Sweden from 2 to 6 October 2017, 16 February 2018, CommDH(2018)4'.

[1097] UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Sweden, 13 April 2015, A/HRC/29/13 (n 1095).

[1098] Sweden's responses to recommendations (as of 17.08.2015).

[1099] Swedish Government, 'Sweden and the 2030 Agenda — Report to the UN High Level Political Forum 2017 on Sustainable Development' (2017) 39 <https://sustainabledevelopment.un.org/content/documents/16033Sweden.pdf> accessed 1 March 2019.

[1100] Swedish Government, 'A Strategy for National Efforts with Human Rights' (2017) <https://www.government.se/4ab459/contentassets/08bcf332d33e40908f918f0cd29a13ae/a-strategy-for-national-efforts-with-human-rights> accessed 15 January 2019.

[1101] ibid 23.

[1102] ibid 28.

[1103] ibid 30.

[1104] ibid 30–31.

institution's independence can be ensured if it has the Parliament as its principal.[1105] In its response,[1106] the Swedish Parliament declined the Government's proposal for the establishment of an NHRI – at least in its proposed form. The Parliament would like the new NHRI to be managed within the framework of the current authority structure. *Id est*, the Swedish Parliament is not designed to govern or provide support to authorities, they are answerable to the Government. It is 'catch-22' then because according to the independence requirement of the Paris Principles, an NHRI must be 'independent from the government in its structure, composition, decision-making and method of operation'.[1107] Also, civil society responded to the announcement of the Government. Various human rights organisations formed a network and discussed how a Swedish NHRI could look like. These discussions went deeper when analysing the necessity of an NHRI in the country. Among the arguments in favour, we can find the 'noticeable difference in capacity between different municipalities in dealing with human rights issues', the need for 'education among local civil servants, politicians and the general public, as well as increased diversity and inclusion in public Swedish institutions'. The NHRI needs to be efficient and have the capacity to address issues in general and along with individual human rights violations. The participating organisations emphasised that '[t]he NHRI must also meet the structural demands of the Paris Principles and create a real impact in order to make changes on the ground'.[1108]

In March 2018, the Government commissioned Lise Bergh, the chairman of Save the Children Sweden, to assist the Ministry of Culture in the work of analysing the establishment of an NHRI in Sweden. The mandate of the Commission composed of further human rights experts was restricted in as much as it could not consider the question of putting the new institution under the Parliament, and having the mandate to accept individual complaints.[1109] In October 2018, the Commission presented its findings on how a future Swedish NHRI should/could look like. In order to ensure the independence from the Government as appointing authority, the institution would be led by a Board of seven

[1105] ibid 32.
[1106] 'En Strategi För Arbetet Med Mänskliga Rättigheter i Sverige (Betänkande 2017/18:KU6) [A Strategy for Work on Human Rights in Sweden]' <http://data.riksdagen.se/dokumentstatus/H501KU6.rix> accessed 15 January 2019.
[1107] Paris Principles (n 92); Global Alliance of National Human Rights Institutions, 'General Observations of the Sub-Committee on Accreditation' (n 142) para 1.9.
[1108] Raoul Wallenberg Institute of Human Rights and Humanitarian Law (n 1043).
[1109] 'Investigate the Establishment of a National Human Rights Institution (Ku 2018: A)' 29 <https://www.likaunika.org/Filer/181122 Mr instutition2018 11 21.pdf> accessed 8 February 2019.

members, who would be suggested by external actors and appointed by the Government for five years. The Board would employ a Director for seven years. While strategic planning would be the task of the Board, the Director would be responsible for managing the activities of the institution. The proposal contains further guarantees in the spirit of the Paris Principles.[1110] The report was sent for a referral to national authorities, municipalities, county councils, and CSOs until 22 May 2019.[1111] It is up to the Government to decide on how to implement the idea of the Swedish NHRI. Whether by establishing a brand new institution or by broadening the mandate of an already existing institution dealing with human rights. While the commission suggests the former, the Government may argue in favour of the latter that new agencies with similar mandates were recently established (the Swedish Gender Equality Agency[1112] in January 2018 and the Swedish Agency for Participation[1113] in May 2014) beyond the already existing ombudsinstitutions, and it does not want to multiply the number of institutions dealing with human rights.[1114] Thus, the NHRI question has not been answered in Sweden yet.

[1110] ibid 6.2.
[1111] Email exchange with Kerstin Jansson, International Coordinator, The Equality Ombudsman (Sweden), 19 March 2019 (n 1053).
[1112] 'Swedish Gender Equality Agency' <https://www.jamstalldhetsmyndigheten.se/en> accessed 25 February 2019.
[1113] 'Swedish Agency for Participation' <http://www.mfd.se/other-languages/english/> accessed 25 February 2019.
[1114] Skype interview with Ylva Lennartsson Hartmann, Human Rights Advisor, Swedish Foundation for Human Rights, 22 February 2019.

3.2.2 The Parliamentary Ombudsman for Public Administration – Norway

History and legal background

Norway established first a Parliamentary Ombudsman for the Norwegian Armed Forces (Military Ombudsman) in 1952. In 1951, the King in Council appointed an Expert Commission on Administrative Procedure in order to investigate and propose measures for the improvement of administrative procedures and strengthening the citizens' judicial security when dealing with public administration. The Commission made three major recommendations in its final report in 1958. One of these was the establishment of the office of the Commissioner for Civil Administration.[1115] The Commission's proposal with some modifications became the Government's bill, that the Government submitted to the Norwegian Parliament (*Storting*) in 1960.[1116] Broad nationwide consultations followed that may explain why the Parliament adopted the law setting up the Parliamentary Ombudsman for Public Administration (Norwegian Civil Ombudsman, *Silvilobundsmannen*)[1117] only in its session in 1961-62.[1118] The mandate of the ombudsinstitution has been broadened over the years. First, it covered only central government bodies. It was extended to complaints touching upon municipalities in 1968. In 1980, another revision followed, the importance of that lies within the fact that the Parliament revised the Parliamentary Ombudsman Act without passing through the Cabinet, indicating the independence of the ombudsinstitution.[1119] Based on the enabling legislation,[1120] the Parliament issued general instructions[1121] containing provisions in relation to the procedures of the ombudsinstitution. The constitutional rank of the institution dates back to 1995. Since then, Article 75 has listed among the competences of the Parliament the appointment of 'a person, not a member of the *Storting*, in a manner prescribed by law, to supervise the public administration and all who work in its service, to assure that no injustice is done against the individual citizen'.[1122]

[1115] Anderson (n 998) 432.
[1116] Ingunn N Means, 'The Norwegian Ombudsman' (1968) 21 The Western Political Quarterly 624, 626.
[1117] Act relating to the Parliamentary Ombudsman for Public Administration (Act of 22 June 1962 No. 8), hereinafter referred to as The Parliamentary Ombudsman Act (Norway).
[1118] James A Storing, 'The Norwegian Ombudsman for Civil Affairs: The First Three Years, 1963-66' (1968) 21 The Western Political Quarterly 302, 303.
[1119] Rakel Surlien, 'Norway' in Gerald E Caiden (ed), *International Handbook of the Ombudsman: Country Surveys* (Greenwood Press 1983) 161.
[1120] The Parliamentary Ombudsman Act (Norway) (n 1117) Section 2.
[1121] Instructions for the Parliamentary Ombudsman for Public Administration of 19/2/1980 (Norway).
[1122] The Constitution, as laid down on 17 May 1814 by the Constituent Assembly at Eidsvoll and

Since 1962, five persons have occupied the position. The previous mandate holder (Arne Fliflet) was in office for 24 years (from 1990 till 2014), while the current ombudsman (Aage Thor Falkanger) was already re-elected once in 2018.

Organisation

There are three thematic divisions within the Ombudsman's Office, dealing with the whole spectrum of human rights from labour rights through education to transport and communication. The Investigation Division deals with the Ombudsman's own initiatives and coordinates the drafting of the annual report. There is the NPM Division and an Administrative Division.[1123] The Presidium of the Parliament appoints the Ombudsman's staff upon the Ombudsman's recommendations.[1124] At the moment, approximately 70 staff members work in the office full time.[1125] The Presidium is the highest authority of the Parliament having the final responsibility in administrative matters[1126] and constituting of the President and five Vice Presidents.[1127] Their working conditions correlate to the provisions applied to officials in the central government administration.[1128]

Selection, appointment, and tenure

The Parliament elects the Ombudsman for four years. The Ombudsman's term begins on 1 January.[1129] Re-election is possible for unlimited terms since the law does not rule it out. The fourth ombudsman in the row, Arne Fliflet was reappointed five times (1990-2014).[1130] The candidate's qualification must be identical with that of a Supreme Court judge,[1131] that means a 30 years old Norwegian citizen holding a first-class law degree.[1132] He or she cannot be a member of the Parliament or representative of any political party.[1133] If the Presidium of the Parliament is on the view that the Ombudsman 'is disqualified to

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subsequently amended (Norway), Article 75(l) (hereinafter referred to as the Norwegian Constitution).
[1123] Sivilombudsmannen, 'Organisasjonskart' <https://www.sivilombudsmannen.no/om/organisasjon/organisasjonskart/> accessed 19 January 2019.
[1124] The Parliamentary Ombudsman Act (Norway) (n 1117) Section 14.
[1125] Telephone interview with Helga Fastrup Ervik, Head of NPM Unit, Norwegian Parliamentary Ombudsman, 28 February 2019.
[1126] The Norwegian Parliament Rules of Procedure and the Constitution 2018 Article 9a.
[1127] ibid Article 7.
[1128] The Parliamentary Ombudsman Act (Norway) (n 1117) Section 14.
[1129] ibid Section 1.
[1130] Store norske leksikon, 'Arne Fliflet' <https://snl.no/Arne_Fliflet> accessed 1 March 2019.
[1131] The Parliamentary Ombudsman Act (Norway) (n 1117) Section 1.
[1132] Walter Gellhorn, 'The Norwegian Ombudsman' (1966) 18 Stanford Law Review 293, 296.
[1133] Arne Fliflet, 'Legal Institution of Ombudsman' in Kamal Hossain and others (eds), *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (Kluwer Law International 2001) 365.

deal with a particular matter', it elects a deputy Ombudsman for this purpose[1134] – who is usually one of the heads of units. It is not a regular position, thus.

The appointment and election procedure itself is not outlined in the law. It is rather the result of talks and negotiations, based on both formal and informal procedures.[1135] The Norwegian Press Association published a critical article on the appointment procedure in 2013 before the expiry of the sixth mandate of the resigning ombudsperson. It highlights the paradox that while the ombudsinstitution works for a better public administration, including a higher level of transparency and openness, the election process of the new ombudsperson progresses in secret.[1136] According to the Norwegian Editor's Association, the Ombudsman has also pointed out weaknesses in its own enabling legislation in this regard.[1137] On 1 January 2014, the Ombudsman in office resigned. The Parliament promised 'an open process in which relevant candidates for the office of the Storting's Ombudsman for Administration can express their interest'.[1138] It was the first time that the Parliament issued a public call for the post requesting interested candidates to send their CVs, diplomas, certificates and other relevant information to the Storting's Director.[1139] The Presidium meets the candidates before putting forward its recommendation in the plenary session of the Storting. To the appointment, a simple majority is needed that means 85 votes in favour.[1140]

Once in the office, holding another public or private appointment or office without the consent of the Parliament is not allowed.[1141]

Independence and immunity

Performing his or her duties, the Ombudsman is autonomous and independent from the Parliament.[1142] Due to its independence from the ordinary administrative machinery of the

[1134] The Parliamentary Ombudsman Act (Norway) (n 1117) Section 1.
[1135] Fliflet (n 1133) 365.
[1136] Norsk Presseforbund [Norwegian Press Association] (Kristine Foss and Ingrid Synnøve Torp), 'Ny Sivilombudsmann i All Hemmelighet [New Civil Ombudsman Secretly]' (2013) <https://presse.no/np-nyhet/ny-sivilombudsmann-i-all-hemmelighet/> accessed 8 March 2019.
[1137] Norsk Redaktørforening [Norwegian Editor's Association], 'Lukket Prosess Rundt Ny Sivilombudsmann [Closed Process around the New Civil Ombudsman]' (2013) <https://www.nored.no/Norsk-Redaktoerforening/Redaktoernyheter/Lukket-prosess-rundt-ny-sivilombudsmann> accessed 8 March 2019.
[1138] Stortinget, 'Ønsker Kandidater Til Ny Sivilombudsmann [Want Candidates for a New Civil Ombudsman]' (2013) <https://www.stortinget.no/Hva-skjer-pa-Stortinget/Nyhetsarkiv/Hva-skjer-nyheter/2013-2014/Onsker-kandidater-til-ny-sivilombudsmann/> accessed 8 March 2019.
[1139] ibid.
[1140] Email exchange with Marte Lund Saga, Consultant, Storting Executive Office (Norway), 23 March 2019.
[1141] The Parliamentary Ombudsman Act (Norway) (n 1117) Section 13.

state (i.e. ministries, directorates, and county governors), the public trust the Ombudsman Office.[1143] The Ombudsman is not immune from prosecution, in any case.[1144] Nevertheless, legislative changes are foreseen in relation to the immunity of the NPM Unit.[1145]

Funding

There are no exact legal provisions regarding the budgeting of the Norwegian ombudsinstitution. The Instructions say only that the communication between the Parliament and the Ombudsman regarding the institution's budget are 'exempted from public disclosure'.[1146]

In practice, the Ombudsman sends the financial report of the previous year and the budget proposal of the upcoming year until March to the Scrutiny and Constitutional Affairs Committee of the Storting. The Committee considers the proposal in detail and forwards its recommendation to the Presidium. The Presidium approves the budget proposal. The draft budget is sent to the Ministry of Finance. Thus, when the Government proposes the annual fiscal budget to the Storting in October, it encompasses the draft budget of the ombudsinstitution approved by the Presidium.[1147]

Functions

The Ombudsman ensures that citizens 'are not unjustly treated by the public administration' and 'the public administration respects and safeguards human rights'.[1148] Unjust treatment may stem from dealing a case incorrectly or irresponsibly or lengthily, or not responding to the citizen at all. The Ombudsman provides an objective legal assessment of individual complaints. Thus, following the Danish investigator model, the emphasis in the functioning of the ombudsinstitution is rather on the redress providing to the individual citizen and not on the supervision and punishment of civil servants.[1149] As

[1142] ibid Section 2.
[1143] Email exchange with Arni Hole, Former Director General, Ministry of Food and Agriculture; Former Director General, Ministry of Children, Equality and Social Inclusion, Norway, 30 January 2019.
[1144] Joachim Stern, 'Norway' in Gabriele Kucsko-Stadlmayer (ed), *European Ombudsman-Institutions* (Springer 2008) 333.
[1145] Telephone interview with Helga Fastrup Ervik, Head of NPM Unit, Norwegian Parliamentary Ombudsman, 28 February 2019 (n 1125).
[1146] Instructions for the Parliamentary Ombudsman for Public Administration of 19/2/1980 (Norway) (n 1121) Section 11.
[1147] Email exchange with Marte Lund Saga, Consultant, Storting Executive Office (Norway), 23 March 2019 (n 1140).
[1148] The Parliamentary Ombudsman Act (Norway) (n 1117) Section 3.
[1149] Audvar Os, 'The Parliamentary Ombudsman for Public Administration in Norway – Questions of

said, the protection of human rights is an explicit task of the ombudsinstitution. He or she also supervises, on behalf of the Parliament, the compliance of the administrative practice with international human rights standards.[1150]

The Ombudsman has a supplementary role. First, public authorities are given the opportunity – with the exception if the King is the only complaints body – to investigate a complaint before the Ombudsman would launch his or her procedure. If the one-year time limit for submitting a complaint with the ombudsinstitution hinder the complainant to have the decision reviewed by a higher authority, the Ombudsman may decide in his or her discretionary power to consider the case.[1151]

Anyone can be complainant, who is subject to a violation that happened within one year, after having exhausted all available legal remedies.[1152] If the one year limit has expired, the ombudsman may take up a complaint on his own initiative.[1153] A complaint should be made in writing and be signed by the complainant or a person acting on the complainant's behalf. The complainant should provide an account of the grounds and present evidence and other documents in the case, as far as possible.[1154] Complainants are encouraged to submit their complaints through the electronic complaint form to be found on the Ombudsman's website. The Parliamentary Ombudsman Act enables the Ombudsman to proceed *ex officio* 'in the interests of due process of law or other special reasons'.[1155] The Ombudsman proceeded *ex officio* 45 times in 2013, 35 times in 2014, and 26 times in 2015.[1156]

Competences and powers

Jurisdiction' (1984) 2 <http://www.theioi.org/downloads/brfet/IOI Canada_Occasional Paper 27_Audvar Os_Parliamentary OM for public administration in Norway_1984.pdf> accessed 24 March 2018.

[1150] Common core document forming part of the reports of States parties: Norway, 24 January 2014, HRI/CORE/NOR/2013 para 118.

[1151] Instructions for the Parliamentary Ombudsman for Public Administration of 19/2/1980 (Norway) (n 1121) Section 5.

[1152] The Parliamentary Ombudsman Act (Norway) (n 1117) Section 6.

[1153] Instructions for the Parliamentary Ombudsman for Public Administration of 19/2/1980 (Norway) (n 1121) Section 4.

[1154] ibid Section 3.

[1155] The Parliamentary Ombudsman Act (Norway) (n 1117) Section 4.

[1156] Sivilombudsmannen, 'Annual Report 2015' 43.

The Ombudsman supervises the public administration, including private institutions, where persons are detained based on the decision of a public authority.[1157] He or she proceeds upon an individual complaint or on his or her own initiative.[1158]

The Ombudsman has no competence over matters dealt with by the Parliament, the decisions adopted by the King in Council, the functions of the courts of law, the activities of the Auditor General, cases coming under the competence of the Military Ombudsman, as well as decisions made by municipal, or county councils, or cooperative municipal councils – 'unless the decision is made by municipal executive board, a county executive board, a standing committee or a city or county government'.[1159] Nevertheless, the Ombudsman may proceed *ex officio* – as mentioned – also in these cases 'in the interest of due process of law or for other special reasons'.[1160] The Parliament may further narrow the Ombudsman's competences in as much as it may determine whether specific public institutions or enterprises belong to the public administration, or certain activities of public authorities fall outside of the Ombudsman's competences.[1161] The Instructions name two such bodies: the Norwegian Parliamentary Intelligence Oversight Committee that shall not be considered as part of the public administration, and cases dealt with by the Ex gratia Payments Committee of the Parliament.[1162]

Some authors argue that the Norwegian Ombudsman should have authority at least regarding the administrative functions of courts, since administrative decisions of courts are subject to appeal to the competent ministry (e.g. 'official registration of documents can be brought before the Ministry of Justice; the charging of a stamp tax can be submitted to the Ministry of Finance, and complaints of delays on the part of the courts can be addressed to the Ministry of Justice'[1163]), and the decisions of ministries may be the basis of complaints to the Ombudsman.[1164] On the other hand, an interpretation that would exclude all cases that can be brought before the courts of law would be meaningless, since almost all decisions of the public administration can land on the table of the competent

[1157] The Parliamentary Ombudsman Act (Norway) (n 1117) Section 4.
[1158] ibid Section 5.
[1159] ibid Section 4.
[1160] ibid Section 4.
[1161] ibid Section 4.
[1162] Instructions for the Parliamentary Ombudsman for Public Administration of 19/2/1980 (Norway) (n 1121) Section 2.
[1163] Sverre Thune, 'The Norwegian Ombudsmen for Civil and Military Affairs' (1968) 377 The Annals of the American Academy of Political and Social Science 41, 47.
[1164] Os (n 1149) 10; Thune (n 1163) 47–48.

minister as appeal organ. The 'activities of the courts of law' in the wording of the Act[1165] rather refers to cases that are already pending before a court or a court has made its final judgment so that simultaneous handling of the case is avoided.

In the course of his or her investigations, the Ombudsman may require public officials to provide him or her with information.[1166] Officials have the right to refuse to provide the requested information in case of professional secrecy as determined by the Civil Procedures Act.[1167] The Ombudsman is entitled to access premises of any administrative body or enterprise belonging to his or her competences.[1168] When accessing documents, the Ombudsman and his or her colleagues bear the duty of confidentiality.[1169] In order to review actual circumstances with a view to identifying breaches of the law or reproachable actions, the Ombudsman may demand the hearing of evidence before the courts.[1170] If it is held for necessary, the Ombudsman can obtain an expert opinion.[1171]

The Ombudsman may call attention to errors or negligence and inform the prosecutor or the appointing authority to launch their proceedings against the official concerned. He or she may point out invalid, or clearly unreasonable or good administrative practice conflicting decisions, and make public authorities aware of other important factors of the given case. He or she can initiate the payment of compensation.[1172] If the Ombudsman detects an error of an act, regulation or administrative practice, he or she will notify the ministry concerned.[1173] The Norwegian Ombudsman's possibilities of action are narrower than that of the Danish model. While the Danish Ombudsman can order the actions of the prosecuting authority, as well as disciplinary proceedings conducted by the appointing authority, or bring cases before courts, the Norwegian Ombudsman can only inform the prosecuting or appointing authority and share his or her opinion with them.[1174] The Ombudsman's opinion is not legally binding, but the Parliamentary Ombudsman's

[1165] The Parliamentary Ombudsman Act (Norway) (n 1117) Section 4.
[1166] ibid Section 7.
[1167] Act on Civil Procedures, Act No. 6 of 13 August 1915 (Norway) Article 204(2).
[1168] The Parliamentary Ombudsman Act (Norway) (n 1117) Section 8.
[1169] ibid Section 9.
[1170] Act relating to the Courts of Justice, Act No. 5 of 13 August 1915 (Norway) Article 43(2).
[1171] Instructions for the Parliamentary Ombudsman for Public Administration of 19/2/1980 (Norway) (n 1121) Section 6.
[1172] The Parliamentary Ombudsman Act (Norway) (n 1117) Section 10.
[1173] ibid Section 11.
[1174] Thune (n 1163) 42.

statements provide an interpretation of pubic administrative law, they are quoted by courts and followed by the public administration.[1175]

NPM mandate

The Ombudsman has performed NPM tasks since 2013. For this function, the Ombudsman established an advisory committee as prescribed by the Parliamentary Ombudsman Act[1176] that provides him or her with expertise, information, advice, and input. The members of the advisory committee have expertise in particular on children, human rights, and psychiatry. The committee is gender-balanced (each sex shall be represented by a minimum of 40 % of the membership) and may include both Norwegian and foreign members.[1177] The Ombudsman's recommendations made as NPM aim at 'improving the treatment and the conditions of persons deprived of their liberty and preventing torture and other cruel, inhuman or degrading treatment or punishment'. NGOs are represented in the advisory committee of the NPM Unit. The addressed authorities must cooperate with the Ombudsman regarding the implementation of the appropriate measures.[1178]

Cooperation activities

Like the other Nordic ombudssystems, Norway has special ombudsinstitutions in certain fields, such as the Consumer Authority,[1179] the Equality and Anti-Discrimination Ombud,[1180] and the Ombudsman for Children[1181]. The Government appoints these mandate-holders who maintain informal cooperation with the Parliamentary Ombudsman. As an informal rule, a complaint first is dealt with by the appropriate specialised ombudsinstitution before the Parliamentary Ombudsman would take it into consideration.[1182]

[1175] Skype interview with Petter Wille, Special Advisor, Norwegian Human Rights Institution, 28 February 2019.
[1176] The Parliamentary Ombudsman Act (Norway) (n 1117) Section 3a.
[1177] Instructions for the Parliamentary Ombudsman for Public Administration of 19/2/1980 (Norway) (n 1121) Section 8a.
[1178] The Parliamentary Ombudsman Act (Norway) (n 1117) Section 10.
[1179] 'The Consumer Authority (Norway)' <https://www.forbrukertilsynet.no/> accessed 30 January 2019.
[1180] 'The Equality and Anti-Discrimination Ombud (Norway)' <http://www.ldo.no/> accessed 30 January 2019.
[1181] 'Ombudsman for Children (Norway)' <http://barneombudet.no/> accessed 30 January 2019.
[1182] Os (n 1149) 4–5.

The Parliamentary Ombudsman submits annual reports to the Parliament,[1183] by 1 April each year that covers the Ombudsman's activities in the period 1 January - 31 December of the previous year.[1184] The Standing Committee on Scrutiny and Constitutional Affairs reviews and submits recommendations to the Parliament on the Ombudsman's reports.[1185] The Ombudsman is not entitled to participate in the debates.[1186] The report is also covered broadly by the media.[1187]

NHRI accreditation

The Parliamentary Ombudsman for Public Administration is not an NHRI in line with the Paris Principles. Although its mandate contains human rights related tasks, the Ombudsman's and the staff's appointment, the immunity and funding rules, and its mandate do not make it capable of the NHRI role. In Norway, this is not the aim, though, as the country established a separated institution for this purpose. From 2001 to 2015, the Norwegian Centre for Human Rights played this role. This multi-disciplinary centre under the Faculty of Law at the University of Oslo was not fully Paris Principle compliant in the lack of independence and establishment by the law, although, it has been holding an A status till 2012.[1188] In November 2012, the SCA recommended that the accreditation of the Norwegian national institution should be downgraded from A to B status.[1189] In the meantime, the Government established an inter-ministerial working group in order to consider whether changes should be made to the NHRI, including establishing a new institutional model that would be more compliant with the Paris Principles. The working group held broad consultation both nationally and internationally. Based on the working group's evaluation, the Ministry of Foreign Affairs prepared a consultative paper that was circulated for review to a wide range of stakeholders in June 2013. Meanwhile, the Board of the University of Oslo decided that the Centre ceases to function as Norway's NHRI.[1190]

[1183] The Parliamentary Ombudsman Act (Norway) (n 1117) Section 12.
[1184] Instructions for the Parliamentary Ombudsman for Public Administration of 19/2/1980 (Norway) (n 1121) Section 12.
[1185] The Norwegian Parliament Rules of Procedure and the Constitution (n 1126), Article 14(8)(d).
[1186] Stern (n 1144) 336.
[1187] Email exchange with Arni Hole, Former Director General, Ministry of Food and Agriculture; Former Director General, Ministry of Children, Equality and Social Inclusion, Norway, 30 January 2019 (n 1143).
[1188] The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 25-28 October 2011' para 3.7.
[1189] The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Sub-Committee on Accreditation (SCA), Geneva, 19-23 November 2012' (n 483) para 3.7.
[1190] Common core document forming part of the reports of States parties: Norway, 24 January 2014,

The Parliamentary Ombudsman for Public Administration was also considered as the new NHRI, but the ombudsperson in office recommended the NHRI to be an independent body with a clear mandate.[1191] In 2015, Norway established a national human rights institution, the Norwegian National Human Rights Institution (*Norges nasjonale institusjon for menneskerettigheter*) that was accredited with A status in March 2017.[1192]

The Parliamentary Ombudsman and the Norwegian Human Rights Institution share administrative facilities, including the building, where they have their seat. The institutions have an agreement on common administrative functions, with the possibility to authorise the ombudsinstitution for spending on the NHRI's budget.[1193] Both institutions are represented in each other's advisory boards.[1194] Membership is a good opportunity for the Ombudsman to liaise with other ombudspersons and practitioners. The NHRI's submission to the UPR in 2014 was prepared in consultation with the Parliamentary Ombudsman.[1195]

HRI/CORE/NOR/2013 (n 1150).

[1191] Skype interview with Pernille Meum, Koordinator, Norwegian National Human Rights Institution, 8 March 2019.

[1192] Global Alliance of National Human Rights Institutions, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 13-17 March 2017' para 2.4.

[1193] Skype interview with Pernille Meum, Koordinator, Norwegian National Human Rights Institution, 8 March 2019 (n 1191).

[1194] Skype interview with Petter Wille, Special Advisor, Norwegian Human Rights Institution, 28 February 2019 (n 1175).

[1195] Norwegian Centre for Human Rights, 'Submission to the Universal Periodic Review of Norway 2014' (2013).

3.2.3 Summary analysis

While the Parliamentary Ombudsman for Public Administration is an old institution in Norway (1962), the Swedish Equality Ombudsman is the result of an institutional transformation taking place in 2008. The Government elects the Equality Ombudsman in Sweden based on merits and competences for a fixed term that is not regulated by law. The Ombudsman is transferable to another position. The Parliament elects the Parliamentary Ombudsman of Norway for four years from candidates whose qualification is identical with that of a Supreme Court Judge. Both legislation is silent about the exact details of the selection and appointment procedure. Several re-elections are present in practice. The main difference between the two Nordic institutions lies in their subordination to the legislative and the executive powers. The Equality Ombudsman may receive instructions from the Swedish Government; the Norwegian Ombudsman is independent of the Parliament (and the Government). None of the ombudsmen enjoys immunity. The budget of both institutions is part of the state budget. The institutions handle individual complaints. The Swedish Ombudsman is mandated to bring cases to courts and request the competent constitutional authority to issue compensation in case. The Office increasingly pursues strategic litigation. The Parliamentary Ombudsman of Norway is rather a classic ombudsman, who fights maladministration and conducts *ex officio* investigations. Both institutions may investigate the activities of public and private entities, with some restrictions that concern public bodies. While the Swedish Equality Ombudsman holds an Equality Body and an NHRI mandate, the Norwegian Ombudsman has an NPM mandate. The Swedish Equality Ombudsman holds an accredited B-status with GANHRI at the moment; however, the establishment of a new NHRI is in progress. In Norway, the Norwegian National Human Rights Institution functions in its capacity as NHRI; nevertheless, the Parliamentary Ombudsman and the NHRI have tight connections, including participating in each other's advisory bodies and sharing the same building.

	Swedish Equality Ombudsman	**Parliamentary Ombudsman for Public Administration (Norway)**
History and legal background	2008	1962
Organisation	• Omb.=Director-General • 8 units • Advisory Council	• 6 divisions
Selection, appointment, and	• Government elects	• Parliament elects

tenure	• no term • merits and competence, SE citizenship • transfer is possible • the selection procedure is not in the law	• 4 years-term • re-election • qualification of a Supreme Court judge: 30 years old, Norwegian citizen, a law degree • incompatibility rules • the selection procedure is not in the law
Independence and immunity	• may receive instructions from the Gov. • no immunity	• independent from the Parliament • no immunity
Funding	• part of the state budget	• part of the state budget
Functions	• complaint-handling • bringing cases to courts • strategic litigation • promoting non-discrimination • contributing to equal treatment legislation • EB, NHRI	• complaint-handling • supplementary role • 1-year time limit • fighting maladministration • human rights protection • ex-officio investigation • NPM
Competences and powers	• public and private entities • except for ministries • cooperation obligation • determine compensation	• public and private entities • except: Parliament, King in Council, courts, Auditor General • further restrictions by the Parliament • call attention, inform, share an opinion
NPM mandate	• no	• since 2013 • Advisory Committee
Cooperation activities	• with other ombudsinstitutions • with CSOs • with international organisations • with the media	• with specialised ombudsinstitutions • reporting to the Parliament
NHRI accreditation	• B-status since 2011 • establishing a new NHRI	• no • separate NHRI

Table 7: Summary table (SE-NO)

As represented, the two analysed Nordic ombudsinstitutions differ from each other, especially regarding their subordination to state powers, their mandates, and the nature of their main activities. However, both legislations are characterised by leaving questions – especially around the selection and appointment – open that are of elementary importance

to the assessment of the Paris Principles conformity of the institutions. Nevertheless, practitioners unanimously reported that the Swedish Equality Ombudsman and the Parliamentary Ombudsman of Norway enjoy a high level of respect and appreciation, including the perception of being fully independent. Apparently, the principle of independence and non-interference is a basic and determining feature of the ombudsinstitutions in both countries. Thus, the case studies of the Nordic region show that beyond analysing the legal background and mandates of the institutions, one needs to understand the national legal and social democratic tradition, including (1) the specialities of the public administration, (2) that of the litigation culture, as well as (3) the perception of human rights.

(1) The necessity to understand the specialities of the public administration is especially remarkable in Sweden, where ombudsinstitutions – similar to other public bodies – are government authorities and as such, are not self-governed and independent from the Government. It means that they may receive instructions from the Government, and ministries fall outside their jurisdiction. Being a government authority also means that the ombudsman position is integrated into the public administration system, and as Director-General, the Public Employment Act applies to it. This together with the fact that Sweden has a constructive public administration since years[1196] is accompanied by a **'strong sentiment'** that the system has been working, 'so it will work'.[1197] In Norway, the principle of independent self-government at the municipal level restricts the competence of the ombudsinstitution as a parliamentary body to oversee municipal affairs.[1198]

(2) Sweden does not have a strong litigation culture. Human rights are politically given to citizens; they are not individually enforceable rights,[1199] and there are fewer safeguards for their enforcement. The interviewed Swedish experts referred to the phenomenon of **'collective justice'**.[1200] According to this, people do not go to courts individually; they let

[1196] Telephone interview with Anna-Sara Lind, Professor, Department of Law, Uppsala University, 21 February 2019 (n 1019).
[1197] Telephone interview with Karol Nowak, Senior lecturer, Department of Law, Lund University, 12 February 2019.
[1198] Email exchange with Arni Hole, Former Director General, Ministry of Food and Agriculture; Former Director General, Ministry of Children, Equality and Social Inclusion, Norway, 30 January 2019 (n 1143).
[1199] Skype interview with Ylva Lennartsson Hartmann, Human Rights Advisor, Swedish Foundation for Human Rights, 22 February 2019 (n 1114).
[1200] Telephone interview with Karol Nowak, Senior lecturer, Department of Law, Lund University, 12 February 2019 (n 1197); Skype interview with Ylva Lennartsson Hartmann, Human Rights Advisor, Swedish Foundation for Human Rights, 22 February 2019 (n 1114).

themselves represented by and enforce their rights through their union, church, and ombudsinstitutions. Therefore, the role of these institutions is crucial in society.

(3) As of the national system of human rights protection, a **'confident thinking'** prevails, according to what Nordic countries are 'human rights champions'. This thinking is often reluctant to see non-compliance.[1201]

The concepts of 'strong sentiment', 'collective justice', and 'confident thinking', shortly the deep belief in the well-functioning of the system helps us to understand the solid respect towards the ombudsinstitutions also in the absence of clear legal regulations. Nevertheless, since the national context can change and threats that human rights defenders, including ombudsinstitutions, must face may increase – as we saw it in the Central and Eastern European region – it is advisable to have legal safeguards. Also, because in the absence of such safeguards, it is difficult to bring the national contexts and the NHRI accreditation together.[1202] The SCA needs to understand the national legal context and how the specific Paris Principle is guaranteed in the national legal tradition. Then the SCA tries to balance the international standards and the national legal context. It is a strong belief that for each national context, there is a possibility to develop an institution that fits in the national context and can live up to the global minimum standards at the same time.[1203] This is the case regarding NHRIs of the Nordic region, where independence and functional immunity are often self-evident. As the SCA noted regarding the re-accreditation of the Danish Institute for Human Rights in 2017:

> 'It is recognised that in some national contexts, functional immunity is not part of the legal tradition and it may, therefore, be unrealistic or inappropriate for the NHRI to request that formal legal provisions be adopted. In such exceptional circumstances, the NHRI under review should provide sufficient information to explain why it would be both unnecessary and inappropriate to introduce such provisions given its particular national context. This information will be reviewed in line with other guarantees provided at the national level to ensure independence, security of tenure and the ability to engage in critical analysis on human rights issues.'[1204]

[1201] Skype interview with Ylva Lennartsson Hartmann, Human Rights Advisor, Swedish Foundation for Human Rights, 22 February 2019 (n 1114).
[1202] Telephone interview with Katrien Meuwissen, Senior Human Rights Officer, ENNHRI, 20 February 2019 (n 567).
[1203] ibid.
[1204] Global Alliance of National Human Rights Institutions, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 13-17 November 2017' (n 489) para 3.2; Global Alliance of National Human Rights Institutions, *A Practical Guide to the Work of the Sub-Committee on Accreditation (SCA)* (n 146) 21.

The Nordic cases studies also reflect examples when the ombudsman and the NHRI functions are separated. In the Swedish case, the mandate of the ombudsinstitution focusing on promoting equal treatment is too narrow to be in full compliance with the Paris Principles. Therefore, the establishment of an NHRI is currently in process. It is not known yet, whether the Swedish Government will extend the Ombudsman's mandate or establish a completely separate institution. Considering the subordinated position of the ombudsinstitution to the Government that also causes non-compliance with the Paris Principles, the latest solution is more likely. In Norway, the Parliamentary Ombudsman for Public Administration refused to undertake NHRI functions; therefore, the Parliament decided to designate a new institution as NHRI in 2015. The mandates of the institutions are separated, while the ombudsman fulfils classic ombudsman tasks, the NHRI works for advising public authorities, spreading knowledge about human rights among the population, and conducting systematic monitoring of the human rights situation in Norway.[1205]

[1205] Norges institusjon for menneskerettigheter [Norwegian Human Rights Institution], 'NIM's Historikk Og Grunnlag [NIM's History and Basis]' <https://www.nhri.no/om/grunnlagsdokumenter/> accessed 17 April 2019.

3.3 The Latin American region

As discussed before, the Latin American ombudsman model (*Defensoría del Pueblo* or *Procuraduría*) is rooted in the Spanish legal tradition.[1206] Cheng gives a historical inside when he reports that the Latin American delegates in the UN Seminar held in Jamaica in May 1967[1207] were inspired by the Swedish Ombudsman's paper, 'and agreed that the institution should be adopted in their countries'.[1208] Thus, the Latin American model carries the core elements of the Swedish prototype as well, being a parliamentary institution, overseeing the public administration, and reporting to the parliament. Nevertheless, there are essential differences between the traditional idea of the ombudsinstitution and how it has come to evolve in Latin America.[1209] The *Defensoría del Pueblo* has additional characteristics, though, which connect it firmly to the Spanish model: it is empowered to hold laws unconstitutional, control the judiciary, and protect human rights.[1210] This latest development is due to the fact that Spain, and later in the '80s Latin American states have been passing through a period of transition from authoritarianism to democracy. Authoritarian regimes have generally been distinguished by the practice of systematic abuse of state power and violation of citizens' rights,[1211] as well as the lack of mechanisms that would check and balance this state behaviour.[1212] Thus, the protection of human rights has come to the forefront while organising the new state structures.

The appearing new constitutional player,[1213] the *Defensoría del Pueblo* represents a unique public institutional model that is able 'to prevent human rights abuses and bureaucracy left behind by the prior regimes'.[1214] It was born first and foremost with the commitment to protect those human rights that were infringed in the '80s.[1215] Although civil and political

[1206] Reif, 'Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman' (n 165) 284.
[1207] Seminar on the effective realization of civil and political rights at the national level, Kingston, Jamaica, 25 April-8 May 1967, ST/TAO/HR/29.
[1208] Cheng (n 286) 28–29.
[1209] Uggla (n 313) 450.
[1210] Merino (n 307) 3.
[1211] Uggla (n 313) 424.
[1212] Guillermo O'Donnell, 'Horizontal Accountability in New Democracies' (1998) 9 Journal of Democracy 112.
[1213] Abraham, 'Commentary: The Future in International Perspective: The Ombudsman as Agent of Rights, Justice and Democracy' (n 268) 685.
[1214] Pegram, 'Diffusion Across Political Systems: The Global Spread of National Human Rights Institutions' (n 155).
[1215] Jorge Luis Maiorano, 'Justice Administration and the Defensor Del Pueblo' (1998) 3 <http://www.theioi.org/downloads/etrmf/IOI Canada_Occasional Paper 64_Dr. Jorge Maiorana_Justice Administration and the Defensor del Pueblo_1998_EN. Jorge Maiorana_Justice Administration and the

rights – that were primarily violated by the regimes – lie at the heart of the *defensorías'* work,[1216] they had and still have an important role in the monitoring of the fulfilment of economic, social and cultural rights against the existing social inequality, exclusion, and discrimination.[1217] The scale of democracy affects the maintenance of public services[1218] that touch upon citizens' economic, social and cultural rights. Therefore, it is not surprising that in the new-born Latin American democracies it belongs to the fundamental functions of ombudsinstitutions to intervene in social conflicts as mediator and facilitator of dialogues and supervise public policies in the interests of the most vulnerable members of the society.[1219] Research has shown that ombudsinstitutions have 'tangible effects on improvements in access to education, health, and housing'.[1220] It already indicates one important strength of the Latin American model, namely the capability of protecting economic, social and cultural rights. The Latin American ombudsman is also involved in the protection of third generation rights.[1221]

The authoritarian past in the continent has had consequences that placed the emerging institutions in a disadvantaged position. The abusive, corrupt, and repressive regimes caused a climate of insecurity and impunity; thus, destroyed public trust in state institutions.[1222] Beyond restoring this trust among people, ombudsmen had to convince public authorities of the benefits that they could bring.[1223] Since the judiciaries were heavily politicised, ombudsinstitutions had to wait till their countries became judicially normalised.[1224] They were the first institutions that put 'accountability as a norm of political and administrative behaviour'[1225] on their agenda. The *defensorías* have mixed the

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Defensor del Pueblo_1998_EN> accessed 20 February 2018.
[1216] Uggla (n 313) 432.
[1217] Maiorano (n 1215) 4; Merino (n 307) 4.
[1218] David A Lake and Matthew A Baum, 'The Invisible Hand of Democrarcy. Political Control and the Provision of Public Services' (2001) 34 Comparative Political Studies 587.
[1219] Merino (n 307) 7.
[1220] Moreno (n 430) 112.
[1221] Maiorano (n 1215) 4.
[1222] Interview with Delia Muñoz, Chief of Staff, Defensoría del Pueblo, Lima, 7 December 2016; Interview with Elizabeth Flores, former General Director of Inter-institutional Relations and Delegate of the Defensor del Pueblo, Official Advisor of the Human Rights Committee of the Ministry of Public Affairs, Asunción, 9 December 2016.
[1223] Maiorano (n 1215).
[1224] Michael Dodson, Dolnald W Jackson and Laura Nuzzi O'Shaughnessy, 'Protecting Human Rights: The Legitimacy of Judicial System Reforms in El Salvador' (1999) 198 Bulletin of Latin American Research 403, 403–404.
[1225] Dodson (n 425) 30.

roles of an unofficial political opposition, a campaigning non-governmental organisation, and a quasi-judicial body.[1226]

The ombudsinstitutions in Latin America were not only products of democratisation, but an important role was dedicated to them in the consolidation of democratic states, with special regard to hearing compensatory claims of victims of the dictatorships. However, complaints filed with the ombudsman's office does not constitute an effective judicial remedy under the terms of the American Convention,[1227] the offices usually had the power to recommend specific forms of redress, including the award of financial compensation. Thus, they became the main characters in the peace and transitional justice processes besides human rights trials and truth commissions.[1228]

Research has shown that in post-authoritarian settings, even democratically elected regimes are cautious about supporting the strengthening of ombudsinstitutions.[1229] As discussed earlier, different factors stimulate the establishment of an ombudsinstitution, including international pressure, regional developments. Cardenas focuses on three situations: (1) regulatory moments in the country's history, such as the adoption of new constitutions or political transitions, when state leaders undertake commitments; (2) external obligations, such as the consequences of a treaty accession; and (3) 'systematic patterns of abuse'.[1230] While regulatory moments have not influenced the establishment in every country of the continent, the establishment of ombudsinstitutions in Latin American countries were highly supported by international organisations, such as the UN Treaty Bodies or the Organisation of American States (OAS) through their encouraging resolutions. They underpinned the role that ombudsinstitutions play in 'strengthening democratic governance and consolidating the promotion and dissemination of citizen rights'.[1231] The Inter-American Commission on Human Rights (IACHR) has pointed out the ombudsman's advisory role, the assistance they provide to victims, and their recommendations urging the compliance of states with their obligations under international

[1226] Abraham, 'Commentary: The Future in International Perspective: The Ombudsman as Agent of Rights, Justice and Democracy' (n 268) 685.
[1227] Inter-American Commission on Human Rights, 'Second Report on the Situation of Human Rights Defenders in the Americas' (2011) para 535.
[1228] Kathryn Sikkink and Carrie Booth Walling, 'The Impact of Human Rights Trials in Latin America' (2007) 44 Journal of Peace Research 427.
[1229] Dodson (n 425) 29.
[1230] Cardenas (n 626).
[1231] OAS General Assembly: Support for International Exchanges Among Ombudsmen, OAS AG/RES 1505, XXVII-0/97 (June 5, 1997).

human rights instruments,[1232] which role is highly relevant in terms of the Paris Principles. The establishment was encouraged and enabled by donor organisations as well,[1233] such as the EU and the UNDP through providing funds to Latin American governments building democracy. Research has shown that the resolutions of the UN Committee on Human Rights influenced multilateral aid allocations, while they did not affect bilateral aids.[1234] As said, systematic patterns of abuse were also present in the countries.[1235] While Amnesty International reported on evidence of ongoing torture in fifteen Latin American countries in the '80s,[1236] Lutz and Sikkink identify particularly three problems in Latin America during the '70s and the '80s: torture, disappearances, and the lack of democracy.[1237] Ombudsinstitutions undertook an important role in providing redress to these.

Human rights ombudsmen of the region gather in the *Federación Iberoamericana del Ombudsman* (FIO). A network that was established in 1995 running according to its Statute and governed by a General Assembly, its Directive Committee, and the Rector Council. Its primary objective is to be a forum of cooperation and exchange of experiences, as well as to promote the diffusion and strengthening of ombudsinstitutions in the region under its jurisdiction. As of 2018, countries that are members of the FIO network are Andorra, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Portugal, Puerto Rico, Spain, Uruguay, and Venezuela.[1238]

Latin American ombudsinstitutions that are A-status NHRIs are also voting members of the GANHRI. As of August 2018, 14 Latin American countries have A-status institutions, from which 11 are *defensoría* or *procuraduría*, such as Argentina, Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Nicaragua, Panama, Peru, and Uruguay.

[1232] Inter-American Commission on Human Rights, 'Second Report on the Situation of Human Rights Defenders in the Americas' (n 1227).
[1233] Hossain and others (n 633).
[1234] James H Lebovic and Erik Voeten, 'The Cost of Shame: International Organizations and Foreign Aid in the Punishing of Human Rights Violators' (2009) 46 Journal of Peace Research 79.
[1235] Sikkink and Booth Walling (n 1228) 441.
[1236] Amnesty International, 'Torture in the Eighties' (1984) 143–179 <https://www.amnesty.org/download/Documents/200000/act400011984eng.pdf> accessed 10 March 2018.
[1237] Ellen L Lutz and Kathryn Sikkink, 'International Human Rights Law and Practice in Latin America' (2000) 54 International Organization 633.
[1238] Federación Iberoamericana del Ombudsman (FIO), 'Miembros y Regiones, Ombudsman Nacionales' <http://www.portalfio.org/fio/miembros-y-regiones/> accessed 28 September 2018.

Venezuela has a B-status institution, while Antigua and Barbuda, Barbados, and Puerto Rico have C-status institutions at the moment.[1239]

This subchapter discusses ombudsinstitutions in two neighbouring countries of the Latin American continent, Paraguay and Uruguay. The selection was influenced by the fact that the literature is rather silent about the ombudsinstitutions of these two countries. Authors discuss many other *defensorías* of the region, but there is hardly any analysis on these two.[1240] Another influential factor was the chance of an interesting comparison based on the striking differences between the two *defensorías* in terms of timing of establishment, institutional form, and Paris Principles conformity. A third, practical element of the choice was the existing personal contacts in these countries that made the organisation of personal interviews smooth.

Paraguay and Uruguay share similar historical past; thus, their *defensorías* grew from a similar social and political context. Nevertheless, the recovery from the authoritarian regimes (that lasted in Paraguay from 1954 to 1989, in Uruguay from 1973 to 1985), the rebuilding of state structures and the transitional justice have worked out differently. This difference is reflected in the timing and circumstances of the creation, as well as the form and functioning of their ombudsinstitutions. While the *Defensoría* in Paraguay (*Defensoría del Pueblo de la República del Paraguay*) has its roots in the Swedish and Spanish ombudsman model and was established in 1995, the *Defensoría* in Uruguay (*Institución Nacional de Derechos Humanos y Defensoría del Pueblo*) is a combination of the ombudsman and the institute models and a relatively new institution from 2008. By describing the characteristics and SWOT of the institutions not only the differences and similarities between the two institutions are highlighted, but – based on findings stemming from empirical research in the countries conducted in December 2016 – insights regarding the effectiveness, the Paris Principles conformity, and novel challenges of the ombudsinstitutions are delivered.

[1239] Global Alliance of National Human Rights Institutions, 'Chart of the Status of National Institutions Accredited by the Global Alliance of National Human Rights Institutions. Accreditation Status as of 8 August 2018'.

[1240] E.g., Tom Pegram, 'Accountability in Hostile Times: The Case of the Peruvian Human Rights Ombudsman 1996- 2001' (2008) 40 Journal of Latin American Studies 51; Dodson (n 425); Miranda Basaure and Isaac Marcelo, 'The Absence of the Ombudsman in Argentina: Seven Years without Collective Representation; La Ausencia Del Defensor Del Pueblo En Argentina: Siete Años Sin Representación Colectiva' [2017] Derecho PUCP 199; Reif, *The Ombudsman, Good Governance and the International Human Rights System* (n 375); Dodson, Jackson and O'Shaughnessy (n 1224).

3.3.1 Defensor del Pueblo de la República del Paraguay – Paraguay

History and legal background

The military and General Alfredo Stroessner headed Paraguay from 1954 to 1989. From the late '60s and in the '70s, Amnesty International reported arrests and disappearances of suspected political opponents and their relatives; long term detentions without trial; and the use of torture.[1241] Although detention without trial for indefinite periods was the most characteristic feature of the human rights situation in Paraguay,[1242] the human rights organisation observed further human rights violations, including judicial partiality, press restrictions, and corruption.[1243] Remarkably, there was a huge controversy between the classic safeguards of human rights guaranteed by the 1967 constitution and the reality, namely the repression exercised by the government.[1244] In 1989, 35 years of dictatorship and systematic human rights violations came to an end with the fall of Stroessner. The new head of state, President General Andrés Rodríguez aimed at establishing a society respectful of the rule of law and human rights. The government ratified the American Convention on Human Rights; the American Convention on the Prevention, Punishment and Eradication of Violence Against Women; the Inter-American Convention to Prevent and Punish Torture; and in 1990 the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment.[1245] A series of reforms introduced new legislation, including a new constitution in 1992, that promoted the creation of institutions, including the *Defensoría del Pueblo*. The Paraguayan Constitution introduced the *Defensoría del Pueblo* in Chapter IV (Other State Institutions), Section I (Office of the Ombudsman) and describes its autonomy, the procedure of appointment and removal, requirements, incompatibilities and immunities, its duties and functions in five articles (Articles 276-280). These rules are further defined in Act No. 631 of 1995, called the Structure of the Office of the People's Defender (*Organica de la Defensoría del Pueblo*).[1246] The enabling legislation contains detailed rules regarding the Ombudsman's procedure as well. An

[1241] Amnesty International, 'Paraguay in the Seventies. A Background Paper' (1971) <https://www.amnesty.org/download/Documents/204000/amr450011971en.pdf> accessed 15 October 2018; Amnesty International, 'Amnesty International Briefing: Paraguay' (1978) <https://www.amnesty.org/download/Documents/204000/amr450011976en.pdf> accessed 15 October 2018.
[1242] Amnesty International, 'Amnesty International Report 1977' (1977) 152.
[1243] Amnesty International, 'Amnesty International Briefing: Paraguay' (n 1241) 11–13.
[1244] ibid 1.
[1245] Inter-American Commission on Human Rights, 'Annual Report of the Inter-American Commission on Human Rights 1998' (1999) ch IV <http://www.cidh.org/annualrep/98eng/Table of Contents.htm>.
[1246] Ley Nº 631/95 Organica de la Defensoría del Pueblo.

additional law referring to the Ombudsman was promulgated in 1996 that is the basis for delivering compensation to victims of human rights violations during the dictatorship of 1954 to 1989. This act provides that the *Defensoría* is responsible for considering indemnification claims and deciding on compensations.[1247]

Thus, there was a regulatory moment in 1992, when the institution was formally created on paper.[1248] Nevertheless, no one was appointed to the head of the office. The OAS noted the delay of appointing the first People's Defender with extreme concern. It is because the IACHR attributed an essential role to the institution in protecting Paraguayan people's basic rights on the one hand,[1249] and in considering compensation claims owed to victims and their families according to the law on the other hand.[1250] The IACHR considered the designation of an ombudsperson 'an important measure for protecting human rights in Paraguay'[1251] and the parliament's constitutional commitment 'toward the Paraguayan people and the international community'[1252]. The Commission concluded that however, Paraguay had made important steps toward consolidating democracy, the failure to appoint an ombudsperson had been unacceptable because this institution 'has proven to play an important role protecting human rights in other countries'.[1253] Similarly, the UN Treaty Bodies advocated for the establishment of the ombudsinstitution as foreseen in the constitution.[1254] The Committee on the Rights of the Child (CRC) even suggested the Paris Principles conformity of the institution to be established.[1255]

Despite the legal regulation declaring that the first *Defensor* and his or her Deputy should have been appointed for the period of the Congress years 1993-1998[1256] and the

[1247] Ley Nº 838 Que indemniza a victimas de violaciones de derechos humanos durante la dictadura de 1954 a 1989 Article 3.
[1248] Cardenas (n 626) 163.
[1249] Inter-American Commission on Human Rights, 'Press Release No. 23/99' (1999) para 32.
[1250] ibid 38.
[1251] Inter-American Commission on Human Rights, 'Annual Report of the Inter-American Commission on Human Rights 1998' (n 1245) Chapter IV para 57.
[1252] Inter-American Commission on Human Rights, 'Press Release No. 23/99' (n 1249) para 33.
[1253] Inter-American Commission on Human Rights, 'Third Report on the Situation of Human Rights in Paraguay' (2001) para 64 <http://www.cidh.org/countryrep/Paraguay01eng/chap1.htm> accessed 10 April 2018.
[1254] UN Committee on Economic, Social and Cultural Rights, Concluding observations: Paraguay, 28 May 1996, E/C.12/1/Add.1 para 19; UN Committee against Torture, Report, 1997, A/52/44(SUPP) paras 197, 207; UN Committee against Torture, Report, 2000, A/55/44(SUPP) paras 150(a), 151(a); UN Committee against Torture, Twenty-fourth session, Summary record of the first part (public) of the 425th meeting, 17 May 2000, CAT/C/SR.425 para 9.
[1255] UN Committee on the Rights of the Child, Concluding observations: Paraguay, 6 November 2001, CRC/C/15/Add.166 para 16.
[1256] Ley Nº 631/95 Organica de la Defensoría del Pueblo (n 1246) Article 32.

international pressure, it took nine years to designate the first mandate holder. Manuel María Páez Mónges was designated in the office by Resolution No. 768/2001 of the Honourable Chamber of Deputies in October 2001.[1257] The office set up only in January 2002 because of budgetary constraints.[1258] As the IACHR pointed out, it was probably not the absolute majority rule that procrastinated the *Defensor's* appointment because the necessary political will manifested in relation to other constitutional institutions that require the same majority.[1259]

Organisation

The Paraguayan institution is a classical ombudsman office headed by one ombudsperson and a deputy, who substitutes the Ombudsman if necessary.[1260] The *Defensor* himself is 'a parliamentary commissioner, whose functions are to defend the human rights, channel popular complaints, and protect community interests'[1261]. The Ombudsman Office has quite a huge number of administrative and operational departments and directorates.[1262] The General Directorate of Truth, Justice and Reparation[1263] was created in 2009[1264] based on the proposal of the Truth and Justice Commission,[1265] in order to implement the Commission's recommendations and carry out the Ombudsman's tasks in relation to indemnification as required by the law.[1266] The internal rules of the Paraguayan *Defensoría* govern the labour relations of the Office with its permanent staff.[1267]

[1257] Arenilla Manuel Sáez and others (eds), *Manual de Buenas Prácticas Institucionales de Las Defensorías de Iberoamérica* (Trama editorial 2004) 166.
[1258] UN, International Human Rights Instruments, Core document forming part of the reports of States parties, Paraguay, 24 January 2011, HRI/CORE/PRY/2010 para 178.
[1259] Inter-American Commission on Human Rights, 'Third Report on the Situation of Human Rights in Paraguay' (n 1253) para 62.
[1260] Ley Nº 631/95 Organica de la Defensoría del Pueblo (n 1246) Articles 6 and 11.
[1261] Constitución de la República de Paraguay, 1992 Article 276; Ley Nº 631/95 Organica de la Defensoría del Pueblo (n 1246) Article 2.
[1262] Defensoría del Pueblo, 'Organigrama' <http://www.defensoriadelpueblo.gov.py/organigrama.pdf> accessed 24 March 2018.
[1263] 'Dirección General de Verdad, Justicia y Reparación (Defensoría Del Pueblo)' <http://www.verdadyjusticia-dp.gov.py/index.php> accessed 23 March 2018.
[1264] Resolución No 179/09 Por la cual se establece la Dirección General de Verdad, Justicia y Reparación, en la Estructura Organica de la Defensoría del Pueblo.
[1265] 'Conclusiones y Recomendaciones Del Informe Final de La Comisión de Verdad y Justicia Del Paraguay' (2008) para 91 <http://www.derechoshumanos.net/lesahumanidad/informes/paraguay/Informe_Comision_Verdad_y_Justicia_Paraguay_Conclusiones_y_Recomendaciones.pdf> accessed 23 March 2018.
[1266] Luis Roniger and others, *Exile, Diaspora, and Return. Changing Cultural Landscapes in Argentina, Chile, Paraguay, and Uruguay* (Oxford University Press 2017) 133.
[1267] Reglamento interno de la Defensoría del Pueblo para funcionarios permanentes, contratados y comisionados, Article 1.

The Defensoría has regional offices[1268] as provided in the Constitution: 'departmental or municipal defenders may be appointed'.[1269] The Asunción office provided some assistance to the offices, but there are no periodic meetings among the headquarter and them.[1270] The reigning Ombudsman claimed the lack of readiness for cooperation on the regional offices' side.[1271]

Selection, appointment, and tenure

To become Ombudsman of Paraguay, one needs to hold Paraguayan nationality, be at least twenty-five years old, and in full enjoyment of civil and political rights.[1272] The *Defensor del Pueblo* in Paraguay is appointed by a two-thirds majority vote of the Chamber of Deputies (the lower house of the Congress) from a list of three candidates submitted by the Senate (the upper house of the Congress).[1273] The Deputy Ombudsman is appointed through the same procedure.[1274] The *Defensor del Pueblo* is elected for a five-year term, and the law allows re-election.[1275] It is an interesting regulation in the Paraguayan law that the *Defensor's* five-years term must correspond to the term of the Congress.[1276] In European legislations, the term of the ombudsman and that of the legislator are usually not in full overlap guaranteeing independence for the institution also in this way. Since if the terms of the ombudsman office overlap with those of the elected officials who control appointment, appointees may fear to act against their supervisors.[1277]

The enabling legislation does not clarify the situation of appointing an ombudsman in case of a vacancy. In order to fill in this gap, the Congress passed Law No. 2103 in May 2003

[1268] Regional offices in Paraguay: Areguá, Caaguazú, Caazapá, Ciudad del Este, Cnel. Oviedo, Encarnación, Itacurubi de la Cordillera, Itaguá, Pedro Juan Caballero, San Ignacio, San Lorenzo, and Santa Rosa del Aguaray, see at: Defensoría del Pueblo, 'Sedes' <http://www.defensoriadelpueblo.gov.py/sedes.html> accessed 23 March 2018.
[1269] Constitución de la República de Paraguay, 1992 (n 1261) Article 280.
[1270] Interview with Elizabeth Flores, former General Director of Inter-institutional Relations and Delegate of the Defensor del Pueblo, Official Advisor of the Human Rights Committee of the Ministry of Public Affairs, Asunción, 9 December 2016 (n 1222).
[1271] Ultima Hora, 'El Defensor No Encuentra a 21 Funcionarios de Las Sedes' (11 November 2016) <http://www.ultimahora.com/el-defensor-no-encuentra-21-funcionarios-las-sedes-n1038903.html> accessed 23 March 2018.
[1272] Ley Nº 631/95 Organica de la Defensoría del Pueblo (n 1246) Article 7.
[1273] Constitución de la República de Paraguay, 1992 (n 1261) Article 277; Ley Nº 631/95 Organica de la Defensoría del Pueblo (n 1246) Article 4.
[1274] Ley Nº 631/95 Organica de la Defensoría del Pueblo (n 1246) Article 11.
[1275] Constitución de la República de Paraguay, 1992 (n 1261) Article 277; Ley Nº 631/95 Organica de la Defensoría del Pueblo (n 1246) Article 4.
[1276] Interview with Hugo Oscar Richer, Senator and Head of the Human Rights Committee in the Congress, Asunción, 12 December 2016.
[1277] Moreno (n 430) 102.

that establishes that once the Ombudsman's mandate has expired, he continues to exercise his functions and powers until his successor takes office.[1278] This vague ruling made it possible that, however, the official mandate ended in June 2008, the first mandate holder was in office for 14 years from 2002 to 2016, until the new Defensor (Miguel Ángel Godoy Servín) was elected on 1 November 2016.[1279] Almost all UN Treaty Bodies criticised the Paraguayan parliament for its reluctance.[1280] Due to this situation, the institution significantly lost its credibility.[1281]

The legislation formulates rules regarding incompatibility, i.e. what are those positions or activities that could affect the independence, the impartiality, or the prestige of the position, and thus, exclude the appointment or holding the mandate. These are political activities, especially being a member of a political party,[1282] having a judicial function or executive competence,[1283] or another remunerated public or private office – with the exception of teaching or scientific research.[1284] Incompatibility plays a role during candidature, i.e. candidates need to cease these activities, for example, suspend their membership in a party,[1285] and while holding the mandate, i.e. if they would like to take up a public position, they must resign and cease exercising their office.[1286] Sworn statements upon taking office must affirm compatibility.[1287]

The *Defensor's* position terminates with the expiration of the term of appointment, with death and incapacity of supervening, and with resignation.[1288] The *Defensor del Pueblo*

[1278] Ley Nº 2103/2003 Que prevé la prorroga de funciones en la Defensoría del Pueblo ínterin asuma su sucesor.
[1279] Ultima Hora, 'Diputados Designa a Miguel Godoy Nuevo Defensor Del Pueblo' (2016) <http://www.ultimahora.com/diputados-designa-miguel-godoy-nuevo-defensor-del-pueblo-n1036267.html> accessed 25 March 2018.
[1280] UN Committee against Torture, Concluding observations: Paraguay, 14 December 2011, CAT/C/PRY/CO/4-6 para 14; UN Human Rights Committee, Concluding observations: Paraguay, 29 April 2013, CCPR/C/PRY/CO/3 para 7; UN Committee on Enforced Disappearances, Concluding observations: Paraguay, 20 October 2014, CED/C/PRY/CO/1 para 11; UN Economic and Social Councul, Concluding observations: Paraguay, 20 October 2014, E/C.12/PRY/CO/4 para 9; UN Committee on the Elimination of Racial Discrimination, Consideration of reports submitted by States parties under article 9 of the Convention. Fourth to sixth periodic reports of States parties due in 2014: Paraguay, 5 January 2016, CERD/C/PRY/CO/4-6 para 13.
[1281] Interview with Hugo Oscar Richer, Senator and Head of the Human Rights Committee in the Congress, Asunción, 12 December 2016 (n 1276).
[1282] Constitución de la República de Paraguay, 1992 (n 1261) Articles 254 and 278.
[1283] ibid Article 276; Ley Nº 631/95 Organica de la Defensoría del Pueblo (n 1246) Article 3.
[1284] Constitución de la República de Paraguay, 1992 (n 1261) Article 254.
[1285] Ley Nº 631/95 Organica de la Defensoría del Pueblo (n 1246) Article 30.
[1286] Constitución de la República de Paraguay, 1992 (n 1261) Article 235(3).
[1287] Ley Nº 631/95 Organica de la Defensoría del Pueblo (n 1246) Article 29.
[1288] ibid Article 5(1)-(3).

must leave the office with the age of 75.[1289] A conviction also terminates the office[1290] – in case of the poor performance of functions.[1291]

Independence and immunity

The law declares that the *Defensor del Pueblo* in Paraguay is autonomous and irremovable.[1292] While holding the office, the *Defensor del Pueblo* in Paraguay has the same immunities as those of the judicial magistrates.[1293] Accordingly, he or she may not be accused or interrogated judicially for his or her opinions formulated while exercising his functions. He or she may not be arrested or detained except for *in flagrante*. In this case, the *Defensor* must be put under custody in his residence, and the intervening authority must communicate the fact immediately to the Supreme Court of Justice while remitting the prior records to the competent judge.[1294] The *Defensor* can be subject of political trial for misconduct, crimes committed in its official capacity, or common crimes. The Chamber of Deputies formulates the accusation by a majority of two-thirds. The Senate judge in public trial by an absolute majority of two-thirds, and declares the *Defensor* guilty resulting in removing him from the office. In cases of the alleged commission of crimes, the case will be passed to ordinary justice.[1295]

Funding

Beyond the personal autonomy that is ensured by a fair, transparent and pluralistic appointment procedure, and the functional autonomy encompassing immunity and adequate powers, the financial autonomy contributes to the *Defensorías'* independent operation. The *Defensoría* prepares its draft budget annually. The Senate includes it in the Budget Project (*Proyecto de Presupuesto*) and presents it to the Executive Power.[1296]

Functions

The enabling legislation lists several duties, competences, and the necessary powers of the institution. The ombudsman office receives and investigates complaints related to human

[1289] ibid Article 5(4).
[1290] ibid Article 5(5).
[1291] Constitución de la República de Paraguay, 1992 (n 1261) Article 277.
[1292] ibid Article 277; Ley Nº 631/95 Organica de la Defensoría del Pueblo (n 1246) Article 5.
[1293] Constitución de la República de Paraguay, 1992 (n 1261) Article 278.
[1294] ibid Article 255.
[1295] ibid Article 225.
[1296] Ley Nº 631/95 Organica de la Defensoría del Pueblo (n 1246) Article 28.

rights violations. The *Defensor* may act *ex officio* or at request, advise the government and other public authorities on the adaptation or modification of legal norms and administrative practice, must report to the parliament on an annual basis, may file a habeas corpus, disseminate information on human rights, including reports on the situation of human rights in the country, and provide human rights education to the public.[1297]

The main complaint handling function corresponds with the classical ombudsman's function.[1298] Any person can request the *Defensor's* procedure without any restriction and without the need to exhaust previous instances.[1299] Complaints need to contain the complainant's name, address, and ID number, as well as the statement of the facts and a request.[1300] The *Defensor* must inform the complainant about acceptance or dismissal within 30 days.[1301]

The *Defensor* is enabled to promote the knowledge and practice of human rights;[1302] however, in practice, not much activity is done on this. The Office is focusing on maladministration and judicial proceedings.[1303]

Competences and powers

The *Defensor* does not have any judicial function or executive competence. The scope of competences of the *Defensor* is rather broad; he or she may handle a variety of matters. The *Defensor* has a double role, he or she is (a) el Justicia (mediator among neighbours) and (b) el Protector de Naturalis (for indigenous issues).[1304] The office has competences not only in relation to public bodies but it may consider human rights violations committed by private persons.[1305] Nevertheless, the investigation of the judicial branch is excluded from its competences.[1306] It means that the *Defensor* cannot revise decisions of judicial organs or consider matters being under judicial way. However, he may formulate opinions and reports when discovering systematic malfunctions of the judiciary from the angel of its

[1297] ibid Article 10.
[1298] ibid Articles 12-27.
[1299] ibid Article 13.
[1300] ibid Article 16.
[1301] ibid Article 18.
[1302] ibid Article 10(10).
[1303] Interview with Miguel Godoy, Defensor del Pueblo, Asunción, 12 December 2016.
[1304] Cardenas (n 626) 163.
[1305] Ley Nº 631/95 Organica de la Defensoría del Pueblo (n 1246) Article 10(6).
[1306] ibid Article 3.

administrative functioning. During his investigations, he may also request information from authorities, including the police, security, and judicial organs.[1307]

In countries where democracy is not fully consolidated in practice, and there is a risk of manipulation of elections, some *Defensorías*[1308] may audit the electoral process aiming at protecting and promoting the right to vote.[1309] The Office of the Ombudsman in Paraguay is prohibited from exercising functions that fall under electoral matters.[1310]

Considering the investigative powers of the institution, they go hand in hand with the recommendations of the Paris Principles.[1311] Thus, the *Defensoría* is allowed to visit places, conduct interviews, examine files, and obtain any information necessary for assessing the situation under consideration. Colleagues may also enter places of detention and in case file criminal complaints to the respective authority.[1312]

Since ombudstype human rights protection is considered rather as a soft tool, it is important to formulate rules regarding the public administration's obligation to collaborate with the ombudsman office during its investigation. In Paraguay, a contempt qualifies for an obstruction of the *Defensor's* functions, and as such, it is a crime of failure to obey a lawful order with sanctions foreseen in the penal legislation.[1313]

Closing its investigation, the Paraguayan institution prepares individual reports, in which he communicates the result of the requested action to the complainant.[1314] It is appealing that the law remains silent about the *Defensor's* resolutions and their effect.

The *Defensor* may 'suggest the modification of norms or procedures' that are implemented by state organs or that govern the behaviour of state officials. The Defensor's legislation related tasks also aim at improving 'the services of the administration and the operation of state bodies'.[1315] The *Defensoría* also collaborates with the judiciary and the public

[1307] ibid Article 10(2).
[1308] For example, in El Salvador.
[1309] Guillermo Escobar, 'Defensorías Del Pueblo y Democracia' [2005] Quórum: Revista de pensamiento iberoamericano 72, 80 <http://www.redalyc.org/pdf/520/52001309.pdf> accessed 30 March 2018.
[1310] Tom Pegram, 'National Human Rights Institutions in Latin America: Politics and Institutionalization' in Ryan Goodman and Thomas Pegram (eds), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (Cambridge University Press 2012) 232; Volio (n 259) 238.
[1311] Paris Principles (n 92) para C(b)-(c).
[1312] Constitución de la República de Paraguay, 1992 (n 1261) Article 279(2); Ley Nº 631/95 Organica de la Defensoría del Pueblo (n 1246) Articles 10(2) and 23.
[1313] Ley Nº 631/95 Organica de la Defensoría del Pueblo (n 1246) Articles 21 and 24.
[1314] ibid Article 10(12)(c).
[1315] ibid Article 10(11).

prosecution, when transferring cases regarding the operation of the administration of justice 'to the Supreme Court of Justice, the Jury of Prosecution of Magistrates, or the Public Ministry, depending on the nature of the claim, so that these agencies take action according to the respective area of competence […]'.[1316]

NPM mandate

The *Defensoría* does not have an NPM mandate, as the state designated a specialised institution for this purpose.[1317]

Cooperation activities

The relationship of the *Defensorías del Pueblo* to state organs have already been touched upon. It is the right and the duty of an ombudsman office to produce and submit an annual report on its functioning. The Paraguayan *Defensor* presents its annual report, containing a description of rejected and investigated cases, the outcomes and the obstacles of the investigations to both chambers of the Congress at the beginning of each annual session period.[1318] The law does not address the question of consideration of the report, its approval or rejection by Congress. The *Defensor del Pueblo* prepares special reports on serious or urgent cases if he considers it necessary or required,[1319] and disclosure reports on the human rights situation.[1320] On the website of the institution rather operational reports can be found.[1321]

The Paris Principles require from NHRIs to develop relations with NGOs 'devoted to promoting and protecting human rights'.[1322] According to the law, the Paraguayan *Defensoría* relies on the participation of NGOs 'in the implementation of projects and programs to disseminate and promote the knowledge and practice of human rights and their protection mechanisms'.[1323] In reality, there has been little or no cooperation.[1324] NGOs mostly bring complaints to the Ombudsman Office.[1325]

[1316] ibid Article 15.
[1317] 'Mecanismo Nacional de Prevención de La Tortura' <http://www.mnp.gov.py/> accessed 31 March 2018.
[1318] Ley Nº 631/95 Organica de la Defensoría del Pueblo (n 1246) Article 10(12)(a).
[1319] ibid Article 10(12)(b).
[1320] ibid Article 10(12)(d).
[1321] Defensoría del Pueblo (Paraguay), 'Documentos Informes' <http://www.defensoriadelpueblo.gov.py/informes.html> accessed 22 April 2019.
[1322] Paris Principles (n 92) para C(f)-(g).
[1323] Ley Nº 631/95 Organica de la Defensoría del Pueblo (n 1246) Article 10(10).
[1324] Interview with Elizabeth Flores, former General Director of Inter-institutional Relations and Delegate of

Neither its enabling legislation nor its mission or vision contain a reference to the interaction of the ombudsinstitution with the international human rights monitoring mechanisms. The Paraguayan Ombudsman Office has not contributed to the work of the international human rights community yet. The Office puts more emphasis on regional level cooperation. The Paraguayan *Defensoría* is a member of the FIO. There are further internal avenues that the *Defensor* could make use of, in any case. The Ministry of Foreign Affairs together with the Ministry of Justice developed a computer-based monitoring system 'SIMORE'[1326] and 'SIMORE Plus',[1327] facilitating the systematisation of the international human rights recommendations made to Paraguay by the different human rights monitoring mechanisms of the UN and the OAS. It provides access to updated information on the actions of state organs as well.[1328] The *Defensoría* does not feed into and employ the system yet.[1329] The EU Delegation in the country would also be ready to support the *Defensoría del Pueblo* with some limited funds enabling project cooperation.[1330]

NHRI accreditation

The institution used to be a member of the GANHRI. Some years after its establishment, the Paraguayan *Defensoría del Pueblo* applied for an accredited NHRI status. The GANHRI (ICC at that time) considered the office in full compliance with the Paris Principles[1331] and granted it an A-status in November 2008. Nevertheless, the SCA noted that salaries of staff members were lower than those of civil servants performing similar tasks in other public institutions. It also encouraged the institution to interact more consistently with the international human rights system, and with civil society.[1332] Being a

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the Defensor del Pueblo, Official Advisor of the Human Rights Committee of the Ministry of Public Affairs, Asunción, 9 December 2016 (n 1222); Interview with José Luis Sanchez, First Counsellor and Head of the Political, Press & Information Section, EU Delegation to Paraguay, Asunción, 12 December 2016.

[1325] Interview with Miguel Godoy, Defensor del Pueblo, Asunción, 12 December 2016 (n 1303).

[1326] 'SIMORE' <http://www.mre.gov.py/mdhpy/Buscador/Home> accessed 1 April 2018.

[1327] 'SIMORE Plus' <http://www.mre.gov.py/SimorePlus/> accessed 1 April 2018.

[1328] 'SIMORE - Monitoring System on International Recommendations' <https://www.youtube.com/watch?v=5R-spwu0YXc> accessed 1 April 2018.

[1329] Interview with Juan Miguel González Bibolini, Director General, General Human Rights Unit, Ministry of Foreign Affairs, Asunción, 13 December 2016.

[1330] Interview with José Luis Sanchez, First Counsellor and Head of the Political, Press & Information Section, EU Delegation to Paraguay, Asunción, 12 December 2016 (n 1324).

[1331] UN General Assembly Resolution 48/134. National institutions for the promotion and protection of human rights, 20 December 1993, A/RES/48/134 (n 1).

[1332] The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation, Geneva, 3-6 November 2008' (n 1086) para 4.9.

five-year periodic review, the Paraguayan *Defensoría* was considered for re-accreditation in November 2013. The SCA recommended that this consideration should be deferred to its next session. The main reason for this decision was the failure to appoint the *Defensor's* successor.[1333] The circumstances of the appointment of ombudsmen is a highly sensitive issue, as it is 'a potential source of political interference'.[1334] Therefore, also the UN Human Rights Committee formulated its concern about the failure of selecting a new ombudsman, and 'the lack of clear procedures and criteria for ensuring that the ombudsman's office is fully independent and effective'.[1335] Submission from civil society also raised serious concerns about the *Defensoría's* effective performance.[1336] Acknowledging the elections in April 2013, the SCA was sitting on the fence, hoping that the elections entail the appointment of the new *Defensor* and 'threatened' the *Defensoría* with B-status in case of not considering the raised concerns. In March 2014, the SCA further deferred its decision to the next session and remained concerned about the *Defensoría's* effectiveness in some areas, including providing recommendations to the State on a clear and effective mandate, proactively providing assistance to victims of the dictatorship, and advocating for the appointment of a new *Defensor*.[1337] In its upcoming session, the SCA recommended the suspension of the *Defensoría's* accredited status. Namely, the *Defensoría* – instead of providing information on the implementation of the SCA's recommendations – withdrew its application for re-accreditation on 10 July 2014.[1338] The *Defensoría* has not submitted an application for re-accreditation within one year of the suspension; therefore, its accreditation lapsed.[1339] According to his statement, the new *Defensor* does not aim at applying for re-accreditation until having solved 'issues at home', i.e. working on ignored cases, focusing on policies, and finishing the accusation

[1333] The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 18-22 November 2013' (n 475) para 3.6.
[1334] Uggla (n 313) 434.
[1335] UN Human Rights Committee, Concluding observations: Paraguay, 29 April 2013, CCPR/C/PRY/CO/3 (n 1280).
[1336] The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 18-22 November 2013' (n 475) para 3.6.
[1337] The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 17-21 March 2014' para 3.3.
[1338] The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 27-31 October 2014' (n 883) para 3.7.
[1339] Global Alliance of National Human Rights Institutions, 'Statute' (n 176) Article 20.

procedure that he launched against the former *Defensor* in order to indicate his non-connection to the previous era.[1340]

[1340] Interview with Miguel Godoy, Defensor del Pueblo, Asunción, 12 December 2016 (n 1303).

3.3.2 Institución Nacional de Derechos Humanos y Defensoría del Pueblo – Uruguay

History and legal background

Until 1973, Uruguay had quite a long tradition of democratic rules and outstanding records of protecting citizens' rights.[1341] The country's early commitment to human rights is reflected in its contribution to the establishment of the Inter-American System of Human Rights, and the signature of the American Convention on Human Rights already in 1969.[1342] Uruguay acknowledged the Standard Minimum Rules for the Treatment of Prisoners (1957) and ratified the UN Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975). From 1974, the military took power and the country subordinated to a civilian-military regime, headed by Juan María Bordaberry. From 1974 to 1985, Amnesty International and the International Commission of Jurists repeatedly reported on widespread torture and ill-treatment of political prisoners, the failure of Uruguayan authorities to open procedures, and the lack of adequate remedies.[1343] The main human rights violations encompassed large scale arrests and imprisonments, illegal detention procedures, trials of civilians before military tribunals, bad prison conditions, torture, deaths in custody, and disappearances.[1344] In 1976 and 1978, Amnesty reported information on concrete cases of death under torture. Meanwhile, due to the entering into force of the International Covenant on Civil and Political Rights and its Optional Protocol in 1976, the UN Human Rights Committee received petitions and found Uruguay responsible for treaty violations, including torture and arbitrary detention.[1345] Uruguayan victims appealed to the IACHR as well.[1346] All these efforts of NGOs and intergovernmental human rights bodies contributed

[1341] Lutz and Sikkink (n 1237) 642.
[1342] Inter-American Commission on Human Rights, 'Report on the Situation of Human Rights in Uruguay' (1978) para 3 <http://www.cidh.org/countryrep/Uruguay78eng/TOC.htm> accessed 15 October 2018.
[1343] International Commission of Jurists, 'Report of Mission to Uruguay' (1974) <https://www.icj.org/wp-content/uploads/1974/05/Uruguay-political-prisoners-fact-finding-report-1974-eng.pdf> accessed 15 October 2018; International Commission of Jurists, 'First Supplement to the International Commission of Jurists' Report on Uruguay of 17 June 1974' (1976) <https://www.icj.org/wp-content/uploads/1976/01/Uruguay-political-prisoners2nd-sup-fact-finding-mission-report-1975-eng.pdf> accessed 15 October 2018; International Commission of Jurists, 'Human Rights in Uruguay' (1980) <https://www.icj.org/wp-content/uploads/2013/06/Uruguay-human-rights-political-prisoner-report-1980-eng.pdf> accessed 15 October 2018; Amnesty International, 'Political Imprisonment in Uruguay' (1979) <https://www.amnesty.org/download/Documents/204000/amr520131979en.pdf> accessed 14 October 2018.
[1344] Amnesty International, 'Uruguay - an Amnesty International Briefing' (1983) <https://www.amnesty.org/download/Documents/AMR520341983ENGLISH.PDF> accessed 14 October 2018.
[1345] Office of the UN High Commissioner for Human Rights, 'Jurisprudence' <http://juris.ohchr.org/Search/Documents> accessed 15 October 2018.
[1346] Inter-American Commission on Human Rights, 'Archive Decisions'

to the evolvement of bilateral political pressure against Uruguay. Uruguay was a test case for the US administration to take human rights into consideration and stop granting economic aid on the one hand, and opposing Uruguay's loan requests to international financial institutions between 1977 and 1980 on the other hand.[1347] On 1 March 1985, democracy returned to Uruguay when Julio María Sanguinetti assumed the presidency. The government had to strengthen the country's economic situation and rebuild democratic institutions.[1348]

However, the country has already had a constitution from 1967 that was amended in 1989, 1994, 1996, and 2004, the institution of the *Defensoría del Pueblo* does not appear in the document. It was Law No. 18.446 that established the *Institución Nacional de Derechos Humanos* (INDDHH) in 2008.[1349] Establishing the institution four years after the last amendment of the constitution indicates that there was no regulatory moment.[1350] The establishment reflected a combination of external obligations and international regime pressure.[1351] UN Treaty Bodies were relieved by the establishment [1352] and urged the operational functioning of the institution.[1353]

The enabling legislation provides all detailed rules regarding the structure and the functioning of the institution. Articles regarding composition, budget, and accountability were amended in 2011 by Law No. 18.806 that changed the Institution's name to National

<http://www.oas.org/en/iachr/decisions/archive.asp> accessed 15 October 2018.
[1347] Lutz and Sikkink (n 1237) 644.
[1348] Fredrik Uggla, *Disillusioned in Democracy: Labour and the State in Post-Transitional Chile and Uruguay* (Department of Government, Uppsala University 2000) 125.
[1349] Ley Nº 18.446 Institución Nacional de Derechos Humanos: Creación.
[1350] Cardenas (n 626) 182.
[1351] ibid.
[1352] UN Committee on Enforced Disappearances, Concluding observations: Uruguay, 8 May 2013, CED/C/URY/CO/1 para 5; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Concluding observations: Uruguay, 2 May 2014, CMW/C/URY/CO/1 para 6(a); UN Committee on the Rights of the Child, Concluding observations: Uruguay, 5 March 2015, CRC/C/URY/CO/3-5 para 5(a); UN Committee on the Elimination of Racial Discrimination, Concluding observations: Uruguay, 12 January 2017, CERD/C/URY/CO/21-23 para 6(b); UN Committee on Economic, Social and Cultural Rights, Concluding observations: Uruguay, 20 July 2017, E/C.12/URY/CO/5 para 5(e).
[1353] UN Committee on the Rights of the Child, Concluding observations: Uruguay, 11 October 1996, CRC/C/15/Add.62 para 19; UN Committee on the Rights of the Child, Concluding observations: Uruguay, 5 March 2015, CRC/C/URY/CO/3-5 (n 1352); UN Committee on Economic, Social and Cultural Rights, Concluding observations: Uruguay, 1 December 2010, E/C.12/URY/CO/3-4 para 5; UN Committee on the Elimination of Racial Discrimination, Concluding observations: Uruguay, 8 April 2011, CERD/C/URY/CO/16-20 para 7.

Institution of Human Rights and Ombudsman's Office (*Institución Nacional de Derechos Humanos y Defensoría del Pueblo*).[1354]

Organisation

The Uruguayan institution diverges from the traditional Latin American ombudsman model.[1355] It is a combination of the institute and the ombudsman model. The INDDHH is an institution of the legislative power for the defence, promotion, and protection of human rights recognised by the constitution and international law.[1356] The institution is managed and represented by the Board of Directors, a body of five members elected by the General Assembly (the Uruguayan legislative authority) for five years, and coming from different segments of the society, ensuring pluralism on the top of the institution.[1357] The Board of Directors appoints from among its members the President of the institution. It is a one-year position that is subject to rotation.[1358] The institution has a much smaller apparatus in comparison to the Paraguayan *Defensoría*. Beyond the administrative secretariats, it has four main sections responsible for (1) complaints and investigations, (2) the NPM mandate, (3) education, and (4) public relations.[1359]

The Uruguayan institution does not have regional offices – however, it aims at making agreements with universities around the country winning collaborating professors, who would collect data on human rights problems in the different regions of the country.[1360]

The internal rules of the INDDHH regulate the institution's structure, attributions, and functioning.[1361]

Selection, appointment, and tenure

Membership to the Board of Directors requires no age limit but Uruguayan citizenship and the full enjoyment of civil rights. Furthermore, the Uruguayan law prescribes high moral

[1354] Ley Nº 18.806 de modificación de la Ley de Creación de la INDDHH Article 1.
[1355] Linos and Pegram, 'The Language of Compromise in International Agreements' (n 111) 614.
[1356] Ley Nº 18.446 Institución Nacional de Derechos Humanos: Creación (n 1349) Article 1.
[1357] ibid Article 36.
[1358] ibid Article 53.
[1359] Institución Nacional de Derechos Humanos y Defensoría del Pueblo (INDDHH), 'Integrantes de La INDDHH' <http://inddhh.gub.uy/integrantes/> accessed 24 March 2018.
[1360] Interview with Ariela Peralta Distefano, former member of the Board of Directors, INDDHH, Montevideo, 17 December 2016.
[1361] Reglamento Instutución Natcional de Derechos Humanos y Defensoría del Pueblo Article 1.

authority, human rights-related experience, and the lack of public positions – except for the area of academia.[1362]

The selection procedure is pluralistic. Social organisations may propose candidates for the Board of Directors to the General Assembly. Parliamentarians receive these proposals and formulate a list of candidates.[1363] The General Assembly designates a Special Commission with members of all the political parties represented in the Parliament in order to screen proposed candidates' eligibility, prepare the list of qualified candidates, and communicate it to the Presidency of the General Assembly.[1364] The members of the Board of Directors of the INDDHH are elected by two-thirds of the votes of the total number of General Assembly members.[1365]

Members of the INDDHH are not allowed to pursue any other remunerated or political activity - except for teaching or scientific research.[1366] When taking office, they need to cease such incompatible positions.[1367] Incompatibility plays a role even after the termination of the position, ex-mandate holders cannot occupy public positions until three years after the date of termination.[1368] Sworn statements upon taking office must affirm compatibility.[1369]

The members of the Board of Directors of the INDDHH are elected for a five-year term and may be re-elected for the next period once.[1370] Their position terminates with the expiration of the term of appointment, with death and incapacity of supervening, with renunciation, with conviction, and with dismissal.[1371] The regulation specifies the cases of dismissal, such as offensive behaviour, notorious negligence, serious misconduct, and supervening incompatibility.[1372]

Independence and immunity

[1362] Ley Nº 18.446 Institución Nacional de Derechos Humanos: Creación (n 1349) Article 45.
[1363] ibid Article 39.
[1364] ibid Article 40.
[1365] ibid Article 37.
[1366] ibid Article 46(C)-(D).
[1367] ibid Articles 47-48.
[1368] ibid Article 50.
[1369] ibid Article 49.
[1370] ibid Article 41.
[1371] ibid Article 52.
[1372] ibid Article 52(F).

The INDDHH [1373] and the members of the Board of Directors are autonomous. Neither the institution, nor its members are subjects to imperative powers, and will not receive instructions or orders from any authority.[1374] The enabling legislation and the internal rules of the INDDHH declare that the institution and its members must act in good faith. The violation of this principle implies serious misconduct to the duties inherent to the position. This obligation includes that the members of the Board of Directors are allowed to issue opinions, recommendations or proposals on subjects that are specific competence of the INDDHH in a public way and in a personal capacity with preliminary authorisation of the Board.[1375]

Funding

The Uruguayan law declares that the budget of the INDDHH 'should be adequate to guarantee its autonomous operation and should ensure the infrastructure and staffing necessary for the good performance of the INDDHH in all areas of its competence'.[1376] Indeed, the GANHRI observes as well that the 'adequate funding' demanded by the Paris Principles[1377] serves the purpose of guaranteeing the institution's independence and its ability to determine its priorities and activities freely.[1378] As of the procedure, similar to the Paraguayan Office, the Board of Directors prepares the draft budget and submits it to the President of the General Assembly for inclusion in the budget of the Administrative Commission of the Legislative Power.[1379] After consideration, the Chamber of Senators approves it by a vote of three-fifths and notifies the Executive Power in order include the approved budget of the institution in the National Budget.[1380] The INDDHH reports annually to the General Assembly and may propose the budgetary modifications.[1381]

The INDDHH's legislation allows the institution to 'obtain resources from assistance and cooperation agreements of international or foreign organisations' while giving immediate

[1373] ibid Article 2.
[1374] ibid Article 51.
[1375] ibid Article 9.
[1376] ibid Article 74.
[1377] Paris Principles (n 92) para B(2).
[1378] Global Alliance of National Human Rights Institutions, 'General Observations of the Sub-Committee on Accreditation' (n 142) para 1.10.
[1379] Ley Nº 18.806 de modificación de la Ley de Creación de la INDDHH (n 1354) Article 3; Reglamento Instutución Natcional de Derechos Humanos y Defensoría del Pueblo (n 1361) Article 7.
[1380] Constitución de la República Oriental del Uruguay, Constitución 1967 con las Modificaciones Plebiscitadas el 26 de noviembre de 1989, el 26 de noviembre de 1994, el 8 de diciembre de 1996 y el 31 de octubre de 2004 Article 108.
[1381] Ley Nº 18.806 de modificación de la Ley de Creación de la INDDHH (n 1354) Article 4.

account to the General Assembly, the Ministry of Foreign Affairs and the Office of Planning and Budget. The institution may receive donations, inheritances or legacies as well, giving immediate account to the General Assembly.[1382]

Functions

The enabling legislation describes the duties, competences, and powers of the institution. The Uruguayan legislation reflects the requirements of the Paris Principles on international human rights treaties related competences. The INDDHH is expressly mandated to propose the ratification of international human rights treaties, encourage their implementation, promote the harmonisation of the legal system and administrative and institutional practices with international human rights standards, and issue opinions on State reports addressed to the international human rights monitoring bodies.[1383] The institution is also mandated to draft human rights related studies and reports, advise the government and other public authorities on the adaptation or modification of legal rules and administrative practice, launch investigations either *ex officio* or at request, disseminate information on human rights and provide human rights education to the public.[1384]

Competences and powers

The enabling law gives a detailed description of the institution's complaint handling procedure; that corresponds with the classical ombudsman's function.[1385] A complainant can be any natural or legal person without limitation.[1386] The complaint must contain the complainant's name and address[1387] and be submitted within six months 'counted from having taken knowledge of the acts or events that motivate it'. However, 'in the case of serious violations of human rights, this period may be extended by the Board of Directors of the INDDHH' and in the case of human rights violations such as genocide, crimes against humanity or war crimes, 'there will be no limitation on the deadline for the presentation of complaints'.[1388]

[1382] Ley Nº 18.446 Institución Nacional de Derechos Humanos: Creación (n 1349) Article 77.
[1383] ibid Article 4(A)-(D).
[1384] ibid Article 4.
[1385] ibid Articles 11-34.
[1386] ibid Article 11.
[1387] ibid Article 13.
[1388] ibid Article 14.

Similarly to the Paraguayan *Defensoría*, the Uruguayan institution has competences not only in relation to public bodies but it may consider human rights violations committed by private persons.[1389] The institution is not allowed to investigate the judicial branch.[1390] It may only request precautionary measures from the judicial power and file writs of habeas corpus.[1391]

The investigative powers of the institution reflect the requirements of the Paris Principles.[1392] Thus, the *Defensoría* is allowed to visit places, conduct interviews, examine files, and obtain any information necessary for assessing the situation under consideration. They may also enter places of detention and in case file criminal complaints to the respective authority.[1393]

If a public authority does not collaborate with the INDDHH, it refers to this fact in its annual or special report.[1394] The Board of Directors of the INDDHH presents the institution's annual report to the General Assembly within the first hundred and twenty days of each year. The General Assembly receives and listens to the INDDHH in a special session.[1395] The report is disseminated nationwide.[1396] The Board may present special reports to the General Assembly at any time.[1397]

NPM mandate

In Uruguay, the NPM was established as part of the INDDHH.[1398] The actual work as NPM started only in 2013.[1399] In addition, the Parliamentary Commissioner of Prisons also acts as a national mechanism for preventing torture in the adult prison system.[1400] Their

[1389] ibid Articles 5 and 29; Reglamento Instutución Natcional de Derechos Humanos y Defensoría del Pueblo (n 1361) Article 4.
[1390] Ley Nº 18.446 Institución Nacional de Derechos Humanos: Creación (n 1349) Articles 6 and 19.
[1391] ibid Articles 24 and 35(D)-(E).
[1392] Paris Principles (n 92) para C(b)-(c).
[1393] Ley Nº 18.446 Institución Nacional de Derechos Humanos: Creación (n 1349) Article 35; Reglamento Instutución Natcional de Derechos Humanos y Defensoría del Pueblo (n 1361) Article 58.
[1394] Ley Nº 18.446 Institución Nacional de Derechos Humanos: Creación (n 1349) Articles 23 and 72.
[1395] ibid Article 68.
[1396] ibid Article 71.
[1397] ibid Article 70.
[1398] ibid Article 83.
[1399] Association for the Prevention of Torture (apt), 'Uruguay - OPCAT Situation' <https://apt.ch/en/opcat_pages/opcat-situation-77/> accessed 25 April 2019.
[1400] Interview with Juan Miguel Petit, Penitentiary Parliamentary Commissioner, Montevideo, 15 December 2016.

operations, 'including their investigations, publication of reports and implementation of budgets, are not subject to any form of control by the State'.[1401]

Cooperation activities

At the state institutions level, the INDDHH shall coordinate its functions with the Parliamentary Commissioner for the Prison System and the Ombudsman for Neighbours (*Defensoría de Vecinas y Vecinos*), investigating claims related to services performed by the Municipality of Montevideo, the Human Rights Directorate of the Ministry of Education and Culture, and the Directorate of Human Rights and Humanitarian Law of the Ministry of Foreign Affairs.[1402] The institution has contact points in every ministry, facilitating the smoother collaboration and regularly advises the Ministry of Foreign Affairs how to comply with the recommendations formulated by the international human rights bodies.[1403] Thus, the Uruguayan institution takes up the traditional NHRI role of bridging the national and the international level. Beyond these ad hoc cooperation opportunities, the institution has the power to sign cooperation agreements with committees and agencies controlling the implementation of the obligations of the state stemming from international commitments, with human rights NGOs, academic and social organisations, as well as with independent experts.[1404]

The INDDHH established an institutionalised platform for cooperation with other national actors. The extraordinary sessions of the INDDHH, called National Assembly for Human Rights[1405] invites social organisations, as well as government agencies, especially representatives of parliamentary commissions and local advocates in order to present and discuss the INDDHH's annual report and work plan, as well as the performance reports of its working groups. In this way, the *Defensoría* can make other actors acquainted with its activity and channel in observations and suggestions. The report of each National Assembly is available on the INDDHH's website and forms part of the annual report presented to the General Assembly.

[1401] UN, International Human Rights Instruments, Core document forming part of the reports of States parties, Uruguay, 27 December 2016, HRI/CORE/URY/2016 para 59.
[1402] Ley Nº 18.446 Institución Nacional de Derechos Humanos: Creación (n 1349) Article 10; Reglamento Instutución Natcional de Derechos Humanos y Defensoría del Pueblo (n 1361) Article 9.
[1403] Interview with Ariela Peralta Distefano, former member of the Board of Directors, INDDHH, Montevideo, 17 December 2016 (n 1360).
[1404] Ley Nº 18.446 Institución Nacional de Derechos Humanos: Creación (n 1349) Article 35(G).
[1405] ibid Articles 61-64; Reglamento Instutución Natcional de Derechos Humanos y Defensoría del Pueblo (n 1361) Articles 40-50.

The enabling legislation of the Uruguayan institution expressly refers to the institution's competence to cooperate with regional or international human rights organisations.[1406] Accordingly, there are submissions by the INDDHH to the UPR,[1407] to the HRC,[1408] and to Treaty Bodies.[1409]

NHRI accreditation

Since its establishment, the international human rights monitoring bodies have urged the accreditation of the Uruguayan institution.[1410] The application for accreditation of the Uruguayan institution was considered in March 2015. The SCA deferred its decision to its next session and formulated the following concerns regarding the INDDHH.[1411] More than half of the staff positions were filled by secondment. This practice is against the open, transparent, and merit-based recruitment procedure desired by the SCA in order to fulfil the requirement of pluralism and independence demanded by the Paris Principles. Another concern related to the institution's funding, as donor contributions were significant. Again, the lack of adequate funding provided by the state jeopardises the institution's independence and credibility. In May 2016, the INDDHH received the A-status as its funding increased in 2015.[1412]

[1406] Ley Nº 18.446 Institución Nacional de Derechos Humanos: Creación (n 1349) Article 4(M).
[1407] For example, Summary prepared by the OHCHR in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Uruguay, 7 November 2013, A/HRC/WG.6/18/URY/3.
[1408] For example, UN Human Rights Council, Thirty-seventh session, Written submission by the National Human Rights Institution and Office of the Ombudsperson of Uruguay, 26 February 2018, A/HRC/37/NI/3.
[1409] For example, 'Committee Against Torture 52nd Session, Report by the National Institution of Human Rights and Ombudsman of Uruguay, 11 April 2014'.
[1410] For example, UN Committee against Torture, Concluding observations: Uruguay, 10 June 2014, CAT/C/URY/CO/3 para 15(b); UN Committee on Enforced Disappearances, Concluding observations: Uruguay, 8 May 2013, CED/C/URY/CO/1 para 10.
[1411] The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 16-20 March 2015' para 5.1.
[1412] Global Alliance of National Human Rights Institutions, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 9-13 May 2016' para 2.5.

3.3.3 Summary analysis

While the establishment of the *Defensoría* in Paraguay is due to a regulatory moment in 1992 that resulted in a new constitution and institutional reforms, in Uruguay the establishment of the *Defensoría* in 2008 is the result of the combination of external obligations and international regime pressure. The two institutions have a diverse organisational structure: the Paraguayan *Defensoría* is a classic ombudsinstitution with one ombudsman and a deputy on the top, the Uruguayan institution is managed by a collective body, the Board of Directors. The Paraguayan institution has regional offices; the Uruguayan does not have county representatives. The primary decision-makers of both institutions are elected by the Parliament for five years with the opportunity of re-election once. Incompatibility rules are present in both legislations; the selection criteria are more human rights-focused in the case of the Uruguayan institution. Regarding the Uruguayan ombudsinstitution, pluralism pervades both the selection and the appointment procedures. Both institutions are autonomous and enjoy immunity. The institutions are budgeted from the state budget; the Uruguayan institution may receive third-party contributions. Both institutions handle individual complaints, but in the case of the Uruguayan ombudsinstitution, the emphasis is on its international law-related activities – in accordance with the Paris Principles. Private or legal persons can turn to the ombudsinstitutions, who do not have competence over the judiciary. Both legislations prescribe cooperation obligation to the authorities under the *Defensors'* investigation. The Paraguayan institution does not have an NPM mandate, the Uruguayan does. The enabling legislations contain references to cooperation obligations that are more present in the practice of the Uruguayan institution than in that of the Paraguayan. The ombudsinstitutions report annually and on special occasions to the Parliaments. The *Defensoría* in Uruguay is more present at the international level. The Paraguayan institution lost its accredited NHRI status in 2014, the Uruguayan gained it and has been holding an A-status since 2016.

	Defensor del Pueblo de la República del Paraguay	**Institución Nacional de Derechos Humanos y Defensoría del Pueblo (Uruguay)**
History and legal background	1992	2008
Organisation	• Omb. + 1 Deputy • General Directorate of	• Board of Directors • President (rotates yearly)

	Truth, Justice and Reparation • regional offices	• 4 main sections • no regional offices
Selection, appointment, and tenure	• PY nationality, 25 years old, full capacity to act • Proposal of the Senate • 2/3 majority in the Chamber of Deputies • 5 years-term • re-election once • incompatibility rules	• no age limit, UY citizenship, high moral authority, experience in human rights • incompatibility rules • pluralism • 2/3 majority in the General Assembly • 5 years-term • re-election once • pluralism
Independence and immunity	• autonomous and irremovable • immunity as judicial magistrates • *in flagrante* • political trial for misconduct and crimes	• autonomous • acting in good faith
Funding	• part of the state budget	• part of the state budget • adequate funding • resources from cooperation agreements • donations
Functions	• complaint-handling • no exhaustion of remedies • informing the complainant within 30 days • *ex officio* investigations • advising the Gov. • legislative proposals • filing *habeas corpus* • promoting human rights	• proposing ratification • encouraging implementation • promoting harmonisation • contributing to state reporting • drafting thematic reports • *ex-officio* investigations • advising the Gov. on changes • filing *habeas corpus* • complaint-handling • disseminating information • human rights education
Competences and powers	• public and private entities • no competence over the judiciary (except administrative functions) • cooperation obligation • transferring cases	• any natural or legal person • time limit: 6 months • no competence over the judiciary • cooperation obligation
NPM mandate	• no	• since 2008

		• actual work since 2013 • cooperation with the Parliamentary Commissioner of Prisons
Cooperation activities	• annual report to both chambers • special reports • NGOs as complainants • not with int. actors • FIO	• with the Parliamentary Commissioner of Prisons • with the Defenders of the Neighbour • with ministries • annual and special reports • National Assembly for Human Rights • with international actors
NHRI accreditation	• A-status in 2008 • lapsed in 2014	• A-status since 2016

Table 8: Summary table (PY-UY)

Despite being neighbours in the Latin American continent, and regardless of the similar historical past, the *Defensoría del Pueblo* in Paraguay and the *Institución Nacional de Derechos Humanos y Defensoría del Pueblo* in Uruguay show different institutional characteristics, level of efficiency, and social standing. They differ in their legal status (constitutional/non-constitutional), organisational structure (classic ombudsinstitution/institute), Paris Principles conformity (non-status/A-status), and functioning. The case study reveals that the constitutional status in itself does not always provide the assumed benefits, and formal design principles cannot protect the institutions against political interference.[1413] In spite of being a constitutional institution established right after the collapse of the authoritarian regime, the delays in the appointment of the first, then the second *Defensor* in Paraguay, as well as the lapse of the NHRI accredited status of the institution led to losing credibility in the public – both in the country and abroad.

Nevertheless, it is early to judge the future of the *Defensoría*, considering that the new Ombudsman was appointed to the office not that long ago. As a matter of fact, beyond the legal environment guaranteeing effective functioning to the institution, the ombudsman's personality, his philosophy about his mandate, and his perception of the role are of high importance in relation to the institution's functioning and effectiveness. Being a collective body, the Uruguayan institution shows different features. However, the *Defensoría* is not rooted in the country's constitution; it was born in the spirit of the Paris Principles that is

[1413] Pegram, 'National Human Rights Institutions in Latin America: Politics and Institutionalization' (n 1310).

well reflected in the wording of the enabling legislation and the practice of the institution. Even if *Defensorías* fight with shortcomings from time to time, especially concerning their autonomy, research results keep highlighting the value of these institutions,[1414] with special regard to their achievements in promoting and protecting human rights by giving explicit priority to human rights in their everyday functioning. The two Latin American examples have it in common that they put much emphasis on the protection of economic, social and cultural rights that is a natural heritage after the bad social situation caused by the authoritarian regimes. Similarly, handling complaints on human rights violations caused by private companies is a necessity resulted in the fact that many public services – because of the incapability of the states – are run by private enterprises, who may violate citizens' rights directly.

[1414] Erika Moreno and Richard Witmer, 'The Power of the Pen: Human Rights Ombudsmen and Personal Integrity Violations in Latin America, 1982-2006' (2016) 17 Human Rights Review 143; Linos and Pegram, 'What Works in Human Rights Institutions?' (n 440).

4.
Conclusions

The research has been searching for the answer to the question of whether ombudsinstitutions are suitable for the role of National Human Rights Institutions (NHRIs). It has been working with the hypothesis that ombudsinstitutions, especially those that were recently accredited as NHRIs, struggle between their traditional ombudsman role and their new extended role as NHRI. In order to prove this assumption, a SWOT analysis tried to bring us closer to ombudsinstitutions by collecting their strengths, weaknesses, opportunities, and threats in general; and seven ombudsinstitutions of three different regions (Central and Eastern Europe, the Nordic region, and Latin America) were analysed along theoretical and practical features – from appointment through funding to cooperation activities – that are also benchmarks for assessing NHRIs. Digesting the findings of this comparative analysis and the discoveries of the SWOT analysis, the conclusions consider whether (a) the time of establishment, (b) the Paris Principles conformity, (c) the region and the environment, (d) the funding, or (e) the ombudsperson's personality matters. It also attempts to formulate recommendations to decision-makers on the design of the ideal ombudsinstitution model that is the most suitable for the NHRI role.

NHRIs are emerging actors on the national and international human rights scene. They are valuable allies of both international monitoring mechanisms and national governments in their efforts for implementing international human rights standards at the national level. Those NHRIs that comply with the requirements determined by internationally agreed minimum standards, the so-called Paris Principles,[1415] have better chances to be effective and efficient in fulfilling their mandate. According to the Paris Principles, 'NHRIs should have a broad mandate to deal with all human rights; an inclusive and transparent selection and appointment process for their leadership; be independent both in law and in practice; have access to sufficient resources and staff, and co-operate effectively with national and international stakeholders'.[1416] The full compliance with the Paris Principles, the granted A-status accreditation enables the institutions to actively participate in the mechanisms of

[1415] UN General Assembly Resolution 48/134. National institutions for the promotion and protection of human rights, 20 December 1993, A/RES/48/134 (n 1).
[1416] CoE Commissioner for Human Rights, 'Human Rights Comment - Paris Principles at 25: Strong National Human Rights Institutions Needed More Than Ever' (n 576).

the UN Human Rights Council.[1417] As described in Chapter One, this interaction is mutually beneficial and means an added value to the work of NHRIs at home as well. Nevertheless, the accreditation cannot guarantee fully that an institution is effective; and *vice versa*, a non-accredited NHRI can be successful as well. Taking the basic requirements of the Paris Principles and the case studies, it could be observed that not all of the ombudsinstitutions that are accredited as A-status NHRIs have (1) a broad human rights mandate, (2) a transparent selection and appointment process, (3) full independence, (4) sufficient resources, and (5) effective cooperation activities with national and international stakeholders. It either means that the SCA is too indulgent when granting A-status accreditation or the full compliance simply cannot be reached. Chapter One formulated critics on the function and significance of the accreditation process, and Chapter Two listed NHRI accreditation as a threat to ombudsinstitutions. Still, the Paris Principles and the compliance with them are getting more and more relevance; for example, they are a reference point in two international documents, the Optional Protocol to the Convention against Torture (OPCAT) and the Convention on the Rights of People with Disabilities (CRPD). These instruments encourage state parties ('shall take into account', 'shall give due consideration') to establish national monitoring mechanisms in accordance with the Paris Principles.[1418]

NHRIs or similar human rights bodies existed already before the 1991/1993 drafting of the Paris Principles. Among the analysed case studies, the Austrian (1977) and the Polish (1987) institutions of the Central and Eastern European region and the *Defensoría* in Paraguay (1992) were established in the pre-Paris Principles period and received accredited NHRI status later on. Even if the Paris Principles are non-binding benchmarks of international law, as formal institutional safeguards they have been highly influential in the design of NHRIs globally,[1419] has effected state behaviour, 'both democratic and authoritarian governments in very different parts of the world'[1420] and have been contributing greatly to the efficacy of NHRIs both in authoritarian and transition

[1417] Haász, *National Human Rights Institutions in the UN Human Rights Framework* (n 2).
[1418] Convention on the Rights of Persons with Disabilities (CRPD), New York, 13 December 2006, United Nations, Treaty Series, vol. 2515, p. 3 (n 42) Article 33(2); Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), New York, 18 December 2002, United Nations, Treaty Series, vol. 2375, p. 237 (n 42) Article 18(4).
[1419] Linos and Pegram, 'Architects of Their Own Making: National Human Rights Institutions and the United Nations' (n 63).
[1420] Linos and Pegram, 'The Language of Compromise in International Agreements' (n 111).

regimes.[1421] 'States make strategic choices when establishing an NHRI.'[1422] They need to consider what is more suitable for their reality: setting up a new ombudsinstitution, strengthening the existing one, or setting up a human rights commission.[1423] In the post-Paris Principles period, governments willing to establish an NHRI have two choices: either trying to fit their existing institution – for example ombudsinstitution – into the frames of the Paris Principles or establishing a new institution in line with the Paris Principles. The two ways of creation, namely transformation and establishment, were also distinguished in Chapter Two, when discussing the human rights model of ombudsinstitutions. Considering the case studies, the mandates of the Austrian and the Hungarian institutions were expanded in line with the Paris Principles and the recommendations of the Sub-Committee on Accreditation (SCA) in 2012 under the obvious influence of the OPCAT ratification. The Polish Commissioner also received progressively additional mandates that relate to the monitoring of the implementation of international standards in 2008 (National Preventive Mechanism – NPM), 2010 (Equality Body – EB), and 2012 (National Monitoring Mechanism – NMM). Sweden (ongoing), Norway (2015), and Uruguay (2008) opted for the establishment of a new institution in line with the Paris Principles. The institutions that went through on transformation and whose mandate has been expanded, admitted the burden, what these additional tasks mean to them and the difficulty of balancing them with their original – complaint handling – functions. It is reflected in their modest human rights promotional activities (Austria) – even if their enabling legislations contain references to that – and moderated cooperation activities at the international level (Poland, Paraguay) or with NGOs (Hungary, Paraguay).

Definitely, it makes a difference if an institution is established in the spirit of the Paris Principles, according to the newest developments and by learning from NHRIs' experiences, rather than taking new functions and responsibilities that the institution is not yet ready to fulfil for different reasons. The idea of encouraging and promoting the Paris Principles conformity of – previously classic – ombudsinstitutions is welcomed. However, as said, the compliance in itself and the gained accredited NHRI status usually does not guarantee the presence of a strong and effective NHRI.[1424] Apparently, the timing of establishment and the Paris Principles compliance do not determine the suitability of an

[1421] Linos and Pegram, 'What Works in Human Rights Institutions?' (n 440).
[1422] Brodie (n 1033) 148.
[1423] Franz Matscher (ed), *Ombudsmann in Europa: Institutioneller Vergleich = Ombudsman in Europe* (Engel 1994) 165.
[1424] Human Rights Watch (n 88).

ombudsinstitution to the NHRI role. Since this observation is valid for every type of NHRIs (human rights ombudsinstitutions, commissions, institutes, councils), it is highlighted below what are the specialities of ombudsinstitutions.

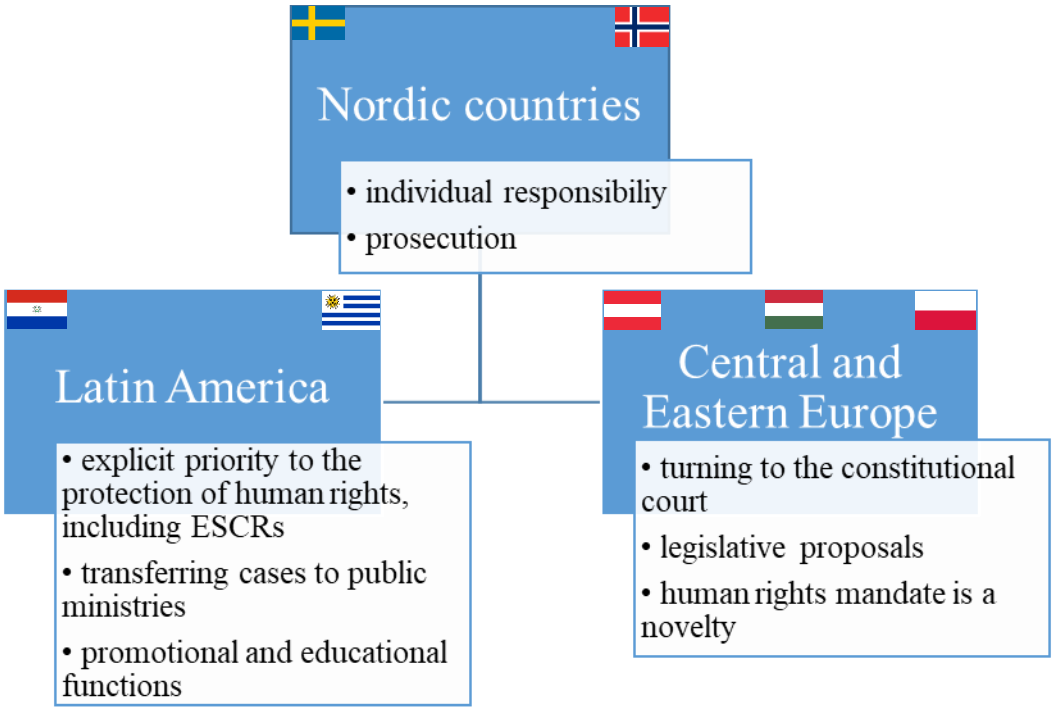
Authors consider ombudsinstitutions as 'human rights protection mechanism of the 21st century',[1425] the 'fourth estate' like the media,[1426] feedback mechanisms[1427] and overwhelmingly support the phenomenon of 'ombudsmanry',[1428] 'ombudsmania',[1429] 'the Ombudsman idea'.[1430] Ombudsinstitutions are statutory creatures, who bring public authorities to account[1431] based on individual complaints mainly on maladministration. Ombudsinstitutions help society to resolve shared problems.[1432] They provide 'professional surveillance of administrative authorities'[1433] and thus, may 'add real value to the quality of governance'[1434]. Furthermore, the findings of the ombudsman may mirror the status of democracy, the rule of law, and human rights in the given country. Kostelka goes as far as stating that ombudsmen's criticism of the government's policy and administration can decide elections.[1435] This high profile, however, assumes 'a sharp-eyed and brave critic of political power-ups'.[1436] It is undoubtedly an expression of real democracy when a society establishes a particular institution with the task of ensuring that the other agencies serving the society respect citizens' rights.[1437] Not only with their complaint handling function but with their further activities, such as advising the legislature, reporting to the parliament, and awareness-raising, ombudsinstitutions can contribute to the protection of fundamental rights.[1438] The institution went through on a metamorphosis: from the legal control of the lawful functioning of the public administration – and the justice sector in some countries – to the guarantee of fundamental (human) rights.

Authors try to group ombudsinstitutions according to this functional change based on geographical regions. The so-called Nordic model is considered as the tool of

[1425] Somody, 'Az Ombudsman-Típusú Jogvédelem Című Doktori Értekezésének Tézisei' (n 119).
[1426] Moreno (n 430) 101.
[1427] Oosting (n 504) 1.
[1428] Gottehrer (n 241).
[1429] Ascher (n 284).
[1430] Kucsko-Stadlmayer (n 288).
[1431] Satyanand (n 524) 22.
[1432] Ayeni (n 416) 7.
[1433] ibid.
[1434] ibid 9.
[1435] Kostelka (n 398).
[1436] Majtényi (n 620).
[1437] Bexelius (n 1016) 19.
[1438] Messner (n 522) 109.

parliamentarian control that operates preferably through *ex officio* investigations and making civil servants responsible for maladministration. The so-called Western European model investigates individual rights violations and recommends redress. The Southern and Central European model provides fundamental rights protection through activities such as turning to the constitutional court, submitting legislative proposals, or raising awareness on human rights.[1439] The present dissertation proved in Chapter Two that there were four waves instead of three in the history of establishing ombudsinstitutions, whereby the Southern European that influenced the Latin American establishments and the Central and Eastern European developed separately. This statement was further elaborated when discussing factors that may cause confusion resulting in the mixing of the classic and the human rights model of ombudsinstitutions. It led to the conclusion that the Central and Eastern European ombudsinstitutions cannot be categorised as human rights model by default as institutions from the Latin American region.

Since the ombudsinstitutions of both the Central and Eastern European and the Latin American regions originate from the Swedish model, it can be summarised schematically, what the region specific factors added to the mandate of the basic Nordic model.



[1439] Somody, 'Ombudsman' (n 838).

Figure 1: Region specific factors

All systems work based on individual complaints, since this is one of the strengths of ombudsinstitutions, but while in the Nordic countries the emphasis is on making 'maladministrating' public officers responsible for their wrongdoings, ombudsinstitutions in the Central and Eastern European region try to fix problems based on a systematic approach; this is the purpose of their functions, such as turning to the constitutional court and submitting legislative proposals. In Latin America, coping with maladministration is not the main priority to ombudsinstitutions; their focus is on human rights. This observation does not entail, however, in proving that they would be better at promoting and protecting human rights, thus, fulfilling the role of NHRIs. But it underlines – as discussed in Chapter Two – that ombudsinstitutions of the Latin American region have a different mind-set that works on the basis of human rights-based approach with all its necessities, such as strong knowledge on international human rights law, proactivity, preventive approach, educational approach, language skills needed for participation and interaction in the international human rights scene. Such a simple thing that the representatives of Latin American ombudsinstitutions speak Spanish as mother tongue that is one of the official languages of the UN eases their interaction at the supranational level.

Having a closer look at the regulations of the selected ombudsinstitutions, we can observe further region specific characteristics – that are also discussed in the summary analyses (3.1.4, 3.2.3, 3.3.3) of the regional subchapters. In Eastern Europe, the institutions have constitutional rank, and the enabling legislations require a legal professional background for the ombudsperson position. It determines a particular, namely, legalistic approach to issues and cases. This is not in line with the spirituality of the Paris Principles that requires a rather broad inter-disciplinary approach to human rights. Re-election is allowed but has not occurred in the history of the Eastern European institutions yet. The institutions may conduct investigations *ex officio* and have strong investigatory powers. Human rights promotional activities are present in the practice of the institutions; however, it much depends on the personal mission and role perception of the ombudsperson in office. In the Nordic countries, the enabling legislations are reticent; they do not regulate the selection and appointment procedures, or tenure. Despite being silent about immunity as well, the ombudsinstitutions do enjoy a high level of respect and trust among the public. Maybe that is the reason why ombudspersons were re-elected several times without any protest. It is

typical of the Nordic region that not the ombudsinstitutions but separate organisations fulfil the role of NHRIs.

Despite region specific characteristics, the case studies indicated that institutions of the same region could differ from each other, and institutions of different regions can show similarities to each other. Differences in the same region are the most tangible in Latin America, where despite the similar historical past and focus on human rights, the evolution and functions of the two analysed ombudsinstitutions differ. They distinguish in their legal background (constitutional/non-constitutional), institutional structure (classic ombudsinstitution/institute), and NHRI accreditation (non-accreditation/A-status) as well. SCA recommendations can also serve as evidence for deviations within one region. Having a look at the recommendations of the SCA made for the Hungarian and the Polish institutions, for example, we can see that similar institutions of the same region need to face different kind of SCA recommendations.

Hungary / 2014[1440]	Poland / 2017[1441]
1. encouraging the ratification of treaties	1. human rights mandate
2. interaction with the international human rights system	2. immunity
3. ensuring pluralism	3. ensuring pluralism
4. selection and appointment	4. adequate funding
5. outreach	

Table 9: SCA recommendations (HU and PL)

Analysing the features and modalities of the institutions, we can observe some similarities that do not depend on the regional origin of the institutions. Considering their structures, for example, five institutions have one single head (with deputies) on the top of the institution, while the Austrian and the Uruguayan institutions are managed by a collective body (Ombudsman Board and Board of Directors). Despite this identical choice of structure, the realisation of the two designs differs from each other. While pluralism prevails in the case of the Uruguayan institution due to the modalities of the selection procedure, this is already not the case with Austria, where the composition is the result of the compromise of the leading political parties. *Nota bene*, the case studies justified that

[1440] The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 27-31 October 2014' (n 883) para 2.2.
[1441] Global Alliance of National Human Rights Institutions, 'Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA), Geneva, 13-17 November 2017' (n 489) para 2.6.

the single or collective body structure in itself does not guarantee the independence and effectiveness of an institution. Considering their accessibility, the Polish and the Paraguayan ombudsinstitutions have more local offices, while the other five institutions have seats only in the capitals. The research has shown that not necessarily the physical presence is the key to accessibility; however, it is undoubtedly a strength of an ombudsinstitution. A parallel can be drawn between the Norwegian and the Paraguayan institutions in as much as the ombudspersons' appointment follows the rhythm of the parliamentary elections. Here again, it could not be decided which practice is the right one.

Summing up, despite the attempt of the dissertation to categorise ombudsinstitutions according to geographical regions, the case studies showed that the institution is so flexible and adaptive to the factors directly around it that it is difficult to place the institutions in clear cut categories according to geographical regions. It would also be wrong to assume that identical efforts will play out in similar ways across world regions.[1442] Without denying that the evolution of different procedures around and within the institutions is conditioned by the environment,[1443] beyond the legal, political, economic, socio-cultural, and international factors,[1444] there must be further factors that may determine how an ombudsinstitution performs in its capacity as NHRI.

One of the threats to ombudsinstitutions is reducing its budget. It is very often also an argument for modest performance. The case study of the Polish Commissioner for Human Rights showed that the institution had to face severe budget cuts that have not prevented the institution from keeping performing well. This situation raised concerns at the supranational level as well and evoked solidarity towards the institution that is a valued member of the European Network of NHRIs. The Polish example showed that we could not merely state that adequate funding is the key to effective functioning.

One last observation remained that seems to be the decisive factor as it is valid in all regions and for all type of ombudsinstitutions. NHRIs and ombudsinstitutions, in particular, are highly dependent on the independence and quality of their leadership in order to be effective. Even if the institutions have a well prepared and enthusiastic professional staff, a strong, independent, and committed ombudsperson is also needed

[1442] Emilie M Hafner-Burton, 'Human Rights Institutions: Rhetoric and Efficacy' (2007) 44 Journal of Peace Research 379, 382.
[1443] Lane (n 292) 143.
[1444] Vangansuren (n 606).

because the ‘last word’ is always with the ombudsman in charge. Independence is crucial since ombudsinstitutions are especially vulnerable politically, as discussed in the course of the SWOT analysis. Having a well-identified human face is one of the strengths of ombudsinstitutions – as discussed in Chapter Two. The achievements of an ombudsinstitution also depend on the ombudsman’s public standing with the complainants and authorities and are strongly connected to his or her reputation.[1445] An ombudsperson in office may decrease the impartiality and efficiency of the institution if only being independent on paper, while, for example, an executive ombudsinstitution can function independently and effectively if led by a suitable person.[1446] Institutional frameworks alone cannot deliver valid human rights promotion and protection.[1447] Therefore, we must divide the written mandate and the practice of the institution. It is rightly so that the SCA considers both the legal background and the practice of national institutions when measuring their compliance with the Paris Principles.

Furthermore, taking the opportunities of ombudsinstitutions that were listed in the course of the SWOT analysis in Chapter Two, one can observe that it highly depends on the ombudsperson’s personal choice what opportunities he or she takes. Whether he or she brings prevention to the fore, facilitates systematic change, finds it essential to use communication channels, including social media, cooperates with other national and international human rights bodies, recruits skilled staff, establishes clear internal accountability and assessment processes in order to ensure high standards within the office. It is also the ombudsperson’s strategic decision if he or she undertakes international law-related tasks. Along with the same logic, it depends on the ombudsperson how much he or she is ready to minimise or overcome the threats that the institution must face. Therefore, beyond his or her professional competence, the ombudsman’s role perception and level of (pro)activity also matter. Within his or her discretion competences, the ombudsperson can develop his or her own understanding of the office and focus on specific aspects of his or her mandate. It can be the ombudsperson’s personal choice to pursue human rights promotional activities, for example.

[1445] Serota (n 453) 41.
[1446] Somody, ‘Jogállami Paradoxon - A Sikeres Ombudsmani Jogvédelem Sajátosságai [Rule of Law Paradox - Features of the Successful Protection Provided by the Ombudsman]’ (n 246).
[1447] Human Rights Watch (n 88) 11–12.

The personal qualities can be considered a determining factor in the success or failure of an ombudsman.[1448] Under qualities not necessarily or solely, the educational background and professional experiences are to be understood. The power of the ombudsman lies in legal argumentation, prestige, convincing, and publicity.[1449] These require a person, who has a personal mission, is prepared for fulfilling this mission and the institutional mandate, and is courageous.[1450] It also helps if the ombudsperson is charismatic and has an extravert personality because these contribute to his or her persuasive power[1451] that is very much needed in the case of an ombudsinstitution that does not make binding decisions and is usually lacking in enforcement mechanisms. For binding decisions, a formalised procedure would be needed; this would steal the unique character of the institution.[1452] In this way, the institution of the ombudsman becomes 'a rule of law paradox'.[1453] Namely, there are such features of the institution that legal provisions cannot describe at all or only in an indirect way, because they depend on the personality of the person in the office (e.g. client-oriented procedure, promotional activities). It also means that there are no criteria to measure the ombudsman's personality.[1454] The only way to secure that the right ombudsperson gets into office are the guarantees around his or her selection and appointment that are one of the most emphasised requirements of the Paris Principles, and one of the most often raised concerns of the SCA.

Considering it from the SWOT perspective, the strengths of the institutions are inherent, so are some of their weaknesses, for example, having one person on the top, lacking in enforcement power. The ability to minimise or overcome the rest of the weaknesses, as well as to take advantage of their opportunities, and to avoid threats depend partly on the ombudsman's personality, partly on the legislator. With other words, how well ombudsinstitutions perform depends on how well they want to perform, and how well they are allowed to perform.[1455] Therefore, recommendations into three directions can be formulated. A set of recommendations guide national decision-makers (governments,

[1448] Pegram, 'Accountability in Hostile Times: The Case of the Peruvian Human Rights Ombudsman 1996-2001' (n 1240).
[1449] Somody, 'Ombudsman' (n 838).
[1450] Majtényi (n 620).
[1451] Skype interview with Jonas Grimheden, Senior Policy Mangager, European Union Agency for Fundamental Rights (FRA), 15 February 2019 (n 182).
[1452] Somody, 'Az Ombudsman-Típusú Jogvédelem Című Doktori Értekezésének Tézisei' (n 119).
[1453] ibid.
[1454] Skype interview with Jonas Grimheden, Senior Policy Mangager, European Union Agency for Fundamental Rights (FRA), 15 February 2019 (n 182).
[1455] Caiden, Macdermot and Sandler (n 264) 15.

parliaments), who have a say in the design of ombudsinstitutions; others address ombudspersons, who have the crucial role in reaching achievements, as concluded above; and the SCA that assesses ombudsinstitutions during the NHRI accreditation procedure and formulates recommendations to their NHRI status.

A. Recommendations to national decision-makers (governments, parliaments)

It is an often striking warning that ombudsinstitutions must not be created according to one particular formula (the 'one-size-fits-all ombudsman model'[1456]). Instead, they must be designed according to the tradition, economic reality, and political situation of the given country. Without calling into question this statement, based on the case studies, some features could be collected that may contribute to the more effective functioning of ombudsinstitutions in their capacity as NHRIs.

National decision-makers' responsibility is of two-folded: the extent of the codification of the legal mandate of the institution, and the content of these written rules. Strengthening NHRIs is only possible if they have the legal environment enabling them to work properly.[1457] The case studies reflected that enabling legislation of ombudsinstitutions are of different length and depth. The laws ruling the institutions in the Nordic countries are mainly short and reticent. As concluded in Subchapter 3.2, the national context can change and become threatening to national institutions promoting and protecting democratic values, as it has been the case in Central and Eastern Europe, therefore, the mandate, procedures should be regulated by law. Having clearly defined legal mandates and competencies eases the job of the SCA as well when measuring the Paris Principles compliance of the institutions and trying 'to bring the national context and the NHRI accreditation together'.[1458] Legal safeguards make it also possible to call ombudspersons better to account in case.

As of the content of the enabling legislation, national decision-makers' contribution is especially relevant around the rules on selection and appointment (weaknesses), the mandates, competences and powers (opportunities), they vest the institutions with and their decisions on budget cuts and the establishment of multiple national institutions (threats).

[1456] CoE Parliamentary Assembly, Resolution 1959 (2013), Strengthening the institution of ombudsman in Europe (n 582).
[1457] Telephone interview with Katrien Meuwissen, Senior Human Rights Officer, ENNHRI, 20 February 2019 (n 567).
[1458] ibid.

Without mentioning the requirements of the Paris Principles and the SCA General Observations[1459] that clarify these requirements, the following observations have been made. In order to increase the credibility of, and public trust in the institutions, candidatures should be made in a more transparent and participatory way. Providing more significant publicity to ombudsperson candidates also brings the institution closer to people. Since fulfilling a broad human rights mandate demands an in-depth knowledge on human rights, the selection criteria should not be restrictive, for example prescribing legal background as most legislations do, and candidates with interdisciplinary background should be promoted.[1460] Also, the professional background is often overvalued, although, personal qualities, authority, and experience may determine better whether an ombudsperson will be effective.[1461] Aiming at a proactive attitude, experiences made in civil society organisations can be beneficial.

The case studies showed that it is rather beneficial and contribute to a broader spectrum of human rights protection if an institution has competence over private companies and an NPM mandate – accompanied with the necessary resources, of course. As both multiple mandates and multiple institutions may mean a threat to the functioning of the institutions, decision-makers need to consider whether the institution is overburdened or suffers from the lack of specialised staff and whether the multiplication of institutions causes conflictual jurisdictions between them.

B. Recommendations to ombudspersons

NHRIs tend to focus on specific responsibilities, often depending on their institutional type – as discussed in Chapter Two. In the case of ombudsinstitutions, this is the handling of individual complaints that is reactive in nature. It would be impossible, indeed, to require that the institutions spend the same energy on all of their responsibilities. Focusing on some responsibilities is not in contradiction with the Paris Principles, provided that other responsibilities are not neglected.[1462]

[1459] Global Alliance of National Human Rights Institutions, 'General Observations of the Sub-Committee on Accreditation' (n 142).
[1460] CoE Venice Commission, 'Compilation on the Ombudsman Institution, CDL(2011)079' (n 67).
[1461] International Ombudsman Institute (IOI), 'Developing and Reforming Ombudsman Institutions: An IOI Guide for Those Undertaking These Tasks' (n 378) 5.
[1462] de Beco and Murray (n 197) 65.

Ombudsinstitutions that are committed to promoting and protecting human rights also in a more preventive manner need to undertake proactive tasks as well that address broader human rights issues.[1463] Monitoring, legislation reviews, awareness-raising campaigns, human rights training all belong to these proactive tasks. Carver suggests to use the patterns from the individual complaints and identify priority human rights issues based on them and the findings of other monitoring activities. It also belongs to a preventive approach that the related legislation needs to be reviewed and modifications need to be suggested in case. The findings of this monitoring activity need to be transmitted through public information campaigns, whereby using mass media, including social media in a strategic manner, is crucial. Those officials who are affected with the violation of the given human rights issue need to be trained so that to prevent violating practices also in this way.[1464]

Undertaking additional tasks is usually a burden for public institutions, including ombudsinstitutions. For the implementation of the activities mentioned above, ombudspersons need to recruit skilled staff and develop the organisational capacity of the institution. The rethinking of source allocation is also unavoidable. Needs assessment and strategic planning are useful tools for self-assessment. It helps to identify all working areas, where resources can be decreased or withdrawn and allocated to other areas. Formulating clear goals, objectives, and the necessary activities helps the institutions to get rid of this feeling of burden.

It contributes to the effectiveness of ombudsinstitutions if they are known and appreciated among the wider public; therefore, they should 'conduct awareness-raising activities on their roles and functions, in collaboration with all relevant stakeholders'.[1465] In the 21st century, good communication starts with a user-friendly website that contains all the necessary information simply and helpfully. Sharing information through social media channels is crucial, also because they are popular among the younger generations, who are the legal subjects of the future, and those who will apply the law.

[1463] Dodson (n 425) 44.
[1464] Carver, 'National Human Rights Institutions in Central and Eastern Europe: The Ombudsman as Agent of International Law' (n 380).
[1465] UN Secretary-General Report, The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights, 31 July 2017, A/72/230 (n 575).

C. Recommendations to the SCA

Strengthening NHRIs is only possible if they have the environment enabling them to work properly.[1466] Due to their flexibility, ombudsinstitutions adapt to their environment. The SCA needs to understand the surroundings as a whole in order to be able to assess institutions meaningfully. The accrediting body needs to look also into the motivation of establishment in order to filter out those cases when the establishment is only a window dressing exercise for some purpose, e.g. securing foreign aid. The SCA can only be encouraged to keep looking at the practice of ombudsinstitutions and not only their legal mandate. The aim is to accredit those ombudsinstitutions with A-status that are prepared, indeed, to pursue those international activities that an NHRI mandate requires them. However, the NPM and NMM mandates are essential factors; the SCA should not overestimate the existence of these. It also should not compare institutions to each other and work based on precedents.

The title of the dissertation raised the question of whether ombudsinstitutions are suitable for the role of National Human Rights Institutions. In order to answer the question, the comparative research method has been chosen but not in the traditional institutional model (commission, ombudsinstitution, institute) based way. It compared ombudsinstitutions in three main geographic regions, where ombudsinstitutions are traditionally present. It assumed that by comparing and analysing selected ombudsinstitutions of the different regions, it would be able to identify clearcut geographical (i.e. the Central and Eastern European, the Nordic, the Latin American) categories of ombudsinstitutions and prove that one model is better than the other. It turned out that even if having region specific attributes, ombudsinstitutions show broad diversity that makes it difficult to set up clearcut categories and models. Apparently, not the regional specifics determine whether the given institution is suitable for the NHRI role. At the same time, there were several indications that ombudsinstitutions can fulfil the NHRI role successfully. Therefore, the final answer to the research question cannot be a simple ‘yes’ or ‘no’. It is a ‘yes, if …’. Also, the recommendations above aim at promoting the dual (ombudsinstitution and NHRI) role of ombudsinstitutions. The research came to the conclusion that ombudsinstitutions have an excellent opportunity to take advantage of their complementary classic ombudsman

[1466] Telephone interview with Katrien Meuwissen, Senior Human Rights Officer, ENNHRI, 20 February 2019 (n 567).

function and NHRI role and make a meaningful link between the national and international levels.[1467]

[1467] Sotto Maior (n 423).

Annexe I:
Principles relating to the Status of National Institutions
(The Paris Principles)[1468]

A. Competence and responsibilities

1. A national institution shall be vested with competence to promote and protect human rights.

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

3. A national institution shall, *inter alia*, have the following responsibilities:

(a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:

(i) Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;

(ii) Any situation of violation of human rights which it decides to take up;

[1468] Adopted by General Assembly resolution 48/134 of 20 December 1993

(iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;

(iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;

(b) To promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;

(c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;

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

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

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

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

B. Composition and guarantees of independence and pluralism

1. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social

forces (of civilian society) involved in the protection and promotion of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

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

(b) Trends in philosophical or religious thought;

(c) Universities and qualified experts;

(d) Parliament;

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

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

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

C. Methods of operation

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

(a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner,

(b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;

(c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;

(d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly concerned;

(e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;

(f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular, ombudsmen, mediators and similar institutions);

(g) In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

D. Additional principles concerning the status of commissions with quasi-jurisdictional competence

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

(a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;

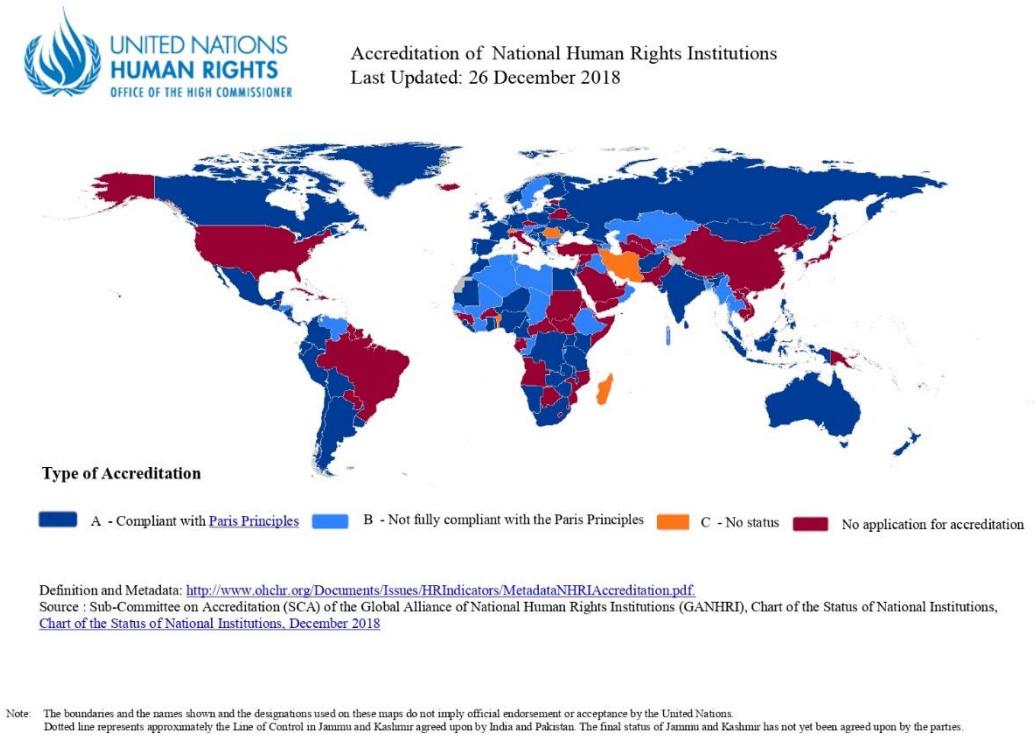
(b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;

(c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;

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

Annexe II:

Map on the accredited status of National Human Rights Institutions



(2018)

Source: https://www.ohchr.org/Documents/Issues/HRIndicators/NHRI.pdf

Figure 2: Map on the accredited status of National Human Rights Institutions (2018)

Annexe III:

Chart on the accredited status of ombudsinstitutions worldwide (2018)

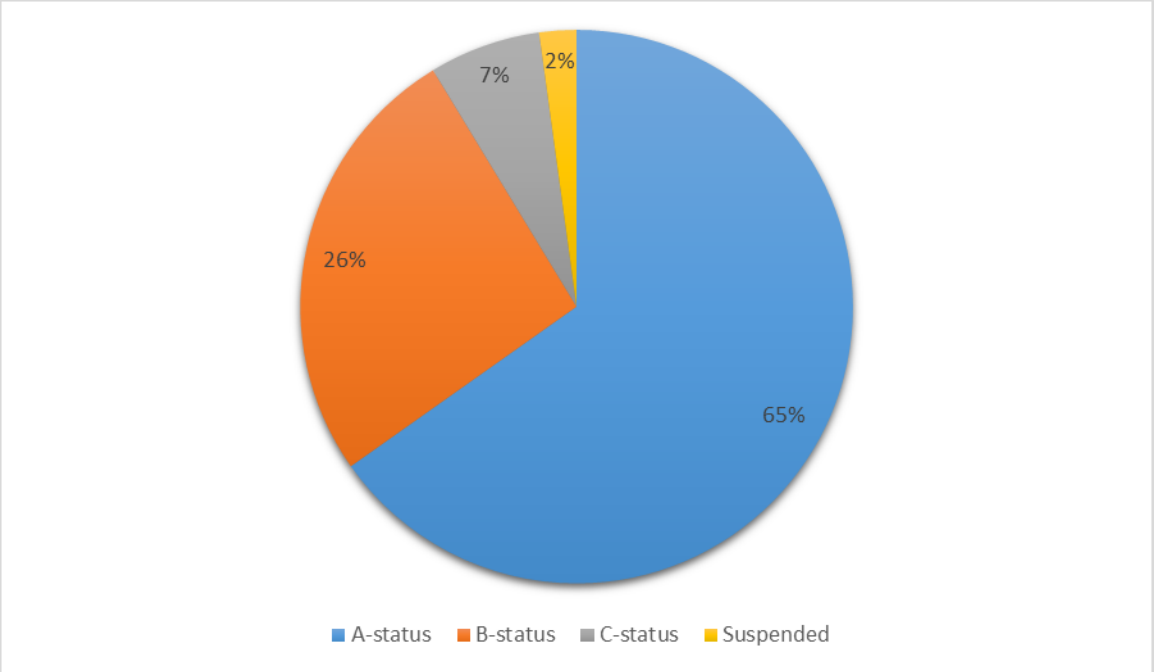


Figure 3: Chart on the accredited status of ombudsinstitutions worldwide (2018)

A-status

1. Albania: People's Advocate
2. Argentina: Defensoría del Pueblo
3. Armenia: Human Rights Defender
4. Bolivia: Defensor del Pueblo
5. Bosnia and Herzegovina: Institute of Human Rights Ombudsmen
6. Colombia: Defensoría del Pueblo
7. Costa Rica: Defensoría de los Habitantes
8. Croatia: Ombudsman
9. Ecuador: Defensor del Pueblo

10. El Salvador: Procuraduría para la Defensa de los Derechos Humanos

11. Georgia: Public Defender's Office

12. Guatemala: Procuraduría de los Derechos Humanos

13. Haiti: Office for the Protection of Citizens

14. Hungary: Commissioner for Fundamental Rights

15. Latvia: Ombudsman of the Republic of Latvia

16. Lithuania: Seimas Ombudsmen Office

17. Moldova: The Office of the People's Advocate of Moldova

18. Namibia: Office of the Ombudsman

19. Nicaragua: Procuraduría para la Defensa de los Derechos Humanos

20. Panama: Defensoría del Pueblo

21. Peru: Defensoría del Pueblo

22. Poland: The Commissioner for Human Rights

23. Portugal: Provedor de Justiça

24. Russian Federation: Commissioner for Human Rights in the Russian Federation

25. Samoa: Office of the Ombudsman

26. Serbia: Protector of Citizens

27. Spain: El Defensor del Pueblo

28. Timor-Leste: Provedoria for Human Rights and Justice

29. Ukraine: Ukrainian Parliament Commissioner for Human Rights

30. Uruguay: Institución Nacional de Derechos Humanos y Defensoría del Pueblo

B-status

1. Austria: The Austrian Ombudsman Board
2. Azerbaijan: Human Rights Commissioner (Ombudsman)
3. Bulgaria: The Ombudsman
4. Cyprus: Commissioner for Administration and Human Rights
5. Kazakhstan: The Commissioner for Human Rights
6. Kyrgyzstan: The Ombudsman
7. Macedonia: The Ombudsman
8. Montenegro: Protector of Human Rights and Freedoms
9. Slovenia: Human Rights Ombudsman
10. Sweden: Equality Ombudsman
11. Tajikistan: The Human Rights Ombudsman
12. Venezuela: Defensoría del Pueblo

C-status

1. Antigua and Barbuda: Office of the Ombudsman
2. Barbados: Office of the Ombudsman
3. Puerto Rico: Oficina del Procurador del Ciudadano del Estado Libre Asociado de Puerto Rico

Suspended

A. Paraguay: Defensoría del Pueblo

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