

# **The design, origins and distribution of national human rights institutions in Latin America**

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## **Abstract**

This paper examines the origins and distribution of national human rights institutions (NHRIs) in Latin America, seeking to explore the interaction between processes of diffusion, domestic political conditions, and the implications of this relationship for the outcome of such institutional reforms. The paper finds that the spatial and temporal spread of the institution across so many different political systems is suggestive of a powerful international diffusion process. However, diffusion alone will not explain structural outcomes. The formal configuration of the institution is traced to a confluence of international and domestic incentives which impact upon (1) the formal autonomy and powers of the NHRI, and (2) the demands and expectations associated with the institution. Institutional origin has a bearing on future performance, but holding power holders to account for their actions goes beyond questions of formal design.

# The design, origins and distribution of national human rights institutions in Latin America

## 1. Introduction

This paper examines the design, origins and distribution of national human rights institutions (NHRIs) such as the Defensoría (Defender), Procuraduría (Attorney) and Comisiones (Commissions) in Latin America.<sup>1</sup> In particular, it explores the links between theories of diffusion (how can we account for the regional spread and domestic origins of these institutions) and the degree to which origins of reform has a bearing on the resulting configuration of institutional forms. The study draws upon a growing body of work on NHRIs in the region, which has focused primarily on formal design (Giddings and Gregory 2000; Volio 2003; Reif 2004), but also increasingly on the political impact of these institutions (Dodson 2006; Ungar 2002; Kenney 2003; Ugglá 2004; Dodson and Jackson 2004; Ackerman 2007; Cardenas 2007).

Taking into account the increasingly ubiquitous presence, but also recency, of NHRIs in the region, the subject of their origins and subsequent impact raises an important, but elusive, aspect of institution-building central to the concerns of this paper. Namely, to what extent is institutional design an autonomous process with a determinative influence on the outcome or performance of the institution, or, rather, does the form and function of new institutions depend primarily on the political conditions under which the institution emerges? Some scholars, such as Cardenas (2007a, 2), contend that the impact of NHRIs is primarily a reflection of their origins and design, following a path-dependent logic. Others are more circumspect, emphasizing the sensitivity of the institution to the political conditions within which they operate (Ugglá 2004, 450). This paper does not seek to resolve this issue, but rather to deepen our understanding of the relationship between the origins and political impact of the NHRI in Latin America in a context often characterized by unstable and weakly enforced formal rules and institutions. The primary focus of this paper is on the structural, historical and normative emergence of the NHRI in Latin America.

The paper addresses the origins and distribution of the 14 NHRIs found throughout Latin America, with the exceptions of Brazil, Chile and Uruguay.<sup>2</sup> The first section gives a general overview of NHRI design in the region, with a view to outlining the subject of research; differentiating between three prominent models found in Latin

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<sup>1</sup> This chapter will refer collectively to defensorías del pueblo, procuradurías del pueblo and human rights commissions in Latin America as NHRIs except where referring to a specific institution. Where applicable, the Spanish translation will be used in recognition of important distinctions between the Western ombudsman or commission model and what Jorge Madrazo (1996) has termed the ‘Creole ombudsman’ with a primary function to defend human rights as opposed to control of the public administration.

<sup>2</sup> The paper does not consider the many ombudsmen-type institutions created in the Caribbean. In Latin America, Brazil has no national office of the ombudsman but does have a state ombudsman in Paraná and a number of specialized police ombudsmen, the institution remains under consideration in Chile, and in Uruguay a provincial level NHRI exists in the capital Asunción.

America; and outlining the implications of institutional design for the study of these institutions. The second section explores the distribution of NHRIs to a range of political systems in Latin America. This section argues that the degree of stability and enforcement of formal rules will shape the behavior and expectations of actors toward new institutional forms and vice versa. The analysis then turns to the diffusion of the institutions throughout the region since the mid-1980s. The focus here is on the transmission of the NHRI template from international and regional platforms to domestic jurisdictions by processes of coercion, acculturation and persuasion. The paper concludes by considering the implications of the interaction of diffusion processes and domestic political conditions on the origins and formal design of the institution and what bearing this may have on future performance.

## **2. Design and distribution of the Latin American NHRI**

The contemporary departure point for discussion of NHRIs is the Paris Principles, devised in 1991 and adopted by the United Nations (UN) General Assembly in 1993.<sup>3</sup> This document provides an internationally recognized standard for such institutions and the UN (1995, 6) defines them as ‘a body which is established by a Government under the constitution, or by law or decree, the functions of which are specifically designed in terms of the promotion and protection of human rights.’ The UN-affiliated International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) identifies 119 NHRIs, with 63 fully accredited in accordance with the Principles.<sup>4</sup> Within the broad designation of NHRI there exists considerable design variation across three paradigm models: the classical ombudsman, the human rights commission, and the hybrid or human rights ombudsman.

The ability of all NHRIs found in Latin America to receive complaints as well as perform an advisory function indicates their Iberian lineage as human rights ombudsmen, emulating the pioneering Spanish Defensor del Pueblo model created in 1976. The Spanish office was the first to incorporate human rights as an explicit standard of control as well as to endow the institution with an array of legal prerogatives, providing the basic configurative template for many contemporary NHRIs, especially in Central, Eastern Europe and Latin America (Kuckso-Stadlmayer 2008, 36). Although the ICC has fully accredited all 14 of the below institutions, this paper contends that the standard triadic categorization of NHRIs requires further modification when applied to the Latin American context. As Table 1.1 outlines, there are three dominant NHRI models in the region. The Iberian-inspired Defensoría del Pueblo (Defender of the People) is a prominent designation with the Paris Principles-influenced Commission model present in Honduras and Mexico. However,

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<sup>3</sup> Principles Relating to the Status and Functioning of National Institutions for the Promotion and Protection of Human Rights, adopted by the UN Human Rights Commission, Res. 1992/54, 3 March 1992 and the UN General Assembly, Res. 48/134, 20 December 1993.

<sup>4</sup> The ICC was created in 1993 at the second international workshop on National Institutions for the Promotion and Protection of Human Rights, Tunis, 13-17 December 1993, p. 17. This system ascribes one of four classifications to prospective NHRIs ranging from ‘A’ for full compliance to ‘C’ for non-compliance. Currently, of 119 accredited NHRIs 61 have ‘A’ status: <http://www.nhri.net/nationaldatalist.asp> (Accessed 11/11/08).

the region has also witnessed the creation of the novel NHRI-type Procuraduría of Human Rights (Attorney for Human Rights). As will be further explored, the diverse titles of the office reflect in part competing normative demands and expectations on an institution with a function that spans administrative supervision, political accountability and, fundamentally, human rights protection and promotion.

Table 1.1 NHRIs in Latin America (1985-2008)<sup>5</sup>

<b>Country</b>	<b>Year created</b>	<b>Nomenclature</b>
Guatemala	1985	Procuraduría Nacional de los Derechos Humanos
Mexico	1990	Comisión Nacional de los Derechos Humanos
Honduras	1990	Comisionado Nacional de Protección de los Derechos Humanos
Colombia	1991	Defensor del Pueblo
El Salvador	1991	Procuraduría para la Defensa de los Derechos Humanos
Costa Rica	1992	Defensor de los Habitantes
Argentina	1993	Defensor del Pueblo de la Nación
Peru	1993	Defensoría del Pueblo
Nicaragua	1995	Procuraduría para la Defensa de los Derechos Humanos
Paraguay	1995	Defensor del Pueblo
Bolivia	1996	Defensor del Pueblo
Ecuador	1996	Defensor del Pueblo
Panama	1996	Defensor del Pueblo
Venezuela	1999	Defensor del Pueblo

Ombudsmen offices can be said to exist on a spectrum, with some closer to the classical administrative ombudsman at one end, and others to human rights commissions at the other end of the spectrum. Similarly, in functional terms, a spectrum may be applied to human rights commissions: from those enjoying strong remedial powers to address individual complaints, to others that act as governmental advisory bodies or educational research institutes.<sup>6</sup> Importantly, the generic commission model is often viewed as an advisory body (with no investigatory powers) while all human rights ombudsman have investigatory powers.<sup>7</sup> The range of models found in Latin America reflects these structural antecedents, displaying features associated with both investigative and advisory functions. Important widespread modifications of the Spanish blueprint include an expanded political supervision function over issues such as corruption and electoral monitoring, active engagement in human rights policy research, advice, documentation and educational

<sup>5</sup> Table does not include NHRIs found in the Caribbean.

<sup>6</sup> For a discussion of human rights commissions, ombudsmen, advisory committees, and research institutes see Pohjola (2006).

<sup>7</sup> According to the Paris Principles, NHRIs do not necessarily handle individual complaints. However, the importance of this function has been recognized (Pohjola 2006, 8). The French NHRI, which hosted the Paris Conference of 1991, does not receive individual complaints.

activities and, most significantly, a raft of legal prerogatives in matters of human rights protection. Investigative and court-referral powers are common within this group, although prosecutorial authority and jurisdiction over private entities and actors are rare (Volio 2003).

The legal foundations of NHRIs in Latin America provide some indication of function. For example, a formal mandate to intervene in electoral matters is indicative of a political accountability function,<sup>8</sup> as a mandate to undertake human rights education activities suggests a remit to promote human rights.<sup>9</sup> However, in practice, such indicators provide only limited comparative leverage, with many offices undertaking such activities with or without an explicit legal mandate. Following Elizondo and Aguilar (2001, 215), the *sine qua non* is that the mandate includes human rights protection. Building upon the above discussion, structural form may also have some bearing on the institution performing a regulative as opposed to constitutive function.<sup>10</sup> However, given the NHRIs found in Latin America receive thousands of citizen complaints each year, in practice the onus is necessarily on the regulative function of seeking redress, over and above promotional or constitutive activities.

This paper adopts an alternative method of mapping NHRI models – focusing on structural attributes of formal autonomy and powers as opposed to function. A substantial body of scholarly work focused on the structural characteristics of NHRIs acts as the point of departure for the mapping exercise contained in Graph 1.1 (Gregory and Giddings 2000; Elizondo and Aguilar 2001; Ungar 2002; Volio 2003; Reif 2004; Ugglá 2004; Cardenas 2007a). The variables underpinning the dimensions of formal autonomy and powers are outlined in Annex 1, with all offices assigned a score along a scale of 1 to 18. In addition, all variables are weighted according to their configurative impact upon the respective dimension – drawing in particular on Volio (2003) and Elizondo and Aguilar’s (2001) treatment of ‘minimum standards’ for NHRIs. In terms of entrenching autonomy, for instance, the assignment of constitutional status is considered paramount. An explicit legal mandate to conduct investigations in response to a submitted complaint or, importantly, *ex officio* provides the foundation for institutional formal powers.

According to a functionalist logic, these two dimensions constitute baseline commitments that must be accepted by the political elite if the NHRI is to fulfill its function without political interference. For the purposes of this discussion, these two dimensions also provide a useful means of differentiating all NHRIs found in Latin America along two axes to produce a typology of formally constrained and unconstrained models in the region. At a general level, structural conformity is apparent in the region, with the majority of models located in the top-right quadrant indicating a relative lack of formal constraint along these two dimensions. Within this

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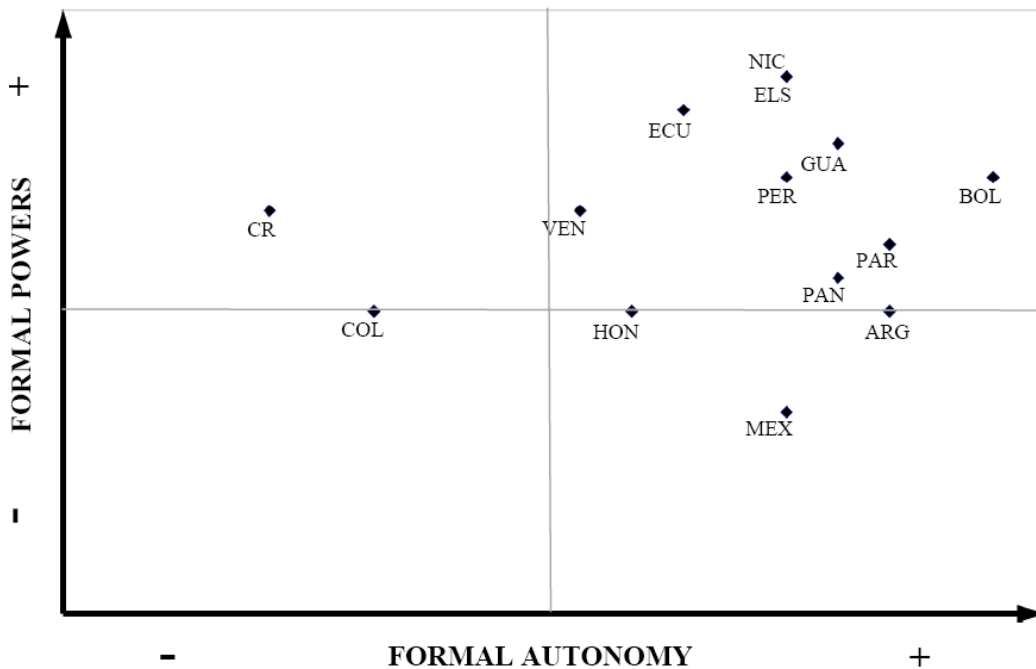
<sup>8</sup> This is the case with all offices with the exception of Costa Rica, Ecuador, Mexico, Panama and Paraguay.

<sup>9</sup> Offices in Colombia, Ecuador, El Salvador, Mexico, Nicaragua, Panama, and Paraguay have such a mandate.

<sup>10</sup> Regulative functions are those that attempt to regulate human rights abuses by the state. They may consist of investigating complaints, mediating conflicts between the state and society, handling petitions, monitoring state practices, and proposing legal changes. Constitutive functions are those activities that seek to diffuse international and domestic democratic and human rights norms within the local setting (see Cardenas 2007a).

unconstrained group there is more fine-grained variation, with only the Nicaraguan and El Salvadorian offices being structurally isomorphic. To what extent the inclusion of formally enabling or constraining attributes at design stage is a reflection of international or domestic incentives is probed further below.

Graph 1.1. Formal institutional strength of NHRIs in Latin America (2008)



Source: see Annex 1.

According to Graph 1.1, the most unconstrained models are found in Bolivia, El Salvador and Nicaragua with these offices displaying robust formal attributes of both autonomy and power. Nicaragua and El Salvador score particularly high in terms of formal powers, lacking only the ability to initiate criminal proceedings before the courts.<sup>11</sup> The Bolivian and Paraguayan offices enjoy particularly high levels of formal autonomy, attributable, in the case of Bolivia, to the fact that in the case of vacancy, the Congress is obligated to initiate election procedures for a new Defensor within 30 days.<sup>12</sup> A lack of clear legal guidance on procedures surrounding vacant office has had serious repercussions for the integrity of NHRIs throughout the region (Volio 2003, 235-6). In terms of outliers, Costa Rica and Colombia are notable for their diminished formal autonomy. This is largely due, in the case of Costa Rica, to the institution's lack of constitutional status and, in the case of Colombia, a hybrid election arrangement whereby the President proposes a short list of candidates to congress.<sup>13</sup> Along the dimension of formal powers, Mexico is the least endowed office in the region. Most notably, this model lacks formal authorization to initiate investigations *ex officio* (although this may not stop them in practice). Furthermore, the Mexican National Human Rights Commission (CNDH) lacks legal prerogatives

<sup>11</sup> This power is relatively rare and found only in the Colombian and Guatemalan models.

<sup>12</sup> Bolivia: Article 13, Law No. 1818, 1997. In Paraguay, legal modification means that once the Defensor's term in office has expired, the incumbent remains in office until a new Defensor has been appointed (law No. 2103, 2003).

<sup>13</sup> Article 281 of the Colombian Constitution (1991)

commonly associated with Latin American NHRIs, including the ability to exercise *habeas corpus* and *amparo* powers.<sup>14</sup>

Belying the static nature of Graph 1.1, the paper recognizes that many of these institutions have and will continue to undergo legal modification. Notably, many Latin American NHRIs originally created and integrated within the executive or its agencies have subsequently been assigned autonomous status adjunct to the legislative branch of government.<sup>15</sup> As such, despite the relative stability of formal structures NHRIs have nevertheless been subject to infrequent institutional change over time. Mexico provides a good illustration of this phenomenon. Created by Presidential Decree in 1990, the Mexican National Human Rights Commission was subsequently inserted into Article 105 of the Constitution in 1992, further modified in 1999 to provide the institution with formal autonomy, and, most recently, granted powers of constitutional review in 2006.<sup>16</sup>

To end, despite the advantages of mapping institutions according to their formal attributes – most evident in the comparative scope and parsimonious nature of the exercise – the limitations are evident in the inability of the technique to shed insight into the actual political experience of the NHRI over time. As this paper argues, formal structures, especially in the Latin American context, may have little bearing on the eventual impact and outcome of these novel reforms.

### 3. Political regimes and NHRIs in Latin America

NHRIs have diffused across a wide range of political regimes displaying variation along multiple political, institutional, historical, socio-economic and cultural dimensions. Formal design and origins will have a bearing on institutional trajectories, in terms of delineating the parameters of intervention and ‘structures of opportunity.’ However, relying exclusively on a path-dependent logic carries with it serious limitations in the Latin American context. This argument rests on the premise that the politically contested nature of formal rules and the resulting instability and variable enforcement of rights in many new democracies in the region affects the behavior and expectations of actors (Levitsky and Murillo 2009). The challenge of fulfilling an institutional mandate in contexts where formal rules are widely contested, routinely violated and frequently changed takes on a particular character. Rather than being locked in at design state, the institutional trajectory of NHRIs is governed primarily by political processes following their activation.

This assertion highlights the importance of variation across political contexts when dealing with the diffusion of new institutional forms such as NHRIs. The institution may initially diffuse through what Whitehead (2001, 22) terms ‘neutral transmission mechanisms,’ such as accelerating flows of information, especially within regional contexts. However, this ‘neutral’ process may, when tested by local conditions,

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<sup>14</sup> Powers of *amparo* refers to the ability of individuals to launch emergency constitutional review procedures before the appropriate legal authority. NHRIs in Latin America are commonly empowered to file such actions on behalf of individual claimants.

<sup>15</sup> This is the case in Argentina, Honduras, Mexico, Panama and Venezuela.

<sup>16</sup> See Cámara de Diputados, Boletín 2931, 20 de abril de 2006.

produce results distinctly at odds with the expectations of the original designers. The following empirical exercises differentiate political regimes in Latin America along the dimensions of formal rule stability and enforcement.

Table 1.2 Stability of formal rules: Constitutional change in Latin America 1990-2000

Country	Constitutions 1990-2000	Average duration	Implemented in democratic context	Year of current constitution	Amendments to constitution
Argentina	3	36.75	3	1994	1
Bolivia	6	20.00	1	1967*	4
Brazil	6	18.20	2	1988	62
Chile	3	55.70	2	1980	10
Colombia	2	57.00	2	1991	28
Costa Rica	4	32.35	1	1949	54
Ecuador	8	12.90	3	1998*	4
El Salvador	7	16.30	1	1983	8
Guatemala	5	24.20	4	1985	1
Honduras	8	13.25	3	1982	29
Mexico	2	71.00	1	1917	92
Nicaragua	8	13.40	1	1987	5
Panama	4	24.00	2	1972	5
Paraguay	4	32.50	1	1992	No information
Peru	5	26.60	2	1993	8
Uruguay	6	28.30	5	1967	4
Venezuela	16	6.30	3	1999	1
<b>Total</b>	<b>98</b>	<b>-</b>	<b>37</b>	<b>-</b>	<b>316</b>
<b>Mean</b>	<b>5.8</b>	<b>28.75</b>	<b>2.18</b>	<b>-</b>	<b>19.75</b>

\*New constitution in process as of 2008.

Source: Negretto 2008, 12.

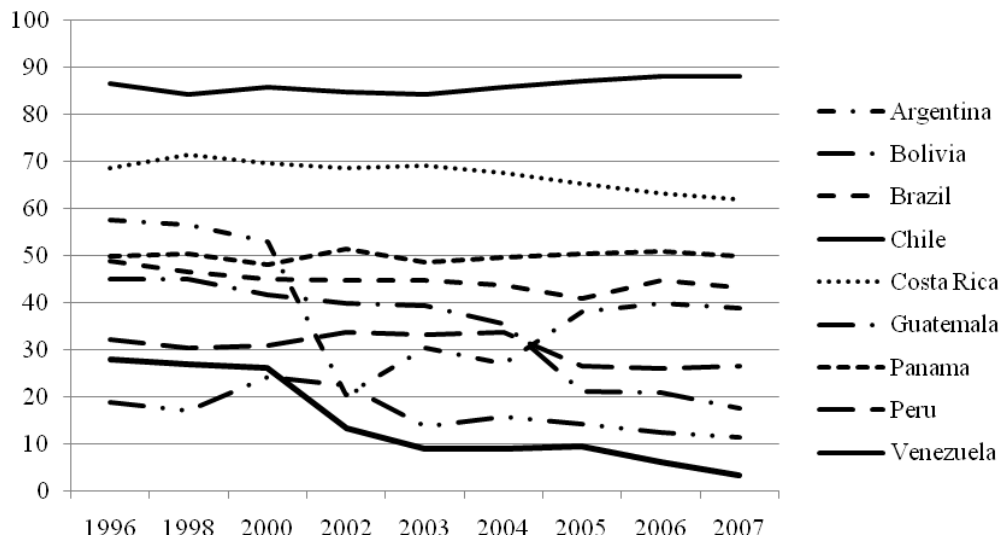
As Table 1.2 shows, the shelf life of Latin American constitutions has often been short. Of a sample of 17 countries, there have been a total of 98 constitutions between 1990 and 2000 with a mean average of 5.8. Furthermore, of those 98, only 37 were implemented under democratic conditions. Argentina, Chile, Colombia, Costa Rica, Mexico and Uruguay display relatively high degrees of constitutional stability. At the other end of the spectrum are Ecuador, Honduras and Venezuela. Constitutional longevity may further belie frequent amendments to the original text, as in Mexico where two constitutions have been subject to 92 amendments. A similar disjuncture between formal rules and their enforcement is discernible with reference to World Bank Governance proxies on rule of law, as shown in Graph 1.2. The indicator, rule of law, ‘measures the extent to which agents have confidence in and abide by the rules of society, in particular the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence.’<sup>17</sup> Of the nine countries included in the sample, considerable variation can be observed. Chile, Costa Rica and Panama display the highest and most constant trend lines on rule of law while Guatemala and Venezuela occupy the lowest positions. Notably, despite a highly stable constitutional order in Table 1.2, perceptions of the rule of law in Argentina are extremely volatile.

<sup>17</sup> See <http://www.govindicators.org> for definitions and methodology.



Diamond asserts that an incipient ‘democratic recession’ is in motion partly due to a lack of internalisation of democratic norms, especially in nascent democracies.<sup>18</sup> An in-depth discussion of stability and enforcement of formal rules and their implications for democratic institutional theory is beyond the scope of this paper. For the purposes of the present discussion, where enforcement and stability of formal rules is low, the demands and expectations attached to the NHRI are likely to be in significant contrast to an opposing scenario where procedures are perceived as clear, comprehensive and appropriate. The impact of such an observation is likely to be particularly acute in relation to institutional frameworks governing political accountability and human rights protection at the domestic level. The empirical data displays considerable variability across cases, with Graph 1.2 indicative of a regressive trend in a number of countries. Although observance of democratic protocol and human rights – especially civil and political rights – in many countries has improved, systematic rights violations and non-democratic practices persist.<sup>19</sup>

Graph 1.2 Enforcement of formal rules: World Bank Governance indicators on rule of law (1996-2007)



Source: World Bank Governance Indicators. See <http://www.govindicators.org>.

As will be elaborated in the following section, the transmutation of the original NHRI template into an increasingly diverse array of structural configurations depends in part upon the responsiveness of the governing elite to international conditions as well as powerful domestic political and social forces. Unstable regimes throughout Latin America with only a loose constitutional adherence to democratic practices and the presence of ongoing or historical systematic human rights violations present a far from propitious institutional terrain for institutional grafting. The Iberian blueprint, designed and engineered in Spain in 1978, then exported to Latin America in 1985 via Guatemala, is not the same institution – each replication responding to a distinct logic. Informed by processes of diffusion and domestic reception, through a more or less organic adaptive process, the resulting configuration of formal autonomy and powers

<sup>18</sup> See Larry Diamond (2008).

<sup>19</sup> See O'Donnell et al. 2004.

will reflect the relative influence of competing forces at the international and local level.

#### **4. The diffusion of the Latin American NHRI**

The striking co-variation of NHRI diffusion in Latin America over the past 25 years raises the question of how to account for their rapid proliferation and, more specifically, what are the drivers of diffusion? For the purposes of the present discussion, diffusion can be defined as a process where ‘prior adoption of a trait or practice in a population alters the probability of adoption for remaining non-adopters’ (Strang 1991, 325). This section argues that a diffusion effect is observable in the regional spread of NHRIs, but to explain this phenomenon it is necessary to apply a more precise analytical framework drawing on diffusion analysis (Simmons et al. 2008). Following the work of Goodman and Jinks (2004), this article emphasises three general classes of diffusion mechanism in order to explain the spread of NHRIs in Latin America: (1) coercion leading to compliance; (2) acculturation leading to conformity; and (3) persuasion leading to habituation. These three general classes of mechanisms with contrasting but also complementary underlying logics have propelled NHRIs into all corners of the region, with variable results.

##### **4.1. Organizational platforms and networks<sup>20</sup>**

The metaphor of diffusion provides a useful sense of process underpinning international socialization through the transmission of norms from organizational platforms at the international and regional level to individual states.<sup>21</sup> The focus of international organization in the Americas is the Organization of Americas States (OAS), the Inter-American Commission of Human Rights and its enforcement arm, the Inter-American Court of Human Rights (IACHR). The Inter-American system has made significant advances in protecting human rights, especially since the demise of authoritarian governments throughout the region.<sup>22</sup> Outside of Europe, the Americas display the highest regional concentration of NHRIs, with 26 of 35 OAS members, or 75 percent, having established the institution. The OAS has promoted the establishment of NHRIs in all member states since the mid-1990s and NHRIs have made sporadic use of their power to submit petitions to the IACHR.<sup>23</sup> NHRI coordination has generally focused on regional platforms rather than the UN, reflecting prevalent geopolitical dynamics, particularly its strong ties to Spain. In turn, the UN paid limited attention to NHRIs in the region before the 1990s (Pohjola 2006, 110).

The three NHRI coordinating agencies within the Americas are the International Institute for Human Rights (IIDH), the International Ombudsman Institute (IOI) and

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<sup>20</sup> This section is based on interviews conducted from 2005 to 2009 with a range of individuals working within NHRI coordinating bodies as well as senior functionaries within individual NHRI offices in the Americas.

<sup>21</sup> See Finnemore and Sikkink 1998, 902.

<sup>22</sup> See Farer 1997.

<sup>23</sup> See Reif 2004, 172-87.

the Iberoamerican Federation of Ombudsmen (FIO).<sup>24</sup> There also exist a plethora of sub-regional peer coordinating bodies including the Andean Council of Defensorías del Pueblo (CADP), the Caribbean Ombudsman Association (CAROA), and the Central American Council of Procuradurías of Human Rights (CCPDH). Despite its title, the IOI, created in 1978, is viewed as an essentially Euro-centric organization, and has recently relocated its headquarters from Canada to Austria. It has very little presence in Latin America and many of its members in the region have let their subscriptions lapse in recent years. Since its creation in August 1995, NHRIs throughout the region have affiliated with the FIO. Originally, the IIDH based in San José, Costa Rica, was the technical secretariat of FIO. However, the Spanish NHRI, upon assuming the Presidency of the FIO in 1999, successfully lobbied for the Secretariat to be moved to the University of Alcalá in Spain. The IIDH found few defenders among affiliated members. This development caused a serious rift within the NHRI community in the Americas, with the new Spanish-controlled Secretariat excluding all Caribbean NHRIs as well as the US and Canada (with the exception of Puerto Rico).<sup>25</sup>

This schism remains a source of internal friction. At the meeting of the FIO in Lima in November 2007 the Nicaraguan Procurador, Omar Cabezas, was elected as President of the Federation. Advocates of closer ties with Caribbean countries, such as Costa Rica, were effectively lobbied against. The raising of this issue at a meeting held at the IIDH with the Ombudsman of Belize in October 2007 – at which the Nicaraguan Procurador was not in attendance – prompted remonstrations from Spanish officials. Cabezas won the FIO Presidency with the support of Spain and continued the Spanish-sponsored policy of exclusion. In response, the IIDH has created a rival coordinating mechanism called Ombudsnet which does facilitate communication between NHRIs in the Americas, Caribbean and Europe. However, due to a lack of resources, it struggles to assert its presence on the regional stage – focusing mainly on bilateral technical assistance projects with individual NHRI offices.<sup>26</sup> An incipient UN presence in the form of the Network of National Human Rights Institutions of the Americas created in 2000 signals greater engagement with the Americas by the Office of the High Commissioner for Human Rights (OHCHR) and also offers an alternative to the exclusionary policy of the FIO.<sup>27</sup> Annual meetings have been held since 2002 on a range of human rights themes, such as the rights of indigenous peoples, migrants, and persons with disabilities. However, unlike other coordinating platforms the network still lacks dedicated infrastructure or personnel.<sup>28</sup>

The current situation of many NHRIs in the region suggests a growing awareness of the need to strengthen inter-institutional regional monitoring of adherence to general principles of political non-partisanship, accountability, and human rights. However, as many of these institutions enter their second or third decade of existence there is

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<sup>24</sup> Its full name is ‘Federación Iberoamericana de Defensores del Pueblo, Procuradores, Comisionados y Presidentes de Comisiones Publicas de Derechos Humanos.’

<sup>25</sup> Its members include Argentina, Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, México, Nicaragua, Paraguay, Peru, Portugal, Puerto Rico, Spain and Venezuela.

<sup>26</sup> See <http://www.iidh.ed.cr/Comunidades/Ombudsnet/>

<sup>27</sup> Its membership include Argentina, Bolivia, Canada, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Venezuela. The Network also includes observers such as Antigua and Barbuda, Barbados, Belize, Haiti, Jamaica, Saint Lucia, Trinidad and Tobago, the Association of Caribbean Ombudsmen, UNHCHR, UNESCO, and the IIDH.

<sup>28</sup> See <http://www.nhri.net/>

growing insecurity as to whether the regional framework of mutually reinforcing institutional legitimacy is functioning. By supporting transparent recruitment procedures, scrutiny of election procedures and operational standards, peer organizational platforms such as the FIO and the Network of the Americas can provide important platforms through which to promote NHRIs, within a liberal conception of democracy that asserts the importance of institutional checks and balances on the exercising of power. However, the reality in much of Latin America is that, to varying degrees, control institutions are subject to established formal and informal mechanisms of political patronage. The experience of NHRIs provides a salient example of the challenges of democratic institution-building in the region. The case of Cabezas, the current President of the FIO, illustrates this point. Cabezas is a former guerrilla and ally of President Daniel Ortega (elected 2007).<sup>29</sup> Cabezas in his capacity as Procurador has closely aligned himself with the Ortega administration – even attacking highly regarded human rights NGOs such as CENIDH.<sup>30</sup> Concerns within the NHRI community at these developments may explain recent active attempts to further formalize coordination between regional NHRIs and UN and OAS platforms.<sup>31</sup>

## 4.2. Diffusion mechanisms

### 4.2.1 *Diffusion by coercion*

The analysis has thus far explored the processes and arenas through which diffusion has occurred. Now the focus turns to the mechanisms that shape the incentives, even underlying preferences, of state actors as they decide whether to institute an NHRI. The first class of mechanism is coercion by powerful states or others to conform to their interests through the offering of rewards or sanctions. The underlying explanatory model of much diffusion analysis is one focused on coercion and competition within the international system.<sup>32</sup> Similarly, in the literature on democratisation, a focus is placed on control whereby the promotion of democracy by one country in another is levered by positive or negative sanctions.<sup>33</sup> However, for the purposes of explaining diffusion of institutions such as NHRIs, coercion lacks precision and is an over-simplification although it does, importantly, grant the possibility of explicit external agency.<sup>34</sup> Most evident in the Central American cases of Honduras, El Salvador and Guatemala, a correlation is discernible between NHRI establishment and foreign intervention in conflict situations.

Distinct to those NHRIs established as part of a democratization process from authoritarian and often abusive government, many Central American NHRIs were created in the aftermath or, in the case of Guatemala, in the midst of very high levels

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<sup>29</sup> See Cabezas 1985.

<sup>30</sup> See 'A Omar Cabezas le "da asco" el CENIDH,' *El Nuevo Diario*, 29-06-07.

<sup>31</sup> See 'Strengthening the Role of National Institutions for the Promotion and Protection of Human Rights in the Organization of American States,' OAS/CP/CG-1770/09 rev. 2 Add. 1 rev. 1, adopted 06-05-09.

<sup>32</sup> See Simmons et al. 2008.

<sup>33</sup> According to Whitehead, two-thirds of the democracies existing in 1990 owed their origins, at least in part, to deliberate acts or impositions or intervention from without. See Whitehead 2001, 9.

<sup>34</sup> It may gain nuance by introducing other depictions of power – such as the popular dichotomy between 'hard' and 'soft' power – but in terms of explaining the spread of the ombudsman it may be more appropriate to combine coercion with the concept of institutional façade. See Nye 1991.

of enduring violence, civil unrest and the widespread and systematic violation of human rights by both state and non-state actors. In contexts such as El Salvador, Guatemala, Honduras and Nicaragua where violent conflict has pervaded all aspects of political and institutional life for a decade or more, democratization must contend with a set of post-conflict challenges that exacerbate a rule of law focus on the instability and lack of enforcement of formal rules laid out above.<sup>35</sup> The degree of internal political and institutional instability found in El Salvador and Guatemala, coupled with the level of direct intervention by external actors, marks out this cluster of cases. A coercive mechanism is observable, with institutional diffusion engineered through externally mediated peace settlements as opposed to domestic channels. As will be further elaborated, coercion may explain initial diffusion and adoption of such policy instruments but, on its own, offers less explanatory leverage as to the content of reform.

The direct coercion of policy transfers, as occurred in Japan or Germany in the aftermath of World War II, is rare. Democracy promotion is associated with the projection abroad of US institutions at home and the creation of new arenas in which to project US interests.<sup>36</sup> Despite the absence of a national level NHRI in the US, this has not prevented discussion of its implantation in Central America. US influence is historically pervasive in the region. For example, the Honduran transition to democracy in 1980 was highly conditioned by US geopolitical interests – the new democracy providing an operational base for US proxies fighting in El Salvador and Nicaragua.<sup>37</sup> However, due to the idiosyncrasies of the Reagan doctrine, it is the UN – not the US – which provides the key referent point and impetus for NHRI diffusion among these countries. Notably, the Iberian emulation prevalent throughout the rest of the region is notably diminished in Central America, with the Defensoría del Pueblo template modified into a more prosecutorial model with an enhanced human rights profile in El Salvador, Guatemala and Nicaragua, and the UN-defined commission model in Honduras (and Mexico). The monopoly of UN legitimacy in this arena largely stems from the active political and military opposition of the US toward the regional peace processes of the 1980s. As Wehr and Lederach (1991, 89) note, the Contadora peace initiative of 1983 which would eventually lead to the regional Esquipulas Peace Agreement of 1987, and further UN-coordinated peace accords of the 1990s, was undertaken ‘not only without but *in spite of* US policy.’

The various peace accords were instrumental in the creation of NHRIs in El Salvador, Guatemala and Honduras. The Esquipulas Peace Agreement among the five Central American governments called upon the signatory governments to establish National Reconciliation Commissions (CNR) to facilitate the cessation of conflict. This institution assumed considerable authority in the Honduran context and its recommendations on demilitarization and modernization galvanized President Rafael Callejas (1990-1994) to create a Commission to Modernize the State in 1990. An NHRI swiftly followed, signed into law by executive decree in June 1990. Not only did the CNR promote the establishment of the NHRI, it also proposed the list of candidates for Commissioner. The evidence strongly suggests that Callejas, in

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<sup>35</sup> All countries in Central America were to a greater or lesser extent affected by the regional conflicts of the 1980s. Costa Rica and Panama were left relatively unscathed by the regional context, although Panama endured military dictatorship until 1989.

<sup>36</sup> See Cox et al. 2000, 5.

<sup>37</sup> See Sieder 1996.

creating the NHRI, was responding to the prestigious CNR in the context of a highly publicized regional peace process, as opposed to mobilization by domestic social actors who in any case were distrusted by government.<sup>38</sup> As such, the process of diffusion was coercive to the degree to which it was imposed through a top-down – if filtered through domestic channels – command and control process, with little or no consultation with actors outside an elite government cabal.

The international lines of influence are more in evidence in the case of El Salvador, with the creation of an NHRI expressly stipulated in the UN sponsored 1991 Mexico Agreement, which also contained a Truth Commission proposal, and 1992 Chapultepec Peace Accords orchestrated by the UN.<sup>39</sup> As with Honduras, the pace of NHRI insertion was rapid, with President Alfredo Cristiani (1989-1994) accepting the creation of the Procuraduría as a key provision of the 1992 Peace Accords. The Constitution was amended to include the NHRI,<sup>40</sup> a regulative law was drafted and activated by March 1992,<sup>41</sup> and the first office-holder was appointed in February, with operations commencing in July 1992. The level of external control is notable, with the Chapultepec Accords stating the Procurador be appointed within 90 days after the entry into force of constitutional reforms, that the National Commission for the Consolidation of Peace (COPAZ) be entrusted with preparing the legislation, and that the bill contain means to eradicate specific human rights abuses.<sup>42</sup> Similar to the Honduran CNR, the El Salvadorian Accords placed emphasis on the demilitarization and modernization of the state. While the NHRI was being created, powerful actors within the state were mobilizing to resist systemic reform of the armed forces or judiciary.<sup>43</sup> This is indicative of the imposition of institutional forms by external agencies, irrespective of political and institutional conditions. However, reflecting the unpredictable consequences of reform, the findings of the Truth Commission Report of March 1993 on the justice reform agenda was seismic, converting this artifice of international designers into a legitimate source of domestic pressure.<sup>44</sup>

The depth of the political and institutional trauma wrought by large-scale armed conflict defines this cluster of cases and, as with other cases, the Guatemalan NHRI can be attributed to a rule of law agenda that places human rights protection at its core after 36 years of military government and civil war. Unlike El Salvador or Honduras, the NHRI was created in 1985 and became operational in 1987 as part of a democratic transition tightly controlled by the armed forces. Intended to demonstrate to an international and, to a lesser extent, domestic audience the regime's adherence to constitutional democracy, the Guatemalan case is more closely aligned to an acculturative mechanism of diffusion as discussed in the following section. However, in the context of the coercive application of institutional forms, the UN-sponsored Guatemala Peace Accords of 1996 contained commitments to strengthening the

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<sup>38</sup> For a detailed account of the NHRI establishment process in El Salvador and Honduras see Dodson 2006.

<sup>39</sup> The 1991 Mexico Agreement contained a provision for the Procurador to be elected by the Legislature, 'whose primary function shall be to promote and ensure respect for human rights.' See Reif 2004, 260-1.

<sup>40</sup> Constitution, Law No. 64, article 194.

<sup>41</sup> Decree No. 163, 1992.

<sup>42</sup> See Peace Agreement between the Government of El Salvador and the FMLN, signed at Chapultepec castle, Mexico City, on Jan. 16 1992. UN Doc.: A/46/864-S/23501 (1992).

<sup>43</sup> See Dodson 2006, 30.

<sup>44</sup> See Dodson and Jackson 2004, 4.

judicial apparatus, and, within this frame, the Procuraduría. Furthermore, as with El Salvador where the UN had a standing Observer Mission (ONUSAL) from 1991 to 1997, Guatemala also had the United Nations Verification Mission in Guatemala or MINUGUA based in country from 1994 to 2004.

The impact of these external agencies on existing political and institutional structures at the domestic level was far-reaching. With respect to NHRIs, they often provided a key source of logistical assistance, capacity building, and network facilitating. In El Salvador, the Truth Commission report (1993, 233) recommended the United Nations to work closely with the Procuraduría to define its role and establish its presence, and urged the office to ‘make more frequent use of its powers.’ Observers note the formative importance of UN assistance and human rights expertise on the El Salvadorian and Guatemalan NHRIs as they began to navigate a highly polarized and violent political terrain.<sup>45</sup> UN engagement provided NHRIs with additional allies at the domestic level, such as the CNR and other bodies, as well as opened up new public spaces for rights contestations. However, UN intervention also produced tensions – exacerbated by factors such as ineffectual NHRI leadership. Whereas in El Salvador ONUSAL fulfilled an oversight function over the armed forces role in politics, in Honduras this function was undertaken by the NHRI and quickly became a key source of institutional legitimacy.<sup>46</sup> Only once the human rights monitoring mandate had been transferred from ONUSAL to the NHRI in 1995 did the institution’s public approval ratings rise markedly.<sup>47</sup> As such, even with good intentions, external agencies may crowd out other domestic human rights institutions.

The limitations of coercion as a ‘pure’ explanatory mechanism are highlighted with regard to these cases. A confluence of factors led to the creation of NHRIs, with international agencies brokering institutional insertion through binding peace accords. But these institutions also found support among domestic constituencies eager to respond to political pressure and demonstrate commitment to the modernization of the state. In addition, coercion as a mechanism may provide insights into the diffusion of institutional forms across international boundaries where a compliance criterion is clearly stipulated but reveals less about the content of those reforms. This is not always the case. For instance, the Chapultepec Peace Accords specifies that the NHRI legislation should address specific human rights abuses falling under the mandate.<sup>48</sup> Such innovation draws influence from the Spanish and Guatemalan NHRI templates. However, reflecting the contextual awareness of domestic institutional designers, the Guatemalan NHRI also contains specific reference to a host of civil, political and social rights contained within the Constitution.<sup>49</sup> The content of these

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<sup>45</sup> Dodson 2006, 32.

<sup>46</sup> Ibid.

<sup>47</sup> Dodson and Jackson 2004, 8.

<sup>48</sup> The bill ‘shall establish appropriate means for putting into effect the firm commitment assumed by a systematic practice of human rights violations, in particular, arbitrary arrests, abductions and summary executions, as well as other attempts on the liberty, integrity and security of persons. This includes the commitment to identify and, where appropriate, abolish and dismantle any clandestine jail or places of detention. In any event, the Parties agree to give top priority to the investigation of such cases, under ONUSAL (UN Observer Mission in ELS) verification.’ See Truth Commission 1993, Ch. III 2C.

<sup>49</sup> Article 21 of the Human Rights Commission of Congress and the Procurador of Human Rights law: ‘The Procurador will protect fundamental individual, social, civil and political rights contained within Title II of the 1985 Constitution of the Republic including the right to life, liberty, justice, peace,

reforms is arguably more a product of adaptation to altered conditions at the legislative stage of institutionalization than the designs of international agency. To end, coercion, as it pertains to the adoption of NHRIs in Latin America, is a limited terrain, given its emphasis on precise obligations, the peripheral nature of the institution, and the lack of a coercive mechanism in cases of non-compliance.<sup>50</sup>

#### 4.2.2 *Diffusion by acculturation*

The above analysis indicates the limits of relying on a structural realist approach to explain the diffusion of NHRIs. The constructivist mechanism of acculturation takes the correlative of norm diffusion across time and space – in this case NHRI diffusion – and applies an explicit mechanism-based explanatory model, with emphasis on ‘the general process by which actors adopt the beliefs and behavioural patterns of the surrounding culture,’ focusing on pressures to assimilate and consequent micro-processes such as mimicry, identification with a reference group and status maximisation (Goodman and Jinks 2009, 2). In work on policy transfer, Rose (1991, 3) has identified a range of micro-processes including copying, emulation, hybridisation, synthesis and inspiration. Elkins and Simmons (2005, 39) speak of ‘uncoordinated interdependence’ and draw attention to the important distinction between adaptation to altered conditions and learning, the predominant benefit of the former being the ‘conferring of legitimacy or *cover* from criticism.’ In work on constitutional convergence across states, the importance of referent groups is clear, with a propensity for institutional architects to emulate countries of colonial, cultural or regional affinity, as well as the preferred institutions of dominant international actors (Horowitz 2001, 31).

What all of these contributions share in common is a concern with the relationship of the actor to a reference group or wider social system. Such a framework that emphasizes indirect but material consequences, such as status maximization and reputation costs, to explain adaptation to altered conditions within the international or regional social system, provides a useful process-oriented explanatory framework with which to evaluate the diffusion of NHRIs in Latin America. In the post-colonial era, many former colonies continued to look toward countries of colonial, as well as cultural or regional, affinity for lessons on institution-building.<sup>51</sup> Given the prevalence of the Westminster model of political institutions in former British colonies, it is not surprising to also find that many of the earliest ombudsmen in the Americas appear in Commonwealth countries.<sup>52</sup> The creation of the Iberian human rights ombudsman in Portugal (1976) and Spain (1978) in the wake of post-authoritarian transitions is widely regarded as the key impetus for Latin American NHRIs, combined with domestic campaigns by human rights organizations and, in some cases, international pressure.<sup>53</sup> As discussed above, this influence is reflected in the nomenclature with

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dignity and equality of peoples, as well as those Rights defined in those treaties and conventions signed and ratified by Guatemala.’

<sup>50</sup> This is particularly true of human rights organisational platforms, such as the UN, which tend to favour an inclusive membership model that imposes a highly elastic conditionality, if any at all.

<sup>51</sup> See Stone 1999, 55.

<sup>52</sup> Including Guyana (1966), Trinidad and Tobago (1976), Jamaica (1978), St. Lucia (1978), Barbados (1980), and Antigua and Barbuda (1985).

<sup>53</sup> See Robles 1995.



nine of the 14 NHRIs in Latin America designated Defensor del Pueblo or a variation on the theme.

The viral contagion inducing the creation of NHRIs is evident among Latin American countries and must be placed in the febrile context of early democratization, a highly charged human rights discourse, and the desire to emulate institutions that connoted constitutional order and modernization. The cluster of cases discussed above demonstrates the imposition of institutional forms by external agencies, but also a regional acculturation effect as states are socialized to norms of democracy, rule of law and human rights. NHRIs have been recognized as potential vehicles to bridge the compliance gap between international norms and practices on the ground in Latin America. The United Nations Educational, Scientific and Cultural Organization (UNESCO) pioneered NHRIs as instruments for the protection of human rights and construction of a ‘culture of peace.’ Beginning in 1997, UNESCO published a range of operational manuals in collaboration with NHRI offices in Guatemala, Costa Rica, Panama, Argentina, and Bolivia.<sup>54</sup>

Table 1.3 Creation of NHRIs and domestic and international processes

<b>Country</b>	<b>Office established</b>	<b>Transition to democracy</b>	<b>Revision of constitution</b>	<b>Ratification of IACHR<sup>55</sup></b>
Guatemala	1985	1986	1985	1978
Colombia	1991	1957	1991	1973
Costa Rica	1992	1948	1948	1970
El Salvador	1992	1989	1983	1978
Honduras	1990	1981	1982	1977
Mexico	1992	2000	1999	1981
Paraguay	1992	1989	1992	1989
Argentina	1993	1983	1994	1984
Peru	1993	1979	1993	1978
Bolivia	1994	1982	1994	1979
Nicaragua	1995	1990 <sup>56</sup>	1995	1979
Ecuador	1996	1979	1999	1997
Panama	1997	1989	1983	1978
Venezuela	1999	1958	1999	1977

Source: Authors own elaboration using a range of sources.

However, the initial creation of NHRIs in the region also responded more simply to adaptation to altered conditions, with the Guatemalan office providing an important ‘demonstration effect’ for other countries in Central America – beginning with El Salvador in 1990 which would largely mimic this model. The phenomenon of

<sup>54</sup> See Alfredo Islas Colín, *Manual de calificación de hechos violatorios de derechos humanos*, UNESCO: Paris, series 1997-1999.

<sup>55</sup> Inter-American Convention on Human Rights.

<sup>56</sup> The 1984 elections were regarded by many international election monitors as basically free and fair. An interpretation strongly contested at the time by the US. See Larry Garber (Reply by Robert S. Leiken), ‘Nicaraguan Elections: An Exchange,’ *The New York Review of Books*, Vol. 33 (1), January 30, 1986.

institutional emulation occurs not only at the regional level, but, arguably, with more potency within the sub-regional areas of the Andean region, Central America and the Southern Cone. Table 1.3 displays a basic correlation between the creation of NHRIs and domestic ruptures such as transition to democracy and constitutional revision. In the cases of Paraguay and Ecuador, convergence with regional human rights instruments may have also provided an impetus to create the office. However, democratization in the context of the so-called ‘third wave’ of democracy appears to be the primary motor for the diffusion and establishment of the institution (Huntington 1991). The recognition of internationally sanctioned norms and institutions to deflect criticism has been a frequent occurrence in Latin America, the signing and ratification of international conventions and treaties historically often bearing little relation to events on the ground.<sup>57</sup> In cases such as Guatemala and Peru, the creation of the NHRI can be largely attributed to the regime’s desire to improve a tarnished international image.<sup>58</sup>

Scholars have suggested that compliance with human rights norms may be commensurate with the robustness of international human rights regimes and their ability to induce – rather than coerce or persuade – states through processes such as transparency and reputation-maximising.<sup>59</sup> Although the interventionist policies of the UN to secure and stabilize peace in Central America are exceptional, the UN, alongside other international agencies, has advocated the creation of NHRIs to serve a myriad of normatively desirable functions. A 1967 UN-sponsored workshop in Jamaica was attended by many Latin American and Caribbean representatives. At the meeting, the Swedish Ombudsman Alfred Bexelius advocated the creation of the office in those underdeveloped countries, although their architecture and function remained ill-defined (Rowat 1986, xx). The Paris Principles of 1991 may have had less impact in Latin America than in other regions.<sup>60</sup> However, declarations by the UN did resonate among governments increasingly looking outward for legitimation. The Vienna Declaration and Program of Action adopted in 1993 made explicit mention of the constructive role played by NHRIs in human rights protection and promotion.<sup>61</sup> This process of state socialization was encouraged by certain NHRIs in the region, with the Mexican Commission hosting the Fourth International Workshop of National Institutions in 1997 under the auspices of the UN.

The UN is not the only international platform that has lobbied for the creation of these institutions. International financial institutions (IFIs) such as the International

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<sup>57</sup> A perverse example of this is Honduras ratification of the Inter-American Court of Human Rights in 1981 while simultaneously state security services were actively torturing and, in some instances, disappearing opponents of the regime.

<sup>58</sup> ‘The office [was set up], however, “at a time when the military still had a very real and strong influence on all state institutions. . . . [Thus], his term had a very limited effect; it served mainly to improve the country’s image in the international arena [because] a country with 45,000 disappearances and 150,000 deaths must have a human rights office” Mario Polanco 2001. Secretary-General, *Grupo de Apoyo Mutuo*. Author interview, Guatemala City, May 23 in Dodson and Jackson 2004, 14.

<sup>59</sup> See Shelton (ed.) 2000.

<sup>60</sup> See Cardenas 2004.

<sup>61</sup> Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights, A/CONF.157/23, 12 July 1993, Article 36: 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.’

Monetary Fund (IMF) and the World Bank (WB) have also promoted the ombudsman institution under the auspices of ‘good governance,’<sup>62</sup> a normative framework distinct from, even sometimes at odds with, the human rights framework espoused by the UN human rights mechanisms (Uvin 2002). A radical critique of the diffusion of NHRIs in the region would highlight the institution as part of a broader pattern of imperialism, or neo-colonialism, following the economic crises of the 1980s and the accruing of coercive power by the US through economic leverage. A significant sub-category of coercion, conditionality is an operational category, with its emphasis on degrees of external coercion through institutional channels. Within this framework, NHRIs have been commonly envisaged as a specialised regulative agency with a potential role as a corruption agency and are often attached as a component part to judicial and administrative reform packages surrounding privatization initiatives (World Bank 1992; 1999). However, while NHRI establishment has been promoted, it has not formed part of precise or enforceable obligations. The normative agenda of the UN and IFIs has converged significantly on the issue of justice reform, particularly pertaining to modernization and security.<sup>63</sup> The sudden creation of the Commission in Mexico has been attributed in large part to the North American Free Trade Agreement negotiations (NAFTA).<sup>64</sup> International NGOs such as Amnesty International have also lobbied for the creation of NHRIs in the region.<sup>65</sup>

Regional organisations, such as the European Union (EU) and Organisation of American States (OAS), have also played an important role in the establishment, and subsequent stabilising of, NHRIs in the region. The creation of NHRIs has coincided with a growing interest in the institutions by the OAS, signalled in 1997 with a declaration calling for their establishment in all member states.<sup>66</sup> The OAS has continued to promote the role of these institutions in human rights protection and promotion, recent declarations of July 2008 notably using UN standardized language.<sup>67</sup> The European Union (EU), the region’s leading investor and second largest trading partner, has also actively promoted the establishment of these institutions, primarily through financial inducement.<sup>68</sup> EU financial assistance has also been directed toward the creation of individual offices throughout the region as part of the European Instrument for Democracy and Human Rights (EIDHR).<sup>69</sup> Recently, the EU transferred 6.52 million euros and considerable technical assistance to Brazil’s Secretariat of Human Rights to promote the work of the police

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<sup>62</sup> ‘Good governance’ identifies the market as the most efficient mechanism to achieve not only fiscal stabilisation, but also a wide range of social ends previously undertaken by government.

<sup>63</sup> World Bank memo (internal) provided by Dr. Elizabeth Dasso, Senior Social Development and Civil Society Specialist, The World Bank Group – Lima, Peru Office. Personal communication with author 21 February 2006.

<sup>64</sup> Ackerman 2007, 125-6.

<sup>65</sup> See Reif 2004, 191.

<sup>66</sup> OAS General Assembly: Support for International Exchanges Among Defensorías, OAS AG/RES 1505, XXVII-0/97 (June 5, 1997)

<sup>67</sup> OAS AG/RES. 2411 (XXXVIII-O/08) Strengthening of the 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); OAS AG/RES. 2421 (XXXVIII/08) Strengthening the role of National Human Institutions for the Promotion and Protection of Human Rights in the Organization of American States (OAS).

<sup>68</sup> European Commission (2000), Follow-up to the First Summit between Latin America, Caribbean and the European Union [COM (2000) 670 final, 31 October 2000], (European Commission, Brussels).

<sup>69</sup> European Commission (2008) EC-LA Development Cooperation Guide 2008-2010, Brussels: EC, 110.

ombudsmen.<sup>70</sup> Individual countries also have bilateral arrangements with NHRIs throughout the region, with many offices the recipient of funding from USAID, Netherlands, Spain and the Nordic countries. Sweden, for example, works with NHRIs in every Central American country except Costa Rica and, following its recent withdrawal, Nicaragua.<sup>71</sup>

Finally, NHRI diffusion has occurred not only through organisational platforms but also via transnational networks, devised by NHRIs themselves, operating at the regional level to facilitate information exchange among offices.<sup>72</sup> The IIDH has provided technical assistance in the creation of NHRIs in Paraguay, Nicaragua, Panama, Uruguay, Venezuela and Chile. The institute has also provided training for NHRI personnel and facilitated inter-regional communication through the holding of regional meetings.<sup>73</sup> The IOI has been credited, through the ‘careful and strategic’ selection of Buenos Aires to host the VI IOI conference in 1996, with providing added impetus to not only the establishment of these institutions but also their activation (Corte and Mestres 2000, 74). The FIO, despite political contamination noted above, has developed one of the most sophisticated NHRI regional networks in operation. It is highly integrated with international forums and recognized as an important source of technical assistance for regional offices.<sup>74</sup> This discussion would not be complete without consideration of another category of norm entrepreneurs, namely, individual NHRI proselytizers. During the 1970s and 1980s, it was individual academics and policymakers who initially diffused the concept of the ombudsman, notably creating the Latin American Ombudsman Institute (ILO) in Caracas in 1983. As Jorge Santistevan (2004, 27) has observed, ‘the ombudsman arrived in Iberoamerica as an intellectual problem before it was a constitutional creation.’ It was the ‘Constitutional Debates’ organized by the College of Lawyers and Notaries in Guatemala, not a blueprint devised by UN or Spanish policy-makers, which first proposed the creation of a Procuraduría to Congress in May 1984. Former members of this college, elected as new legislators, would be instrumental in its passage into law.<sup>75</sup>

The acceleration and deceleration of the wave of NHRIs throughout Latin America appears to suggest that the relevance of the international context may increase with each successive instance of diffusion. Pertinent to this discussion are those negative cases in the region – Brazil, Chile and Uruguay – one can speculate that these countries have resisted the implementation of NHRIs as part of a broader interest in remaining outside international socializing norms, even displaying a ‘fatigue effect’ as the region becomes saturated by these innovations. However, beyond resisting the pressure to conform to the international social system, the answer lies with domestic processes of contestation as new institutional forms are submitted to the gauntlet of congressional deliberation. The process of acculturation emphasises the international and regional relational environment of the actor, not the content of the reform

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<sup>70</sup> Secretariat of Human Rights 2007. Reprinted in Pereira 2007, 16.

<sup>71</sup> Executive Summary in L. Bloomquist, M. L. Bartolmei, and F. Uggla, Evaluation of Swedish Support to the Ombudsman Institutions in Latin America. (Stockholm: Swedish Institute for Public Administration, 2002).

<sup>72</sup> See Keck and Sikkink (1998).

<sup>73</sup> Elizondo and Aguilar 2001, 211.

<sup>74</sup> See ‘Support for the work of Defenders of the People, Defenders of the Population, Human Rights Attorneys, and Human Rights Commissioners (Ombudsmen) in the Context of Strengthening Democracy in the Hemisphere,’ OEA/Ser.P AG/RES. 1670 (XXIX-O/99), 7 June 1999, Res. 5.

<sup>75</sup> See <http://www.derechos.org/nizkor/guatemala/pdh/funcion.html> (accessed 04 June 2009).

adopted. In this discussion, little has been said of the process of institutionalization of new institutional forms that are critical to their stability and durability. The state may adopt an NHRI largely as a response to altered conditions within its social system. However, the transmission of NHRIs to the domestic level and the eventual outcome of these structural scripts will be determined decisively by a broad range of internal political forces.

#### *4.2.3 Diffusion by persuasion*

Finnemore and Sikkink (1998, 895) have argued that the process of transnational socialisation may lead to the internalisation of norms across international dimensions. The logic of diffusion by persuasion places emphasis on the content of the norm and the receptiveness of the adopting country to the intrinsic values contained therein. New institutional forms are unlikely to endure or function well at the domestic level without the development of an internal platform of legitimacy among a variety of stakeholders. The notion of institutionalization is indicative of the need for some degree of persuasion or, setting the bar lower, consent. Given the specialised institutional characteristics of the NHRI – in particular its lack of enforcement authority – consent is desirable and, in this respect, more relevant to its eventual function than compliance or conformity with international norms. Consent is most likely to occur through learning, in contrast to compliance through coercion or conformity to the patterns of the surrounding culture.

#### *The scope for intra-regional learning*

In generating consent, information is exchanged by exemplars and a gradual process of learning undertaken by adopters. In the case of Latin American NHRIs, a key issue is the scope for intra-regional learning as an institution of European origin is diffused among a diverse group of political systems that nevertheless may, for the most part, be considered loosely stable, democratic and governed by the rule of law. Scholars have asserted that the conditions commonly associated with the Western and Latin American models decisively part company from each other in at least three key areas: firstly, the transplanting of an institution that has developed in parliamentary systems to a presidential setting; secondly, transfer from highly structured democracies to contexts where the state has neglected the institutional sphere of representative democracy and even perpetrated systematic human rights violations; and thirdly, the formative historical and cultural idiosyncrasies associated with the NHRI.<sup>76</sup> However, setting aside the instability of an auxiliary legislative entity within a Presidential setting – there may be enough comparative leverage across the Iberian divide to overcome the latter points. Similar to Spain and Portugal, NHRIs emerged throughout Latin America – with the clear exception of Costa Rica – amidst a process of democratic opening and stabilisation of fragile political regimes and the processes that underpin them. As such, the Iberian NHRI forms part of a broader normative agenda to strengthen the constitutional guardians of a liberal democratic order, establish a regulatory state, and respond to the demands and expectations of the citizenry. A further dimension of comparison – egregious violations of human rights

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<sup>76</sup> See Anderson 1971; Ugglá 2004.

– is apparent with reference to modern Spain’s authoritarian past that has left approximately 30,000 civilians still interred in unmarked graves.<sup>77</sup>

However, the limitations of intra-regional learning must also be acknowledged. For example, the depth of historical denigration of the judiciary in terms of independence, infrastructure and access provides a fault-line not only demarcating Spain from many Latin American countries, but also across cases within the region itself.<sup>78</sup> Such an observation cautions against the overtones of value homogeneity often found in intra-regional practitioner material (Quórum 2008). The first NHRI in the region, the Guatemalan Procurador, represents a modification on the original template which, in recognition of the Guatemalan political and structural realities, enhances the human rights function of the institution by providing for strengthened judicial powers such as participating in habeas corpus actions before the Supreme Court.<sup>79</sup> The Defensor of Spain at the time, Joaquín Ruiz Jiménez, participating in the first Latin American Symposium of Ombudsmen held in Buenos Aires in November 1985, remarked that the ombudsman must “convert itself into the protector of human rights and a promoter of a culture of peace.”<sup>80</sup> As opposed to the notion of coercive imposition, diffusion by persuasion implies a process of dialogue between actors and the assimilation of values intrinsic to both the new institutional form and the receiving setting. This search for domestic normative legitimacy has led jurists to describe the Latin American NHRI model as the ‘Creole ombudsman’ (Madrado 1996), tracing its ancestry not only to Europe but also to indigenous antecedents such as the humane initiatives of the ‘Protector of the Indians’ undertaken by Fray Bartolomé de las Casas during the Spanish colonial period and even the Tucuy Ricuy (‘he who sees all’) under the Incan Empire (Patiño 2007, 96). Others, such as Morales (2007, 53), place the institution in the tradition of contemporary institutional innovations unique to the Americas, such as the emergency *amparo* provision or, in the case of Colombia, the more powerful *accion de tutela*.

#### *Insertion into the local setting*

Insertion of this new mechanism at the domestic level rests in part on the building of social momentum behind the NHRI, and, in turn, at least the consent of potential veto players to the addition of this new institutional actor. Many observers concur that initial establishment of NHRIs has been an insular affair, indicative of government attempts to appease reformers without threatening entrenched interests.<sup>81</sup> This is a valid criticism. An elite-driven process is perilous for the NHRI, the ability of social actors outside the state to inform the inception and design of the institution being potentially critical to its eventual legitimacy upon activation. As discussed above, the creation of the Mexican Commission may have responded primarily to external incentives as part of the NAFTA negotiations, but it was also in part an attempt by government to shore up its domestic and international human rights credentials following US press reports of ‘official terror’ against regime opponents (Ackerman 2007, 125). However, the design of the Commission was strictly controlled by a one-

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<sup>77</sup> See Kovras 2008, 373.

<sup>78</sup> See Prillaman 2000.

<sup>79</sup> Elizondo 2001, 218.

<sup>80</sup> Quoted in Carlos Constenla 2008, ‘Latinoamerica y la Experiencia del Defensor del Pueblo,’ Address to the Latin American Institute of Ombudsmen, Buenos Aires, 10 September 2008.

<sup>81</sup> See Ungar 2002, 37; Dodson and Jackson 2004.

party electoral regime, leading Ackerman (2007, 117) to draw causation between resulting weak institutional design and a lack of plural consensus at its foundational moment. In contrast, other cases display a relatively high degree of engagement by social actors in the design of the NHRI, pointing to government attempts to respond to social demands. In Guatemala the legislative project was drafted and submitted by the College of Lawyers. In Bolivia and Chile, offshoots of the ILO in the form of National Ombudsman Chapters composed primarily of academics and jurists, were instrumental in drafting legislation – even if, in the case of Chile, they ultimately failed to see it pass into law.<sup>82</sup> The Panamanian government went so far as to include civil society in a special consultative commission to debate the Defensor bill and in Nicaragua the resulting legislation includes a provision that candidate lists be devised in consultation with civil associations.<sup>83</sup>

Drawing together different strands of the analysis above, NHRIs are subject to diverse and competing normative demands and expectations concerning their appropriate function. A confluence of interacting international and domestic incentives inform the blueprint of the institution but, as argued above, there is only limited pay-off in attempting to evaluate function from formal design. As Annex 1 outlines, beyond a broad mandate to protect and promote human rights, certain functions can be extrapolated from formal powers bestowed, such as the ability to launch investigations *ex officio*, legal faculties before the courts, a stipulated mediation role and authorized intervention into electoral matters. Arguably, it is ongoing political, institutional and historical processes that inform the trajectory of the institution. Surveying regional NHRIs, initial insertion often responds to a combination of three principle domestic processes: addressing historical experiences of authoritarian government, historical or ongoing egregious human rights violations, and the modernization of the state. However, NHRIs have frequently proven themselves capable of subverting the original intentions of their designers. Whether by financial inducement from international agencies or effective mobilization by domestic constituencies, NHRIs originally conceived as technocratic legal or administrative entities have reoriented their focus and become influential political protagonists.

A further dimension to NHRI function that warrants attention is the reception of the institution in a pre-existing institutional framework, particularly the network of accountability and control institutions, some with an explicit human rights mandate. Ungar (2002) has highlighted the important role of legislative committees, public prosecution offices, public agencies and independent judicial councils. A recent contribution by Elmendorf (2007) identifies an expansive new tier of ‘advisory counterparts’ with auxiliary rule of law responsibilities to the courts, including NHRIs. Many countries have long-standing legislative committees for human rights and other – often executive – bodies with human rights briefs. In addition, many NHRIs were originally envisaged as administrative agencies to assist overstretched public prosecutor offices with processing citizen complaints which may explain their enhanced legal powers in matters of human rights.<sup>84</sup> NHRI advocates contend that such executive and legislative bodies generally lack formal safeguards regarding independence, autonomy and powers.<sup>85</sup> Furthermore, in terms of function, such

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<sup>82</sup> See Santistevan 2004.

<sup>83</sup> Article 138(8) Constitution, Article 8, Regulative Law.

<sup>84</sup> Ungar 2002, 18.

<sup>85</sup> See Contesse 2007, 539.

institutions may encroach and in effect crowd out or dilute the authority of any single agency. In a number of instances, NHRI insertion has been accompanied by a raft of other reforms including the creation of more than one human rights agency in Nicaragua, Guatemala and Venezuela. Most visible among potential competing actors, the judiciary has proven a formidable adversary of NHRIs at design-stage. In Costa Rica, the Supreme Court rejected any oversight provision over its administrative or jurisdictional activities and the Constitutional Chamber found that the law contravened the Constitution on an unprecedented 14 separate occasions.<sup>86</sup> NHRI function will also reflect domestic governance frameworks, most visibly in federal states such as Argentina and Mexico where the federal NHRI has limited or no mandate to intervene in state or provincial matters.<sup>87</sup>

### *Legislative deliberation and path-dependency*

If the content of NHRI reform is arguably more a product of vying internal forces than the designs of international agency then the legislative process is the key arena of contestation over the structural form of the institution. This initial interaction between institution and its political environment may have important repercussions for the future trajectory of the institution. Drawing on Pierson's definition of path dependency – whereby a self-reinforcing sequence of events makes deviation from a course of action increasingly difficult – a key issue is the degree to which the NHRI can be 'locked-in' to a predetermined institutional path at its foundational moment.<sup>88</sup> A corollary to this observation is the recognition that NHRIs are subject to what Fox defines as 'accountability politics:' the arena of conflict over whether and how those in power are held publicly responsible for their decisions.<sup>89</sup> It is not within the scope of this paper to elaborate on each instance of NHRI insertion into the legislative process. However, Table 1.4, in a sequential analysis of NHRI institutionalization, provides a preliminary indication of the conflict often inherent at each stage of the process from initial establishment to passage of regulative legislation and the appointment of the first office-holder and activation of the institution.

With reference to Peru, diffusion appears to fall in the category of acculturation with the Defensor project included within the 1993 Constitution literally duplicating Article 54 of the Spanish Constitution with some minor modifications. As a political act of good faith to the international community, the 1993 Constitution contained a variety of democratic innovations that were not envisaged to contradict the central neo-liberal thrust of the Fujimori project. The main goals of the government having been achieved in the political and economic sphere, little attention was paid to peripheral innovations such as the Defensoría.<sup>90</sup> Furthermore, lacking legal training, the principal political backers did not comprehend the implications of these reforms,

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<sup>86</sup> See The Supreme Court, Plenary Session, 23 June 1986; Sala Constitucional de la Corte Suprema de Justicia, Consulta de Constitucionalidad, voto No. 502-91, 07/03/91.

<sup>87</sup> Argentina has seven provincial and five municipal sub-NHRIs while Mexico has 30 state sub-NHRIs. Paraguay, Uruguay and Venezuela also have a sub-NHRI in their capital cities.

<sup>88</sup> See Pierson, Paul (2004). *Politics in Time: History, Institutions, and Social Analysis*. Princeton, NJ: Princeton University Press.

<sup>89</sup> Fox, Jonathan (2008). *Accountability politics: power and voice in rural Mexico*, New York: University Oxford Press, p. 2.

<sup>90</sup> Samuel Abad, 14 July 2005.



especially in the judicial sphere.<sup>91</sup> As such, the design of this institutional façade was delegated to civil society advocates – principally the Andean Commission of Jurists – supported with funding from USAID and the World Bank.<sup>92</sup> The actual appointment of the first Defensor was a more contentious episode.<sup>93</sup> In Argentina, a Defensor project was first proposed in the 1970s but only achieved legislative approval in 1994 in the context of a rare party agreement, with both parties seeking stronger checks and balances on the executive and positive media coverage.<sup>94</sup> In the Peruvian case and, to a lesser extent, the Argentinean case, the content of NHRI reform was not subject to in-depth scrutiny. As such, the reform arguably responded more to idiosyncratic domestic incentive structures rather than to a process of learning. This contrasts to the case of Costa Rica where the compatibility of the Defensor project to the Costa Rican reality was subject to extensive debate.<sup>95</sup>

**Table 1.4 Domestic legislative process and activation of NHRIs**

<b>Country</b>	<b>Established by decree or law</b>	<b>Established in the constitution</b>	<b>Regulative law</b>	<b>Activated<sup>96</sup></b>
Guatemala	-	1985	1985	1987
Colombia	-	1991	1992	1992
Costa Rica	1992	-	1994	1992
El Salvador	-	1992	2001	1992
Honduras	1990	1995	1995	1992
Mexico	1990	1992	1999	1992
Paraguay	-	1992	1995	2001
Argentina	1993	1994	1994	1994
Peru	-	1993	1995	1996
Bolivia	-	1992	1997	1998
Nicaragua	-	1995	1999	1999
Ecuador	1997	1998	1998	1998
Panama	1997	2004	1997	1998
Venezuela	-	1999	1999	1999

Source: Authors own elaboration using a range of sources.

Referring to Table 1.4 stark disparities can be drawn between cases such as El Salvador, where under the auspices of the UN peace accords the NHRI was established and activated within a space of four months, and Paraguay, for instance, where the institution remained in legislative limbo for nine years. What can explain

<sup>91</sup> César Landa, interview by author, 22 July 2005, Lima, Peru. César Landa is a Professor of constitutional law at the Catholic University, Lima. He is currently an elected Magistrate on the Constitutional Tribunal.

<sup>92</sup> Samuel Abad, 14 July 2005.

<sup>93</sup> See Pegram 2008.

<sup>94</sup> Ungar 2002, 38.

<sup>95</sup> “It is yet to be demonstrated to this Plenary what aspects of citizens’ lives are to be represented and protected by an institution of monarchical origins grafted onto our democratic republican system which is not already within the competence of the Attorney General’s Office, the Ministry of Justice, the Office of the Prosecutor or the Public Defenders.” See Danilo Chaverri Soto, 03 November 1992, Acta de la Sesión 91,872.

<sup>96</sup> This category corresponds to appointment of the first office-holder.

such variation among cases? One possible factor in delay may be negative feedback from intra-regional learning. In the case of Paraguay, the appointment of an office-holder proved highly controversial in Congress due to the potential role of the institution in addressing the issue of victims of the dictatorship.<sup>97</sup> NHRIs throughout the region have assumed an influential role in seeking redress for historical rights abuses. For example, the Honduran Commission (1994) built its credibility by releasing a report into the forced disappearances that occurred in the 1980s. As Jorge Santistevan, the Defensor of Peru from 1996 to 2000 elaborates:

You have to understand, in 1993 nobody really understood what the Defensoría was and even less, gave it any importance. I had lived in Mexico and Central America, where the institution first began – in Guatemala. From this experience, I had a good idea of the potential of an institution such as the Defensoría.<sup>98</sup>

However, reflecting the arena of conflict inherent to accountability politics, NHRIs in many cases were subject to significant formal modification precisely to delimit their future trajectory – with particular attention paid to autonomy and powers. The clearest expression of this is the inclusion of the office within the clear control and command structure of the executive or its subordinates. As such, in Honduras and Mexico the NHRI was initially established under the auspices of the executive branch; in Bolivia, Costa Rica, El Salvador and Peru under the Public Prosecutor’s Office; and, in Colombia, the NHRI is part of the Ministry of Justice ‘under the supreme direction of the Attorney General.’<sup>99</sup> In the case of Venezuela, the NHRI is included within the new citizen branch of government.<sup>100</sup> More insidious forms of control can be found in provisions pertaining to appointment procedures and budget autonomy. This is reflected in Graph 1.1. For instance, the Colombian appointment process whereby the President presents a short-list of candidates to Congress fails to ensure independence of the office. Constitutional status, common to all NHRIs with the exception of Costa Rica, is also an important safeguard of autonomy, given the elevated cost of repeal. Lack of constitutional rank may further impact upon the standing afforded the office-holder – immunity from prosecution for instance – as well as the credibility of the office as an auxiliary guardian of the Constitution to the courts. Other constitutional texts are explicit in fencing off NHRI jurisdiction, especially regarding judicial activities and defense or security forces.<sup>101</sup>

The extent to which parchment rules can lock-in the trajectory of NHRIs at their foundational moment is debatable. Beyond the structural baseline commitments of formal autonomy and powers analyzed in this paper, the institutional mandate is uniformly expansive rather than highly specified, as is common among specialized agencies such as anti-corruption units. This situation provides opportunity, especially in a context defined by unstable and weakly enforced formal rules, but it also poses challenges to a new institution that lacks clear operational parameters and is not well understood by either public officials or citizens. The formal design of NHRIs and the circumstances of their origin are nevertheless significant, if not determinative. NHRIs

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<sup>97</sup> Law No. 838, 1996.

<sup>98</sup> Jorge Santistevan, personal communication with author, 22 February 2006.

<sup>99</sup> Article 281 of the Constitution.

<sup>100</sup> This branch of government is composed of the Defensor del Pueblo, the General Prosecutor, and the Controller General, Article 273 of the 1999 Constitution.

<sup>101</sup> Argentina, for instance, is prohibited from supervising these areas.

have often, as a concession to their autonomy, been delegated the responsibility of drafting their internal regulative rules. They have used this opportunity to further enhance their institutional profile and define their function. For instance, the Costa Rican regulative law devised by NHRI personnel, but issued by executive decree, effectively orients the institution toward a constitutive rather than regulative control mandate.<sup>102</sup> Undoubtedly, institutions have been undermined or contained by manipulation through formal channels. Control of the budget is a common manipulative device, with the Panamanian NHRI denied a budget upon activation following a ruling by the Supreme Court in 1998, and the Nicaraguan office subject to a 40% budget cut in 1999.<sup>103</sup> Despite the limiting effect of constitutions as binding documents, regressive structural modifications of NHRIs following activation have been attempted across cases. For example, the Honduran Commissioner was subjected to a reform effort in 1999 to reduce his term in office from six to four years.<sup>104</sup> The Mexican Commission, following a legislative amendment in 1992, was barred from intervening in electoral matters.<sup>105</sup>

What this discussion highlights is the open-ended and contested nature of NHRI insertion into the local setting. As Ugglá (2004, 428) suggests, ‘the influence of the ombudsman can hardly be deduced from the formal, legal dispositions regulating the institution. Instead, the strength and autonomy of the institution are generated by a process that is primarily political.’ According to this logic, the trajectory of the institution is likely to be determined by a range of political criteria, such as the aptitude of the office to enter into alliances with progressive actors within and outside the state, to define an effective human rights agenda that is sensitive to political contingency, and to identify and act upon structures of opportunity. The empirical evidence suggests that a decisive component of whether an NHRI will become an influential and authoritative actor following activation is the appointment of credible and effective office-holders. The personal leadership qualities of the first appointee appear to be of paramount importance in negotiating with and navigating a course through official and societal interests. The trajectory of institutions led initially by individuals that have lacked credibility or authority – as occurred in Argentina and El Salvador – contrasts starkly with opposing cases. Individuals such as Leo Valladares in Honduras, Rodrigo Carrazo in Costa Rica, Jorge Santistevan in Peru and Ana Maria Romero de Campero in Bolivia, have demonstrated that the personal qualities displayed by the first appointee may overcome the functionalist limitations imposed by formal design. Underlying this discussion is the observation that the institutionalization of norms – as opposed to their initial diffusion – should not be conceived as a finite process with a standardised outcome or timescale but rather a process of continual renewal and political contestation.

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<sup>102</sup> The open-ended language of Article 1 of Law No. 7319 sits uneasily with other more constrictive provisions such as Article 14(1) which explicitly limits administrative oversight to ‘effectively ensure their legality’.

<sup>103</sup> Statement from the Panamanian Ombudsman in response to the Ruling of the Supreme Court of Panama, dated 12 February 1998; Ungar 2002, p.41.

<sup>104</sup> Dodson and Jackson 2004, 32.

<sup>105</sup> Ackerman 2007, 131.

## 5. Conclusion

Caution is warranted in extrapolating the outcome of institutional reform from the structural configuration of the institution in question. However, as this analysis maintains, robust institutional design is important – especially along the dimensions of formal autonomy and powers. Without certain baseline commitments the institution will be prone to political interference and even capture, or, alternatively, risk quickly losing public standing among the citizenry as an effective channel of redress for rights violations. The findings of this paper present basic variations among cases in Latin America along these two axes: from the relatively strong formal powers of the Nicaraguan and El Salvadorian offices to the Mexican Commission which enjoys few of the necessary, if still insufficient, prerogatives to ensure the institution has the toolset to perform its function. Along the axis of autonomy, the range spans from Costa Rica, which has very few of the safeguards iterated in the literature, to Bolivia, which scores the maximum possible in this exercise.

This analysis raises and addresses a further question, namely, how to account for variation in formal institutional design. Clearly there is a powerful diffusion process in play throughout the early to mid-1990s, propelled in part by the Iberian model of the Defensor del Pueblo and the emulation of Article 54 of the Spanish Constitution. This explains the preponderance of cases found with largely commensurate design features. Other referent points for institutional designers emerged in the 1990s from alternative and influential international and regional norm platforms, such as the UN blueprint contained in the Paris Principles and the World Bank's support of ombudsmen within a package of rule of law reforms.

However, this is only part of the story. The remainder is what occurs when this new set of organizational rules enters the domestic arena and is subject to political contestation at the local level, especially in contexts defined by unstable and weakly enforced formal rules. The rational incentives of political elites, in particular the three primary branches of government, are likely to intercede in the negotiation surrounding the origins of the institution at different points in the legislative process, from its initial establishment in law, the passing of the regulative legislation, and, most crucially, in the election of the first appointee. It is not possible to account for the formal fragility of the Mexican NHRI without taking stock of the circumstances of its inception by a one-party electoral regime beginning to make overtures toward a democratic and human rights discourse. The debilitating state of the Commission's formal powers has meant that the NHRI has emphasized a constitutive, over regulative, function. Interestingly, the Commission has been subject to incremental progressive modification along both axes. However, it has also suffered from a succession of poor office-holders.

Outside the confines of government, other actors, such as bar associations, NGOs and civic organizations, have also voiced their preferences, and in doing so have affected change to the structural configuration of the institution and, importantly, mobilized to activate the NHRI. For instance, this is the case in Nicaragua where a human rights commission was already in operation, and also in Peru where civil society effectively lobbied, alongside international actors, for the long overdue activation of the Defensor in 1996. Transnational networks of jurists under the auspices of the Latin American

Ombudsman Institute were instrumental in advancing NHRI projects in Guatemala, Bolivia and Chile. Beyond institutional design, the trajectory of the NHRI is also affected by the manner of its diffusion and establishment, especially with regard to its insertion within the local setting and the degree to which the NHRI can assimilate the values intrinsic to the local setting. Implicit in this statement is a consideration not only of the initial impetus for implantation – be that through coercion, acculturation or persuasion – but also information symmetries concerning the content of reform.

The trifurcation of the NHRI template in Latin America into the Defensoría, Procuraduría and Commission, rather than reflecting a structurally discrete typology of NHRIs, responds to powerful normative claims on this new institutional form – from above and below – contingent on prevailing conditions at the international, regional and domestic levels. Hence, ongoing egregious human rights violations, a highly unstable political context, and weak prosecutorial institutions in Guatemala in 1985 were instrumental in the designation of a Procuraduría with, at least formally, a powerful enforcement framework. The well-endowed Peruvian model appears to respond to the oversight of its designers who did not comprehend the political potential of an ostensibly administrative legal body of Swedish origin. The denomination of the UN-defined Commission models in Mexico and Honduras arguably reflects a heightened level of international influence within these domestic domains. In Argentina, Bolivia, Costa Rica and Peru, the NHRIs more closely resemble the Spanish antecedent with their combination of a human rights protection function and a supervisory role over the public administration. Notwithstanding variation within this group of political systems, the political elite in these countries have placed particular emphasis on the NHRI as part of a neo-liberal modernization agenda.

Finally, the issue of path dependency – the degree to which design and origins determine the future trajectory of the institution – is a key concern of this paper. This chapter has surveyed the institutional design of NHRIs in Latin America and the process of diffusion and domestic institutionalization that led to their initial emergence. As stated at the outset, holding power holders to account for their actions goes beyond questions of origin and formal design. However, baseline structural issues of autonomy and enforcement will enable or constrain the ability of the institution to overcome structural obstacles and identify opportunity structures in their surrounding political and institutional environments. Similarly, the normative demands and expectations attached to the institution at point of origin may have a powerful impact on the future attitudinal orientation of the institution. However, the institutionalization of NHRIs, particularly in new democracies, remains an inherently complex, conflict-ridden and politically contingent endeavor.

Annex 1: Variables governing formal institutional strength of NHRIs (2008)

		ARG	BOL	COL	CR	ECU	ELS	GUA	HON	MEX	NIC	PAN	PAR	PER	VEN
FORMAL AUTONOMY	4	Constitutional status	4	4	4	0	4	4	4	4	4	4	4	4	4
	3	Elected by congress	3	3	1	3	3	3	3	3	3	3	3	3	3
	2	2/3 majority required	2	2	0	0	2	2	2	0	2	2	2	2	2
	2	No dismissal without cause	2	2	0	0	2	2	2	2	0	2	2	0	0
	2	Separate budget or part of the legislature	2	2	0	2	0	2	2	0	2	0	2	2	2
	2	Time limited obligation to fill vacant office	0	2	0	0	0	0	0	0	0	0	0	2	0
	1	Term of 5 years +	1	1	0	0	0	0	1	1	1	1	1	1	1
	1	Possibility of re-election	1	1	1	1	1	1	0	1	1	1	1	1	1
	1	Immunity from prosecution	1	1	0	0	0	0	1	0	1	1	0	1	1
18	<b>TOTAL</b>	<b>16</b>	<b>18</b>	<b>6</b>	<b>4</b>	<b>12</b>	<b>14</b>	<b>15</b>	<b>11</b>	<b>14</b>	<b>14</b>	<b>15</b>	<b>16</b>	<b>14</b>	<b>10</b>
FORMAL POWERS	4	Investigative function (ex officio)	4	4	0	4	4	4	4	0	4	4	4	4	4
	3	Const. review procedures	3	3	3	3	3	3	0	0	3	3	0	0	3
	3	Habeas corpus/ amparo	1	3	3	3	3	3	3	0	0	3	3	3	3
	2	Legal obligation to cooperate	0	0	0	2	2	2	2	2	0	2	0	2	0
	2	Oversight of the military	0	2	2	0	2	2	2	2	2	2	2	2	2
	2	Initiate criminal proceedings	0	0	2	0	0	0	2	0	0	0	0	0	0
	1	Intervention in electoral arena	1	1	1	0	0	1	1	1	0	1	0	0	1
	1	Mediation function	0	0	1	0	1	1	0	0	1	1	1	0	0
18	<b>TOTAL</b>	<b>9</b>	<b>13</b>	<b>9</b>	<b>12</b>	<b>15</b>	<b>16</b>	<b>14</b>	<b>9</b>	<b>6</b>	<b>16</b>	<b>10</b>	<b>11</b>	<b>13</b>	<b>12</b>

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