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# SUB-NATIONAL HUMAN RIGHTS INSTITUTIONS AND THE DOMESTICATION OF INTERNATIONAL HUMAN RIGHTS NORMS

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## ***Abstract***

*While the domestication of international human rights law has been intensively studied in recent years, little attention has been paid to the domestication role of sub-national human rights institutions, meaning those ombudsmen, human rights commissions, and similar independent non-judicial governmental institutions that possess sub-national mandates, and whose mission includes the implementation of human rights norms. This article demonstrates that sub-national human rights institutions around the world are not simply local institutions implementing local norms. Rather, they are increasingly involved in the domestication of international human rights law through their quasi-judicial resolution of disputes, promotion of governmental compliance with international norms; promotion of international norms in civil society; promotion of the use of international norms by the courts, and use of international norms as standards in human rights monitoring. The article explores the implications of these actions, and how the sub-national human rights institutions add to the existing domestication of international norms by national-level actors.*

**Keywords:** sub-national human rights institutions; ombudsmen; National Human Rights Institutions; human rights; domestication

## 1. INTRODUCTION

In recent years, scholars have focused considerable attention on the means by which international human rights norms are transmitted to the domestic sphere. Empirical legal scholars have examined the domestication role of domestic courts, compiling databases of cases and

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conceptualising the different ways in which judges use international law.<sup>1</sup> Drawing from the groundbreaking work of Sikkink, Risse, and others, political scientists have studied the conditions under which international human rights norms can be internalised into domestic practice.<sup>2</sup> Socio-legal and anthropological approaches have highlighted the role of both international and local non-governmental organisations in ‘localising’ international human rights norms within particular cultural contexts.<sup>3</sup> A small but active group of academics have focused their attention on National Human Rights Institutions (NHRIs), those national human rights commissions, human rights ombudsmen, and other institutions that have emerged around the world in recent years with – in many cases – the express goal of domesticating international human rights law.<sup>4</sup> The sustained academic attention to the issue of domestication is in part a reflection of the growing consensus of its importance to human rights advocacy: in short, human rights practitioners have realised that the weakness of international human rights mechanisms means that domestic institutions must play the leading role in actually applying international human rights norms, if those norms are to actually make a significant difference in people’s lives.

This article will extend this attention to sub-national human rights institutions (SNHRIs), those sub-national equivalents of NHRIs that are defined here as *independent non-judicial governmental institutions that possess a sub-national mandate, and whose mission includes the implementation of human rights norms*.<sup>5</sup> These institutions – provincial and local ombudsmen,

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<sup>1</sup> André Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011); Magnus Killander (ed), *International Law and Domestic Human Rights Litigation in Africa* (Pretoria University Law Press 2010); Michael Kirby, ‘Domestic Courts and International Human Rights Law – The Ongoing Judicial Conversation’ (2010) 6 Utrecht L Rev 168.

<sup>2</sup> Thomas Risse, Stephen Ropp, and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (CUP 1999); Ryan Goodman and Derek Jinks, ‘Incomplete Internalization and Compliance with Human Rights Law’ (2008) 18 Eur J of Intl L 725.

<sup>3</sup> Sally Engle Merry, *Human Rights & Gender Violence: Translating International Law into Local Justice* (University of Chicago Press 2006); Koen de Feyter, *Localizing Human Rights*, University of Antwerp Institute of Development Policy and Management, Discussion Paper 2006/02 (2006); Zvika Orr, ‘The Adaptation of Human Rights Norms in Local Settings: Intersections of Local and Bureaucratic Knowledge in an Israeli NGO’ (2012) 11 J Human Rights 243.

<sup>4</sup> Richard Carver, ‘A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law’ (2010) 10 Human Rights L Rev 1; Morten Kjaerum, *National Human Rights Institutions Implementing Human Rights* (Danish Institute for Human Rights 2003). According to one scholar, the domestication of international norms is the “raison d’être” for NHRIs. Sonia Cardenas, ‘Adaptive States: The Proliferation of National Human Rights Institutions’ (2004) Carr Center for Human Rights Working Paper T-01-04, <<http://content.knowledgeplex.org/kp2/cache/kp/24.pdf>> accessed 6 February 2015.

<sup>5</sup> To date, the domestication of international law by SNHRIs has been the subject of relatively little academic attention, and those studies that have taken note of the trend have largely focused on entities within a single country. See, eg, Risa Kaufman, ‘State and Local Commissions as Sites for Domestic Human Rights Implementation’ in

anti-discrimination commissions, *defensores del pueblo*, and the like – have become increasingly ubiquitous around the world. While some SNHRIs are focused on implementing civil rights norms from domestic sources with little attention to the corpus of international human rights law, this is not always the case. In fact, as this article will demonstrate, SNHRIs with different legal traditions and institutional forms from around the world are increasingly involved in domesticating international norms in a myriad of ways.

After a brief introduction to SNHRIs, this article will address the direct application of international human rights norms by SNHRIs by examining three related questions.<sup>6</sup> First, what sources of human rights norms do SNHRIs use, and how do they relate to international norms? In particular, this section will examine the different ways that SNHRI mandates refer to international norms, and the ways in which SNHRIs have justified the use of international human rights norms when such use is not explicitly provided for in their mandates. Second, in what functions have SNHRIs used international norms? This section will explore five broad manners of use, namely the use of international norms in adjudicating claims; promotion of governmental compliance with international norms; promotion of international norms in civil society; promotion of the use of international norms by the courts, and the use of international norms as standards in human rights monitoring. Third, what are the implications of SNHRI domestication of international norms? This section will focus on exploring what SNHRI domestication of international norms adds to the existing human rights regime beyond the domestication role already played by NHRIs and other actors.

## 2. SUB-NATIONAL HUMAN RIGHTS INSTITUTIONS

While the proliferation of NHRIs in the past two decades is a well-known and relatively straightforward story, far fewer people are aware of the simultaneous and similarly striking growth in

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Shareen Hertel and Kathryn Libal (eds) *Human Rights in the United States: Beyond Exceptionalism* (CUP 2011); Lesley Wexler, 'The Promise and Limits of Local Human Rights Internationalism' (2010) 37 *Fordham Urban L J* 599.

<sup>6</sup> For the purposes of this article, the term 'international human rights norms' will be used to refer to those norms contained in international human rights treaties, customary international law, and declarations such as the Universal Declaration of Human Rights.

independent human rights institutions at the sub-national level.<sup>7</sup> In some places, the two types of institutions developed in tandem: in Russia, India, and Morocco, for example, the establishment of human rights commissions or ombudsman institutions at the national level was accompanied by the authorisation (and, over time, the establishment) of analogous institutions at sub-national levels.<sup>8</sup> Elsewhere, especially in the US, Canada and Australia, pre-existing sub-national anti-discrimination institutions gradually began adopting more of a human rights focus.<sup>9</sup> Meanwhile, classical ombudsman institutions around the world turned more and more to human rights<sup>10</sup> while ‘human rights ombudsman’ institutions (with an explicit human rights implementation mandate) were established at national and sub-national levels in newly democratised countries in Southern and Eastern Europe and Latin America.<sup>11</sup> Most recently, new grass-roots movements have begun to emerge in cities to promote human rights at the local level, leading to the establishment of entirely new and innovative forms of SNHRIs.<sup>12</sup>

The SNHRIs that emerged through these various processes are now present on every continent of the world, and in significant numbers. There are 71 regional human rights ombudsmen in Russia;<sup>13</sup> 47 state human rights commissions in the US;<sup>14</sup> 23 state human rights commissions in India;<sup>15</sup> at least 1,000 *personeros municipales* (human rights ombudsmen) in

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<sup>7</sup> On NHRI proliferation, see, eg. Cardenas (n 4); Anna-Elina Pohjolainen, *The Evolution of National Human Rights Institutions—The Role of the United Nations* (Danish Institute for Human Rights 2006); Jeong-Woo Koo and Francisco Ramirez, ‘National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966–2004’ (2009) 87 *Social Forces* 1321.

<sup>8</sup> Federal Constitutional Law on the Commissioner for Human Rights of the Russian Federation, N 1-FKZ, Art 5 (26 February 1997) [Russia]; Protection of Human Rights Act 1993 [as amended by the Protection of Human Rights (Amendment) Act, 2006-No 43 of 2006] art 21 (1994) [India]; Dahir no 1-11-19 du 25 rabii I 1432, art 28-31 (1 March 2011) [Morocco].

<sup>9</sup> Shubhankar Dam, ‘Lessons from National Human Rights Institutions Around the World for State and Local Human Rights Commissions in the United States’ Report Prepared for Harvard Executive Session on Human Rights Commissions and Criminal Justice (August 2007) 10.

<sup>10</sup> Linda Reif, ‘Ombudsmen and Human Rights Protection and Promotion in the Caribbean: Issues and Strategies’ in Victor Ayeni, Linda Reif and Hayden Thomas (eds) *Strengthening Ombudsman and Human Rights Institutions in Commonwealth Island and Small States* (Commonwealth Secretariat 2000) 163.

<sup>11</sup> Linda Reif, ‘Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman’ (2011) 31 *Boston College Third World L J* 278.

<sup>12</sup> Charlotte Berends and others (eds), *Human Rights Cities: Motivations, Mechanisms, Implications* (University College Roosevelt 2013).

<sup>13</sup> European Commission against Racism and Intolerance, ‘Fourth Report on the Russian Federation’ CRI (2013) 40, 18.

<sup>14</sup> Kenneth Saunders and Hyo Eun Bang, ‘A Historical Perspective on U.S. Human Rights Commissions’ Executive Sessions Papers: Human Rights Commissions and Criminal Justice (June 2007) 13. In addition, the US has hundreds of local human rights commissions, including over 60 in California alone. *ibid* 11.

<sup>15</sup> Minister of State in the Ministry of Home Affairs, Response to Unstarred Question no 3963 (18 February 2014) <<http://mha1.nic.in/par2013/par2014-pdfs/ls-180214/3963.pdf>> (accessed 11 April 2015).

Colombia,<sup>16</sup> and an estimated 900 sub-national human rights boards in Turkey.<sup>17</sup> According to a Council of Europe report, there are several hundred regional ombudsmen and close to 1,000 local ombudsmen in Council of Europe Member States.<sup>18</sup> Clearly, these SNHRIs comprise a very diverse institutional category. SNHRIs exist at virtually all administrative levels, from cities and counties to provinces and vast autonomous regions. While by definition all are engaged in human rights implementation, they do so in different ways: many receive and investigate complaints from the public, but others concentrate on promotional activities, monitoring, or providing sub-national governments with advice and guidance. Some SNHRIs are mandated to implement the broad sweep of human rights, while others focus on particular rights, such as the rights of children or the elderly. Nevertheless, SNHRIs are increasingly viewed as a coherent (if poorly defined) group by other actors in the international system. In recent years the UN Secretary General, the Office of the High Commission on Human Rights (OHCHR), the Commonwealth Human Rights Initiative, and others have issued recommendations specifically geared toward “sub-national human rights institutions”, signifying a recognition that the category is practically meaningful, at least in the eyes of the international community.<sup>19</sup>

### 3. INTERNATIONAL HUMAN RIGHTS NORMS AND SNHRI MANDATES

While SNHRIs (by definition) are concerned with implementing human rights, they vary quite widely as to which norms they implement, and where those norms originated. Fundamentally,

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<sup>16</sup> The Federación Nacional de Personeros de Colombia currently includes as members 1,093 *personeros municipales* and *personeros distritales*. Federación Nacional de Personeros de Colombia, ‘Directorio de Personerías’ <<http://fenalper.org/index.php/2014-08-04-04-41-56/directoriopersonerias>> (accessed 11 April 2015).

<sup>17</sup> Kirsten Roberts and Bruce Adamson, ‘Chapter 23 Peer-Review Mission: Human Rights Institutions’, Delegation of the EU to Turkey (January 2011) 8.

<sup>18</sup> Council of Europe, Commissioner for Human Rights, ‘Effective Protection of Human Rights in Europe: Enhanced Co-operation between Ombudsmen, National Human Rights Institutions, and the Council for Europe Commissioner for Human Rights,’ Background Paper for 10<sup>th</sup> Round Table of European Ombudsmen and the Council for Europe Commissioner for Human Rights, CommDH/Omb-NHRI(2007)1 Rev 3 (April 2007) para 16 (some of these ombudsmen would address classic maladministration issues without implementing human rights, and thus would not be considered SNHRIs according to the definition used here).

<sup>19</sup> Address by Navanetham Pillay, High Commissioner for Human Rights, to the Annual Meeting of the Coordinating Council of Sub-national Ombudspersons of the Russian Federation, ‘National Human Rights Protection Systems: The First Ports of Call’ (18 February 2011) <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10798&LangID=E>> (accessed 11 April 2015); Report by the Secretary General: National Institutions for the Protection and Promotion of Human Rights, A/66/274 (8 August 2011) para 95; Commonwealth Human Rights Initiative, ‘The Parliamentary Committee as Promoter of Human Rights: The UK’s Joint Committee on Human Rights’ (2007) 17.

one can point to three types of normative sources in use. First, some NHRIs are explicitly mandated to implement one or more forms of international human rights norms. Second, some NHRIs are mandated to implement a set of human rights norms contained elsewhere in the (national or sub-national) domestic laws of the country where the SNHRI is located. Third, the mandates of many NHRIs are silent or ambiguous as to the sources of the human rights norms that are to be implemented. Of course, in some cases, these three categories of sources will be combined, so that a SNHRI will be mandated to implement both domestic norms and certain international treaties, or will have a general mandate to promote “human rights” (with source undefined) but will be mandated to use specific domestic or international norms to resolve disputes.

### 3.1. SNHRI MANDATES TO IMPLEMENT INTERNATIONAL NORMS

An increasing number of SNHRIs are explicitly mandated to directly implement international human rights norms in their work. These SNHRIs include both commission and ombudsman-types at the municipal level and the provincial level, from every region of the world. There are significant differences in the type of international norms that are specifically included in these mandates. At the expansive end, some SNHRIs are mandated to use generally recognised norms of international law<sup>20</sup> or to use norms from international treaties without reference to ratification status.<sup>21</sup> In these jurisdictions, SNHRIs may act as entryways for human rights norms not yet explicitly accepted at the national level. More commonly, many SNHRIs are mandated to implement the international human rights treaties that have been ratified by the SNHRI’s home country. This is the case for the Yucatán Human Rights Commission,<sup>22</sup> the Scottish Commission

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<sup>20</sup> This broad guidance is relatively common in Russia and Eastern Europe. See, eg, Primorsky Krai Law N 110-CP (11 December 1997) art 4(1) [Russia]; Novgorod Regional Law N 552-OZ (3 November 2005) art 3 [Russia]; City of Novi Sad Decree no 47, Ombudsman (2008), art 4, 26 [Serbia].

<sup>21</sup> See, eg, Regolamento per la disciplina delle funzioni del Difensore Civico della Provincia di Biella [Italy], Approvato con DCP 98 (5 September 2000) art 2.

<sup>22</sup> Estado de Yucatán Decreto 152/2014 (28 February 2014) s 2(x).

on Human Rights,<sup>23</sup> the Cordoba (Argentina) *Defensor de los Derechos del Niño*,<sup>24</sup> the Oaxaca Human Rights Commission<sup>25</sup> and the Yukon Human Rights Commission.<sup>26</sup>

In some cases, a broad treaty mandate is either supplemented (as in the case with the Yukon Human Rights Commission<sup>27</sup> and Moscow Child Rights Ombudsman<sup>28</sup>) or replaced (as in the case with the Eugene and Portland Human Rights Commissions<sup>29</sup>) by reference to the Universal Declaration of Human Rights (UDHR). From a practical perspective, the use of the UDHR has a few implications. First, it increases the SNHRI's room for interpretation, given that the UDHR is more vaguely phrased than the major UN conventions and has not been the subject of authoritative interpretation by treaty bodies. Second, the acceptance of the preeminent status of the UDHR by virtually all of the world's countries (despite its technically non-binding status) gives the UDHR legitimacy as a normative source even in countries (such as the US) that have not ratified all of the core human rights treaties. On the other hand, the UDHR's non-binding nature may in some cases make it easier for governmental bodies to reject SNHRI recommendations based solely upon the UDHR.

For other SNHRIs, only a smaller subset of ratified treaties or other international norms are cited as sources of law. Sometimes these are particularly fundamental or well-accepted treaties. For example, in India, where the federal legislation authorising the establishment of a national human rights commission also defines state human rights commission mandates, human rights are defined as encompassing constitutionally guaranteed rights as well as those rights embodied in the International Covenant on Civil Political Rights (ICCPR) or International Covenant on Economic, Social and Cultural Rights (ICESCR) and enforceable by Indian courts.<sup>30</sup> The European Convention of Human Rights (ECHR) is singled out for implementation by the Northern Ireland Human Rights Commission<sup>31</sup> as well as provincial and sub-provincial

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<sup>23</sup> Scottish Commission for Human Rights Act 2006 s 2(b).

<sup>24</sup> Ley Provincial 9.396, art 4 (2007) [Cordoba].

<sup>25</sup> Ley de la Defensoría de los Derechos Humanos del Pueblo de Oaxaca, Decreto No 823, art. 2 (14 February 2012) [Estado de Oaxaca].

<sup>26</sup> Human Rights Act, RSY 1986 (Supp), c 11, s 1.

<sup>27</sup> *ibid.*

<sup>28</sup> City of Moscow Law No 43, On the Ombudsman for Childs Rights in the City of Moscow (3 October 2001) art 5.

<sup>29</sup> Eugene Council Ordinance No 20481 (29 November 2011); City of Portland Ordinance No. 181670 (19 March 2008).

<sup>30</sup> Protection of Human Rights Act, 1993 [as amended by the Protection of Human Rights (Amendment) Act, 2006–No 43 of 2006] art 2(f).

<sup>31</sup> Northern Ireland Act, 1998, s 69(11)(b).

human rights boards in Turkey.<sup>32</sup> It should be noted that the ECHR is essentially a civil and political rights convention, so singling out this treaty may be problematic from the perspective of the indivisibility of human rights.

In other cases, where a SNHRI only addresses a specific area of human rights, the mandate refers only to sources related to the narrower subject area. This is most commonly the case in the area of children's rights. Thus, the mandates of the Northern Ireland Commission for Children and Young People,<sup>33</sup> the Flemish Children's Commissioner,<sup>34</sup> and the Balamban (Philippines) Municipal Council for the Protection of Children<sup>35</sup> refer specifically to the Convention on the Rights of the Child (CRC). The Children's Ombudsman of the Republic of Srpska<sup>36</sup> is guided by the CRC as well as other international instruments related to the protection of the rights and interests of children. Interestingly, the CRC is also the only international treaty source specified in the organic law of the Catalan *Síndic de Greuges* (ombudsman), despite its mandate to address all types of human rights.<sup>37</sup>

In the case of NHRIs, scholars have at times attempted to quantify the percentage of mandates that directly refer to international sources.<sup>38</sup> This article does not attempt to follow suit for SNHRIs. Such a task would be complicated by the high number of SNHRIs, the lack of readily accessible information about many SNHRI mandates, and the absence of a widely accepted list of recognized SNHRIs. The most that can be said is that significant numbers of SNHRIs from a wide range of countries are mandated to use international norms, and that this group comprises a diverse range of SNHRI types: general and single-issue SNHRIs; ombudsmen and commissions; and SNHRIs at the municipal, provincial, and autonomous regional administrative levels. What is equally clear, however, is that not all SNHRIs are mandated to implement international norms. In the US, for example, such mandates are still very much the

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<sup>32</sup> Regulation on the Establishment, Duties, and Working Principles of Provincial and Sub-Provincial Human Rights Boards (Turkey) (23 November 2003) art 11(a).

<sup>33</sup> The Commissioner for Children and Young People (Northern Ireland) Order 2003 no 439 (NI 11) (2003) art 6(3).

<sup>34</sup> Decree of 15 July 1997 establishing a Children's Commissioner and Creating the Office of the Children's Commissioner, art 4-6.

<sup>35</sup> Municipality of Balamban Children's Code (14 July 2009) sec 83 [Philippines].

<sup>36</sup> Law of Ombudsman for Children of Republic of Srpska, No 103/08 (2008), art 1.

<sup>37</sup> Act No 24/2009 of 23 December 2009 on the Síndic de Greuges (Generalitat de Catalunya), art 4.

<sup>38</sup> See, eg, Brian Burdekin, *National Human Rights Institutions in the Asia-Pacific Region* (Martinus Nijhoff 2007) 31; Carver (n 4) 6-7 (finding that 45 per cent of NHRI mandates authorise the institution to apply international human rights treaty law, and an additional 45 per cent of mandates do not specify the source of the human rights norms to be implemented).

exception rather than the rule.<sup>39</sup> According to one recent report, most US SNHRIs, despite focusing their attention on issues of racial discrimination, lacked even a basic familiarity with the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>40</sup>

### 3.2. SNHRI MANDATES TO IMPLEMENT DOMESTIC LAW NORMS

In many instances, SNHRIs are only mandated to implement domestic norms, such as the rights contained in a constitution, statute or charter. These domestic sources can be adopted at the national or sub-national level. Even where the mandate does not mention international sources, however, SNHRIs may still be involved in the domestication of international norms. For one thing, the domestic norms that SNHRIs are implementing may have a normative content that overlaps with international norms. In fact, this will almost always be the case, to a certain extent, in human rights law.<sup>41</sup> Sometimes, the overlap will be intentional, as the domestic norms will have been explicitly drafted so as to implement international treaty obligations. In other cases, the domestic rights norms may not be intentionally based on international human rights law, and may even predate the adoption of major human rights treaties, but nevertheless contains much the same normative content. Regardless of the intent of the domestic law's drafters, where substantive overlap exists, the SNHRI will be engaged in indirect domestication (to use Nollkaemper's terminology) of international law.<sup>42</sup> Indirect domestication may have somewhat different effects than direct implementation of international norms, however, as in many cases the jurisprudence developed by local courts will diverge significantly from the recommendations and comments of treaty bodies, even when both are dealing with an identical textual starting point.<sup>43</sup> Thus, SNHRIs that rely on this accumulated domestic precedent will be implementing a

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<sup>39</sup> Tara Melish et al, 'U.S. Human Rights Network's CERD Working Groups on Local Implementation & Treaty Obligations, A Report To The Committee on the Elimination of Racial Discrimination on U.S. CERD Obligations and Domestic Implementation' (February 2008) 10 <<http://www2.ohchr.org/english/bodies/cerd/docs/ngos/usa/USHRN7.doc>> (accessed 11 April 2015).

<sup>40</sup> *ibid* 11.

<sup>41</sup> Nollkaemper (n 1) 218.

<sup>42</sup> *ibid* 117.

<sup>43</sup> *ibid* 218-19. Other commentators, however, dismiss the substantive difference between direct and indirect implementation of international human rights law as unimportant, see Helena Pihlajasaari and Halvdan Skard, 'The Office of Ombudsman and Local and Regional Authorities: Explanatory Memorandum', Report for Council of Europe Congress for Local and Regional Authorities (2011), para 10.

different set of norms than SNHRIs that rely directly on international treaties (or on international actors' interpretation of treaty norms).

Direct implementation of international norms may also be possible, at least in some contexts. One way that international norms have been directly implemented is through an SNHRI's interpretation that a domestic law mandate necessarily includes international law because the relevant country has a monist tradition of treating international law as binding in domestic settings. This type of interpretation has been given to the mandate of *Personeros Municipales* (municipal ombudsmen) in Colombia. The *Personero Municipal's* mandate is defined by the rights included in the Colombian Constitution.<sup>44</sup> However, the Colombian Constitution takes a monist view of international human rights law, stating that ratified human rights treaties prevail in the internal legal order.<sup>45</sup> Thus, at least according to the guidance document produced by the Colombian Vice Presidential Office, *Personeros* must ensure that the content of all laws and administrative regulations are consistent with international human rights treaties.<sup>46</sup>

Even where SNHRIs are directly implementing domestic law, some SNHRIs use international norms as an interpretative tool to determine the content of the domestic norms. This interpretive strategy can be explicitly mandated, as is the case in the state of Victoria (Australia) Ombudsman, which fields complaints of state breaches of the Victoria Charter of Human Rights and Responsibilities, and is explicitly authorised to use international law to help interpret the Charter's provisions by the Charter itself.<sup>47</sup>

Sometimes, SNHRI mandates also contain references to international norms in their preambles, in which case the SNHRI can use these preambular references to justify the use of international norms as an interpretative tool. This can be accomplished either as a general matter of statutory interpretation or through explicit reference to the preamble in the statute's operative clauses. Thus, for example, the Montréal Ombudsman is mandated to 'if it is deemed necessary, refer to the Preamble' in interpreting the substance of the Montréal Charter of Rights and

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<sup>44</sup> Programa Presidencial de Derechos Humanos y DIH, Vicepresidencia de la República, 'El Personero Municipal y la Protección de los Derechos Humanos y de la Población Civil' (2009) 36 <[http://historico.derechoshumanos.gov.co/Prensa/Destacados/documents/2010/destacados/Guia\\_para\\_ElPersonero\\_2009.pdf](http://historico.derechoshumanos.gov.co/Prensa/Destacados/documents/2010/destacados/Guia_para_ElPersonero_2009.pdf)> (accessed 11 April 2015).

<sup>45</sup> Constitution of Colombia (1991), art 93.

<sup>46</sup> Programa Presidencial de Derechos Humanos y DIH (n 45) 37.

<sup>47</sup> Charter of Human Rights and Responsibilities Act 2006, No 43 (Victoria), art 32(2).

Responsibilities, and the Charter's preamble specifies that citizens possess rights contained in the UDHR and human rights treaties ratified by Canada.<sup>48</sup>

Finally, the use of international law as an interpretative tool can simply be initiated at the SNHRI's discretion. This was the case in Quebec, where the Quebec Human Rights Commission has inferred the relevance of international norms in its interpretations of domestic law due to its conclusion that the Province of Quebec could not properly legislate in a manner incompatible with its international commitments.<sup>49</sup> This technique is an illustration of what is known in the US as the 'Charming Betsy' principle, which holds that statutes should wherever possible be interpreted consistently with a country's international obligations.<sup>50</sup> As a practical matter, there may be little substantive difference in outcome in cases where international law is used to interpret domestic norms compared to cases of the direct implementation of international norms.

### 3.3. MANDATES THAT ARE SILENT OR UNCLEAR ON THE SOURCE OF HUMAN RIGHTS NORMS

Finally, some SNHRI mandates are silent or ambiguous as to the precise domestic or international source of the norms that they implement. For example, they may simply be charged with promoting "human rights" or investigating the "fairness" of governmental actions. This ambiguity or silence may leave room for the SNHRI to choose to invoke international norms. To give one example, the Seattle Human Rights Commission is mandated to provide advice 'in respect to matters affecting human rights and in furtherance thereof', without mention of what norms it should look to for guidance.<sup>51</sup> In its 2013 work plan, the Commission specified that it would work with an international human rights framework, including all treaties ratified by the US, treaties signed but not ratified, and US endorsed international human rights declarations.<sup>52</sup>

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<sup>48</sup> City of Montréal, Montréal Charter of Rights and Responsibilities (2005), art 34.

<sup>49</sup> Lysiane Clément-Major, 'International Human Rights Standards: The Quebec Perspective' (Ontario Human Rights Commission Conference: Advancing Economic, Social and Cultural Rights: Implementing International Human Rights Standards into the Legal Work of Canadian Human Rights Agencies, Toronto, Ontario, December 2000).

<sup>50</sup> *Murray v. The Schooner Charming Betsy*, 6 US 64, 118 (1804). Variations of this principle are a feature of human rights jurisprudence in many common law countries. See Melissa Waters, 'Creeping Monism: The Judicial Trend Toward Interpretative Incorporation of Human Rights Treaties' (2007) 107 Columbia L Rev 628, 660-66.

<sup>51</sup> Seattle Municipal Code (1997), 3.14.931.

<sup>52</sup> Seattle Human Rights Commission, 2013 Work Plan <[http://www.seattle.gov/Documents/Departments/SeattleHumanRightsCommission/SHRC\\_2013\\_workplan.pdf](http://www.seattle.gov/Documents/Departments/SeattleHumanRightsCommission/SHRC_2013_workplan.pdf)> (accessed 11 April 2015).

This expansive acceptance of international norms was prompted by a Seattle City Council resolution declaring Seattle to be a Human Rights City committed to respecting, protecting and fulfilling the full range of universal human rights.<sup>53</sup> Similarly, the Los Angeles County Human Relations Commission has embraced an international human rights framework despite the absence of a clear mandate in its organic legislation,<sup>54</sup> and even though the Ontario Human Rights Code (which was enacted in 1962) does not explicitly mandate the Ontario Human Rights Commission to employ international norms, the Commission itself has stated that it ‘relies upon international human rights treaties and Canadian human rights law to inform its research, policy development, outreach, advice, inquiries and interventions’.<sup>55</sup>

#### 4. HOW DO SNHRIS IMPLEMENT INTERNATIONAL HUMAN RIGHTS NORMS?

This section will attempt to clarify the different ways in which SNHRIs work toward the domestication of international human rights law. Fundamentally, there are five principle mechanisms by which SNHRIs can and do domesticate international norms (although others mechanisms may occasionally be used as well). First, those SNHRIs that function as quasi-judicial institutions can directly utilise international human rights law in their decisions when hearing petitions from individuals. Second, SNHRIs can promote compliance with international human rights law by governmental authorities, whether at the sub-national or national levels. Third, SNHRIs can focus on educating and raising awareness of international human rights within civil society. Fourth, SNHRIs can attempt to promote the use of international human rights law by the courts. Fifth, SNHRIs can employ international human rights norms as standards when carrying out human rights monitoring. These domestication mechanisms are broadly similar to those used by NHRIs.

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<sup>53</sup> City of Seattle Resolution 31420 (4 December 2012).

<sup>54</sup> County of Los Angeles Community and Senior Services, ‘For the First Time, State Department Asks State and Local Human Rights Agencies to Help US Comply with its Human Rights Treaty Obligations’ (26 May 2010) <[http://css.lacounty.gov/Data/Sites/1/FolderGalleries/Press/humanrightstreatypressrelease\\_5-26-10\\_rev\\_3\\_2\\_f\\_3.pdf](http://css.lacounty.gov/Data/Sites/1/FolderGalleries/Press/humanrightstreatypressrelease_5-26-10_rev_3_2_f_3.pdf)> (accessed 11 April 2015).

<sup>55</sup> Letter from Ontario Human Rights Commission to High Commissioner of Human Rights re OHCHR Thematic Study on Participation of Persons with Disabilities in Political and Public Life (14 October 2011) <<http://www.ohrc.on.ca/en/re-ohchr-thematic-study-participation-persons-disabilities-political-and-public-life>> (accessed 11 April 2015).

#### 4.1. QUASI-JUDICIAL USAGE OF INTERNATIONAL HUMAN RIGHTS NORMS

Many SNHRIs have a mandate to hear and rule upon petitions from individuals alleging human rights violations. This is always the case with ombudsman-style SNHRIs, who indeed often have a petition-handling mandate that goes beyond rights abuses to also encompass maladministration or corruption.<sup>56</sup> It is also true of many state and local anti-discrimination commissions in the US, Canada and Australia, although there are also some commissions with a purely advisory mandate. With ombudsman-type institutions, petitioners are generally required to allege that the human rights violations have been perpetrated by a sub-national governmental entity; however, many anti-discrimination commissions can also hear cases alleging discrimination by certain private sector actors.<sup>57</sup> As is the case with NHRIs, the decisions made by SNHRIs are generally not considered binding, and compliance with SNHRI recommendations varies by jurisdiction.

The use of international standards in the complaint-handling process is an element of many SNHRIs' work. Oftentimes, these international norms will be used in conjunction with analogous domestic norms so as to emphasise the universality and importance of these domestic norms, but in some cases international law can provide standards that go beyond those embraced elsewhere in domestic law. In some ways, however, the use of international standards to rule on individual complaints is likely to have relatively little impact in the broader society. The decisions of SNHRIs will only rarely be read or discussed by the general public. Even in common law jurisdictions, the precedential value of SNHRI decisions is likely to be slim (or none), especially outside of the SNHRI's jurisdiction. Nevertheless, over time, the enforcement of international norms may lead to their internalisation, help develop new rights jurisprudence,

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<sup>56</sup> Roy Gregory and Philip Giddings, 'The Ombudsman Institution: Growth and Development' in Roy Gregory and Philip Giddings' (eds) *Righting Wrongs: The Ombudsman in Six Continents* (IOS Press 2000) 3-4 (surveying ombudsman definitions, all of which involve a complaint-handling function).

<sup>57</sup> In the US, for example, state and local human rights commissions can typically investigate certain complaints of private sector discrimination, see Saunders and Bang (n 14) 1. Provincial Human Rights Commissions in Canada can hear complaints of discrimination by private sector entities regulated at the provincial level. Tina Piper and A Wayne MacKay, 'The Domestic Implementation of International Law: A Canadian Case Study', in Errol Mendes and Anik Lalonde-Roussy (eds) *Bridging the Global Divide on Human Rights* (Ashgate, 2003) 120-1.

and provide additional recourse where domestic law standards provide less protection than international rights law.<sup>58</sup>

#### 4.2. PROMOTION OF GOVERNMENT IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS NORMS

Another common task for SNHRIs is to promote government implementation of international human rights law. This can involve three conceptually different tasks. First, SNHRIs can pressure the (national or sub-national) executive to follow international human rights norms in their policy-making and policy-implementation roles. Thus, for example, the British Columbia Ombudsman has provided advice to the British Columbia provincial government on implementing the CRC into domestic policies,<sup>59</sup> while the *Conseil Lyonnais pour le Respect des Droits* has lobbied the French national government to maintain a Children's Ombudsman office in compliance with a recommendation of the UN Committee on the Rights of the Child.<sup>60</sup>

Second, SNHRIs can review pending (national or sub-national) legislation or promote new legislation with an eye towards ensuring consistency with international human rights norms. For example, Scotland has recommended that the UK (as well as the Scottish) government incorporate the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) into domestic laws<sup>61</sup> and the Jalisco (Mexico) Human Rights Commission urged the state of Jalisco to pass new legislation to implement CEDAW and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women.<sup>62</sup> The Río Negro (Argentina) *Defensor del Pueblo* has urged local law reform to ensure compliance

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<sup>58</sup> Gaylynn Burroughs, 'Realizing Domestic Social Justice through International Human Rights: Part I: More than an Incidental Effect on Foreign Affairs: Implementation of Human Rights by State and Local Governments' (2006) 30 NYU Rev L and Social Change 411, 421-22.

<sup>59</sup> Linda Reif, *The Ombudsman, Good Governance and International Human Rights System* (Martinus Nijhoff 2004) 111.

<sup>60</sup> Letter from Conseil Lyonnais pour le Respect des Droits to Prime Minister re la suppression de défenseur-e des droits de l'enfant, 5 November 2009 <<http://www.respect-des-droits.org/attachedfiles/download.php?id=1965,3221>> (accessed 11 April 2015).

<sup>61</sup> Scottish Human Rights Commission, 'Submission – Convention on the Elimination of Discrimination Against Women' (25 June 2013) <<http://www.scottishhumanrights.com/resources/policysubmissions/cedawnews2013>> (accessed 11 April 2015).

<sup>62</sup> 'CEDHJ pide al Congreso crear marco legal para proteger a las mujeres' *La Jornada Jalisco* (14 November 2012) <<http://www.lajornadajalisco.com.mx/2012/11/14/cedhj-pide-al-congreso-crear-marco-legal-para-proteger-a-las-mujeres/>> (accessed 11 April 2015).

with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Palermo Protocol).<sup>63</sup>

Third, SNHRIs can advocate for the ratification or acceptance of as-yet unaccepted international norms, as is commonly done by NHRIs, and indeed is explicitly mentioned in the Principles Relating to the Status of National Institutions (Paris Principles), a set of principles adopted by the UN General Assembly that have evolved into authoritative guidelines for NHRIs.<sup>64</sup> While this type of advocacy seems to play a much less prominent role in the work of SNHRIs than NHRIs, it is not always ignored. For example, the Mexico City Human Rights Commissioner has called upon the Mexican government to ratify the Optional Protocol to the ICESCR.<sup>65</sup> Similarly, the Saskatchewan Human Rights Commissions has requested the Canadian federal government to voice its support for the Declaration on the Rights of Indigenous Peoples.<sup>66</sup>

Although formal ratification of international human rights norms can only take place at the national level, the Salt Lake City Human Rights Commission and the San Francisco Commission on the Status of Women in the US have also urged local adherence to unratified treaty norms (CEDAW, in both cases).<sup>67</sup> While this type of sub-national human rights incorporation provides an interesting new sub-national entryway for international human rights norms, and has been lauded by many advocates, the potential also exists for conflict with national-level foreign policy control; as Martha Davis notes, ‘even these seemingly benign,

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<sup>63</sup> Defensor del Pueblo de Río Negro (Argentina) Resolución No 28 del 2011 (17 October 2011).

<sup>64</sup> Principles Relating to the Status and Functioning of National Institutions for the Promotion and Protection of Human Rights, UNGA Res 48/134 (20 Dec 1993) 48th Session (1993) UN Doc A/RES/ 48/141 para 3(c). While the Paris Principles were explicitly drafted with national institutions in mind, in some instances SNHRIs have nevertheless used them for guidance. See, eg, Bermuda Human Rights Commission, ‘2010 Annual Report’ (2011) 22; Ontario Human Rights Commission, ‘Reviewing Ontario’s Human Rights System’ (2005) 19; Estado de Chiapas (Mexico), Decreto no 233, Ley de la Comisión Estatal de los Derechos Humanos (19 Aug 2013).

<sup>65</sup> Comisión de Derechos Humanos del Distrito Federal de México, ‘Se pronuncia CDHDF porque el Estado mexicano ratifique el Protocolo Facultativo del Pacto Internacional de Derechos Económicos, Sociales y Culturales’ (14 October 2011) <<http://www.portalfio.org/inicio/noticias/item/7562-méxico-df-se-pronuncia-cdhdf-porque-el-estado-mexicano-ratifique-el-protocolo-facultativo-del-pacto-internacional-de-derechos-económicos-sociales-y-culturales.html>> (accessed 11 April 2015).

<sup>66</sup> Letter from Saskatchewan Human Rights Commission to Prime Minister Stephen Harper re Declaration on the Rights of Indigenous Peoples <[http://www.shrc.gov.sk.ca/media\\_room/corr-declar-indigenous.html](http://www.shrc.gov.sk.ca/media_room/corr-declar-indigenous.html)> (accessed 11 April 2015).

<sup>67</sup> Salt Lake City Human Rights Commission, ‘Discrimination Report’ (July 2009) 36; Columbia Law School Human Rights Institute, ‘Implementing Recommendations from the Universal Periodic Review: A Toolkit for State and Local Human Rights and Human Relations Commissions’ (2011) <[http://www.law.columbia.edu/ipimages/Human\\_Rights\\_Institute/UPR%20Toolkit.pdf](http://www.law.columbia.edu/ipimages/Human_Rights_Institute/UPR%20Toolkit.pdf)> (accessed 11 April 2015).

inwardly focused instances of domestic incorporation of human rights norms might be seen as impinging on federal foreign affairs prerogatives that have been expressed through inaction'.<sup>68</sup>

#### 4.3. PROMOTION OF INTERNATIONAL HUMAN RIGHTS NORMS IN CIVIL SOCIETY

SNHRIs can also promote international human rights norms among civil society or the general public. This is intended to ultimately create 'a culture of human rights so that every individual in society shares the values that are reflected in the international and national human rights legal framework'.<sup>69</sup> The promotion of international human rights norms in civil society should also have an indirect effect on government policies, as it encourages individuals to stand up for their rights against government actors and insist that governments respect their rights.<sup>70</sup> Promotional activities can include human rights training and education programs, as well as awareness-raising activities. These tasks can be carried out by the SNHRI itself, through its own publications and programs, or by funding and sponsoring events carried out by third parties, such as human rights symposia or film festivals. SNHRI activities to promote international norms are relatively common, and vary widely in their nature and effect. For example, in Pakistan, the Punjabi Ombudsman Office has translated the CRC into Urdu, which it distributed as a promotional brochure.<sup>71</sup> In the US, the Barnstable County (Massachusetts) Human Rights Commission organises a Human Rights Academy to bring together students from each Cape Cod high school to learn about the UDHR.<sup>72</sup> Of course, SNHRIs will vary in the extent to which they engage in civil society-oriented promotional activities; those that hew closely to the traditional ombudsman

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<sup>68</sup> Martha Davis, 'Upstairs, Downstairs: Subnational Incorporation of International Human Rights Law at the End of an Era' (2008) 77 Fordham L Rev 411, 421.

<sup>69</sup> OHCHR, 'National Human Rights Institutions: History, Principles, Roles, and Responsibilities' (2010) 57 <[http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI\\_en.pdf](http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf)> (accessed 11 April 2015).

<sup>70</sup> As Amnesty International states with respect to NHRIs, 'a population which is educated in their human rights is an asset to assist NHRIs to carry out their task'. Amnesty International, 'Amnesty International's Recommendations for Effective Protection and Promotion of Human Rights' AI INDEX: IOR 40/007/2001 (1 October 2001) 18.

<sup>71</sup> Office of the Ombudsman Punjab, 'How We Work' <<http://ombudsmanpunjab.gov.pk/children-complaint-office/how-we-work/>> (accessed 11 April 2015).

<sup>72</sup> Barnstable County Human Rights Commission, 'Human Rights Academy' <[http://www.bchumanservices.net/barnstable-county-human-rights-commission/#Human\\_Rights\\_Academy](http://www.bchumanservices.net/barnstable-county-human-rights-commission/#Human_Rights_Academy)> (accessed 11 April 2015).

model may be more focused on handling complaints, although even ombudsman-style SNHRIs increasingly consider human rights promotion as part of their mandate.<sup>73</sup>

Among the various avenues for promoting international norms, two particular techniques stand out as particularly common. The first of these is the display of international human rights treaties or the UDHR on the SNHRI webpage (or alternatively the provision of a link to the text of these norms at the OHCHR website or elsewhere). This is common, even among SNHRIs that are not specifically mandated to implement international human rights norms.<sup>74</sup> Some SNHRIs go a step further by displaying or reporting on recommendations from international treaty bodies or the Universal Periodic Review process.<sup>75</sup> Webpage awareness-raising has obvious appeal for SNHRIs that often lack the budget and staffing to engage more directly with the community. It also has its disadvantages, however, most notably its ineffectiveness in reaching those people (often the most vulnerable) who lack internet access or awareness, and its fundamentally passive nature; in order to view the treaties or UDHR, members of the public must first come to the SNHRI's website and click on the relevant link.

Another commonly used technique is for the SNHRI to take advantage of one of the various 'days' set aside by the UN General Assembly to promote the relevant international norm, either through the issue of a press release or through sponsoring other awareness-raising activities such as a public seminar or celebration. The most commonly celebrated day is probably December 10, known as 'Human Rights Day', which commemorates the adoption of the

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<sup>73</sup> See, eg, Linda Reif, 'Enhancing the Role of Ombudsman Institutions in the Protection and Promotion of the Rights of Persons with Disabilities' (Speaking Truth to Power – the Role of the Ombudsman in the 21st century conference, Wellington, New Zealand, 14 November 2012) 19.

<sup>74</sup> For example, these SNHRIs display the UDHR on their websites: Defensor del Pueblo de Río Negro (Argentina) <<http://www.defensoriarionegro.gov.ar/drn/orden-juridico/>> (accessed 11 April 2015); Bermuda Human Rights Commission <<http://www.gov.bm/portal/server.pt?open=512&objID=495&PageID=0&cached=true&mode=2>> (accessed 11 April 2015); The following SNHRI websites display the text of international treaties: Victoria (Australia) Human Rights and Equal Opportunities Commission <<http://www.humanrightscommission.vic.gov.au/index.php/the-law/international-law>> (accessed 11 April 2015); Northern Ireland Human Rights Commission <<http://www.nihrc.org/index.php/human-rights-law/un-conventions-and-treaties>> (accessed 11 April 2015).

<sup>75</sup> Scottish Human Rights Commission, 'Universal Periodic Review' <<http://www.scottishhumanrights.com/international/uprinternational>> (accessed 11 April 2015); Victoria (Australia) Human Rights and Equal Opportunities Commission, 'Media Statement on the UN Human Rights Committee findings on the police assault of Corinna Horvath in 1996' <<http://www.humanrightscommission.vic.gov.au/index.php/news-and-events/media-releases/item/802-media-statement-on-the-unhcr-findings-on-the-police-assault-of-corinna-horvath-in-1996>> (accessed 11 April 2015).

UDHR.<sup>76</sup> For example, the International Association of Official Human Rights Agencies (IAOHRA), an association of US and Canadian SNHRIs, adopted a resolution, whereby members committed to ‘utilize Human Rights Day [...] to raise awareness of the UDHR and encourage residents to take action to support its principles’<sup>77</sup> and has specifically encouraged its members to commemorate Human Rights Day through the use of proclamations, op-eds, community events and educational e-mails.<sup>78</sup> Other days commonly commemorated by SNHRIs with the promotion of international norms include March 8 (International Women’s Day); March 21 (International Day for the Elimination of Racial Discrimination), and December 3 (International Day of Persons with Disabilities).<sup>79</sup>

#### 4.4. PROMOTION OF THE USE OF INTERNATIONAL NORMS BY THE COURTS

In addition to promoting international norms to government agencies and civil society, some SNHRIs have attempted to promote the use of international norms by the courts. One way that this has been accomplished has been through the filing of *amicus curiae* briefs in ongoing cases, urging compliance with international norms. For example, the Mexico City Human Rights Commission submitted an *amicus* brief to the federal Supreme Court, that was intended to ensure that the Court’s jurisprudence complied with the requirements of the Convention on the Rights of

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<sup>76</sup> The Maharashtra (India) Human Rights Commission held a public Human Rights Day program publicising the ICCPR and UDHR. Maharashtra Human Rights Commission, ‘Celebration of International Human Rights day on 10th December, 2012’ (December 2012) <<http://www.mschr.gov.in/downloads/10%20Dec%202012.pdf>> (accessed 11 April 2015); Amherst (Massachusetts) Human Rights Commission held a community reading of the UDHR on Human Rights Day. Amherst Human Rights Commission, ‘Celebration of Universal Declaration of Human Rights’ (10 December 2013) <<http://amhersthumanrights.blogspot.kr/2013/12/celebration-of-universal-declaration-of.html>> (accessed 11 April 2015).

<sup>77</sup> IAOHRA, Resolution no 1, ‘International Human Rights’ (31 August 2010).

<sup>78</sup> Letter from Risa Kaufman and Leon Russell to IAOHRA Members re Celebrating Human Rights Day (November 2009) <<http://www.iaohra.org/storage/November%202009%20-Celebrating%20Human%20Rights%20Day.pdf>> (accessed 11 April 2015).

<sup>79</sup> For example, the Kaliningrad Human Rights Ombudsman issued a news release highlighting and linking to the CPD, see Commissioner for Human Rights in the Kaliningrad Region, ‘International Day for the Rights of the Disabled’ <<http://ombudsman39.ru/news/mezhdunarodny-deny-boryb-za-prava-invalidov>> (accessed 11 April 2015). In Argentina, the Defensora del Pueblo de Río Negro published an article quoting CEDAW in the local newspaper on International Women’s Day, see Nadina Díaz, ‘Día Internacional de la Mujer’ *Diario El Cordillerano* (8 March 2014) <<http://www.elcordillerano.com.ar/index.php/notas-de-opinion/columnas-abiertas/item/11621-dia-internacional-de-la-mujer>> (accessed 11 April 2015). In the US, the IAOHRA distributes a resource packet to member SNHRIs to promote CERD compliance on the International Day for the Elimination of Racial Discrimination, see IAOHRA, International Day for the Elimination of Racial Discrimination <<http://www.iaohra.org/international-day/>> (accessed 11 April 2015).

Persons with Disabilities (CPD).<sup>80</sup> The City of Buenos Aires *Defensor del Pueblo* urged the Buenos Aires *Tribunal Superior de Justicia* to use the ICESCR and other relevant international norms in interpreting the right to housing in Argentina.<sup>81</sup> In Canada, the Saskatchewan, Ontario and Alberta Human Rights Commissions filed an *amicus* brief in the Supreme Court of Canada arguing that the British Columbia Code should be interpreted consistently with the CPD.<sup>82</sup>

Some commission-type SNHRIs can also promote the use of international norms as litigants. This type of litigation can take place either in specialised human rights tribunals (where, for example, the Quebec Human Rights Commission has regularly advocated the use of international human rights law<sup>83</sup>), administrative courts,<sup>84</sup> or in the general court system.<sup>85</sup> Of course, the downside to this method of human rights promotion is that participating in litigation as a party can be expensive and time-consuming, so such actions are likely to be rare except in jurisdictions where SNHRI appearances before human rights tribunals or appeals to the courts are expressly anticipated.

Finally, SNHRIs may in some cases promote the use of international norms by the courts outside of a litigation context. For example, the Mexico City Human Rights Commission recently issued a press release criticising the Mexican Supreme Court's failure to cite

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<sup>80</sup> Comisión de Derechos Humanos del Distrito Federal, 'La CFHDF pide a la SCJN observar los estándares internacionales que obligan a México en materia de capacidad jurídica' (9 July 2013) <<http://www.portalfio.org/inicio/noticias/item/12771-mexico-df-la-cdhdf-pide-a-la-scjn-observar-los-estandares-internacionales-que-obligan-a-mexico-en-materia-de-capacidad-juridica.html>> (accessed 11 April 2015).

<sup>81</sup> Defensora del Pueblo de la Ciudad Autónoma de Buenos Aires, *Amicus Curiae* Brief, Expte N 6153/08 Ministerio Público – Asesoría General Tutelar de la Ciudad Autónoma de Buenos Aires c/ GCBA s/ acción declarativa de inconstitucionalidad (2009).

<sup>82</sup> Joint Intervention of Saskatchewan Human Rights Commission, Ontario Human Rights Commission and Alberta Human Rights Commission in Frederick Moore on behalf of Jeffrey P. Moore v Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Education, et al, Court File Nos 34040 & 34041 (Supreme Ct Canada, 2012).

<sup>83</sup> Clément-Major (n 50).

<sup>84</sup> eg *Re Brisbane Housing Company Ltd (No 3)* [2012] QCAT 529 (16 October 2012) [Queensland] para 23 (Queensland Anti-Discrimination Commission highlighting rights to adequate standard of living, food, clothing and housing in ICESCR and CPD).

<sup>85</sup> eg *Yukon (Human Rights Commission) v. Yukon Order of Pioneers, Dawson Lodge #1*, 1993 CanLII 3415 (YK CA).

international law.<sup>86</sup> Such overt criticism of the courts is rare, however, and even NHRIs have been reluctant to directly criticise court decisions.<sup>87</sup>

#### 4.5. USE OF INTERNATIONAL HUMAN RIGHTS NORMS AS MONITORING STANDARDS

The final domestication mechanism commonly used by SNHRIs is the use of international norms as standards when monitoring a particular situation, policy or law. For example, the Puebla Human Rights Commission conducted an analysis of local legislative compliance with the full slate of human rights treaties to which Mexico is a party.<sup>88</sup> Other reviews focus on a single treaty. Thus, the *Andaluz Defensor del Pueblo* reviewed the compliance of Andaluz autonomous legislation with the CPD,<sup>89</sup> the Salt Lake City Human Rights Commission reviewed the status of women while using CEDAW as a guiding document,<sup>90</sup> and both the Madrid *Defensor del Menor* and the Flemish Children's Rights Commission have monitored their jurisdiction's implementation of the CRC.<sup>91</sup> While SNHRI monitoring may not directly lead to the implementation of international norms, it can have an indirect effect; by measuring rights under international norms, the SNHRI is providing an incentive for the government (and other actors, where relevant) to meet those norms, in order to show improvement.

Although many monitoring reports are aimed at domestic actors, some SNHRIs have monitored local conditions primarily in order to convey their findings to international actors. In the US, Belgium, Australia, the UK, Mexico and Hong Kong, for example, SNHRIs have

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<sup>86</sup> Comisión de Derechos Humanos del Distrito Federal, 'Prevalen normas locales sobre Tratados Internacionales en materia de DDHH de las personas con discapacidad' (20 February 2012) <<http://www.portalfio.org/inicio/noticias/item/8915-méxico-df-prevalen-normas-locales-sobre-tratados-internacionales-en-materia-de-ddhh-de-las-personas-con-discapacidad.html>> (accessed 11 April 2015).

<sup>87</sup> Andrew Wolman, 'National Human Rights Institutions and the Courts in the Asia-Pacific Region' (2013) 19 *Asia Pacific L Rev* 237, 247.

<sup>88</sup> Comisión Estatal de Defensa de los Derechos Humanos de Puebla, 'Puebla a la vanguardia en el estudio de la armonización legislativa local y tratados internacionales' (22 August 2012) <<http://www.portalfio.org/inicio/noticias/item/10443-puebla-puebla-a-la-vanguardia-en-el-estudio-de-la-armonización-legislativa-local-y-tratados-internacionales.html>> (accessed 11 April 2015).

<sup>89</sup> Defensor del Pueblo Andaluz, Resolución formulada en la queja 11/6034 dirigida a Consejería de la Presidencia. Relativa a: Adecuación de la normativa autonómica a la convención internacional sobre los derechos de las personas con discapacidad (21 March 2012).

<sup>90</sup> Salt Lake City Government, 'Mayor, Human Rights Commission to Release Report on Women in Salt Lake City' (28 May 2013) <<http://www.ci.slc.ut.us/mayor-human-rights-commission-release-report-women-salt-lake-city>> (accessed 11 April 2015).

<sup>91</sup> Reif (n 60) 322.

contributed their findings to periodic reports for treaty bodies and the Universal Periodic Review (as submitted by either the national government or NHRI or, in the case of Hong Kong and certain Mexican states, as independent ‘alternative reports’).<sup>92</sup> Of particular interest is the monitoring role that SNHRIs can play as independent mechanisms under the CPD and National Preventive Mechanisms under the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). While most States have formally nominated NHRIs to play those roles, both treaties state that parties can appoint multiple bodies to fulfil these roles, and in fact a few States have officially included SNHRIs among their bodies: the UK designated the Equality and Human Rights Commission, the Scottish Human Rights Commission, the Northern Ireland Human Rights Commission, and the Equality Commission of Northern Ireland as CPD independent mechanisms,<sup>93</sup> while Denmark has designated Greenland’s Ombudsperson as an NPM and the UK has designated the Scottish Human Rights Commission and Children’s Commissioner for England (among several other institutions) as NPMs.<sup>94</sup> In Brazil and Argentina, several SNHRIs have been granted monitoring rights as ‘local preventive mechanisms’ that then coordinate their findings with the national-level NPM.<sup>95</sup> In Catalunya, the autonomous regional government has designated the *Sindic de Greuges* as a preventive mechanism, although this designation has not been officially accepted by the Spanish central government.<sup>96</sup>

#### 4.6. INWARD AND OUTWARD DOMESTICATION OF INTERNATIONAL NORMS

SNHRI monitoring actions and SNHRI promotion of human rights norms in civil society are generally inward-oriented, meaning that the SNHRI will be monitoring rights within its jurisdiction (whether for the benefit of local or extra-jurisdictional actors) or promoting human

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<sup>92</sup> Andrew Wolman, ‘Welcoming a New International Human Rights Actor? The Participation of Subnational Human Rights Institutions at the United Nations’ (2014) 20 *Global Governance* 437, 442-43.

<sup>93</sup> ICC and Canadian Human Rights Commission, ‘Survey of National Human Rights Institutions on Article 33.2 of the Convention on the Rights of Persons with Disabilities’ (August 2011) 53-54.

<sup>94</sup> OHCHR, ‘OPCAT Subcommittee on Prevention of Torture: National Preventive Mechanisms’ <<http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx>> (accessed 11 April 2015).

<sup>95</sup> Association for the Prevention of Torture, ‘Local Preventive Mechanism’ <<http://www.apt.ch/en/opcat-database/?kid=39>> (accessed 11 April 2015).

<sup>96</sup> Act No 24/2009 of 23 December 2009 on the Síndic de Greuges (Generalitat de Catalunya), arts 68-77.

rights within its jurisdiction.<sup>97</sup> This is also the case for SNHRIs in their complaints handling function, at least in the geographic sense; there are (exceptionally) some SNHRIs that can review the actions of national governmental entities that take place within the SNHRI's sub-national jurisdiction.<sup>98</sup> SNHRI promotion of international norms in the courts and SNHRI promotion of international norms to governments, on the other hand, can sometimes be outward-oriented, intended to influence jurisdictions outside of the SNHRI's home. Usually, such outward-oriented actions will be aimed at influencing the national government or courts.<sup>99</sup> There are also instances of cooperation between different SNHRIs within a nation to jointly pressure their national government or courts to adopt or follow international norms.<sup>100</sup> It is, of course, difficult to evaluate the impact of such outward interventions. However, they do represent a conceptually interesting lever in international human rights governance, with sub-national governmental actors pressuring national governmental actors to apply international norms. This lever has rarely been recognised by international actors who are more used to promoting their norms directly to national governments.

There have also been occasional attempts by SNHRIs to exercise an influence on the human rights situation in foreign nations. In Eugene, Oregon, for example, the local human rights commission drafted a letter condemning Israeli actions in the Gaza flotilla raid, but

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<sup>97</sup> This distinction is adapted for the sub-national context from an analogous distinction posited by Gaylynn Burroughs, who stated that inward-looking strategy 'focuses on promoting the rights of people within the United States, while the outward-looking strategy focuses on promoting human rights in other countries'. Burroughs (n 59) 414.

<sup>98</sup> Helena Pihlajasaari and Halvdan Skard (n 43) para 17(b).

<sup>99</sup> For example, the Val d'Aosta Ombudsman publicly lent his support to pending national legislation that would bring Italian law into compliance with the CAT and OPCAT. 'Reato di tortura, il Difensore civico valdostano aderisce alla proposta di legge' *Aosta Sera* (23 January 2013) <<http://www.aostasera.it/articoli/2013/01/23/25550/reato-di-tortura-il-difensore-civico-valdostano-aderisce-alla-proposta-di-legge>> (accessed 11 April 2015). The Mexico City Human Rights Commission has urged the Mexican federal government to comply with the CRC. Comisión de Derechos Humanos del Distrito Federal de México, 'Exhorta CDHDF al Estado mexicano a atender el mandato de la Convención sobre los Derechos del Niño' (29 February 2012) <<http://www.portalfio.org/inicio/noticias/item/8996-mexico-df-exhorta-cdhdf-al-estado-mexicano-a-atender-el-mandato-de-la-convención-sobre-los-derechos-del-niño.html>> (accessed 11 April 2015).

<sup>100</sup> For example, the Canadian Association of Statutory Human Rights Agencies ('CASHRA') pressed the Canadian federal government to establish an independent monitoring mechanism in accordance with the CPD, see CASHRA, 'Statement by the Canadian Association of Statutory Human Rights Agencies on Canada's First Report Under the Convention on the Rights of Persons with Disabilities' (3 April 2014) <<http://cashra.ca/news/statement-by-cashra-2014.html>> (accessed 11 April 2015).

suspended work on a resolution after protest from local Jewish groups.<sup>101</sup> Local human rights commissions in the US have occasionally gone a step further and called on their local governments to divest from investments in a human rights abusing country; for example, in 2010 the human rights commission in St. Louis Park, Minnesota, passed a resolution calling on the city to divest itself of investments in companies or nations ‘whose operations are complicit in aiding the government of Sudan or of the government of any nation that is supporting genocide’.<sup>102</sup> Aside from substantive objections, these resolutions have sometimes been challenged by members of the public who feel that a human rights commission should focus its attention on local issues rather than international affairs.<sup>103</sup> This type of local activism has also sparked criticism from those who feel that a nation should speak with one voice at the international level.<sup>104</sup> It should be emphasised, however, that such internationalist interventions by SNHRIs are rare; even NHRIs have so far proven extremely reluctant to express their views about human rights in foreign countries.<sup>105</sup>

## 5. IMPLICATIONS OF SNHRI DOMESTICATION OF INTERNATIONAL HUMAN RIGHTS NORMS

Having shown that SNHRIs can, and do, domesticate international human rights norms in a variety of ways, this section will examine the implications of SNHRI implementation of international norms. In particular, it addresses the question of whether SNHRI domestication of international norms adds any value to the existing human rights regime, given that domestication is already commonly carried out by NHRIs, courts, and other actors. It argues that SNHRI domestication of international norms adds to the existing domestication work of NHRIs in three principle ways. First, by providing sub-national actors with a greater opportunity to utilise

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<sup>101</sup> Ron Kampeas, ‘Oregon Rights Panel Coaxed to Table Resolution Slamming Israel’ *JTA* (19 January 2011), <<http://www.jta.org/2011/01/19/news-opinion/united-states/oregon-rights-panel-coaxed-to-table-resolution-slamming-israel>> (accessed 11 April 2015).

<sup>102</sup> Mary Jane Smetanka, ‘Worldview in the Suburbs? It’s on the Agenda’ *Minneapolis Star Tribune* (15 February 2010) <[http://www.startribune.com/templates/Print\\_This\\_Story?sid=84423117](http://www.startribune.com/templates/Print_This_Story?sid=84423117)> (accessed 11 April 2015).

<sup>103</sup> *ibid.*

<sup>104</sup> eg Lucien Dhooge, ‘Darfur, State Divestment Initiatives, and the Commerce Clause’ (2007) 32 *North Carolina J of Intl L & Commercial Regulation* 391.

<sup>105</sup> Chris Sidoti, ‘National Human Rights Institutions and the International Human Rights System’ in Ryan Goodman and Thomas Pegram (eds) *Human Rights, State Compliance, and Social Change* (CUP 2012) 115.

international norms, SNHRI domestication allows sub-national actors to influence the interpretation of these norms, and potentially implement them more effectively than can be done at the national level. Second, SNHRIs can provide an independent domestication mechanism in countries where NHRIs or other independent actors are unable or unwilling to effectively domesticate international norms. Third, SNHRI domestication allows for the direct application of international norms to restrict sub-national government actions, a task which can sometimes be difficult or impossible for NHRIs and other actors to replicate due to division of powers concerns.

#### 5.1. INCREASED SUB-NATIONAL ROLE IN INTERPRETATION AND IMPLEMENTATION OF INTERNATIONAL NORMS

First, and most obviously, the domestication of international norms by SNHRIs brings the domestication process down to a lower level of government, closer to the people, consistent with the international law principle of subsidiarity.<sup>106</sup> This will have implications on both the way that international human rights law is interpreted, and on its effectiveness. From an interpretive standpoint, there are certain international human rights principles that are likely to be systematically under-emphasised at the national or international level, such as indigenous rights, minority rights, or the right to self-determination, because the main proponents of these rights rarely hold power at the national level. On the other hand, these rights are more likely to be embraced and given teeth by SNHRIs, at least in localities with large indigenous or national minority populations, or where self-determination is widely valued. Thus, for example, in February 2009 the Navajo Nation Human Rights Commission adopted the UN Declaration on

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<sup>106</sup> Risa Kaufman, “By Some Other Means”: Considering the Executive’s Role in Fostering Subnational Human Rights Compliance’ (2012) 33 *Cardozo L Rev* 1971, 2002. The principle of subsidiarity can be characterised as holding that ‘[w]here a lower (political or social) level can effectively undertake a task, the higher level has to abstain from acting’. Markus Benzing, ‘Sovereignty and the Responsibility to Protect in International Criminal Law’ in Doris König et al (eds) *International Law Today: New Challenges Today and the Need for Reform?* (Springer 2008) 28. The principle is most prominently in European Union law due to its inclusion in the Maastricht Treaty; while its relevance in other contexts is hotly contested, subsidiarity has been proposed by some as a structural principle of international human rights law, see Paolo Carozza, ‘Subsidiarity as a Structural Principle of International Human Rights Law’ (2003) 97 *Amer J Intl L* 38.

the Rights of Indigenous Peoples as a set of minimum standards in the Commission's work, at a time when the Declaration had still not been endorsed by the US at the national level.<sup>107</sup>

More generally, sub-national actors may contribute to the elaboration of rights interpretations that are more grounded in local cultures and traditions. This process has been theorised most thoroughly in Sally Merry's work on the 'vernacularisation' of human rights, which Merry defines as the process whereby human rights are 'translated into local terms and situated within local contexts of power and meaning'.<sup>108</sup> Translation refers to the process of adjusting the language and structure of appropriated norms, programs or interventions to local circumstances. Through the vernacularisation process, new ideas are framed in ways that resonate with pre-existing ideas of justice and order, while preserving their essential attributes and potential to transform unequal or unjust local social relations.<sup>109</sup> Merry places particular emphasis on the critical importance of the identity of the intermediary individuals and institutions that can act as 'translators'.<sup>110</sup> These intermediaries, who 'straddle the global and the local', reframe local grievances by portraying them as human rights violations, and also reframe international norms in locally relevant terms.<sup>111</sup>

SNHRIs are in many situations likely to act as translators. They will generally have closer links to local traditions and cultures than their counterparts in national capitals. They will also often possess the legitimacy that accompanies local self-government in the eyes of the governed. According to Merry's theory, SNHRIs are likely to make real advances in expanding the human rights movement to new areas and increasing the likelihood of local disputes being

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<sup>107</sup> Navajo Nation Human Rights Commission, 'NNHRC Welcomes the 5<sup>th</sup> Anniversary of the U.N. Declaration on the Right of Indigenous Peoples' (13 September 2012) <[http://www.nnhc.navajonnsn.gov/PressReleases/2012/Sep/091312\\_NNHRC\\_welcomes\\_the\\_5th\\_Anniversary\\_of\\_the\\_U.N.\\_Declaration\\_on\\_the\\_Rights\\_on\\_Indigenous\\_Peoples.pdf](http://www.nnhc.navajonnsn.gov/PressReleases/2012/Sep/091312_NNHRC_welcomes_the_5th_Anniversary_of_the_U.N._Declaration_on_the_Rights_on_Indigenous_Peoples.pdf)> (accessed 11 April 2015). More recently, President Obama has expressed his support for the Declaration. See US Department of State, 'Declaration of U.S. Support for the Declaration on the Rights of Indigenous Peoples' (16 December 2010) <<http://www.state.gov/documents/organization/184099.pdf>> (accessed 11 April 2015).

<sup>108</sup> Merry (n 3) 1.

<sup>109</sup> Peggy Levitt and Sally Engle Merry, 'Making Women's Human Rights in the Vernacular: Navigating the Culture/Rights Divide' in Dorothy Hodgson (ed) *Gender at the Limit of Rights* (U Penn Press, 2010) 88.

<sup>110</sup> According to Merry, 'the extent to which human rights laws exert an impact at the grass roots depends on the work of these translators'. Sally Engle Merry, 'New Legal Realism and the Ethnography of Transnational Law' (2006) 31 *Law & Soc. Inquiry* 975, 992-93.

<sup>111</sup> Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006) 108 *American Anthropologist* 38, 39; Noha Shawk, 'Global Norms, Local Implementation-How are Global Norms Translated into Local Practice?' (2011) *Globality Stud J* <<https://gsj.stonybrook.edu/article/global-norms-local-implementation-how-are-global-norms-translated-into-local-practice/>> (accessed 11 April 2015).

viewed in rights terms. When translated into the local vernacular, however, these rights will be interpreted and implemented differently in different locales. Some might worry that this could detract from the universality of human rights or lead to the fragmentation of international law.<sup>112</sup> After all, the international human rights system is arguably premised on a system of shared values, and variability in the meaning of particular rights can complicate human rights advocacy.<sup>113</sup> A certain amount of fragmentation, however is not necessarily a negative result; by losing some of its unitary meaning, international law may gain domestic relevance.<sup>114</sup> Some would also argue that a degree of competition among human rights norm-entrepreneurs leads to greater opportunities for incremental positive developments in the law.<sup>115</sup> In any case, the unitary nature of international human rights law certainly does not preclude the implementation of those norms in a manner that is consistent with local culture and practices, and indeed is likely strengthened by empowering a greater number of voices.<sup>116</sup>

In terms of effectiveness, many commentators claim that by moving human rights protection and promotion down to a level closer to the people being affected, the domestication of human rights is likely to be more successful and influential.<sup>117</sup> By this logic, SNHRI implementation of international norms will, all else being equal, be more successful than human rights implementation by NHRIs and other national-level actors. A number of different reasons have been proposed to explain the greater effectiveness of subnational actors. Geographical proximity to the rights bearer may increase the accessibility and availability of human rights services.<sup>118</sup> SNHRI effectiveness may also be furthered by their greater social proximity to the local population; according to one commentator, '[n]ot only is the access easier, the [regional or local] ombudsman is also more acquainted with the regional and local authorities, localities,

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<sup>112</sup> Nollkaemper (n 1) 221-22.

<sup>113</sup> Douglas Lee Donoho, 'Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights' (2001) 15 *Emory Intl L Rev* 391, 412.

<sup>114</sup> Nollkaemper (n 1) 223.

<sup>115</sup> Allen Buchanan, *The Heart of Human Rights* (OUP 2013) 211.

<sup>116</sup> Calos Iván Fuentes, René Provost and Samuel Walker, 'E Pluribus Unum – Bhinneka Tunggal Ika? Universal Human Rights and the Fragmentation of International Law' in René Provost and Colleen Sheppard (eds) *Dialogues on Human Rights and Legal Pluralism* 55 (Springer 2013).

<sup>117</sup> Upendra Baxi, *The Future of Human Rights* (OUP 2002) 101; Kaufman (n 107) 2002; Andrew Schapper, *From the Global to the Local: How International Rights Reach Bangladesh's Children* (Routledge 2013) 175.

<sup>118</sup> Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 'Recommendation on systematic work for implementing human rights at the national level' *CommDH(2009)3* (18 February 2009) para 7.2.

problems and customs'.<sup>119</sup> At least in some countries, people may be more willing to adopt norms that have been introduced by members of their community rather than 'faceless bureaucrats' in Geneva (or even in their national capitals).<sup>120</sup> Yet another explanation is that moving human rights implementation closer to the people allows the public to better see the beneficial aspects of human rights, and especially economic and social rights, which in turn leads people to increase support of those rights.<sup>121</sup>

## 5.2. ALTERNATIVE ENTRYWAY FOR INTERNATIONAL NORMS

One of the general benefits of decentralised or federal governmental structures is that they provide multiple paths for human rights norms to gain acceptance.<sup>122</sup> This principle has perhaps been studied (and debated) most intently in the US, where the civil rights movement once met with greater success at the federal level, but contemporary movements to legalise gay marriage or expand access to health care have enjoyed more support at the state level (in certain states).<sup>123</sup> The domestication of international norms by SNHRIs allows the same principle to play out, by providing an additional entryway for international law. This additional entryway will be of particular significance in three particular scenarios. First, when there is no NHRI in a country, then SNHRIs can stand as the only independent governmental actors actively promoting international human rights norms or – in countries with strongly dualist legal systems – using international human rights norms to resolve disputes. This is most clearly the case today in the US, Hong Kong, and Italy.

Second, the domestication of international norms by SNHRIs provides for an important alternative entryway in cases where the NHRI is considered weak or lacking in independence. This is perhaps most striking in the case of Mexico, where the Mexican National Human Rights Commission has been widely viewed as weak and lacking in independence, while many of the

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<sup>119</sup> Felix Dünser, 'Regional ombudsmen: An institution to defend citizens' rights,' Report for the Congress of Local and Regional Authorities of the Council of Europe (2004) 7. See also Jesse Newmark, 'Legal Aid Affairs: Collaborating with Local Governments on the Side' (2012) 21 Boston U Public Interest L J 195, 204.

<sup>120</sup> Burroughs (n 59) 420.

<sup>121</sup> Wexler (n 5) 625-26.

<sup>122</sup> Yash Ghai, 'The Structure of Human Rights in Federations' in Kamal Hossain et al (eds) *Human Rights Commissions and Ombudsman Offices: National Experiences* (Kluwer 2000) 51.

<sup>123</sup> Robert Schapiro, 'Not Old or Borrowed: The Truly New Blue Federalism' (2009) 3 Harvard L & Policy Rev 33.

sub-national human rights commissions (and in particular the Mexico City Human Rights Commission) play an increasingly prominent role in promoting international norms.<sup>124</sup> In Indonesia, also, there is some evidence that local SNHRIs such as the Yogyakarta Ombudsman are institutionally stronger than the national ombudsman.<sup>125</sup> Of course, in many other situations, NHRIs will be institutionally stronger or more independent than their sub-national counterparts.

Third, SNHRI domestication can take on a more significant role where local populations wish to fully embrace the human rights movement, but national governments prove unwilling to accept all international norms.<sup>126</sup> In these cases, SNHRIs can move farther than the national government by explicitly embracing the UDHR, treaties that are unratified at the national level, or soft law norms. The movement by some US local human rights commissions to embrace CEDAW or the UDHR is one example of this phenomenon, but in fact the desire by local entities to go beyond their home nation in protecting human rights is more widespread. The Human Rights Cities movement has been one vehicle for effectuating this around the world at the municipal level, through a number of measures, centred on civil society actions but also including the establishment of SNHRIs in some cases. By embracing norms that are not accepted at the national level, local jurisdictions can gain reputations as human rights-friendly jurisdictions (with potentially beneficial economic consequences)<sup>127</sup> and act as beachheads for the norms to eventually become more established elsewhere in the country.<sup>128</sup>

### 5.3. LIMITATION ON DISCRETION OF SUB-NATIONAL ACTORS

From a federalist perspective, the effects of SNHRIs are complex. As described above, their establishment can, in a narrow sense, give more power to local entities to embrace new norms and interpret norms in innovative and locally relevant ways. In a broader sense, however,

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<sup>124</sup> On the weakness of the Mexican Human Rights Commission, see Jodi Finkel, 'Explaining the Failure of Mexico's National Commission of Human Rights (Ombudsman's Office) after Democratization: Elections, Incentives, and Accountability in the Mexican Senate' (2012) 13 Human Rights Rev 481, 483.

<sup>125</sup> Melissa Crouch, 'The Yogyakarta Local Ombudsman: Promoting Good Governance through Local Support' (2007) 2 Asian J of Comparative L 1, 28-9.

<sup>126</sup> Wexler (n 5) 615.

<sup>127</sup> David Law, 'Globalization and the Future of Constitutional Rights' (2008) 102 Northwestern U L Rev 1277, 1322; Newmark (n 121) 203-04.

<sup>128</sup> Newmark (n 121) 253. This would be consistent with Brandeis' famous characterisation of a federal system as a laboratory for democracy. *New State Ice Co. v Liebmann*, 285 US 262, 311 (1932) (J Brandeis, dissenting).

SNHRIs cabin the power of sub-national governments to develop and implement their own policies, by holding sub-national governments to human rights standards developed and adopted at the international level (and, usually, ratified at the national level). From an international law perspective, sub-national compliance with international human rights norms is of course entirely desirable, as it is undisputed that international human rights law applies equally to all levels of government, whether national or sub-national.<sup>129</sup> In practice, the importance of SNHRIs in holding sub-national governments to account for breaches of international human rights law is magnified by the fact that international and domestic NGOs tend to underemphasise local government advocacy (as do NHRIs), while paying greater attention to national or international level affairs.<sup>130</sup>

The direct use of international norms by SNHRIs to restrict and influence the actions of sub-national governments is of particular importance in federal States where strong traditions of local and regional self-government makes it difficult for the national government or an NHRI to directly enforce international norms that constrain sub-national governmental actors.<sup>131</sup> While the challenge of how to implement international norms in federal States has been most widely noted in the US in the wake of the International Court of Justice's *Avena* decision,<sup>132</sup> it has also been a major issue in Australia and elsewhere.<sup>133</sup> Although sub-national governments are involved in all areas of public affairs, in many countries they have particular influence in issues of housing, education, water supply, the environment, and social welfare, meaning that SNHRI implementation of international norms of social and economic rights can be especially meaningful.<sup>134</sup> Globally, the challenge of ensuring sub-national governmental compliance with

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<sup>129</sup> International Law Commission, Draft Articles on State Responsibility, UN Doc A/CN.4/L.602/Rev.1, art 4(1) (26 July 2001); *Assanidze v Georgia*, ECtHR (Grand Chamber) Reports 2004-II, paras 137ff.

<sup>130</sup> Martha Davis, 'International Human Rights from the Ground Up' in Wendy Chavkin and Ellen Chesler, *Where Human Rights Begin* (Rutgers University Press 2005) 237; Antoine Meyer, 'Local Governments & Human Rights Implementation: Taking Stock and a Closer Strategic Look' (2009) 3 *Pace Diritti Humani* 7, 14.

<sup>131</sup> Frédéric Mégret, 'International Human Rights and Global Legal Pluralism: A Research Agenda' in René Provost and Colleen Sheppard (eds) *Dialogues on Human Rights and Legal Pluralism* (Springer 2013) 83; Linda White, 'Federalism and Equality Rights Interpretation in Canada' (2013) 44 *Publius: The J of Federalism* 157, 158.

<sup>132</sup> eg Jordan Paust, 'Medellín, Avena, the Supremacy of Treaties and Relevant Executive Authority' (2008) 31 *Suffolk Transnational L Rev* 301; Ted Cruz, 'Defending U.S. Sovereignty, Separation of Powers, and Federalism in *Medellín v. Texas*' (2010) 33 *Harvard J of L & Public Policy* 25.

<sup>133</sup> Katharine Gelber, 'Treaties and Intergovernmental Relations in Australia: Political Implications of the Toonen Case' (1999) 45 *Australian J of Politics & History* 330.

<sup>134</sup> Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 'Local authorities could protect vulnerable people' *CommDH/Speech(2006)8* (1 June 2006); Meyer (n 132) 7.

human rights law has in fact become a more pressing issue in recent years with the current trend towards decentralisation of governmental authority.<sup>135</sup>

## 6. CONCLUSION

As this article demonstrates, SNHRIs represent an interesting and under-explored locus for the implementation of international human rights norms. While not all SNHRIs use international norms as sources, many do, even in cases where their mandates do not explicitly refer to international norms. SNHRIs domesticate international norms while carrying out the same basic functions as NHRIs, namely complaint-handling, advising the government, public promotion of rights norms, litigation, and monitoring. The implementation of international human rights norms by SNHRIs has significant institutional and normative implications, which appear largely positive from a human rights perspective, and the practice has accordingly been recognised and encouraged by international organisations and SNHRI associations.<sup>136</sup>

Further research is necessary to investigate the extent to which SNHRI domestication of international norms represents a growing trend or remains exceptional in nature. Further research can also shed light on the challenges SNHRIs face in effectively domesticating international norms, challenges that may include a lack of experience with international law, a greater comfort with domestic norms, and a lack of capacity to effectively engage with international norms due to, for example, low staffing levels. Nevertheless, it is increasingly clear that the classic view of the international human rights system as a three-tier system with global, regional, and national components is oversimplified. At the sub-national level, SNHRIs also play a role in the direct (as well as indirect) implementation of international human rights norms, a role that is worthy of more consideration and, arguably, cultivation by other national and international human rights actors.

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<sup>135</sup> Andres Rodriguez-Pose and Nick Gill, 'The Global Trend Towards Devolution and its Implications' (2003) 21 *Environment and Planning C: Government and Policy* 333.

<sup>136</sup> Council of Europe Congress of Local and Regional Authorities, Resolution 191 (2004) on Regional ombudspersons: an institution in the service of citizens' rights, art 15-16; Declaración de Quito, Art 5, adopted at IX Congreso Anual de la Federación Iberoamericana de Ombudsman (November 2004); IAOHRA (n 78).