RACHEL MURRAY, *THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS AT THE INTERNATIONAL AND REGIONAL LEVELS: THE EXPERIENCE OF AFRICA* (OXFORD AND PORTLAND, OREGON: HART PUBLISHING, 2007)

BRIAN BURDEKIN, ASSISTED BY JASON NAUM, *NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE ASIA-PACIFIC REGION, THE RAOUL WALLENBERG INSTITUTE HUMAN RIGHTS LIBRARY VOLUME 27* (LEIDEN/BOSTON: MARTINUS NIJHOFF PUBLISHERS, 2007)

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National Human Rights institutions [NHRIs] are created by “a Government under the constitution, or by law or decree, the functions of which are specifically designed in terms of the promotion and protection of human rights.”¹ Human rights commissions, ombudsman institutions, hybrid single-office holder human rights ombudsman/commissioners, and specialized institutions such as the children’s ombudsman are types of NHRIs.² In particular, hybrid human rights ombudsman institutions have exploded in number and geographic spread since the 1980s, comprising most of the NHRIs in Latin America and Central and East Europe, and hybrids are also found in various countries in other parts of Europe, the Caribbean, Africa and Asia.³ While the “classical” ombudsman does not have express human rights protection and promotion functions, in practice a number of ombudsman offices, with their mandate to investigate administrative illegality and unfairness, have also played a role, albeit it often minor, in protecting human rights in investigations that involve human rights issues.⁴

The interest of the United Nations [UN] in NHRIs has been present since the organization’s inception, but accelerated with the adoption of the Paris Principles by the UN Commission on Human Rights in 1992 and the General Assembly in 1993.⁵ While NHRIs have existed for decades, their numbers began to multiply globally starting in the 1990s, spurred by a variety of factors. Academic interest in NHRIs followed later.⁶ At this point in time, while there have been

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1 United Nations Centre for Human Rights, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, Professional Training Series No. 4, UN Doc. HR/P/PT 4 (1995) at 6.

2 Linda C. Reif, “Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection” (2000) 13 *Harv. Hum. Rts. J.* 1 at 3-13.

3 On the various hybrid human rights ombudsman/commissioner institutions throughout the world see Linda C. Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Leiden/Boston: Martinus Nijhoff Publishers, 2004) [Reif, *The Ombudsman*].

4 *Ibid.* at 86-87.

5 Principles Relating to the Status of National Institutions (Paris Principles), U.N.G.A. Res. 48/134, UN Doc. A/RES/48/134 (1993), rep. in *supra* note 1 at 37-38. For an overview of UN and regional international organization attention to NHRIs see Reif, *The Ombudsman*, *ibid* at 89-99.

6 While academic literature on the classical ombudsman has accumulated since the institution spread beyond Scandinavia in the 1960s, much of the scholarship on NHRIs and human rights has been written since the late 1980s.

numerous scholarly articles written on NHRIs generally or on specific institutions, there have been only a few book length treatments of NHRIs. This state of affairs is beginning to change, with the two books reviewed here focusing on NHRI issues in particular regions of the world.

Rachel Murray's book, *The Role of National Human Rights Institutions at the International and Regional Levels: The Experience of Africa*, addresses the African region. Rather than exploring the NHRIs found in states throughout the continent in any depth, she devotes her work to the activities of NHRIs at the UN and pan-African international levels.

Murray's book makes a valuable contribution to scholarship when she examines the roles of NHRIs within the UN and African international human rights systems. In Chapter 2, she examines the legitimacy of NHRI participation at these levels, arguing that since they can provide an alternative voice to that of their governments, they help to promote government accountability in the human rights arena. She also argues that their expertise makes them relevant actors to participate in the development of international human rights norms and standards, although she rightfully recognizes that the NHRI office-holders are not always human rights experts and they may also sometimes be merely mouth-pieces for their governments.⁷ Other reasons posed in support of the legitimacy of their international activities are that they can protect human rights defenders (particularly NHRIs themselves), act as a collective voice for NHRIs (especially the regional collectivities), and act as conduits for the transmission of the views and recommendations between international bodies, the state and NGOs. However, despite all of these potential advantages of NHRI participation in the international human rights systems, given the related issues of NHRI connection to the state and their varying independence and powers, Murray considers that the validity of NHRI participation at the UN and African regional levels has not been properly thought out.⁸

In Chapters 3 and 4, Murray also surveys the methods of NHRI participation in the UN human rights system and in the African human rights system. Treatment of NHRIs by the Commission on Human Rights (now the Human Rights Council) and the Office of the High Commissioner for Human Rights (with its Special Adviser on NHRIs, replaced by the more recent National Institutions Unit) is addressed in critical terms. NHRI representation by the International Coordinating Committee [ICC] of NHRIs is described, looking at its increased participation in UN human rights activities and its gate-keeping role in accrediting (or not) the NHRIs according to the Paris Principles standards. The inconsistent approach of the UN human rights treaty bodies to engagement with NHRIs, the conflicting views on whether NHRIs should play a role in the drafting of their state's periodic reports to the treaty committees, and the extent to which the establishment and strengthening of NHRIs are promoted in treaty committee documentation are also canvassed in a balanced fashion by the author.

7 Rachel Murray, *The Role of National Human Rights Institutions at the International and Regional Levels: The Experience of Africa* (Oxford and Portland, Oregon: Hart Publishing, 2007) at 21.

8 *Ibid.* at 24-25.

Murray's discussion of NHRI participation in the African human rights system is particularly useful given its evolving nature. She notes the beginnings of African Union interest in the development of NHRIs in Africa and then focuses on the role of the African Commission on Human and Peoples' Rights in promoting NHRIs based on its responsibilities as laid out in the African Charter on Human and Peoples' Rights. The African Commission's procedure to decide whether to grant African NHRIs observer status, asking whether a NHRI meets internationally recognized norms and standards, is explained and shown to be relatively more liberal compared to the UN ICC accreditation process although Murray notes that few accredited African NHRIs take advantage of their observer status. As Murray indicates, non-participation may be due to NHRI unhappiness with the working methods of the Commission and NHRI financial resource limitations.⁹ Also, the statistics show that it is predominantly African human rights commissions that have observer status, raising the question why most of the hybrid human rights ombudsman institutions in Africa are not participating in the regional human rights system.¹⁰

Throughout her book, Murray raises the issue as to whether NHRIs can be classified as state or non-state actors, connected with the position that participation in the international and regional human rights systems is predicated mainly on an entity being considered to be either a state or a non-state actor (such as an NGO) where special procedures may have been established for the latter's participation. In Chapter 5, Murray addresses this issue in depth. Her starting position is that NHRI participation in international human rights systems permitted to date has taken place without reasoned thought on the nature of NHRIs "because of the ambiguity of NHRIs as state or non-state actors in a legal system which is premised on the idea that participation of various entities will fall into one or either category."¹¹ She proceeds to debate whether NHRIs can be categorized as either state or non-state actors, often using the concept of an NGO to draw the contours of a non-state actor. Her concern is not just to clarify levels of NHRI participation but also to give them accountability at this international level. However, she slips into calling NHRIs "non-state actors" at points and it is here that her analysis is weaker because, regardless of their level of independence in carrying out their activities, NHRIs remain state institutions.¹² They are created by government, operate pursuant to law, are appointed by the legislature or the executive branches of government, funded out of the public purse (albeit some NHRIs have to rely partly on donor funding because of under-funding by their government) and responsible to a government entity. NHRIs are types of "horizontal accountability" mechanisms created by the state to oversee government conduct, also including auditors general and anti-corruption bodies, and while they can be positioned on the periphery of state institutions their activities

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9 *Ibid.* at 53.

10 *Ibid.* at 50.

11 *Ibid.* at 59.

12 *Ibid.* at 60, 68.

and independence of action do not make them non-state actors.¹³ Murray does flirt with the concept of a functional approach to the treatment of NHRIs on the international level, an approach that is more realistic given the nature of NHRIs, but does not really run with it.¹⁴

In Chapter 6, Murray looks at ensuring the accountability of NHRIs for their performance under international law, examining the roles of the UN and regional bodies. Here, she notes that a difficulty is determining whether the NHRI's state or the NHRI itself should be accountable. Her tendency to want to divorce NHRIs from their characterization as state institutions/actors leads to further questions on: the (in)applicability of the international law on state responsibility and which entities NHRIs are accountable to. Finally, Murray turns to the Paris Principles standards as a means for determining NHRI accountability on the international level as taken into account through the UN and African regional NHRI accreditation processes. She is critical of the lack of in-depth analysis of the effectiveness of particular NHRIs by these bodies, in part due to their conflicting roles. In the end, Murray calls for a "more nuanced and honest approach to the issue of independence"¹⁵ of NHRIs and rightfully suggests an "examination of the utility of the Paris Principles and the appropriateness of more detailed guidance on NHRIs".¹⁶

In contrast, in *National Human Rights Institutions in the Asia-Pacific Region*, Brian Burdekin focuses on the domestic level, cataloguing NHRIs—only human rights commissions—in the Asia-Pacific region. Burdekin's book is less ambitious than Murray's in terms of critical scholarship, and is intended foremost for teaching purposes and as a source book for government officials and others involved in the establishment or strengthening of NHRIs. The first segment of the book contains a series of short chapters that look at various aspects of NHRIs. The history of the UN and NHRIs, various elements of the Paris Principles and challenges and strategies for NHRIs are addressed, with particular application to twelve human rights commissions in the Asia-Pacific region.¹⁷ Brief chapters on Asia-Pacific NHRI cooperation with UN human rights bodies and regional bodies are also included.

This segment of the book provides very useful comparative information on the different mandates, human rights jurisdictions, methods of appointment, etc., of these commissions. Given his long experience as a federal human rights

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13 For a discussion of the classical and human rights ombudsman as types of horizontal accountability mechanisms, see Reif, *The Ombudsman*, *supra* note 3 at 59-61. From another perspective, Anne-Marie Slaughter looks at the rise of "government networks" where disaggregated government officials (e.g. financial regulators, judges, legislators) from various countries cooperate informally internationally to achieve solutions to common problems, Anne-Marie Slaughter, *A New World Order* (Princeton and Oxford: Princeton University Press, 2004).

14 Murray, *supra* note 7 at 64, 68.

15 *Ibid.* at 89.

16 *Ibid.* at 90.

17 The human rights commissions examined are those in: Australia, Fiji, India, Indonesia, Republic of Korea, Malaysia, Mongolia, Nepal, New Zealand, Philippines, Sri Lanka and Thailand. Afghanistan's human rights commission is mentioned in places, but is not covered in the more extensive comparative work. The challenges and strategies examined are: economic, social and cultural rights; conflict situations, national inquiries; and national human rights action plans.

commissioner in Australia and as the Special Adviser on National Institutions to UN High Commissioners for Human Rights from 1995 to 2003, Burdekin has numerous pragmatic recommendations for the structuring of NHRIs in general and human rights commissions in particular, and good insights into the state and non-state contextual factors that influence the effectiveness of a NHRI. In this respect, Burdekin, unlike Murray, does not question the nature of a NHRI as a state institution; rather, he provides suggestions on maximizing their independence of action while noting that in terms of accountability "in generic terms they are administrative bodies and are all ultimately subject to the supervision of the courts."¹⁸

The remaining seventy-five percent of Burdekin's book is a compilation of primary sources. These appendices comprise: the Paris Principles, Amnesty International's Recommendations for Effective Protection and Promotion of Human Rights Institutions, UN treaty committee general comments pertaining to NHRIs, the UN's Millennium Development Goals and Targets, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, extracts from the Optional Protocol to the Convention Against Torture on national preventive mechanisms, a listing of special rapporteurs of the past Commission on Human Rights, examples of national inquiries conducted by Australia's Human Rights and Equal Opportunity Commission and the legislation of the twelve human rights commissions examined in detail in the book.

While the two books under review have quite different objectives and subject-matter, both authors, have similarities in their views of NHRIs and the Paris Principles.

First, despite the various categories of NHRIs in place around the world, both focus on human rights commissions as the core NHRIs. The authors do not look in any depth at the various other NHRIs that can and do play a role in human rights protections, and which are found in both Africa and the Asia-Pacific region. While most of Murray's book is devoted to the international level, her introductory chapter that canvasses NHRIs in Africa notes a few but not all of the hybrid human rights ombudsman institutions in Africa and does not include, for example, South Africa's Public Protector, an anti-corruption ombudsman which has also undertaken human rights-related investigations.¹⁹ Burdekin looks at twelve human rights commissions in the Asia-Pacific region, those that he considers to meet the standards in the Paris Principles. While commissions are certainly the predominant form of NHRI in this part of the world, he does not address the other NHRIs in the region that deal with human rights complaints and issues, for example, the hybrid human rights ombudsman/commissioner offices in Thailand and East Timor, and the children's commissioner in

18 Brian Burdekin, assisted by Jason Naum, *National Human Rights Institutions in the Asia-Pacific Region*, The Raoul Wallenberg Institute Human Rights Library Volume 27 (Leiden/Boston: Martinus Nijhoff Publishers, 2007) at 72.

19 Murray, *supra* note 7 at 1, lists mainly human rights commissions plus the hybrid human rights ombudsman institutions in Ghana, Namibia and Tanzania. In addition, there are human rights ombudsman offices in Ethiopia, Lesotho, Malawi, Seychelles and Zimbabwe, and e.g. South Africa's Public Protector, Reif, *The Ombudsman*, *supra* note 3 at 218-241.

New Zealand.²⁰ Burdekin states that the East Timor NHRI is not in compliance with the Paris Principles, and he seems to base this view at least in part because it has a single office-holder rather than a plural commission format which he states is “required” by the Paris Principles.²¹ This is a strict reading of guidelines that were drafted with only the human rights commission paradigm in mind, an arguably outdated approach given the numerous single-office holder human rights commissioner or ombudsman offices that have been established since the 1980s.

Second, both authors accept the Paris Principles as the governing standards for NHRIs, although they both do make sporadic comments about the weaknesses of the Paris Principles. Murray recognizes that the Paris Principles are “a crude instrument in assessing the effectiveness of NHRIs” and that there are other factors to be used to measure NHRI effectiveness in action.²²

One of her conclusions calls for reexamination of the Paris Principles, but without much further detail.²³ Burdekin describes the Paris Principles as “minimum, normative standards” and states that more recent non-governmental, practitioner guidelines are stronger in their rigour and relevance, but leaves it at that.²⁴ One leaves both books a little disappointed in that neither went further in delving into the weaknesses of the Paris Principles—such as their neglect of single-office holder and special-sector NHRIs, the fact that a NHRI complaints investigation power is not mandatory, and the minimal coverage of facets of NHRI independence—or looking at alternative, stronger standards that could be developed by the international community that are applicable to the various types of NHRIs found around the world today.

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20 In addition, there are also some human rights protection activities under taken by classical ombudsman in the region, see Reif, *ibid.* at 242-252, 308-309.

21 Burdekin, *supra* note 18 at 8-9.

22 Murray, *supra* note 7 at 4-5.

23 See *supra* text accompanying note 16.

24 Burdekin, *supra* note 18 at 119. He also provides interesting perspective on why the Paris Principles only consider the power of investigation to be optional, *ibid.* at 23-24.