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Author(s)	Raley, Meredith
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**Article 33 of the UN Convention on the Rights of Persons with Disabilities: A New Bridge to Bring Human Rights Law to the Domestic Level and Create a Dynamic of Change.**

This thesis is submitted to the National University of Ireland, Galway in fulfilment of the requirement for the degree of

**Doctor of Philosophy**

*By*

**Meredith Raley, J.D.**

School of Law  
National University of Ireland, Galway

Head of School: Professor Donncha O'Connell  
Thesis Supervisor: Professor Gerard Quinn

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**Abstract:** This thesis looks at Article 33 of the Convention on the Rights of Persons with Disabilities (CRPD). Article 33 requires states to set up a framework, located both within and outside of government, to guide and monitor the implementation of the CRPD. It is a novel development in international law, which generally leaves implementation up to the states. This thesis looks at the history of human rights law and past reform efforts, to put Article 33 in the proper context. The problems with implementing human rights treaties, and the development of human rights law are documented. Past reform efforts, such as the effort to reform the UN human rights treaty body system, are studied to better understand the difficulties in improving human rights law. The development of National Human Rights Institutions is also looked at in great detail, as their rise in numbers is crucial to the creation of Article 33. It then looks at the development of Article 33, to determine why it took the form that it did. Finally, the use of Article 33 by states is studied, with an eye to determining how Article 33 can change the relationship between states and international human rights law, and how it can improve the implementation of human rights treaties.

## **I. Table of Abbreviations**

**AHRC** Australian Human Rights Commission

**APF** Asia Pacific Forum of National Human Rights Institutions

**AU** African Union

**BMASK** Federal Ministry of Labour, Social Affairs and Consumer Protection

**CAT** Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Committee Against Torture

**CCD** Common Core Document

**CEDAW** Convention on the Elimination of All Forms of Discrimination Against Women; Committee on the Elimination of Discrimination Against Women

**CERD** Convention on the Elimination of All Forms of Racial Discrimination; Committee on the Elimination of All Forms of Racial Discrimination

**CERMI** Spanish Committee of Representatives of Persons with Disabilities

**CESCR** Committee on Economic, Social and Cultural Rights

**CMP** Permanent Multi-Sectorial Commission

**CMW** Committee on Migrant Workers

**CNDDHH** Peruvian National Human Rights Coordinator

**CNREE** Department of National Rehabilitation and Special Education

**CONADE** National Council for the Protection of Rights of People with Disabilities

**CONADIS** National Advisory Commission on the Integration of Persons with Disabilities of the National Coordinating Council for Social Policy

**CONFENADIP** Peruvian National Confederation of Persons with Disabilities

**CPDBH** Council of Persons with Disabilities of Bosnia and Herzegovina

**CPDGRC** Committee for Persons with Disabilities of the Government of the Republic of Croatia

**CRC** The Committee on the Rights of the Child; The Convention on the Rights of the Child

**CRPD** Convention on the Rights of Persons with Disabilities

**DEX** Deaf Ex-Mainstreamers Group

**DPO** Disabled Persons Organisation

**ECHR** European Court of Human Rights

**EEC** European Economic Community

**ENNHRI** European Network of National Human Rights Institutions

**EU** European Union

**HRC** Human Rights Committee

**ICC** International Coordinating Committee

**ICCPR** International Covenant on Civil and Political Rights

**ICESCR** International Covenant on Economic, Social and Cultural Rights

**ICJ** International Court of Justice

**IDA** International Disability Alliance

**IDC** International Disability Caucus

**ILC** International Law Commission

**ILO** International Labour Organisation

**INPRO** The National Institute for the Protection of Exceptional Persons

**NANHRI** Network of African National Human Rights Institutions

**NCDA** National Council of Disability Affairs

**NDC** National Disability Council

**NDS** National Disability Strategy

**NGO** Non-governmental Organisation

**NHRC** National Human Rights Commission

**NHRI** National Human Rights Institution

**NPM** National Preventive Mechanism

**ODI** Office for Disability Issues

**OEAR** Umbrella group of the Austrian Disability Association

**OHCHR** Office of the High Commissioner for Human Rights

**OOPD** Office of the Ombudsman for Persons with Disabilities

**OPCAT** Optional Protocol for the Convention against Torture

**PWDs** People with Disabilities

**RAC** Rehabilitation Advisory Committee

**RUD** Reservations, Understanding, or Declaration

**SCA** ICC's Sub Committee on Accreditation

**SENADIS** National Secretariat for the Human Rights of People with Disabilities

**SPT** Subcommittee on the Prevention of Torture

**SWB** Social Welfare Bureau

**UKDPC** United Kingdom Disabled People's council

**UN** United Nations

## **1. Introduction**

### **1.1 Introduction**

One of the most enduring problems in international human rights laws is the gap between the ideals and rights laid down by treaties, and the actual laws and practices of states that are party to those treaties. This problem has been noted by many researchers, including James Crawford<sup>1</sup> and Antonio Cassese.<sup>2</sup> While most states are willing to ratify human rights treaties, few will change their domestic laws and practices enough to completely fulfil their obligations under the treaty. There are many reasons for this gap, such as the lack of enforcement mechanisms within human rights treaties, and the fact that the normal processes and incentives by which other branches of international law encourage compliance often break down when it comes to human rights. There is also the fact that human rights is a comparatively young field of international law. While some scholars argue that human rights have existed in some form since ancient times,<sup>3</sup> most scholars have dated the beginning of modern human rights law to the 1940s,<sup>4</sup> or even as late as the 1970s.<sup>5</sup> Whatever the reasons are, there is wide agreement that the implementation gap is one of the most serious challenges in human rights.

Traditionally human rights treaties are enforced either by regional courts and commissions, e.g. the European Court of Human Rights, the Inter-American Commission on Human Rights, or, for the global UN treaties, state progress is monitored by treaty bodies. For the UN system, this monitoring process provides only a weak incentive for states to comply with treaty obligations. For instance, Ann Bayefsky has shown that states ratify human rights treaties in the expectation that they will not be forced to comply.<sup>6</sup> For this reason, over the past 20 years or so, there has been interest in finding new ways to encourage states to implement human rights treaties. For instance, interest in National Human Rights Institutions (“NHRIs”) increased dramatically in the early 1990s, as a tool to bridge the gap between international human rights norms and domestic practice. Richard Carver has shown that NHRIs can potentially be very effective at bringing international standards into the domestic sphere.<sup>7</sup> The number and influence of

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<sup>1</sup> James Crawford, *The UN Human Rights Treaty System: A System in Crisis? in The Future of UN Human Rights Treaty Monitoring*, 1 (eds. Philip Alston and James Crawford, 2000).

<sup>2</sup> ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 100-1 (1986).

<sup>3</sup> PETER N. STEARNS, *HUMAN RIGHTS IN WORLD HISTORY* (2012).

<sup>4</sup> Cassese, *supra* note 2, 34.

<sup>5</sup> SAMUEL MOYN, *THE LAST UTOPIA* (2010).

<sup>6</sup> Anne F. Bayefsky *THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS*, 5 (2001).

<sup>7</sup> Richard Carver, *A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law*, 10 *Hum. Rts. L. R.* 1, 5 (2001).

NHRIs has therefore increased, and allowed for further innovations involving these bodies. The use of domestic bodies to enforce and implement human rights law makes sense, because, as many scholars have noted, while human rights may be international law, it will ultimately succeed or fail at the domestic level.<sup>8</sup> This is especially true because international enforcement mechanisms are generally weak, meaning that state institutions must often act as the sole enforcers of international law.<sup>9</sup>

The Convention on the Rights of Persons with Disabilities (“CRPD” or “the Convention”) was negotiated in an atmosphere of desire for innovation and new ideas to improve the problems with implementation. The main innovation in the Convention to address this problem is Article 33. Article 33 of the CRPD requires states to erect a three-part national framework, located both within and outside of government, to guide and monitor the implementation of the Convention. Article 33 reads as follows:

1. States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.

2. States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.

3. Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.

While this framework does have some precedents in international law, the CRPD is the first treaty that gives states such specific direction for the process of

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<sup>8</sup> E.g. Christof Heyns and Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, 23 Human Rts Q. 483 (2001); Anne Gallagher, *Making Human Rights Treaty Obligations a Reality: Working with New Actors and Partners*, in *The Future of UN Human Rights Treaty Monitoring*, 201 (eds. Philip Alston and James Crawford, 2000).

<sup>9</sup> Courtney Hillebrecht, *The Domestic Mechanism of Compliance with International Human Rights Law: Case Studies from the Inter-American Human Rights System*, 34 Hum. Rts. Q. 964 (2012).

implementation. If it is successful, this framework could be an important step in bridging the gap between international and domestic law.

My thesis is that Article 33 could potentially make an important contribution to addressing some of the obstacles that contribute to the implementation problem. These contributions could apply not only to the immediate case of the CRPD, but could extend more broadly across the field of human rights. The goals of this thesis are to examine the problem of implementation of human rights treaties, to see how Article 33 can best address the issue, and to chart the changes in international human rights law that led to Article 33, and influenced the form that this article took. This thesis will also examine the general strengthening of international human rights law, particularly since the 1990s, which created an environment in which an innovation like Article 33 could be created and accepted. Next, this thesis will examine how Article 33 has been received by states, and how likely it is that this article will achieve the goal of changing the way that states interact with human rights treaties. Finally, from the examination of these pieces, the thesis will recommend some good practices that should allow Article 33 to be as effective as possible.

First, the history and theory of international human rights law is covered, with an eye towards both understanding what the state of the law was at the time the CRPD was created, as well as understanding the reasons behind the implementation gap, and the extent of the problem.

Having laid the groundwork for understanding the problem, the next area to look into is the UN human rights treaty system. Human rights treaties from the UN, such as the CRPD, are traditionally monitored by treaty bodies. In the early 1990s, around the same time the interest in NHRIs increased, there was also a push to reform the treaty body system, as many saw it as ineffective. This reform effort was still on going at the time the CRPD was drafted. This had two effects on Article 33. First, the general atmosphere of reform meant that there was an understanding that new ideas were needed to make human rights treaties effective. Second, and related, the reform process had brought many of the shortcomings of the treaty body system to light. This may have led to a feeling that the treaty body system, at least working alone, would never be an effective way to bridge the gap between domestic and international law. This in turn would have encouraged parties engaged in the negotiation of the CRPD to look for new ways to monitor and implement the Convention.

The next step is to look at NHRIs, which are often seen as one way to create a bridge between international and domestic law. While these bodies vary in their duties and composition, they do share common features. They are independent bodies funded by government that can, through various means, encourage the adoption of international human rights norms and the ratification of treaties. While the idea of these bodies goes back decades, the current interest in them dates from the early 1990s. The rise of NHRIs, with their dramatic increase in number and influence, is an important part of the story of

the CRPD. First, the interest in NHRIs is part of the more general interest in improving the state of human rights law. Second, Article 33 was, it will be shown, shaped by both state's ideas about NHRIs, as well as the institutions themselves.

The negotiations themselves are also important, as they both set the final text of Article 33, and were the first time that state parties were exposed to the idea of the Article 33 framework. From the beginning, states showed remarkably little resistance to the idea, barring a few concerns that such a framework could become overly prescriptive. Most of the discussion was over concerns that the framework should be flexible enough to accommodate all types of government, and over how prescriptive the section on the monitoring mechanism should be. Many parties, including the NHRIs themselves, who were negotiating as a group, wanted an explicit statement that the monitoring mechanism mentioned in 33.2 be a NHRI. What actually appeared in the final text was an implicit statement, that a monitoring mechanism must have the same level of independence as a NHRI. Despite this, NHRIs are important both to the drafting process, and to the way Article 33 is used by state parties.

The use of Article 33 by state parties is the final area addressed in this thesis. As noted in the drafting chapter, states have shown very little resistance to the idea of a treaty that mandates how they implement the treaty. This is reflected in the action states have taken on the article. Article 33 frameworks can be found in all regions of the world, at all developmental levels, and in all types of government. This level of commitment shows that there is very little resistance to Article 33 as an idea, and opens the door to the possibility of strong national human rights frameworks becoming a new norm. While there are both positive and negative trends appearing in the patterns of state adoption, the most important hurdle, state acceptance of such a framework, appears to have been overcome.

In this thesis I hope to show exactly how Article 33 came to be, what problem it is intended to solve, and how it can best solve that problem. I will look at both the positive and negative developments that have taken place as states have assimilated this new norm, and look for ways to halt and reverse the negative trends. In this way, I hope to show how Article 33 can be used to create a bridge between international and domestic law, not just for the CRPD, but also for human rights law more generally.

## 1.2 Purpose and Goals

The purpose of this thesis is to determine whether and how Article 33 can be an effective tool to improve the implementation of the CRPD. To that end, this thesis looks at the legal context in which Article 33 was developed, other developments in international human rights law that have had or may have influenced on Article 33, and the current use of Article 33 by states. The goal is to determine exactly how Article 33 could address the implementation gap, and a set of good practices for the use of Article

33. If the domestic framework set out in this article can be an effective tool to improve the implementation of the CRPD, then the implications could be far broader than a single treaty. It is likely that if the framework is successful, any future human rights treaty will include a requirement for a similar framework. While it is unlikely that past treaties will be amended to require domestic frameworks, it is possible that states could set up frameworks for these treaties of their own accord, particularly if pressured by civil society groups. This kind of pressure is likely if treaties with frameworks are implemented more quickly and completely. Given the potential impact of Article 33, it is important to establish its effectiveness and best practices.

Establishing the history and context around Article 33 is also important. It is impossible to know how effective Article 33 can be without studying the system that it will operate in. In examining the broader human rights context behind Article 33, an important theme emerged, of the gradual strengthening of human rights law, particularly since the 1990s. This strengthening of human rights law both helps explain why Article 33 came about, as part of this trend, and is an encouraging sign for the success of Article 33, as states are more likely to create effective mechanisms in an environment that encourages such behaviour.

Another part of the context of Article 33 is the existence of the implementation gap, or the gap that exists between the rights and ideas set out in the human rights treaties that a state has ratified, and the actual laws, policies and practices of the state. It is this implementation gap that Article 33 is designed to address. This thesis therefore also tries to address the factors that contribute to the implementation gap, and past efforts to improve the international human rights system, such as the UN reform effort and the creation of other national level bodies. While these factors are important, a complete examination of the history and factors of the implementation gap is outside the scope of this thesis, which is focused largely on ways that Article 33 could address this problem. It is not expected that the framework in Article 33 would solve every factor that contributes to states' failure to fully implement human rights treaties.

### 1.3. Methodology

This thesis is split into two parts. In the first part, the context for the creation of Article 33 is established. This means establishing what the implementation gap is, where it came from, and some earlier efforts to address it. While much of this information may be familiar, it is important to this thesis to support the narrative of the slowly increasing influence of human rights law, and how with this influence came the need to address the implementation gap, a project that eventually led to the creation of Article 33.

This part of the thesis looks first at the history of international human rights laws, in order to accomplish two goals. First, to establish the state of the law at the time Article

33 was proposed. This is important because it makes clear that while Article 33 is unique, it did not arise in a vacuum, but rather as part of an on going effort to improve compliance with UN human rights treaties. This ties into the second goal, which is to give some sense of the breadth of the implementation gap with regard to human rights treaties. In terms of the theoretical framework, this chapter helps to establish the culture of international human rights law that states operate in, which helps highlight what changes Article 33 makes. This section of the thesis relies on a mix of primary sources, such as treaties and UN documents, and secondary sources from books and journals.

Addressed next is the attempt to reform the UN treaty body system. In the early 1990s, it was widely recognised that the treaty body monitoring system at the UN was largely ineffective, and efforts to change the system began, continuing to this day. This section addresses the problems with the system, the efforts at reform, how effective those efforts have been, and what effect this process had on the drafting of the CRPD. Most of this chapter relies on UN documents related to the reform process. Reports and articles produced by experts observing and participating in the reform process are also used. Finally, some documents from the drafting of the CRPD are used. While the reform process itself had made little progress at the time of the drafting of the CRPD, the sense of reform and change was present at the drafting of the CRPD, and may have made states more open to new ideas. In addition, the relative ineffectiveness of the international monitoring system may have encouraged the drafters of the Convention to look for novel ways to improve implementation.

The next chapter covers NHRIs, independent bodies designed to monitor and promote human rights within states. These bodies are important both as a possible part of the Article 33 framework, and as part of the larger effort to reform international human rights law. The chapter covers their history, structure, and place in the legal order. This chapter relies on a number of sources, from books and journals, to reports prepared by NHRIs and their regional bodies. A number of Internet sources, generally websites run by NHRIs or associated groups, are also used. The rise of NHRIs is one of the important changes to the culture around human rights that makes Article 33 both possible and acceptable to states.

The second part of the thesis looks at the creation and use of Article 33. Building on the context provided by the first part of the thesis, this part shows how Article 33 developed out of earlier efforts to address the implementation gap, particularly the success of NHRIs and the, at the time, largely failed efforts to reform the international system with the UN treaty body reform process. This background provides crucial details as to why states were looking for new solutions to the implementation gap and why the focus was on domestic mechanisms. In this second part, why Article 33 took the final shape it did, how states are using the article, and how the article could best be used to achieve lasting results, not only for the CRPD, but more broadly across all of human rights, are discussed.

The chapter on the drafting of Article 33 looks at the precursors in international law to Article 33 as well as the drafting process that led to the Article. This section establishes what sources from previous human rights instruments the drafters drew on to create Article 33. It also looks at the drafting history of Article 33, including the discussions surrounding the exact form the article should take. This helps to establish both what the drafters of the Article intended it to do, and how the states felt about the article during negotiations, which might affect their willingness to implement the Article. This chapter uses a mix of primary sources, such as the treaties and other legal documents under study, as well as documents from the drafting process, and secondary sources, primarily journal articles.

Finally, I took a global view of how Article 33 is being used by countries around the world. While this look at various frameworks does not include every country that has made some progress on Article 33, it includes enough of them, from various regions, government types, and development levels, to draw some conclusions about the spread of Article 33, and the kinds of frameworks that are being erected. The information on what action states are taking on Article 33 was collected largely through Internet sources, supplemented by a few published reports.

#### 1.4 Conclusion

The goal of this thesis is to study Article 33 as a novel mechanism in international human rights law. It will consider Article 33 as one of the latest developments in a long programme of strengthening human rights law, and look at the best practices for the use of Article 33 if it is to be effective. It will also study the problem of implementation, its origins and past efforts to correct it, in order to fully understand the problem that Article 33 must address. In addition, the origins of Article 33 itself are addressed, to understand why this most recent solution has taken the form that it has.

The history of Article 33 is also important because it helps to establish how little resistance this idea met with from states. At the time of the CRPD negotiations, all parties, whether NHRIs, civil society, or states, were aware that the old system and solutions had proved inadequate to address the gap between domestic and international law, and were eager to find new solutions. For this reason, most of the debate over Article 33 addressed the particulars of how the article should function, rather than any concern that the article took over an area traditionally left to states, determining how a treaty was to be implemented.

This lack of resistance to Article 33 has continued as the treaty left the negotiations and entered into force. As states have ratified and begun to implement the treaty, Article 33 frameworks have been widely created. Frameworks so far have appeared in countries in all regions of the world, in all types of governments, and at all levels of development, which suggests strongly that there is no widespread resistance to

the idea, and that states see some value in having an Article 33 framework. While certain regional patterns can be seen, the frameworks are most remarkable for their similarity across cultures and governments. This broad willingness to adopt Article 33 frameworks is an extremely positive sign, as it shows that governments are open to reform, even when these reforms, designed to lead to more effective implementation of human rights, are not necessarily in their self-interest. On a less positive note, there is also evidence that while states are willing to set up a framework, they are less willing or able to engage in best practices in creating and running this framework. In many places, states are erecting frameworks that do not conform to all the requirements of Article 33. In states where the requirements of Article 33 are met, states have often chosen to meet them in ways that are less than optimal, and may create problems for reaching the full potential of the article. While the wide acceptance and adoption of Article 33 by states is promising, these problems must be addressed if the article is to act as a true solution to the implementation gap.

## **Part I. The Context for Article 33**

### **2. Human Rights and the Problem of Implementation**

#### **2.1 Introduction**

The Convention on the Rights of Persons with Disabilities is the latest addition to a system of international human rights law that began to take shape in the aftermath of World War II. This system began with the Charter of the United Nations, and expanded both within and beyond the UN. While the framework for modern human rights law began in this post-war period, progress on human rights almost immediately stalled, both due to the reluctance of the post-war powers to surrender sovereignty within their borders to international bodies, and the politics of the Cold War. It was not until decades later, in the 1970s, that the world began to build on the foundations laid down during the formation of the UN.

The international human rights framework, consisting of the UN, regional bodies, international courts and organisations as well as states, provides the context that Article 33 of the CRPD will operate in. It also helps to explain some of the problems that Article 33 is designed to solve. Studying the history of the UN human rights framework, and some of the current practice around human rights law, helps to explain where the implementation gap arose, why it became a problem, and why it has been so difficult to address. Establishing these facts, as well as setting the context for the operation of Article 33, is the purpose of this chapter. This chapter will examine the problems of implementation and enforcement, clearly defining the problem that Article 33 is designed to solve. The purpose of this chapter is to examine the history and current state of international human rights law, in order to set the context that Article 33 was created in. To that end, it looks at the creation of the UN human rights system, how the implementation problem was present during the creation of the system, how traditional ideas of enforcement and implementation in international law are largely unable to address the problem of human rights treaties, and how in recent years, there has been a push to strengthening human rights, which would lead ultimately to Article 33. In this way, this chapter both defines the problem that Article 33 is designed to solve, and lays out the first steps to its creation.

Since the revival of human rights in the aftermath of the Cold War, a complex framework of human rights instruments and institutions has proliferated around the world, at the national, regional, and international levels. Internationally, the UN has drafted and oversees a set of human rights treaties that have been widely ratified by states in all parts of the world. These treaties not only create obligations to respect and promote human rights within state parties, but also help guide the international discussion around human rights, setting the definitions and boundaries of those rights. In almost all areas of

the world, regional human rights networks provide another layer of protection, usually accompanied by a regional court. At all levels, NGOs and other organisations monitor government behaviour and advocate for greater protections and respect for human rights.

This has changed many old ideas about international law. For centuries, international law governed only the relationships between states. A state's sovereignty within its own borders was absolute, including in the treatment of its citizens. Furthermore, as international law governed only state-to-state behaviour, individuals could never be the direct subjects of international law. International law was not only concerned only with states, but also only with the law itself. There were no great principles, or politics, to guide the use of law. All of these assumptions and traditions have been challenged, and changed, by the emergence of human rights law as a major part of international law.

While the current system of modern international law is generally agreed to have its roots in the Peace of Westphalia in 1648,<sup>1</sup> international human rights law is only a very recent development. There have been efforts to trace the origins of human rights back as far as the philosophy of Stoicism, in classical Greece and Rome, though the American and French Revolutions, with the Declaration of Independence and the Declaration of the Rights of Man and Citizen. However, while these and other historical philosophies provide some foundation for the modern idea of rights, there is a key difference. These historical movements agreed that rights were to be achieved by creating spaces where the rights of citizenship could be granted and protected. Modern human rights, by contrast, sees rights as entitlements, regardless of citizenship and superseding the sovereignty of the state.<sup>2</sup> Other possible antecedents that have been suggested are the anti-slave treaties of the 19<sup>th</sup> century. These early treaties, however, were often self serving on the part of powerful countries, weak and unevenly enforced at best, and focused on groups rather than individuals. Only after World War II, and even more so after the Cold War, would international law change to accommodate human rights law. These changes have taken decades, and continue to take place today.

## 2.2 The UN Charter, the Declaration, and Attitudes Towards Human Rights

The CRPD is only the latest part of the human rights framework of the United Nations. While the UN has created and put into force many human rights treaties, these treaties have always faced problems with implementation. Many of the possible reasons for this will be discussed in a later chapter. One reason, however, is found in the establishment of the UN, and the reluctance of many of the most powerful states of the time to give the UN too much power in the area of human rights. Establishing and

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<sup>1</sup> ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 34 (1986).

<sup>2</sup> SAMUEL MOYN, THE LAST UTOPIA 11-13, (2010); LYNN HUNT, INVENTING HUMAN RIGHTS: A HISTORY (2007).

studying this reluctance, and the beginnings of the human rights framework that did develop, is the purpose of this section.

The establishment of the UN is an important milestone in the creation of international human rights law. During and immediately after World War II was the first time that human rights as a concept was discussed in any serious way. And while the politics of the post war era would mean that human rights would fail to gain traction in the decades following the war, the existence of a human rights framework at the UN would be vitally important when human rights experience a resurgence in the 1970s and 80s. The idea of “human rights” entered the English language, in part, as an ideal that opposed the philosophy behind the Axis powers in World War II.<sup>3</sup> After the war, many groups and individuals would campaign to have the idea of human rights as part of the new order, particularly part of the mission of the United Nations.<sup>4</sup> The United Nations Charter, which created the organisation, was first signed on 26 June 1945. It was fully ratified on 24 October 1945, and served as the basis for all UN activity, including human rights activities, since then.<sup>5</sup> The rise of human rights during this period began to force states to account for their treatment of the individuals within their borders.<sup>6</sup> The question of why the idea of using international law to protect individuals arose during this period in history in particular is complex, but part of the reason was the feeling, in the aftermath of World War II, that the Nazi atrocities were a result of a philosophy that utterly disregarded the rights and dignity of man.<sup>7</sup> Another factor was the role of intellectuals and organisations, which used the language of rights to frame the narrative about the war and the new post-war international order. This combination created a brief period in which the idea of human rights was seriously considered.<sup>8</sup> Unfortunately, this did not last, and this period did not, at the time, have any significant effect on international law.<sup>9</sup> Still, because the documents produced at this time came to be important to the later human rights movement, it is useful to look at how they were created.

While the idea of some kind international protection of rights had arisen before in other forms—such as the protection of minority rights after World War I—it was not until 1941 that powerful heads of states such as Franklin Roosevelt and Winston Churchill began to discuss the idea seriously.<sup>10</sup> As Mark Mazower describes in his article on the creation of the United Nations, at the time, even before the US entered the war, Roosevelt, Churchill and the other Allied powers wanted to define more clearly what the

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<sup>3</sup> Moyn, *supra* note 2, at 44.

<sup>4</sup> Moyn, *supra* note 2, at 46.

<sup>5</sup>History of the United Nations, <http://www.un.org/en/aboutun/history/>.

<sup>6</sup>Cassese, *supra* note 1, at 287.

<sup>7</sup>Cassese, *supra* note 1, at 289.

<sup>8</sup> Catherine Turner, *Human Rights and the Empire of (International) Law*, 29 L. & Ineq., 315 (2011).

<sup>9</sup> Turner, *supra* note 8, at 315-316; Ruti G. Teitel, *Transitional Justice Genealogy*, 16 Harv. Hum. Rts. J. 74 (2003).

<sup>10</sup> Mark Mazower, *The Strange Triumph of Human Rights, 1933-1950*, 47 The Historical Journal, 2, 385 (2004).

aims of the war should be. While combating a dictatorship such as Nazi Germany, both the UK and the US wanted to reaffirm the principles of liberal democracy. Therefore, the Declaration by United Nations, a pledge of alliance initially signed by 26 states, not only committed these states to the war effort, but also to ‘preserve human rights and justice in their own lands and well as in other lands’.<sup>11</sup> From this beginning, the idea of international protection for human rights became part of the planning for the post-war era.<sup>12</sup> In the United States, Roosevelt established an Advisory Committee on Post-war Foreign Policy, which, by the end of 1942, had secretly endorsed the idea of an international bill of rights. The Committee even recommended that this document should override any domestic law that conflicted with it. However, the Committee’s legal advisor, Durwald Sandifer, foresaw serious political challenges with this idea. He warned that implementing such a document would not be easy, as states were unlikely to sign on to anything that contained any sanctions for those that failed to implement the rights it contained. Rather than any serious enforcement mechanism, therefore, he recommended that any such bill of rights should rely “primarily upon the good faith of the contracting parties”.<sup>13</sup>

In the fall of 1944, work began on the international organisation that would become the United Nations. The first talks were between the UK, US and the Soviet Union. Later, talks between the UK, US and China were held on the same subject.<sup>14</sup> At these early talks, it was the US that was the strongest voice on the concept of individual rights, and Britain who was most opposed.<sup>15</sup> Even if the US was more open to the idea of including human rights, it was still not the country’s primary objective. The president, Franklin Delano Roosevelt, saw the UN primarily as a security framework to balance the great post-war powers.<sup>16</sup> In addition to this, almost all the great powers had some reason to dislike the idea of a strong, enforceable human rights regime. It was highly unlikely that Stalin would allow an international organisation to meddle in the Soviet Union’s new sphere of influence. In Britain, many figures in government worried about the possibility of such an organisation interfering in the affairs of the British Empire. And finally, the US, where support for international human rights was strongest, still wished to protect its domestic racial policies.<sup>17</sup> Given the at best conflicting interests of these three powerful states, at Dumbarton Oaks it was ultimately China who proposed a commitment to racial equality in particular, as well as human rights in general. Britain and the Soviet Union both expressed strong opposition to the idea, with the British representative, Sir Alexander Codogan, giving his personal opinion that reference to human rights and basic

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<sup>11</sup> Mazower, *supra* note 10, at 385-386.

<sup>12</sup> Mazower, *supra* note 10, at 385.

<sup>13</sup> Mazower, *supra* note 10, at 386.

<sup>14</sup> The Dumbarton Oaks Conference, 21 *Bulletin of International News*, 22, (1944).

<sup>15</sup> Mazower, *supra* note 10, at 391.

<sup>16</sup> Moyn, *supra* note 2, at 56; ROBERT C. HILDERBRAND, DUMBARTON OAKS: THE ORIGINS OF THE UNITED NATIONS AND THE SEARCH FOR POSTWAR SECURITY (1990).

<sup>17</sup> Mazower, *supra* note 10, at 389.

freedoms was not applicable to the main tasks of a new international organisation.<sup>18</sup> This can be seen in the British proposal for a UN Charter, published on 28<sup>th</sup> of October, 1944. In this proposal, it's clear that the main focus is the maintenance of peace, rather than the promotion of human rights. In this proposal, the new organisation has four purposes. First, to maintain peace, second, to “develop friendly relations among nations”, third, to promote cooperation “in the solution of international economic, social, and other humanitarian problems, and final to serve as “a centre for harmonising the actions of nations”.<sup>19</sup> Out of all of these purposes, only the third could possibly be said to have any bearing on human rights. This was reinforced by other sources. A talk given by the US Secretary of State in December of 1944 stated that the purpose of the organisation would be to “develop friendly relations among nations and that other appropriate measures to strengthen the peace.”<sup>20</sup> Human rights were not mentioned.

Once these four states—the US, UK, Soviet Union, and China—had prepared the Dumbarton Oak Proposal, the United Nations Conference on International Organisation was convened on April 25, 1945, with the 50 founding member states of the UN, to prepare and sign the UN Charter.<sup>21</sup> The conference lasted nine weeks, and all members were allowed to submit amendments to the proposed charter. Almost all states took advantage of this, and the resulting Charter was more than twice the length of the original proposal.<sup>22</sup> Of most concern for the purposes of this thesis, the sections dealing with human rights were greatly expanded. Starting from the idea that the UN would foster cooperation to address humanitarian issues, the conference added a statement that this cooperation would be based on principles of equal rights and self-determination. A pledge to promote higher standards of living, full employment and to promote social and economic development was also added. In addition, language to the effect that the UN would both respect and observe human rights and fundamental freedoms appeared.<sup>23</sup>

The Charter of the United Nations (“the Charter”) was therefore, according to many scholars, including Thomas Buergenthal, the beginning of the internationalisation of human rights law.<sup>24</sup> The Charter contains three major human rights provisions. First, in Article 1(3), the Charter states that one of the purposes of the UN is to ensure international cooperation in solving international problems, including humanitarian problems, as well as “promoting and encouraging respect for human rights and fundamental freedoms for all”.<sup>25</sup> This sentiment is echoed in Article 55(c), which states

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<sup>18</sup> Mazower, *supra* note 10, at 391.

<sup>19</sup> The Dumbarton Oaks Conference, *supra* note 14, at 908.

<sup>20</sup> Philip Marshall Brown, *Secretary of State Stettinius on the Dumbarton Oaks Proposals*. 108 World Affairs, 1, 5 (1945).

<sup>21</sup> George A. Finch, *The United Nations Charter*, 39 The Am J. of Int'l L., 3, 541 (1945).

<sup>22</sup> Finch, *supra* note 21, at 542.

<sup>23</sup> Finch, *supra* note 21, at 544.

<sup>24</sup> Thomas Buergenthal, *The Normative and Institutional Evolution of International Human Rights*, 19 Hum, Rts, Q., 4, 703 (Nov. 1997).

<sup>25</sup> U.N. Charter art. 3 para. 3.

that the UN shall promote “universal respect for, and observance of, human rights”.<sup>26</sup> Finally, Article 56 imposes obligations on UN member states, requiring them to pledge themselves to take action to achieve the goals of Article 55.<sup>27</sup> While vague, these articles were an improvement over the original American draft, which called for states to respect human rights, rather than giving the task to the UN.<sup>28</sup> The fact that from this point in history forward, human rights would no longer be a purely domestic consideration is demonstrated by the way that another article of the UN Charter has been applied. Article 2(7) prohibits the UN from intervening in matters that are 'essentially within the domestic jurisdiction'. Despite this, the UN has taken the view that human right falls within its jurisdiction, and the treatment of individuals is a matter for international concern.<sup>29</sup> While the drafters of the UN Charter may not have intended any action to come out of these provisions, they would open the possibility of unpredictable future actions by both states and other actors.<sup>30</sup>

The references to human rights in the UN Charter, because they were vague, also moved the issue of defining rights to the foreground.<sup>31</sup> In fact, under the Charter, the UN gained the ability to set human rights standards for member states, a process that began with the Universal Declaration of Human Rights in 1948 (“the Declaration”).<sup>32</sup> Adopted as a non-binding resolution that was intended to provide a common understanding of human rights and fundamental freedoms, the Declaration would eventually become a normative document that set up the human rights obligations of every member state and became the basis for the modern-day international human rights framework.<sup>33</sup>

At the time of the drafting of the Charter, there was a push from some states, and many organisations, to get some kind of international bill of rights included. This effort failed, and these groups instead turned towards drafting a separate human rights document.<sup>34</sup> There was some discussion about whether this new document should take the form of a non-binding declaration or manifesto, or a binding convention. It was decided, in 1947, that both documents would be prepared. The reason for this was that a non-binding declaration should be accompanied by a binding convention, while a declaration might have a greater reach than a convention alone.<sup>35</sup> Originally, the newly created Commission on Human Rights created three working groups, assigning one with the task of creating a Universal Declaration of Human Rights, one the task of creating a

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<sup>26</sup>U.N. Charter art. 55. Para. C.

<sup>27</sup>U.N. Charter art. 55.

<sup>28</sup> Moyn, *supra* note 2, at 56.

<sup>29</sup>ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW, 2ND ED, 6 (2010).

<sup>30</sup> Moyn, *supra* note 2, at 62.

<sup>31</sup> Moyn, *supra* note 2, at 62.

<sup>32</sup>Buergenthal, *supra* note 24, at 708.

<sup>33</sup>Buergenthal, *supra* note 24, at 708.

<sup>34</sup> Turner, *supra* note 8, at 317.

<sup>35</sup> Economic and Social Council, Commission on Human Rights, Drafting Committee on an International Bill of Human Rights, *First Session, Report of the Drafting Committee to the Commission on Human Rights*, U.N. Doc. E/CN. 4/21 ¶12 (1 July 1947).

single treaty containing the norms in the Declaration, and one the task of preparing implementation measures for the treaty.<sup>36</sup>

According to Antonio Cassese, the Universal Declaration of Human Rights of 10 December 1948 was written at least partly as an attempt to build a consensus between the many divergent political ideologies and governmental styles of UN members in the 1940s. The Declaration had to find some common ground between countries as different in outlook at the US and the Soviet Union, and between Western governments and those of Third World countries.<sup>37</sup> Reaching a consensus on these issues was an impressive feat, given the political climate of the time. Not only was the Cold War beginning, but the creation of the state of Israel and the partitioning of South Asia also contributed to the tension.<sup>38</sup> This attempt to find some common standard of human dignity led, after lengthy discussion, to the Declaration, and it is this process of consensus building that's responsible for many of the Declaration's features.<sup>39</sup> The Declaration was focused more on civil and political rights, which were favoured by Western states such as the US. Economic, social, and cultural rights are largely confined to Article 23, on the right to work, and Article 25, which covers the right to an adequate standard of living, "including food, clothing, housing and medical care".<sup>40</sup> Some rights, such as the right to self-determination and the rights of colonised people, are either completely absent or largely glossed over. And no mention at all is made of the problems of economic inequality between states, which can make the realisation of rights more difficult in poorer or less developed countries.<sup>41</sup> Despite these limitations, the Declaration was of great importance in setting a direction for the promotion of international human rights. Also, while the document was largely Western in outlook, promoting civil and political rights over economic, social and cultural ones, very few states felt estranged by it, and most saw it as a decent foundation that they could build upon, regardless of a state's particular ideology.<sup>42</sup>

While the drafters of the Declaration had managed to build a consensus around human rights, the Declaration failed to capture the public's imagination, and only a few people were enthusiastic about its creation.<sup>43</sup> The General Assembly made efforts to widely publicise the Declaration, asking Member States to ensure that it would be read in schools, and the UN itself to publish the Declaration in as many languages as possible.<sup>44</sup> Despite this, most international lawyers saw the Declaration as proof that human rights would be nothing more than an empty promise, and the Dumbarton Oaks agreements as

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<sup>36</sup> 183<sup>rd</sup> Plenary meeting, G.A., F Preparation (10 December 1948).

<sup>37</sup> Cassese, *supra* note 1, at 298.

<sup>38</sup> Moyn, *supra* note 2, at 68.

<sup>39</sup> Cassese, *supra* note 1, at 299.

<sup>40</sup> G.A. Resolution 217(a)(III), Universal Declaration of Human Rights, Art. 25 (10 December 1948).

<sup>41</sup> Cassese, *supra* note 1, at 299.

<sup>42</sup> Cassese, *supra* note 1, at 299-300.

<sup>43</sup> Moyn, *supra* note 2, at 63.

<sup>44</sup> 183<sup>rd</sup> plenary meeting, GA, D Publicity (10 December 1948).

the end of human rights law.<sup>45</sup> This was at least partly due to other developments within the UN at the time, including the decision that the newly-created Economic and Social Council, established to oversee human rights, would have no power to investigate, or act upon, individual petitions.<sup>46</sup> At the same session of the General Assembly that accepted the Declaration, the General Assembly declined to give the Economic and Social Council the right to hear petitions, and instead requested that the problem be considered as part of the new covenant on human rights.<sup>47</sup> The drafters of the Declaration were aware of the problems with a non-binding Declaration as the UN's primary human rights instrument. At the time of its drafting, members of the Commission on Human Rights, that drafted both the Declaration and was beginning to draft a human rights covenant, noted several problems, and proposed solutions, including the drafting of a binding Convention that could be enforced in domestic courts, allowing individual petitions to the UN, the creation of an International Court of Human Rights, and the expulsion from the UN of persistent human rights violators.<sup>48</sup> It should be noted, however, that many of these ideas were unpopular at the time, and most would not become part of the UN human rights machinery.

The creation of the UN, and the drafting of the Charter and the Declaration, became important events in the history of human rights law. At the time, however, they failed to register within the popular imagination, or change the perception of international law. Their importance rests largely in creating a framework that later activists would seize on, and use in ways that the original drafters of both the Charter and the Declaration could not have predicted.

### 2.3 The UN Human Rights System: Problems from the Beginning

Despite the reluctance of the most powerful states involved, the UN did gain some powers in regards to human rights. While the Declaration was an important step, it was a non-binding document, and there was a need for a more powerful human rights instrument. The drafting of this instrument was the beginning of the UN human rights treaty framework that the CRPD is now a part of. The creation of these first treaties is important to this thesis, because it shows how problems began to develop in the system from its inception, and how arguments between states, and a general reluctance to create a too-powerful treaty, laid the groundwork for the implementation gap that still plagued human rights law today, and which was the impetus for the creation of Article 33.

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<sup>45</sup> Moyn, *supra* note 2, at 178.

<sup>46</sup> Moyn, *supra* note 2, at 68.

<sup>47</sup> 183<sup>rd</sup> plenary meeting, GA, B, Right of Petition (10 December 1948).

<sup>48</sup> Economic and Social Council, Commission on Human Rights, Drafting Committee on an International Bill of Human Rights, First Session, *Report of the Drafting Committee to the Commission on Human Rights*, U.N. Doc. E/CN. 4/21 ¶19 (1 July 1947).

Even as the Declaration was drafted, there was a desire from many human rights activist for a more enforceable, legally binding international human rights regime. Attempts to draft a human rights covenant therefore began, and ran into problems almost immediately. The original plan called for a single treaty containing all the rights of the Declaration.<sup>49</sup> Originally, this convention would, therefore, focus largely on civil and political rights, as the Declaration had. By the spring of 1950, however, some states were arguing that economic, social and cultural rights should also be included in the convention. Their argument was that the rights already contained in the draft convention could not be fully enjoyed unless economic, social and cultural rights were included as well.<sup>50</sup> By the summer of 1950, the Commission on Human Rights was already reporting that the convention currently being drafted was only the first in a series of conventions, that would address all of the rights in the Declaration.<sup>51</sup> Still, at this point, the decision to split the convention does not seem to have been made. Indeed, in late 1950, the decision to include economic, social, and cultural rights in the convention was made by the General Assembly, though these rights were to be included “in a manner which relates them to the civic and political freedoms proclaimed by the draft Covenant”, which still sets economic, social, and cultural rights as less important rights.<sup>52</sup> The idea of splitting economic, social and cultural rights into a separate convention is brought up in 1951, with Commission on Human Rights also discussing the difficulty it is having defining these rights in legal terms.<sup>53</sup> By the summer of that year, the Commission on Human Rights requested that the General Assembly reconsider its decisions to put all human rights in one document. They cited the difficulties they had encountered during the drafting process, and particularly the fact that the Commission believed that distinctly different implementation methods were needed for civil and political rights versus economic, social and cultural rights, and this made it difficult to include both sets in one document.<sup>54</sup> In February of 1952, the General Assembly officially split the convention into two documents. In its decision, the General Assembly affirmed the important of both sets of rights, noting that they were interconnected, and that economic, social and cultural rights were needed to achieve the ideals of the Declaration. To ensure that both conventions were seen as equally important, the General Assembly require that they be

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<sup>49</sup> Donna E. Arzt, *Law Students' Attitudes About Economic Rights in the Post Cold War World*, 19 Syracuse J. Int'l L. & Com. 42 (1993).

<sup>50</sup> Commission on Human Rights, Report of the sixth Session, ¶30 (27 March – 19 May 1950).

<sup>51</sup> Report of the Commission on Human Rights, (9 August 1950).

<sup>52</sup> General Assembly, *fifth session 317<sup>th</sup> plenary meeting*, ¶7 (4 December 1950).

<sup>53</sup> Economic and Social Council, Thirteenth Session, Commission on Human Rights: *Report to the Economic and Social Council on the seventh session on of the Commission, held at the Palais des Nations, Geneva, from 16 April to 19 May 1951*, ¶30 (1951).

<sup>54</sup> Economic and Social Council, *Report of the Commission on Human Rights (seventh session) Resolutions of 29 August 1951*, ¶C (29 August, 1951).

submitted and open for signatures at the same time, and contain as many similar provisions as possible.<sup>55</sup>

There was also debate over how the convention should be implemented by states. It was agreed fairly early in the process that some kind of mechanism for implementation should be included in the convention.<sup>56</sup> The first measure approved was a permanent body to oversee the treaty.<sup>57</sup> Next, the discussion turned to state reports on treaty implementation progress. Originally, the draft called for these reports to be submitted to the Secretary-General of the UN, although other UN agencies should receive reports on issues within their competency.<sup>58</sup> Around this time, the idea of putting some or all of the implementation measure in a separate document from the rest of the treaty was also raised.<sup>59</sup> The drafters of the human rights convention were also still wary of granting individuals the right to directly petition the UN, one proposed measure for implementation was to allow the Committee that would oversee the treaty the right to make an inquiry after receiving a complaint, with the argument that this power would not create a right of petition in individuals, but only give the Committee a new power.<sup>60</sup>

The need to split the convention into two documents delayed the drafting process. Further delay was caused by an influx of new member states, many of which had been unable to comment on the drafting process, and wanted a chance to do so before the drafting was complete.<sup>61</sup> Thanks to delays such as these, the first of the major human rights treaties was not one of the covenants, but the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), which opened for signatures on the 21<sup>st</sup> of December 1965, and entered into force on the 4<sup>th</sup> of January, 1969.<sup>62</sup> CERD was largely the brainchild of developing, Third World nations,<sup>63</sup> which may have helped the treaty avoid the politics of the Cold War, explaining why it was both opened for signatures and adopted prior to the two major covenants. The year after CERD opened for signatures, two major human rights treaties, the International Covenant on Civil and Political Rights (“ICCPR”), and the International Covenant on Economic,

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<sup>55</sup> General Assembly, Sixth Session, *Preparation of two Draft International Covenants on Human Rights*, 375<sup>th</sup> plenary meeting, (5 February 1952).

<sup>56</sup> Commission on Human Rights, *Report of the sixth Session* (27 March – 19 May 1950), ¶35.

<sup>57</sup> Commission on Human Rights, *Report of the sixth Session* (27 March – 19 May 1950), ¶36.

<sup>58</sup> Economic and Social Council, *Thirteenth Session, Commission on Human Rights: Report to the Economic and Social Council on the seventh session on of the Commission, held at the Palais des Nations, Geneva, from 16 April to 19 May 1951*, ¶60 (1951).

<sup>59</sup> Economic and Social Council, *Thirteenth Session, Commission on Human Rights: Report to the Economic and Social Council on the seventh session on of the Commission, held at the Palais des Nations, Geneva, from 16 April to 19 May 1951*, ¶71(1951).

<sup>60</sup> Economic and Social Council, *Thirteenth Session, Commission on Human Rights: Report to the Economic and Social Council on the seventh session on of the Commission, held at the Palais des Nations, Geneva, from 16 April to 19 May 1951*, ¶84 (1951).

<sup>61</sup> General Assembly, *eighteenth session, Draft International Covenants on Human Rights*, 1279<sup>th</sup> plenary meeting, (12 December 1963).

<sup>62</sup>CERD - <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

<sup>63</sup>Cassese, *supra* note 1, at 302-303.

Social and Cultural Rights (“ICESCR”), also opened for signatures, both on 16 December 1966.<sup>64</sup> These treaties were designed to translate the principles of the Declaration into international law.<sup>65</sup> The rights in the Declaration were split into two treaties, so that states could sign the treaties without further arguments over the definition of “rights”.<sup>66</sup> However, political disagreements, partially influenced by the Cold War, prevented these treaties from achieving their required number of ratifications, and it was not until 1976 that both of these treaties entered into force.<sup>67</sup> By that time, general attitudes towards human rights had started to change.<sup>68</sup> The ICCPR is also significant as it was the first treaty to have an optional protocol, which allowed for individuals to bring complaints of human rights abuses to the committee that oversaw the treaty.<sup>69</sup>

Around the same time that the Covenants entered into force, and began monitoring human rights, the Human Rights Commission was also strengthening its monitoring regime. Beginning in the 1970s, the Commission began to increasingly use its ability to request thematic and country specific reports. These special procedures allowed the Commission to investigate human rights abuses, whether by a specific country, or internationally on a thematic level. According to Catherine Turner, this was widely viewed as one of the most important achievements of the Commission, and the Human Rights Council that replaced it has maintained this power.<sup>70</sup> These investigations allowed the UN to adopt appropriate resolutions, and have contributed to the body of “soft” law which help ideas around human rights develop in the 1970s.<sup>71</sup>

Subsequent treaties have largely focused on the particular human rights challenges faced by different groups in the world, and sought to address these challenges and ensure that these groups enjoyed full human rights. The first of these was the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), which opened for signatures on 18 December 1979, and entered into force on the 3<sup>rd</sup> of September 1981.<sup>72</sup> This was followed by the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”), which opened for signatures on the 10<sup>th</sup> of December 1984, and entered into force the 26<sup>th</sup> of June 1987.<sup>73</sup> Next was the Convention on the Rights of the Child (“CRC”), opened for

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<sup>64</sup>ICESCR - <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>; ICCPR - <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

<sup>65</sup>General Assembly, *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, 1496<sup>th</sup> plenary meeting, (16 December 1966).

<sup>66</sup> Turner, *supra* note 8, at 324-325.

<sup>67</sup> ICESCR - <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>; ICCPR - <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

<sup>68</sup> Turner, *supra* note 8, at 320.

<sup>69</sup><http://www.humanrights.gov.au/publications/timeline-major-international-human-rights-treaties>

<sup>70</sup> Turner, *supra* note 8, at 323.

<sup>71</sup> Turner, *supra* note 8, at 324.

<sup>72</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>

<sup>73</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>

signatures on the 20<sup>th</sup> of November 1989, and which entered into force on the 2<sup>nd</sup> of September 1990. As a worldwide human rights framework—comprised of the UN, regional human rights bodies, and non-governmental organisations—has developed and expanded, it has become more difficult for states to completely ignore the idea of human rights, and most states feel that they must at least pay lip-service to the ideas enshrined in the UN Charter and various human rights treaties.<sup>74</sup>

This new framework expanded the role of individuals in international law, though this new role does come with certain weaknesses. These include the fact that the rights are granted through treaties, and therefore limited in scope, and only applicable if a state is party to a particular treaty. In addition, many of the procedural rights granted by human rights treaties are granted by optional protocols to human rights treaties. Even when a treaty is widely ratified, fewer states generally chose to be a party to the accompanying optional protocol.<sup>75</sup>

## 2.4 The Law of Treaties and Human Rights Law

Human rights is distinct from other branches of international law in a few ways. For instance, most international law regulates relationships between states, rather than relationships between a state and those people living within its borders. Another way that human rights law stands out is the difficulty of its implementation and enforcement. These difficulties have contributed to the implementation gap, and they become clear when one studies the differences in the treatment of human rights law from other treaties. The Vienna Convention on the Law of Treaties 1969 (“Vienna Convention”), attempts to regulate the implementation and interpretation of treaties, both human rights and otherwise, and a study of how the convention is applied to human rights treaties, as opposed to other instruments, help illustrate some of the difficulties that are unique to human rights treaties, and that contribute to the implementation problem that Article 33 attempts to solve.

Prior to 1969, there was no formal set of rules for the creation of treaties and customary law. This was to the benefit of many states, as keeping the rules for the creation of international law vague allowed them more freedom in their interactions with each other.<sup>76</sup> In 1969, however, the need for a clear set of rules on the creation and execution of international law led to the Vienna Convention on the Law of Treaties 1969 (“Vienna Convention”), which laid down a set of rules governing international agreements.<sup>77</sup> The text of the Vienna Convention embodies three main principles. First, that states are not free to behave however they wish, but must conform to a core set of international principles. Second, that all states can freely engage in the process of

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<sup>74</sup>Buergenthal, *supra* note 24, at 712.

<sup>75</sup>Cassese, *supra* note 1, at 100-101.

<sup>76</sup>Cassese, *supra* note 1, at 180.

<sup>77</sup>Cassese, *supra* note 1, at 180.

entering into treaties, and powerful states may not impose treaties upon the less powerful. Finally, the interpretation of treaties is to give greater force to international values, rather than state sovereignty, as had been the case previously.<sup>78</sup>

While the Vienna Convention is not universally ratified—as of 2014 it had 114 parties—and can only be ratified by states, it is now widely accepted as customary law by most international courts and tribunals, including the International Court of Justice.<sup>79</sup> It is also widely accepted to apply not only to states, but also to international bodies that monitor human rights, an idea that has been confirmed by the European Court of Human Rights as well as the Inter-American Commission and Court of Human Rights.<sup>80</sup> For this reason, the Vienna Convention can be viewed as an authoritative statement on all treaties, including those that predate the Convention itself. However, the scope of the Vienna Convention is limited, and does not cover every possible topic, including those such as succession to treaties, responsibility for breach of treaties, or the effect of hostilities on treaties.<sup>81</sup>

International organisations are also capable of signing treaties, a fact that becomes more important as international organisations increase both in number and in prominence. The signing of treaties by international organisations is governed by the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations 1986. The rules contained in this Convention are essentially the same as those in the 1969 Vienna Convention.<sup>82</sup>

Reciprocity is an important part of the Vienna Convention. It is technically the case that all treaties are reciprocal, in that all parties to a treaty are legally entitled to expect compliance from all other parties.<sup>83</sup> However, not all parties can require all other parties to comply with the treaty. In order to invoke a party's duty to comply, the state invoking must directly benefit from the first state's compliance.<sup>84</sup> Also, under the principle of reciprocity, a party to a treaty only owes obligations towards others who are party to the same treaty, and have fulfilled their obligations.<sup>85</sup> The application of this principles would create obvious and serious problems in human rights law. The Vienna Convention generally works under the assumption that reciprocity is the main driver of treaty law. There is, however, one important exception to this trend, in Article 60 of the Vienna Convention, which deals with the termination of treaties after a material breach

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<sup>78</sup> Cassese, *supra* note 1, at 189.

<sup>79</sup> Aust, *supra* note 49, at 50.

<sup>80</sup> Magnus Killander, *Interpreting Regional Human Rights Treaties*, 13 Int'l J. on Hum. Rts., 145 (2010).

<sup>81</sup> Aust, *supra* note 49, at 50.

<sup>82</sup> Aust, *supra* note 49, at 56.

<sup>83</sup> Andreas Paulus, *Whether Universal Values can Prevail over Bilateralism and Reciprocity*, in REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW, 92 (Antonio Cassese ed., 2012).

<sup>84</sup> Paulus, *supra* note 83, at 93.

<sup>85</sup> Pieter van Dijk, *A Common Standard of Achievement. About Universal Validity and Uniform Interpretation of International Human Rights Norms* 13 Neth. J. Hum. Rts. 107 (1995).

by one or more parties.<sup>86</sup> Reciprocity no longer applies when a treaty deals with “the protection of the human person contained in treaties of a humanitarian character”.<sup>87</sup> The main effect of this rule is that states cannot consider a human rights treaty they have ratified terminated if another party to the treaty violates the rights the treaty contains. Human Rights treaties are exempt from the general rule of reciprocity, which dominates much of international law, because unlike most treaties, human right treaties do not govern relations between states, but rather the treatment of individuals within states.<sup>88</sup>

In addition to the rules around treaty compliance, the Vienna Convention also deals with treaty interpretation. Under Article 31(1) of the Vienna Convention, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms . . . in their context and in light of its object and purpose.” In addition to the words of the treaty itself, interpretation may make use of other tools such as subsequent practice among states, other relevant law, and the documents produced in the negotiation process.<sup>89</sup> Context for interpretation can also include the preamble and any annexes to the treaty, and any agreement made by all parties to the treaty.<sup>90</sup> According to John Tobin, some scholars have held that subsequent practice may include soft law, such as resolutions produced by international organisations, as these could throw light on developing international consensus on an issue. In this way, subsequent practice is similar to the development of customary law.<sup>91</sup> This view is not universal, with others arguing that subsequent practice applies only to state practices. The International Law Association, however, has argued that the work of UN treaty monitoring bodies may be included in this category, particularly when states have not objected to the bodies’ interpretations.<sup>92</sup>

Other relevant rules, which are another tool of interpretation in the Vienna Convention, can include other human rights treaties.<sup>93</sup> So, for instance, the ECHR used the concept of “non-refoulement” in the Convention Against Torture (“CAT”) to find a similar right in the European Convention.<sup>94</sup> Both the ECHR and the Inter-American Court have used UN human rights treaties to interpret regional treaties, and both courts have ruled that it is not necessary for the state involved in the case to have ratified the UN treaty in question, for the treaty to be used in interpretation of regional human rights treaties.<sup>95</sup> Similarly, the International Court of Justice (“ICJ”) has held that treaties must

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<sup>86</sup> Vienna Convention on the Law of Treaties art. 60, 23 May 1969, 1155 U.N.T.S 331.

<sup>87</sup> Vienna Convention on the Law of Treaties art. 60, 23 May 1969, 1155 U.N.T.S 331.

<sup>88</sup> Van Dijk, *supra* note 85s, at 108.

<sup>89</sup> Vienna Convention on the Law of Treaties art. 31, 23 May 1969, 1155 U.N.T.S 331

<sup>90</sup> John Tobin, *Seeking to Persuade: A constructive Approach to Human Rights Treaty Interpretation*, 24 Harv. Hum. Rts. J. 16 (2010); Vienna Convention on the Law of Treaties art. 31, 23 May 1969, 1155 U.N.T.S 331

<sup>91</sup> Killander, *supra* note 80, at 148-9.

<sup>92</sup> Killander, *supra* note 80, at 149.

<sup>93</sup> Vienna Convention on the Law of Treaties art. 31, 23 May 1969, 1155 U.N.T.S 331

<sup>94</sup> Killander, *supra* note 80, at 149.

<sup>95</sup> Killander, *supra* note 80, at 149.

be interpreted within the entire international legal framework that exists at the time of the interpretation.<sup>96</sup>

Supplementary materials may be used to “confirm the meaning” that arises after a treaty is interpreted according to its plain meaning, context, subsequent practice, and in light of other relevant rules. They may also be applied if after using all other means of interpretation, the meaning of an article is still unclear, or the interpretation reached is “absurd or unreasonable”. Supplementary material includes preparatory documents as well as the circumstances surrounding the conclusion of the treaty.<sup>97</sup> A judge may also draw on soft law sources such as general comments from the UN treaty bodies, or resolutions from the UN General Assembly. This is considered interpreting a treaty in light of the object and purpose, and so fully in line with the Vienna Convention.<sup>98</sup>

The Vienna Convention, in addition to requiring that that treaties be interpreted in good faith, also requires they be interpreted in a way that ensures they are effective.<sup>99</sup> These requirements are particularly important with regards to human rights treaties, which can often seem vague, as the rights they lay out are not clear rules, as much as standards and objectives for states to meet.<sup>100</sup> The need for effectiveness in interpreting human rights treaties has led, for instance, to the Inter-American Court holding that when interpreting the Inter-American Convention on Human Rights, it is necessary to “choose the alternative that is most favourable to protection of the rights enshrined in said treaty”.<sup>101</sup>

Human rights treaties, because of their unique character, can be more difficult to interpret than traditional treaties. The rules found in the Vienna Convention are useful, but considered by many to not be enough to fully settle on a meaning for a particular right.<sup>102</sup> For this reason, according to Tobin, other rules or principles have been proposed. One is to interpret a treaty in light of the state parties’ intentions. Another, a literalist or formalist approach, is to focus only on the text. A historical approach looks at the drafting history, systematic approach looks at the meaning of a phrase within its broader context, a teleological approach looks for an interpretation consistent with the object of the treaty, and a sociological approach takes an interpretation that fits with social and political objectives, even if it does not fully match the text. In practice, most interpretations of treaties will use a blend of these methods.<sup>103</sup> Also, no matter which

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<sup>96</sup> Tobin, *supra* note 90, at 33-34; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, ¶53.

<sup>97</sup> Vienna Convention on the Law of Treaties art. 32, 23 May 1969, 1155 U.N.T.S 331

<sup>98</sup> Turner, *supra* note 8, at 335.

<sup>99</sup> Vienna Convention on the Law of Treaties art. 31, 23 May 1969, 1155 U.N.T.S 331

<sup>100</sup> Killander, *supra* note 80, at 147.

<sup>101</sup> Killander, *supra* note 80, at 147.

<sup>102</sup> Tobin, *supra* note 90, at 3.

<sup>103</sup> Tobin, *supra* note 90, at 6; Francis Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties Before the Vienna Diplomatic Conference*, 18 Int'l

interpretive tools are used, there is an expectation that treaty interpretation will be framed in the principles of the Vienna Convention, as the norms of the Vienna Convention are accepted by most international actors.<sup>104</sup>

Even when dealing with human rights treaties, it is important to interpret rights in a way that is practical and achievable. Sensitivity to the social, cultural and political situation within a particular country can mean allowing for some flexibility in the implementation of a particular right. This does not, of course, mean that a state may use culture or tradition as an excuse for violating a right. While culture must be taken into consideration when interpreting rights, it cannot be given a special status which allows it to trump the rights of individuals.<sup>105</sup> Consider the General Comment of the Committee on Economic, Social and Cultural Rights (“CESCR”) on minimum core obligations.<sup>106</sup> This was intended as a tool to guide implementation, but there is no clear understanding of how it should be applied. In its general comment on the right to health, the CESCR provides a long list of obligations that it considers minimum core obligations, a list that many states, particularly developing states, would find far out of their reach.<sup>107</sup> This makes minimum core obligations a fairly unhelpful way to interpret the right to health, one that fails to take the context in particular states into consideration.<sup>108</sup> On the other hand, the European Court of Human Rights has developed a doctrine called the margin of appreciation, used in interpreting the European Convention. This doctrine allows states some discretion in their compliance with the European Convention, in light of circumstances in that state.<sup>109</sup> This is justified by the need to accommodate cultural diversity within states that are party to the European Convention.<sup>110</sup>

## 2.5 The Interaction Between International and Domestic Law

When dealing with a treaty such as the CRPD, which attempts to regulate state behaviour within its own borders, it is necessary to establish how international and domestic law interact. While international law is derived from several sources, the most relevant sources for the purposes of human rights law are generally treaties and customary and normative law. Customary law comes from the actions of states. If a

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& Comp. L.Q. 319 (1969); Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. Pa. L. Rev. 713 (1998).

<sup>104</sup> Tobin, *supra* note 90, at 19-20.

<sup>105</sup> Tobin, *supra* note 90, at 41; Philip Alston, *The Best Interest Principle: Towards a Reconciliation of Culture and Human Rights*, *The Best Interests of the Child: Reconciling Culture and Human Rights* 20 (Philip Alston ed., 1994).

<sup>106</sup> Committee on Economic, Social and Cultural Rights, *General Comment 3, The nature of States parties' obligations (Fifth session, 1990)*, U.N. Doc. E/1991/23, annex III at ¶86 (1991).

<sup>107</sup> Committee on Economic, Social and Cultural Rights, *General Comment 3, The nature of States parties' obligations (Fifth session, 1990)*, U.N. Doc. E/1991/23, annex III at ¶86 (1991).

<sup>108</sup> Tobin, *supra* note 90, at 26.

<sup>109</sup> Tobin, *supra* note 90, at 42.

<sup>110</sup> Tobin, *supra* note 90, at 42.

substantial number of states have displayed a uniformity of practice for a substantial period of time, then that particular practice could be considered custom, and therefore customary law could require other states to adopt the same practice.<sup>111</sup> In addition to an established practice, there must be general agreement by states, or *opinio juris*, that the practice amounts to a custom.<sup>112</sup> It is also possible for a state to establish itself as a persistent objector to a particular customary law.<sup>113</sup> Normative law is related to customary law, in that it is based on the norms, or standards, established by practice or influential international documents, but not codified in treaties.<sup>114</sup> Treaties are defined by the Vienna Convention as “an international agreement concluded between two or more states in written form and governed by international law”.<sup>115</sup> Most treaties, whether they are bi-lateral or multi-lateral, rely on the fact that states will implement them out of self-interest, because most treaties follow the customary rules of reciprocity, providing the same rights to all parties, provided all parties follow the treaty.<sup>116</sup> In practice, as Andreas Paulus notes, reciprocity often becomes more complicated. In the most straightforward cases, states enter into a treaty because they directly wish to accomplish the trade of duties and benefits outlined in the treaty. In other cases, a state may enter into an unequal treaty, because they expect the treaty to be accompanied by economic or political benefits not directly laid out in the document itself.<sup>117</sup> The human rights conventions of the UN, however, including the CRPD, are non-reciprocal multi-lateral treaties, which makes implementation and enforcement much more difficult.<sup>118</sup>

For this reason, it may be necessary to look for principles other than reciprocity to encourage the implementation of human rights treaties. Recently, many international organisations have begun to recognise that states have at least a soft law “responsibility to protect”, which not only prevents a states from engaging in some of the worst of human rights abuses, but also requires the state to intervene if such abuses are taking place within its borders.<sup>119</sup> There also may exist a responsibility on the part of the international community to intervene if a state cannot or will not prevent abuses from occurring. This responsibility is never stated as a concrete obligation, however.<sup>120</sup>

There is also a recent trend towards looking at what is “good” or “just” when making decisions in international law. This is a move away from traditional international law, which relied on well-defined sources and state consent before a norm could be

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<sup>111</sup> Aust, *supra* note 49, at 6.

<sup>112</sup> Aust, *supra* note 49, at 6-7.

<sup>113</sup> Aust, *supra* note 49, at 6.

<sup>114</sup> Aust, *supra* note 49, at 8-9.

<sup>115</sup> Vienna Convention on the Law of Treaties, *supra* note 149, art 2.

<sup>116</sup> Cassese, *supra* note 1, at 17.

<sup>117</sup> Paulus, *supra* note 83, at 92.

<sup>118</sup> Cassese, *supra* note 1, at 17.

<sup>119</sup> Paulus, *supra* note 83, at 96.

<sup>120</sup> Paulus, *supra* note 83, at 96.

considered binding.<sup>121</sup> In its 1970 ruling on the *Barcelona Traction* case, the ICJ also discussed the idea of obligations *erga omnes*, or “towards all”. In most bi-lateral treaties, obligations are only owed to the other party to the treaty. In some cases, however, there are obligations that are the concern of all states, for which all states would have standing to demand other states follow these norms. According to the ICJ, this includes matters such as genocide, acts of aggression, and the basic rights of human beings.<sup>122</sup> This view, that some obligations are owed to all states, was confirmed by the International Law Commission in 1976, which stated that there are a small number of obligations that are so important to the international community that all states have an interest in their fulfilment.<sup>123</sup>

This shift towards a community based view of international law, rather than one based purely on state interest, has had an effect on the way that treaties are interpreted.<sup>124</sup> It has changed which sources are considered part of international law. In addition to treaties and custom, judges may now consider policies and principles in making a decision.<sup>125</sup> Justice Higgins, the former President of the ICJ, as quoted by Tobin, has stated that law cannot ignore social factors, and the relationship between law and politics must be acknowledged. Therefore, “the assessment of so-called extralegal considerations is part of the legal process.”<sup>126</sup> Like the recognition of *erga omnes* obligations, consideration of these new sources has the effect of moving the bounds of international law beyond what states may have consented to.<sup>127</sup> Modern international law also recognises that, while only states can be party to human rights treaties, they affect a multitude of actors. The CESCR recognised this in its general comment on the right to health, stating that “all members of society [. . .] have responsibilities regarding the realisation of the right to health.”<sup>128</sup> The Committee on the Rights of the Child (“CRC”) echoed this view in its general comment on the implementation of the CRC.<sup>129</sup> Naturally, as the party to the treaty, states remain the central actor, with primary responsibility to

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<sup>121</sup> Turner, *supra* note 8, at 313; David Kennedy, *The Sources of International Law*, 2 Am. U. J. Int’l L. & Pol’y 20-22 (1987).

<sup>122</sup> Turner, *supra* note 8, at 327; *Barcelona Traction, Light and Power Co., Ltd. (Belg. V. Spain)*, 1970 I.C.J. 4 (Feb. 5).

<sup>123</sup> Turner, *supra* note 8, at 328; Prosper Weil, *Towards Relative Normativity in International Law?*, 77 Am. J. Int’l L. 431 (1983).

<sup>124</sup> Tobin, *supra* note 90 at 9.

<sup>125</sup> Turner, *supra* note 8, at 334.

<sup>126</sup> Tobin, *supra* note 90 at 40 (quoting Rosalyn Higgins, *Integrations of Authority and Control: Trends in the Literature of International Law and International Relations*, in *Toward World Order and Human Dignity: Essays in Honor of Myres S. McDougal* 85 (W. Michael Reisman & Burns H. Weston eds., 1976)).

<sup>127</sup> Turner, *supra* note 8, at 335.

<sup>128</sup> Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000).

<sup>129</sup> Committee on the Rights of the Child, General Comment No. 2, The role of independent national human rights institutions in the promotion and protection of the rights of the child, U.N. Doc. CRC/GC/2002/2 (2002).

implement the treaty.<sup>130</sup> This does not, however mean that, as the United States argued in 2006 before the Human Rights Committee, only “the parties to a treaty [are] empowered to give a binding interpretation of its provisions.”<sup>131</sup>

International law has always relied heavily on domestic legal systems.<sup>132</sup> One reason for this is the lack of any centralised authority to govern it or strong enforcement mechanisms to ensure compliance, which means the cooperation of states is necessary to give expression and force to most international law.<sup>133</sup> This lack of any centralised authority is the same force that gave reciprocity its central role in treaty enforcement.<sup>134</sup> The other reason for this reliance on cooperation is that international law governs the behaviour of states, rather than individuals. States, however, do not have wills of their own and do not act autonomously, but only through individuals.<sup>135</sup> Therefore, a treaty that prohibits a state from engaging in a certain behaviour, for instance racial discrimination, is only effective if national laws are passed to prevent individuals from engaging in racial discrimination within the state.<sup>136</sup> For these reasons, national implementation of international law is crucial. Despite this, there has traditionally been very little regulation of the method by which states implement treaties that they have ratified.<sup>137</sup> While states may not use their domestic law as an excuse for failing to meet their international obligations, states are otherwise free to implement treaties in any way they see fit.<sup>138</sup> While this has led to a wide variety of practices, the behaviour of most states regarding the relationship between international and domestic law can be put into one of two broad categories: monist and dualist.

In a dualist system, treaties have no special status under the constitution of the state.<sup>139</sup> Dualism sees international and domestic law as two separate legal systems that exist independently.<sup>140</sup> In this doctrine, international and domestic law are seen as separate entities because they differ as to their subjects, with the former regulating states and the latter individuals. They are also created in different ways, with domestic law generally coming from statutes, while international law arises from treaties and custom.<sup>141</sup> In dualist states, treaties are not enforceable when they are ratified, but must

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<sup>130</sup> Tobin, *supra* note 90 at 11.

<sup>131</sup> Tobin, *supra* note 90 at 14; Human Rights Committee, *Summary Record of the 2380<sup>th</sup> Meeting: Consideration of Reports Under Article 40 of the Covenant: Second and third periodic reports of the United States of America*, ¶8, U.N. Doc. CCPR/C/SR.2380 (July 27, 2006).

<sup>132</sup> Cassese, *supra* note 1, at 14.

<sup>133</sup> Cassese, *supra* note 1, at 13-14.

<sup>134</sup> Paulus, *supra* note 83, at 97.

<sup>135</sup> Cassese, *supra* note 1, at 14.

<sup>136</sup> Cassese, *supra* note 1, at 14-15.

<sup>137</sup> Cassese, *supra* note 1, at 15.

<sup>138</sup> Cassese, *supra* note 1, at 15-16.

<sup>139</sup> Aust, *supra* note 49, at 75.

<sup>140</sup> Peter Malanczuk, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW*, 7<sup>th</sup> ed. 63 (1997).

<sup>141</sup> Cassese, *supra* note 1, at 20.

be implemented in domestic law by the legislature.<sup>142</sup> Generally, this approach reflects the divide between the executive of the state on one hand, which may be able to enter into treaties without the consent of the legislature, and the legislature on the other, which is ultimately the branch responsible for law making.<sup>143</sup> The weaknesses of this system are first, that treaties must wait on legislative action to gain the force of law, and second, that once this has been accomplished, the provisions of the treaty still have only the force of domestic law, and are vulnerable to amendment or repeal by subsequent legislation.<sup>144</sup>

Monist theory, in contrast, sees international and domestic law as part of the same system.<sup>145</sup> Once a treaty has been ratified by the state in accordance with the constitution, it is considered part of domestic law and its provisions are in force within the state.<sup>146</sup> In a state operating under monism, treaties are generally self-executing, and the terms of a treaty are enforceable on a domestic level at the time of ratification without the need for additional domestic legislation.<sup>147</sup> Generally, monist systems are found in states where the legislature must approve a treaty before ratification. These systems also generally distinguish between treaties that are self-executing, and those that require legislation before their provisions are enforceable. In the case of self-executing treaties, their provisions may be considered supreme law once the treaty is ratified, overriding any conflicted domestic legislation.<sup>148</sup> In practice, there are many variations of these two basic theories, and neither one completely captures the behaviour of states in implementing and interpreting international law in a domestic context.<sup>149</sup>

Regardless of which system of treaty implementation states follow, the Vienna Convention requires, in Article 26, that states perform treaties in good faith. The use of the word “perform” in the article anticipates that the ratification of a treaty will require action on the part of the state. That states must take this action with good faith means that states must take action to give effective implementation to treaties they have ratified.<sup>150</sup>

## 2.6 International Law and the Individual

In addition to establishing how international and domestic law interact, it is also important to establish how individual are viewed in the international law system, which generally, outside of human rights law, concerns itself mainly with state to state interaction. According to Cassese, international law did not concern itself with the rights

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<sup>142</sup>A.O. Enabulele, *Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts?*, 17 African J. of Int'l and Comparative L., 328 (2009).

<sup>143</sup> Aust, *supra* note 49, at 75.

<sup>144</sup> Aust, *supra* note 49, at 76.

<sup>145</sup>Malanczuk, *supra* note 140, at 63.

<sup>146</sup>Aust, *supra* note 49, at 76.

<sup>147</sup> Enabulele, *supra* note 142, at 327.

<sup>148</sup>Aust, *supra* note 49, at 76.

<sup>149</sup>Malanczuk, *supra* note 140, at 63.

<sup>150</sup> Tobin, *supra* note 90 at 16; RICHARD GARDINER, TREATY INTERPRETATION 148 (2008).

of individuals in any serious way until after World War II.<sup>151</sup> Before this, the sovereignty of states, and their ability to act within their own borders, was considered absolute.<sup>152</sup> International law governed only the relationships between states, and only states were seen as having rights and duties in international law.<sup>153</sup> Individuals mattered only insofar as they were citizens of a particular state; for instance, if an individual was harmed while in a foreign country, their interests were protected only to the degree to which their state decided to exercise diplomatic authority. It is only fairly recently that international law has concerned itself with individual human beings.<sup>154</sup> During the first stage of the development of international law (from 1648 through World War I), individuals were exclusively under the control of their state, and international law concerned itself exclusively with state behaviour.<sup>155</sup> At best, treaties such as trade and commerce treaties had an indirect effect on individuals, or treated individuals as reference points, such as laws about the treatment of foreign nationals.<sup>156</sup> An exception may be the 19th century treaties prohibiting the slave trade, but these treaties were at least in part motivated by European countries' desires to end the flow of cheap labour to the Americas. The states that supported these treaties were ones that no longer had colonial holdings in the Americas, and so no interest in maintaining the slave trade.<sup>157</sup>

Individuals began to play a larger role in the international community after World War I, with the creation of the ILO which, among other things, gave groups of workers the right to demand state compliance with ILO Conventions. At the same time, the League of Nations gave minority groups within states the right to lodge petitions if they felt a state was not honouring its obligations.<sup>158</sup> However, in practice individuals rarely made use of these rights,<sup>159</sup> and they applied only to certain countries.<sup>160</sup> The League also turned the former colonies of the defeated countries of WWI into mandates, to be governed by the victorious powers. Under the League's covenant, these mandates were to be governed with "the principle that the well-being and development of [indigenous] peoples form a sacred trust of civilisation".<sup>161</sup> Both the mandates system and the petitions for minority groups were overseen by committees, the Mandates Commission and the Committees of Three respectively. These committees could be seen as the very early

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<sup>151</sup>Cassese, *supra* note 1, at 287.

<sup>152</sup>Cassese, *supra* note 1, at 287.

<sup>153</sup> Philip C. Aka, *Education, Human Rights, and the Post-Cold War Era*, 15 N.Y.L. Sch. J. Hum. Rts. 427 (1998-1999).

<sup>154</sup>Cassese, *supra* note 1, at 288.

<sup>155</sup> Cassese, *supra* note 1, at 99.

<sup>156</sup>Cassese, *supra* note 1, at 99.

<sup>157</sup>Cassese, *supra* note 1, at 289.

<sup>158</sup>Cassese, *supra* note 1, at 99.

<sup>159</sup>Cassese, *supra* note 1, at 99.

<sup>160</sup>Thomas Buergenthal, *The Evolving International Human Rights System*, 100 Am. J. of Int'l L., 4, 785 (Oct. 2006).

<sup>161</sup>Buergenthal, *supra* note 160, at 785.

forerunners of the current framework of human rights committees at the UN today.<sup>162</sup>

Despite these early moves, the idea that the individual could be the subject of international law did not take hold. This can be seen in the Covenant of the League of Nations, which stated in situations that are solely within domestic jurisdiction, international law has no jurisdiction. This idea would not be seriously challenged until 1948, with the drafting of the non-binding Declaration.<sup>163</sup> Under some views of international law, even modern international human rights treaties do not create rights for the individual, but only obligations between states to respect the rights of the states' inhabitants. In this view, individuals are seen as third party beneficiaries of obligations created between states.<sup>164</sup>

## 2.7 The Modern Period: Improving Standards for Implementation

Over the past few decades, human rights has become an increasingly important part of international law, and has been increasingly well-regarded by states. For the purposes of this thesis, this is important for two reasons. First, the increasing drive to improve human rights world-wide was likely a contributing factor to the creation of Article 33, as states felt that the persistent implementation gap must be addressed, and that new ideas were needed. Secondly, the increasing importance of human rights bodes well for the success of Article 33 as a tool to improve implementation, as states in this environment are more likely to make use of Article 33, and to want to improve human rights implementation. For these reasons, it is worth studying this increasing importance.

While post-war actions such as the small concessions to human rights in the UN Charter, and the Declaration of Human Rights are important because of the significance they later came to have, human rights did not become a serious part of international law until decades later. Samuel Moyn argues that it was the effect of events in the 1970s that gave human rights serious momentum as an international movement.<sup>165</sup> The 1970s was the first time that social movements began to use the language of human rights to frame their arguments.<sup>166</sup> The first courses on human rights at both Columbia and Harvard Law School would take place in 1971.<sup>167</sup> In a related field, it was in the 1970s that the field of international relations began to deal with human rights. Before this, belief in the idea of sovereignty had prevented any serious examination of human rights, which was considered exclusively a domestic matter.<sup>168</sup> At the same time, the Helsinki Final Act, in

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<sup>162</sup>Buergental, *supra* note 160, at 785.

<sup>163</sup> Turner, *supra* note 8, at 314-315; MICHELINE ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA*, 215-218 (2004).

<sup>164</sup> Louis Henkin, *A Post-Cold War Human Rights Agenda*, 19 *Yale J. Int'l L.* 249 (1994).

<sup>165</sup> Moyn, *supra* note 2, at 7.

<sup>166</sup> Moyn, *supra* note 2, at 121.

<sup>167</sup> Moyn, *supra* note 2, at 203.

<sup>168</sup> Susan Waltz, *Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights*, 23 *Hum. Rts. Q.* 45 (2001).

1975, gave activists in the North Atlantic region a new forum for human rights.<sup>169</sup> While the human rights provisions of the Helsinki Final Act were originally intended for minor purposes, such as allowing family visits, they provided a new treaty that activists at the time, who were beginning to work within the human rights framework, would seize upon and use for their own purposes.<sup>170</sup> It was at this time older sources of human rights, such as the Declaration of Human Rights, were rediscovered and put to use.<sup>171</sup>

One important player in bringing human rights to the foreground was Amnesty International (“Amnesty”). Amnesty was important in two ways. First, it was the first NGOs to invoke human rights consistently. Second, Amnesty did not put the locus of human rights at the UN, but encouraged mass participation through letter writing and candle lighting. Amnesty would go on to win the Nobel Peace Prize for this work in 1977.<sup>172</sup> Another important factor was the dissident movement in the Soviet Bloc. In 1969, dissidents formed the Action Group for the Defence of Human Rights, to be followed a year later by the Human Rights Committee. These groups argued that the governments in the Soviet Bloc were failing to live up to their own laws, and ignoring rights set out in their constitutions.<sup>173</sup> Since the Soviet Union had recently signed the two Covenants, the group could also argue that the country was not meeting its human rights obligations.<sup>174</sup> The focus on human rights in Eastern Europe spread from that region to others, and led people in other countries, who were experiencing similar human rights abuses, to demand action.<sup>175</sup> At the same time that Soviet dissidents were beginning to use a human rights framework, the rise of dictatorships in Latin America, in Uruguay, Chile, and Argentina, led to a rise in the use of human rights language there.<sup>176</sup> This movement gave the Inter-American human rights system new relevance.<sup>177</sup> All of these factors amplified each other, as the work done by Amnesty brought the human rights movements in the Soviet Bloc and Latin America to the attention of North America and Western Europe.<sup>178</sup> Finally, the phrase “human rights” gained an enormous boost in the popular imagination in 1977, when Jimmy Carter used the phrase in his inaugural address.<sup>179</sup> At the same time that human rights was becoming part of the discourse in international politics, throughout the 1970s, largely unnoticed by the press, the UN had

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<sup>169</sup> Moyn, *supra* note 2, at 121.

<sup>170</sup> Moyn, *supra* note 2, at 150; William Korey, “The UN’s Double Standard on Human Rights” *Washington Post*, 22 May, 1977.

<sup>171</sup> Moyn, *supra* note 2, at 121.

<sup>172</sup> Moyn, *supra* note 2, at 129-130.

<sup>173</sup> Moyn, *supra* note 2, at 134.

<sup>174</sup> Moyn, *supra* note 2, at 135.

<sup>175</sup> David P. Forsythe, *Human Rights in a Post-Cold War World*, 15 *Fletcher F. World Aff.*, 56 (1991).

<sup>176</sup> Moyn, *supra* note 2, at 140-141.

<sup>177</sup> Moyn, *supra* note 2, at 143.

<sup>178</sup> Moyn, *supra* note 2, at 148.

<sup>179</sup> Moyn, *supra* note 2, at 155.

begun to draft a number of human rights treaties that addressed issues such as torture and discrimination against women and children.<sup>180</sup>

As the Cold War came to an end, and human rights became part of the popular consciousness, there was also a shift in perceptions of international relations. During the decades of the Cold War, many leaders in the Western world argued that morality in the international world was a different standard than the one used within a state's borders. The chief concern in the international world was security, and states could not therefore promote human rights abroad in an even-handed manner without risking security.<sup>181</sup> As the Cold War ended, and human rights rhetoric became more common, this type of thinking lost its appeal for many observers.<sup>182</sup>

The post Cold War period, roughly after 1989, also saw a significant increase in the use of international law to promote and enforce human rights.<sup>183</sup> Starting in the 1970s, states began to view human rights through the lens of law. This has encouraged activists to, in turn, frame rights violations as legal matters, and pursue the realisation of rights through legal channels.<sup>184</sup> This can be seen as a surprising turn, given how, for instance, the drafting of the UN Charter and the Declaration avoided coding human rights as a legal matter. Despite this, the treaty has become the favoured tool in the promotion of human rights.<sup>185</sup> Not only do treaties create norms, but there has been a perception that putting rights in treaty form would do more to ensure their monitoring and implementation. The biggest drawback of this method was that treaties, by their nature, could only bind parties who agree to be bound by them, and have no force in states that do not become a party to the treaty.<sup>186</sup>

At the same time, states have begun to look at methods to integrate human rights treaties into their domestic law. There are various ways for states to approach this issue. Some states opt for direct implementation, often giving treaties constitutional force.<sup>187</sup> Some state constitutions even make customary international law binding, allowing it to override national laws if necessary. The constitutions of Italy and Japan are examples of this.<sup>188</sup> For some states, such as France, a treaty is considered binding and national authorities are expected to comply with it upon the treaty's publication in the Official Bulletin.<sup>189</sup> Another example of direct implementation is the Spanish Constitution of 1978, which states in Article 10 that all rights in the Constitution shall be interpreted in conformity with the Declaration on Human Rights, as well as other human rights

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<sup>180</sup> Moyn, *supra* note 2, at 177.

<sup>181</sup> Forsythe, *supra* note 175, at 56.

<sup>182</sup> Forsythe, *supra* note 175, at 56..

<sup>183</sup> Turner, *supra* note 8, at 313.

<sup>184</sup> Turner, *supra* note 8, at 325.

<sup>185</sup> Turner, *supra* note 8, at 325.

<sup>186</sup> Turner, *supra* note 8, at 326

<sup>187</sup> Buergental, *supra* note 160, at 805.

<sup>188</sup> Cassese, *supra* note 1, at 15.

<sup>189</sup> Cassese, *supra* note 1, at 15-16.

instruments recognised by Spain.<sup>190</sup> In addition, Argentina gave constitutional force to several conventions, including the International Covenants on both Civil and Political and Economic, Social, and Cultural Rights, when it amended its constitution in 1994.<sup>191</sup>

Whether or not a treaty can take effect immediately or requires some legislative process in part depends on whether or not a treaty can be considered self-executing. A self-executing treaty is one that can take immediate judicial effect without further action by the state's legislature.<sup>192</sup> In countries such as Germany and Italy, a self-executing treaty takes judicial precedence over any conflicting statute.<sup>193</sup> In general, the judiciary of a state is likely to adopt this approach to human rights treaties when the state uses a monist system, and the legislature has some role in treaty adoption.<sup>194</sup> When looking at the treatment of human rights treaties by states, a special mention must be made of the United States. While the general trend of democratic states has been a greater acceptance of these treaties by both court systems and legislative bodies, the US has moved in the opposite direction.<sup>195</sup> While the US was at the forefront of modern international human rights law in its inception in the 1940s, today treaties are ratified with numerous reservations if they are ratified at all, and US courts take an increasingly restrictive view of treaty interpretation.<sup>196</sup>

A trend in Latin America has been to give human rights treaties, both present and future, a special place in the state's constitution. This trend has been influenced by the aforementioned Article 10(2) of the Spanish Constitution of 1978, which holds that human rights norms in Spain shall be interpreted according to the Declaration as well as all human rights treaties ratified by Spain.<sup>197</sup> Costa Rica has a Constitutional Chamber within its Supreme Court, which among other duties ensures Costa Rica's compliance with its international obligations. This chamber has, since its creation in 1989, set aside a number of laws that were not in compliance with human rights treaties that Costa Rica had ratified.<sup>198</sup> Many states within Latin America, including Costa Rica, Colombia, and Guatemala, have constitutions which incorporate the American Convention on Human Rights. Other states, such as Argentina and Peru, have made parts of the American Convention part of their domestic law.<sup>199</sup>

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<sup>190</sup>Buergenthal, *supra* note 160, at 805.

<sup>191</sup>Buergenthal, *supra* note 160, at 805.

<sup>192</sup>Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 Colum. J. Transnat'l L., 213 (1998).

<sup>193</sup>Buergenthal, *supra* note 252, at 213.

<sup>194</sup>Buergenthal, *supra* note 252, at 214.

<sup>195</sup>Buergenthal, *supra* note 252, at 212.

<sup>196</sup>Buergenthal, *supra* note 252, at 211-212.

<sup>197</sup>Buergenthal, *supra* note 252, at 217.

<sup>198</sup>Buergenthal, *supra* note 252, at 217-218.

<sup>199</sup>Goldman, *supra* note 109, at 884.

## 2.8 Other Views of Human Rights Law

While the majority of international scholars now take the view that human rights law is an important subfield of international law, and that international law itself has become increasingly important in recent decades, other theories do exist. While the arguments in this thesis rest on the idea of human rights as international law, it is important to address alternative theories. These scholars argue that the behaviour of states in regard to human rights can be fully explained by factors outside of the UN human rights treaties, and the treaties themselves have little or no influence on state behaviour.<sup>200</sup> Instead, the way states treat their citizens is best explained as a combination of the state's internal politics and the influence of other states.<sup>201</sup> For instance, a liberal democracy will have greater respect for the rights of its citizens than will an authoritarian state, though even an authoritarian state may allow its citizens enough freedom to prevent unrest.<sup>202</sup> External factors can also influence a state's treatment of its citizens. States may, for various reasons, care about the treatment of people in other states. If a more powerful state wants to intervene in the behaviour of a weaker state, the more powerful state can both offer incentives and apply coercive pressure.<sup>203</sup> Compared to these factors, it is argued, UN human rights treaties play, at best, a weak role in determining state behaviour.<sup>204</sup> This rational choice view of human rights law stands in contrast to, for instance, normative theories of international law, which argue that the norms of human rights law exert some pressure on states, distinct from other considerations such as the state's own interests.<sup>205</sup>

Proponents of this view hold that it is not inconsistent with the fact that human rights are considered a more important issue now than in the past, or that respect for human rights has, on the whole, increased since World War II.<sup>206</sup> Instead, the rise of human rights is attributed to factors such as an increase in international trade and democratisation, and more recently the collapse of the Soviet Union. In addition, technological changes have made human suffering more visible, and made efforts to combat human rights violations easier.<sup>207</sup> It is also possible that large NGOs, such as Amnesty, could play a role in disseminating human rights norms. The important point is that this spread of ideas and coordination of political activity across borders would occur, and indeed, in the past, did occur, without any formal system of international human

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<sup>200</sup>Jack L. Goldsmith & Eric A. Posner, *THE LIMITS OF INTERNATIONAL LAW*, 108 (2005).

<sup>201</sup>Goldsmith & Posner, *supra* note 200, Chapter 4 generally.

<sup>202</sup>Goldsmith & Posner, *supra* note 200, at 109.

<sup>203</sup>Goldsmith & Posner, *supra* note 200, at 109-110.

<sup>204</sup>Goldsmith & Posner, *supra* note 200, at Ch. 4 generally.

<sup>205</sup> Kenneth Anderson, *Remarks by an Idealist on the Realism of The Limits of International Law*, 34 *Georgia J. of Int. and Comparative L.* 255 (2006).

<sup>206</sup>Goldsmith & Posner, *supra* note 200, at 121.

<sup>207</sup>Goldsmith & Posner, *supra* note 200, at 121-122.

rights law.<sup>208</sup> There is a long tradition of activists, journalists, and other human rights monitors calling attention to human rights abuses in order to provoke domestic or international action. These monitors rarely rely on the exact wording of a treaty, or whether or not the state accused of abuses is party to a treaty.<sup>209</sup> Peter J. Spiro, on the other hand, argues that Goldsmith and Posner have not adequately dealt with the increasing importance of NGOs and other non-state actors, arguing that just because these bodies have antecedents, does not diminish their increase in scope, participation on the international stage, and increasing transnational character.<sup>210</sup>

In addition, it is argued that the human rights treaties have no effective enforcement mechanism. The committees designated to oversee the treaties have little power, overdue reports are common, and the recommendations issued by these committees have no legal force.<sup>211</sup> Furthermore, the treaties are not enforced by states in any systematic way. While states may organise sanctions against violators of human rights, this only happens when such sanctions are in line with the organising states' economic and strategic interests, and furthermore occurs whether or not the violating state has ratified the relevant human rights treaties. On the other hand, many violations of human rights by states that are party to a relevant treaty go unpunished.<sup>212</sup> Therefore, states can violate human rights treaties with little fear of recourse, and states that comply with treaties must do so for reasons of their own, outside of the treaties themselves.

If one accepts that human rights law has little effect on state behaviour, and that advances in human rights can both be attributed to other factors, and would occur even in the absence of multi-lateral human rights treaties, then a question still remains: why do states put in the effort to draft and ratify treaties in the first place?<sup>213</sup> The short answer is that states will ratify treaties when the benefits of doing so outweigh the costs. As this argument assumes that human rights treaties have no effective enforcement mechanisms, the costs of ratification are low.<sup>214</sup> This means that a state can ratify the treaty even if the state has no intention of implementing it, because there will likely be no consequences from the lack of implementation. For instance, it could be argued that for liberal democracies the costs of ratification are low because the state is likely to be largely in compliance with a treaty before ratification.<sup>215</sup> Where a liberal democracy is not in compliance with the ICCPR, it can avoid the issue with a RUD (Reservations, Understanding, or Declaration). This would explain why liberal democracies are both more likely than authoritarian states to take reservations, and why liberal democracies

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<sup>208</sup>Goldsmith & Posner, *supra* note 200, at 124-125.

<sup>209</sup>Goldsmith & Posner, *supra* note 200, at 125.

<sup>210</sup> Peter J. Spiro, *A Negative Proof of International Law*, 34 Ga. J. Int'l & Comp. L. 456-7 (2005-2006).

<sup>211</sup>Goldsmith & Posner, *supra* note 200, at 119-120.

<sup>212</sup>Goldsmith & Posner, *supra* note 200, at 120.

<sup>213</sup>Goldsmith & Posner, *supra* note 200, at 127.

<sup>214</sup>Goldsmith & Posner, *supra* note 200, at 127.

<sup>215</sup>Goldsmith & Posner, *supra* note 200, at 127.

took so many reservations to the ICCPR.<sup>216</sup> This still leaves the question of why states put effort into drafting and ratifying human rights treaties, if they do not expect the treaties to have any significant influence on the behaviour of state parties, either due to non-compliance or because a state party is already in substantial compliance before signing. One argument is that the set of UN human rights treaties are used by powerful liberal democracies to establish a kind of worldwide code of conduct that they expect other states to follow in return for, for instance, economic aid.<sup>217</sup> In this view, human rights treaties are important mainly in that they inform smaller, weaker states what behaviour powerful liberal states deem appropriate, and thus what behaviour is likely to result in favourable relations with these states.<sup>218</sup> In this view, ratifying a treaty is a way to send a signal that a states will agree to abide by the code of conduct laid down by the treaty. On the other hand, nonratification also sends a clear signal that a states has no intention of protecting human rights.<sup>219</sup> This theory cannot explain all state behaviour, however. It does not explain, for instances, why the United States has not ratified the Convention on the Rights of Children, or why certain conventions receive more ratifications than others, or why authoritarian regimes ratify some conventions but not others.<sup>220</sup>

The argument that liberal democracies lose little by ratifying human rights treaties because they can simply take reservations to the parts of the treaty that conflict with the state's own laws clearly applies to the United States, which habitually takes extensive reservations to human rights treaties it has ratified.<sup>221</sup> This practice, however, is unique to the United States, and not reflected in the behaviour of other democratic states. Furthermore, if international human rights law is as ineffective as some critics have claimed, it is unclear why these reservations would be necessary, as the price of non-compliance with the treaties should be small enough to make the reservations unnecessary.<sup>222</sup> The claim that human rights treaties serve as a way for powerful states to signal correct behaviour to weaker states is also suspect, given the fact that many human rights initiatives, most prominently those against racial discrimination, were spearheaded by smaller developing countries, who were able to guide the international human rights dialogue at times when powerful states were caught up in political divisions.

While international law may not be as easily implemented or enforced as domestic law, this does not diminish its importance. Indeed, throughout history, and particularly since World War II, international law has expanded, both in the number of agreements, treaties, and bodies governing international law, and in the scope of state

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<sup>216</sup>Goldsmith & Posner, *supra* note 200, at 127-128.

<sup>217</sup>Goldsmith & Posner, *supra* note 200, at 128.

<sup>218</sup>Goldsmith & Posner, *supra* note 200, at 130-131.

<sup>219</sup>Goldsmith & Posner, *supra* note 200, at 131.

<sup>220</sup>Goldsmith & Posner, *supra* note 200, at 131.

<sup>221</sup>Anne van Aaken, *To Do Away with International Law? Some Limits to 'The Limits of International Law'*, 17 Eur. J. of Int'l L., 301 (2006).

<sup>222</sup>van Aaken, *supra* note 221, at 301.

activities that are covered by some kind of international agreement. Peter J. Spiro argues that one sign of international law's increasing importance is the effort other scholars have expended in arguing against it.<sup>223</sup> There is also the fact, noted by David Gray, that despite objections to the idea of international law as law, the international legal regime continues to grow, adding treaties and institutions at a steady rate.<sup>224</sup> The problems of implementation and enforcement remain, particularly in the field of human rights law, but even here there is progress. As this chapter demonstrates, one of the largest hurdles to international human rights law has already been cleared. It is now indisputable in the international arena that bodies such as the UN and regional organisations have the right to require that states abide by certain standards in their treatment of individuals within their borders. In past eras, a state's sovereignty within its own territory was considered absolute. This remained true even in the early days of the UN and its human rights system, when many powerful states worried about the implications of allowing the UN to interfere in domestic affairs.

The newness of international human rights law, which has only seriously been considered a branch of international law since roughly the 1970s, means that many of the problems with the system have yet to be solved. The first major hurdles, such as establishing the protection and promotion of human rights as a legitimate use of international law, and establishing and defining a set of human rights, have been largely overcome. Many other obstacles, such as the problem of implementation, and the universal acceptance of human rights, remain to be dealt with. Given the newness of this program, this should not be surprising.

For the purposes of this thesis, the extent to which human rights can or cannot be considered law is, while important, not necessarily a deciding factor in success. Article 33 of the CRPD assumes that human rights law is law, and that states have an obligation to implement treaties that they have ratified. The framework in Article 33 exists to help states meet their obligation. On the other hand, Article 33 relies on national frameworks. Once a framework is erected by the state, it may draw on international standards in its work, but it operates under national law. This is an idea that could spread and have an impact within states even if human rights treaties are not law, or remain unenforceable by normal means. Therefore, while the legal status of human rights is an important point, it does not need to impede efforts to improve human rights implementation, which can move along legal or normative channels.

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<sup>223</sup> Peter J. Spiro, *A Negative Proof of International Law*, 34 Ga. J. Int'l & Comp. L. 445 (2005-2006).

<sup>224</sup> David Gray, *Rule-Skepticism, "Strategy," and the Limits of International Law*, 46 Va. J. Int'l L. 564 (2005-2006).

## 2.9 Conclusion

Human rights law has already passed many important milestones. After the drafting of the Charter and the Declaration, human rights were nearly forgotten for decades. This was due at least in part to the refusal of states at the time to surrender any amount of sovereignty and allow international law to govern a state's behaviour towards those within its borders. This refusal made any legally binding human rights document impossible in the post-war period, and in the minds of many signalled an end to human rights as an idea. Instead, human rights experienced a resurgence in the 1970s, and this time, in a different political climate and with more popular support, was able to overcome state's reluctance to allow international law within state borders. Since this time, a vast human rights infrastructure has been developed, including treaties, monitoring bodies, and regional human rights courts. This achievement is substantial should not be understated.

The rise of human rights in the legal sphere had an effect on international law, as well. International law, which had previously only governed relationships between states, began to govern state behaviour within its own borders. For the first time, individuals became the direct subjects of international law. With human rights as a subfield of international law, the field also began to expand from pure law-based decisions, to take into account the principle and politics around treaties. "Soft" law sources have become more acceptable, which complicates the interpretation process, but allows for human rights to change and evolve as well.

Despite these great achievements, there is still much work remaining. States have come to accept, and widely ratify, human rights treaties, but compliance with those treaties has proven harder to achieve. Human rights treaties cannot rely on the traditional enforcement methods of international law, such as reciprocity. For regional treaties, a human rights court often exists to enforce compliance, but no such court has been established for the more widely ratified UN treaties. The costs of noncompliance remain low, and implementing a human rights treaty can be a complicated and costly process. Even states that ratify treaties in good faith may find translating those treaties into domestic law a difficult task. Article 33 is designed to make the process less complicated, and the state more accountable, thus addressing some of the problems with treaty implementation.

This problem of implementation is one that the human rights community has been working on for some time. Article 33 is simply the latest in a series of reforms and attempts to improve the link between international and domestic law. Since the creation of the early Covenant, the UN has worked to monitor treaty implementation, and efforts to improve this monitoring continue in the hope that improved monitoring can lead to improved implementation. And more recently, since roughly the early 1990s, states have

been encouraged to establish bodies within their own borders that can hold the state accountable for its human rights obligations.

### **3. The UN Treaty Body Reform, and Its Effect on the CRPD**

#### **3.1 Introduction**

The treaty body system of the UN has been the main monitoring mechanism for international human rights treaties, and the main forum in which states' use of the treaties is scrutinised, since the 1970s. The system has been plagued with problems, and charges of ineffectiveness, almost since its conception. In the early 1990s, the Secretary General announced that the treaty body system would be reformed to be more effective, a process that is still on going today. The problems with the treaty bodies were and are numerous, centred mainly around their chief responsibility, monitoring compliance with human rights treaties. The treaty bodies monitor compliance by accepting reports from states every few years, and meeting with state representatives to discuss these reports, issuing recommendations on how states can improve their compliance. For states with low administrative capacity that were party to several treaties, it was difficult to impossible to meet the reporting requirements. This was exacerbated by the fact that each body had a different set of reporting standards. The treaty bodies themselves were underfunded, and didn't meet often enough to keep up with the number of reports coming in, despite the fact that many states were either reporting later, or not reporting at all. The bodies were aware that states were not meeting the reporting requirements, but had no way to enforce deadlines. Finally, there was the question of whether, even if all the administrative problems were solved, the monitoring bodies had an effect on the behaviour of states.

The reform efforts began in the 1990s and continue today. These efforts are worth studying for this thesis for several reasons. First, the reform effort had a measurable effect on the drafting of Article 33. At the time that the CRPD was drafted, the reform process was stalled, and no major reforms had been accomplished. This gave many of the attendees the sense that novel implementation and monitoring mechanisms outside of the UN were needed if human rights treaties were going to become effective legal tools. Second, the development of the UN treaty body system, its problems and reforms, are a major part of the theme of human rights law beginning as a fairly weak legal force, and gaining effectiveness over time. The purpose of this chapter then, is twofold. First, and most importantly, to study how the UN reform effort affected the drafting of the CRPD, and Article 33 in particular. Second, studying the reform effort helps to illuminate some of the problems within the human rights system that contributed to the implementation gap. The aim of this chapter, therefore, is not to cover the entire reform effort, which is a large and complex subject. Instead, the purpose of this chapter is to give some idea of the scope of the problems with the UN treaty body system, the success of the reform effort, and the effect this process might have had in shaping the CRPD. An examination of the

treaty bodies, and the problems they face, is also useful as part of the broader discussion on the difficulty of implementing human rights treaties, the efforts made to improve this, and the role that Article 33 can play in this process.

### 3.2 The Reform Process: The Context for the Drafting of the CRPD

Before the reform process can be considered, it is important to establish what the treaty body system of the UN is and what it does, as well as the problems the reform effort hoped to address. Currently, within the UN, each human rights treaty has its own monitoring body. The first treaty body, the Committee on the Elimination of Racial Discrimination (“CERD”), began work in 1970. By 2009, the treaty body system was made up of nine treaty bodies, with 145 committee members.<sup>1</sup> Each of these bodies is responsible for monitoring state compliance with its particular treaty. This is primarily done through the consideration of mandatory state reports.<sup>2</sup> Most of these bodies also issue general comments and recommendations on their treaty, to clarify provisions or address their application.<sup>3</sup> Most also consider individual communications and undertake inquiries.<sup>4</sup> Some of the treaties also allow for inter-state complaints, though this mechanism has never been used.<sup>5</sup> Members of the committees of the treaty bodies are considered experts in their field, and are appointed for their competence, experience, and “high moral standing”. Because their posts are unremunerated, they must have a stable income, as well as a job that allows for travel and time to participate in committee meetings. In theory, membership in the committees is balanced by both geographic origin and gender, though in reality neither of these goals is consistently achieved.<sup>6</sup>

The existence of the treaty system establishes the legitimacy of international law having an interest in the protection of human rights, that international supervision of state behaviour is valid, and that sovereignty is limited with respect to human rights.<sup>7</sup> Treaty bodies have a vital role to play in promoting human rights norms and monitoring state behaviour. Although the opinions of treaty bodies are non-binding, they make up an important part of the international response to human rights and, given their key role in setting and promoting human rights norms, it is important that they be seen to function

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<sup>1</sup> Michael O’Flaherty, *Reform of the UN Human Rights Treaty Body System: Locating the Dublin Statement*, 10 Hum. Rts. L.R. 2, 319 (2010).

<sup>2</sup> Rachael Lorna Johnstone, *Cynical savings or Reasonable Reform? Reflections on a Single Unified UN Human Rights Treaty Body*, 7 Hum. Rts. L. R., 1, 175 (2007).

<sup>3</sup> Johnstone, *supra* note 2, at 175.

<sup>4</sup> O’Flaherty, *supra* note 1, at 320.

<sup>5</sup> Johnstone, *supra* note 2, at 175.

<sup>6</sup> Johnstone, *supra* note 2, at 177-8; Neimi and Scheinin, *Reform of the United Nations Human Rights Treaty Body System Seen from the Developing Country Perspective*, 66 (Finland: Institute for Human Rights, Abo Akademi University, 2002).

<sup>7</sup> Anne F. Bayefsky *THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS*, 5 (2001).

well, and be perceived on the international stage as a credible voice on human rights.<sup>8</sup> In addition, these bodies provide guidance on the content of the treaties.<sup>9</sup> The reporting process, in addition to monitoring progress, has helped to turn the sometimes vague goals in the treaties into concrete standards.<sup>10</sup> At its best, the state reporting system is intended to promote the internalisation of human rights norms, and start a process on the national level. This process begins with the understanding of human rights standards, the review of national laws and practices in light of those standards, the creation of a plan to handle shortfalls discovered, monitoring the implementation of this plan, and finally reporting progress at the next state report.<sup>11</sup> Support for the treaty body system is apparent in both the number of states that ratify human rights treaties, and the engagement of civil society with the treaties and treaty bodies.<sup>12</sup>

Although the treaty body system has made some gains, there has been criticism of the treaty body system, and its failure to completely live up to its potential, almost since the system was formed.<sup>13</sup> As Anne Bayefsky noted in her wide ranging report on the treaty body system, problems in the treaty body system are of particular importance, because they can have ramifications beyond the system itself. If rights written into treaties are not protected, and the standards in the treaty are treated as unachievable ideals, rather than law, then the rule of law is at risk, and the international law system is threatened.<sup>14</sup> At the moment, many states are willing to ratify human rights treaties precisely because there is little chance they will be forced to make changes to their national laws.<sup>15</sup> The largest problem with the treaty body system is that at the time the system was developed, and began to take on its current shape, effective monitoring of human rights was neither intended nor achievable.<sup>16</sup> For these reasons, there have been three major attempts to reform the treaty body system. The first two attempts were made in the 1990s and early 2000s. Both attempts failed to gain significant momentum, or lead to major changes. A more recent attempt, starting in the 2010s, was because of these failures noticeably more timid, refraining from any suggestions that would change the text of the treaties or the basic features of the treaty body system.<sup>17</sup>

The problems in the treaty body system began to develop in the decade between 1979 and 1989. In this period, the work of the bodies underwent a massive increase, due

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<sup>8</sup> Michael O’Flaherty & Claire O’Brien, *Reform of the UN Human rights Treaty Monitoring Bodies: A Critique of the Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body* 7 Hum. Rts. L. R. 1, 145 (2007).

<sup>9</sup> O’Flaherty & O’Brien, *supra* note 8, at 142.

<sup>10</sup> Johnstone, *supra* note 2, at 178.

<sup>11</sup> Bayefsky, *supra* note 7, at 77.

<sup>12</sup> O’Flaherty & O’Brien, *supra* note 8, at 145.

<sup>13</sup> O’Flaherty & O’Brien, *supra* note 8, at 146.

<sup>14</sup> Bayefsky, *supra* note 7, at 7.

<sup>15</sup> Bayefsky, *supra* note 7, at 7.

<sup>16</sup> Bayefsky, *supra* note 7, at i.

<sup>17</sup> Yuval Shany, *The Effectiveness of the Human Rights Committee and the Treaty Body Reform*, 15 (International Law Forum, The Hebrew University of Jerusalem, Research Paper No.02-13,2013).

to increasing numbers of treaties, state parties, and other bodies with an interest in human rights. At the same time, many treaty bodies added to their own workload by taking on additional work, for instance individual communications, and creating new output, such as general comments.<sup>18</sup> By 1996, the system was considered unsustainable, and according to an Independent Expert, three things were needed to allow the system to meet its objectives: increased resources, enhanced efficiency, and a revision of the fundamental operating model of the treaty body system.<sup>19</sup> In 2006, the Office of the High Commissioner for Human Rights (“OHCHR”) stated that the goals of the reform efforts were to achieve implementation of the various human rights treaties, and increase the protection of rights holders.<sup>20</sup> During this period of reform, several proposals have been made, sometimes before work on previous proposals was finished, resulting in various discussions around different reform proposals that ran in parallel.<sup>21</sup>

This was the state of the reform process at the time of the drafting of the CRPD. Given this, it is clear why many of the drafters were discouraged about the prospects for any UN monitoring mechanism, to the point that many drafters suggested leaving out the treaty body altogether. While the CRPD did, in the end, contain a standard treaty body, those who felt that the reform process had revealed intractable problems were able to create novel national level mechanisms in Article 33.

### 3.3 Common Core Documents, A Successful but Minor Reform

At the time that the CRPD was drafted, the reform effort had been on going for more than a decade, with few gains to show for the effort involved. The Common Core Documents were one of the few reforms that had taken hold in that time. The process that created them, and the results are therefore worth studying, as an example of what the drafters of the CRPD would have seen as one of the few success of the reform process.

After a 1997 report on the problems within the treaty body system, the Secretary General announced a reform of the system as part of a larger effort to reform the UN.<sup>22</sup> Although he requested that recommendations for change be submitted by 2003, the Secretary General did proposed two major changes in the report: That the treaty bodies

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<sup>18</sup> O’Flaherty & O’Brien, *supra* note 8, at 146.

<sup>19</sup> O’Flaherty & O’Brien, *supra* note 8, at 150.

<sup>20</sup> Johnstone, *supra* note 2, at 173; OHCHR, *Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body*, U.N.Doc. HRI/MC/2006/2 (22 March 2006).

<sup>21</sup> Hanna Beate Schopp-Schilling, *Treaty Body Reform: The Case of the Committee on the Elimination of Discrimination Against Women*, 7 Hum. Rts. L. Rev. 205 (2007).

<sup>22</sup>Secretary General, *Strengthening of the United Nations, an Agenda for Further Change* ¶ 52-54, U.N. Doc. A/57/387 (9 September, 2002).

coordinate their activities and standardize their reporting requirements, and consider allowing states to submit one report covering all treaties.<sup>23</sup>

The various treaty bodies did not react favourably to the idea of a single report covering all of a state party's human rights obligations. Treaty bodies feared that states would not be able to give the necessary amount of detail to all of their obligations in a single report, and some committees, such as the Committee on Economic, Social and Cultural Rights ("CESCR") and the Committee on the Elimination of Discrimination Against Women ("CEDAW"), worried that certain human rights obligations would be neglected under such a reporting regime.<sup>24</sup> The Committee on the Rights of the Child ("CRC") questioned whether such a reporting process would improve reporting rates, or be worth the difficulty it would cause other groups that took part in the reporting process, such as NGOs.<sup>25</sup> The treaty bodies also argued that the treaties would have to be amended before a single report could legally fulfil a state's reporting obligation.<sup>26</sup> The idea of a single report was also rejected by an independent group of experts who looked at the recommendations.<sup>27</sup> Like the treaty bodies, the experts felt that it would be extremely difficult for a state party to address all of its human rights obligations in a single document, without leaving out important rights or details of implementation. Other arguments against the single consolidated report included worries about such a report reaching an unmanageable length, which would make the report less useful for human rights groups and civil society in general. The experts pointed out that the separate reports are useful for civil society organisations, which often focus on just one area or issue.<sup>28</sup> The experts did suggest, however, that states with limited administrative abilities could be allowed to submit a single report, as even a single report would be an improvement over non-reporting.<sup>29</sup>

By the summer of 2004, at the 16th meeting of the chairpersons of the treaty bodies, a compromise over the idea of a single treaty report had been reached. Rather than one report, states would have the option to prepare a single core document that would cover all the overlapping requirements of the various treaties the state had ratified. This document would be supplemented by treaty-specific documents when the state

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<sup>23</sup>Second inter-Committee meeting of the human rights treaty bodies, *Methods of Work Relating to the State Reporting Process*, ¶ 3, U.N. Doc. HRI/ICM/2003/2 (11 April 2003).

<sup>24</sup>*Methods of Work Relating to the State Reporting Process*, *supra* note 23, at ¶ 9.

<sup>25</sup>*Methods of Work Relating to the State Reporting Process*, *supra* note 23, at ¶ 9.

<sup>26</sup> Johnstone, *supra* note 2, at 182.

<sup>27</sup>Christian Wenaweser, *Letter dated 13 June 2003 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General*, ¶ 23-28, U.N. Doc. A/58/123 (8 July 2003).

<sup>28</sup>*Letter dated 13 June 2003 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General*, *supra* note 27, at ¶ 21-28.

<sup>29</sup>*Letter dated 13 June 2003 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General*, *supra* note 27, at ¶ 28.

reported to treaty bodies.<sup>30</sup> While the idea of a core document had existed since 1991, it was considered a first step in a state report.<sup>31</sup> The expanded core document accepted by the treaty bodies would cover a wider range of information, and reduce the amount of duplicate work for state parties in preparing their reports.<sup>32</sup> A common core document (“CCD”) shared among the treaty bodies could also increase coordination and communication among the bodies themselves.<sup>33</sup> By 2005, a set of guidelines for preparing the core document had been agreed upon.<sup>34</sup> As of June 2006, several countries that received technical assistance from the OHCHR had begun work on their core document, such as Afghanistan, Angola, Guyana, and Timor-Leste. Other countries, such as Burkina Faso and Equatorial Guinea had sought assistance. Of countries that did not receive technical assistance in their reporting requirements, Australia and Switzerland had begun preparation of a core document.<sup>35</sup>

As of April 2014, the website of the OHCHR held the core documents of 73 states,<sup>36</sup> and a few countries had already issued more than one version, providing updates on their human rights situation. However, the documents varied greatly in the detail provided, and how closely each CCD conformed to the guidelines provided by the UN. According to the most recent set of reporting guidelines issued by the UN,<sup>37</sup> The CCD must contain 3 broad sections: general information about the reporting state,<sup>38</sup> the state’s general framework for the protection of human rights,<sup>39</sup> and information on non-discrimination, equality, and effective remedies.<sup>40</sup> The draft guidelines had at one point

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<sup>30</sup> The Secretary-General, *Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights*, ¶ 22-23 U.N. Doc. A/59/254 (11 August 2004).

<sup>31</sup> Sixteenth meeting of chairpersons of the human rights treaty bodies, *Guidelines on an expanded core document and treaty-specific targeted reports and harmonized guidelines on reporting under the international human rights treaties*, U.N. Doc. HRI/MC/2004/3 (9 June 2004).

<sup>32</sup> *Guidelines on an expanded core document and treaty-specific targeted reports and harmonized guidelines on reporting under the international human rights treaties*, supra note 31, at ¶ 7-8.

<sup>33</sup> *Guidelines on an expanded core document and treaty-specific targeted reports and harmonized guidelines on reporting under the international human rights treaties*, supra note 31, at ¶ 7-8.

<sup>34</sup> Seventeenth meeting of chairpersons of the human rights treaty bodies, *Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific targeted documents*, U.N. Doc. HRI/MC/2005/3 (1 June 2005).

<sup>35</sup> Eighteenth meeting of chairpersons of the human rights treaty bodies, *Report on the Implementation of Recommendations of the Fourth Inter-Committee Meeting and the Seventeenth Meeting of Chairpersons*, ¶ 6-8, U.N. Doc. HRI/MC/2006/6 (2 June, 2006).

<sup>36</sup> <http://www2.ohchr.org/english/bodies/coredocs.htm>.

<sup>37</sup> Compilation of guidelines on Common Core Documents, HRI/GEN/2/Rev.6, <http://www2.ohchr.org/english/bodies/coredocs.htm>.

<sup>38</sup> Compilation of guidelines on Common Core Documents, HRI/GEN/2/Rev.6, <http://www2.ohchr.org/english/bodies/coredocs.htm>.

<sup>39</sup> Compilation of guidelines on Common Core Documents, HRI/GEN/2/Rev.6, <http://www2.ohchr.org/english/bodies/coredocs.htm>.

<sup>40</sup> Compilation of guidelines on Common Core Documents, HRI/GEN/2/Rev.6, <http://www2.ohchr.org/english/bodies/coredocs.htm>.

included a section covering the common core provisions of each treaty,<sup>41</sup> but this section was ultimately removed from the final version of the guidelines. The guidelines also stipulate what each section of the CCD must cover to be considered adequate.<sup>42</sup> Currently, however, several CCDs do not meet even the broad requirements of covering the three main sections. A few older CCDs, such as Angola,<sup>43</sup> Australia,<sup>44</sup> Maldives,<sup>45</sup> and Timor Leste,<sup>46</sup> conform to the draft requirements and include a section, now unnecessary, on common treaty provisions. Several other CCDs, at least ten,<sup>47</sup> do not include the third section of the CCD, covering equality, non-discrimination, and effective remedies. Even among the remaining reports, some are brief and lack sufficient detail to meet requirements.<sup>48</sup> On the other hand, the process of collecting CCDs is on going, albeit slowly, and CCDs have been submitted regularly from 2006<sup>49</sup> to the end of 2013,<sup>50</sup> suggesting that while the process of changing the reporting requirements may not be moving quickly, it does continue to make some progress.

As a success of the reform process, CCDs are modest, and even though states and treaty bodies rapidly agreed to this reform, progress on their implementation remained slow, a problem that also plagued other accepted reforms of the time. In this way, even these modest reforms may have provided fuel for those drafters who felt that the international system of monitoring had failed, and that new ideas and mechanisms were needed in human rights treaties.

### 3.4 Unified Treaty Body, an Ambitious Failed Effort

One of the most commonly proposed and popular ideas in the reform process was the idea of some kind of consolidated treaty body.<sup>51</sup> By the time of the drafting of the CRPD, this reform had already failed. Like the CCDs, it is worth studying this failure to understand the mindset of the drafters, who had seen minor reforms succeed, and more ambitious ideas such as this one fail, further cementing the feeling that new ideas were needed in human right treaties. The current treaty body system was developed in a rather disorganised, ad hoc fashion, with the result that it is made up of a selection of diverse

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<sup>41</sup>*Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific targeted documents, supra note 34.*

<sup>42</sup>Compilation of guidelines on Common Core Documents, HRI/GEN/2/Rev.6, <http://www2.ohchr.org/english/bodies/coredocs.htm>.

<sup>43</sup>Angola CCD, <http://www2.ohchr.org/english/bodies/coredocs.htm>.

<sup>44</sup>Australia CCD, <http://www2.ohchr.org/english/bodies/coredocs.htm>.

<sup>45</sup>Maldives CCD, <http://www2.ohchr.org/english/bodies/coredocs.htm>.

<sup>46</sup>Timor Leste CCD, <http://www2.ohchr.org/english/bodies/coredocs.htm>.

<sup>47</sup>Costa Rica, Israel, Macedonia, Mexico, Mongolia, Peru, Poland, Timor Leste, Turkmenistan, United States, <http://www2.ohchr.org/english/bodies/coredocs.htm>.

<sup>48</sup>e.g. Mauritius, Korea, <http://www2.ohchr.org/english/bodies/coredocs.htm>.

<sup>49</sup>US CCD, <http://www2.ohchr.org/english/bodies/coredocs.htm>.

<sup>50</sup>Norway CCD, <http://www2.ohchr.org/english/bodies/coredocs.htm>.

<sup>51</sup> O'Flaherty & O'Brien, *supra* note 8, at 144.

bodies that are not subject to the authority of a single body, and not easily fit into an organisational structure.<sup>52</sup> Examples of the disorganised nature of the treaty body include the CESCR, which unlike the all other treaty bodies, was established by a resolution of the General Assembly, rather than through a treaty. This affects the way its members are elected, though the Economic and Social Council rather than state parties.<sup>53</sup> There is also CEDAW, which alone is serviced by the Division for the Enhancement of Women, and based in New York, while the other bodies are serviced by the OHCHR, and based in Geneva.<sup>54</sup> There were also concerns that the sheer number of recommendations that states receive from the treaty bodies makes it both difficult to form a comprehensive picture of the human rights situations in a particular state, and for the state to respond to recommendations.<sup>55</sup> An Independent Expert therefore concluded, in 1989, that it would be necessary to consolidate the bodies in some way.<sup>56</sup>

Different forms of a consolidated body have been proposed. One report suggested two bodies, one to handle state reports, and a second for individual communications.<sup>57</sup> Another report rejects the idea of a single body without any sub-chambers, as it would not increase working capacity. It proposes various ideas for subdivisions. Another rejected idea is to divide the single body into sub-chambers by treaty, as this would have a high risk of recreating the current situation.<sup>58</sup> Other proposed ideas are a single body made up of chambers, each with an identical mandate, operating in parallel.<sup>59</sup> Or, a single body could have sub chambers with different functions, such as reviewing state reports in one, and individual communications in another. This appears to be the preferred option.<sup>60</sup> Another suggestion is a sub-chamber that could act as an early warning system, to respond to violations of human rights that required the immediate attention of the treaty body.<sup>61</sup>

The proposed advantages of unifying the treaty bodies are many. It would entirely standardise the reporting procedure, reduce the volume and number of reports, therefore reducing the burden of reporting, and eliminating overlap between the treaty bodies,

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<sup>52</sup> O'Flaherty & O'Brien, *supra* note 8, at 148.

<sup>53</sup> Veronique Joosten, *Reforming the United Nations' Human Rights System: To determine the way ahead, one has to know the route already travelled*. 1 Hum. Rts, and Int'l Legal Discourse, 193 (2007).

<sup>54</sup> Joosten, *supra* note 53, at 193.

<sup>55</sup> Fifth Inter-Committee Meeting of the Human Rights Bodies, Eighteenth Meeting of chairpersons of the human rights treaty bodies, *Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body*, U.N. Doc. HRI/MC/2006/2, ¶ 23 (22 March 2006).

<sup>56</sup> O'Flaherty & O'Brien, *supra* note 8, at 149

<sup>57</sup> O'Flaherty & O'Brien, *supra* note 8, at 152.

<sup>58</sup> *Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body*, HRI/MC/2006/2, ¶ 37-45 (22 March 2006).

<sup>59</sup> *Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body*, *supra* note 58, at ¶ 37-45.

<sup>60</sup> *Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body*, *supra* note 58, at ¶ 37-45.

<sup>61</sup> O'Flaherty & O'Brien, *supra* note 8, at 161.

therefore eliminating inconsistent interpretations.<sup>62</sup> States would be able to report to this body with a single report, covering all treaties to which the state is a party. Reporting guidelines would, of course, have to take into account the fact that every state has not ratified every convention, and states should not be obliged to provide information that is pertinent only to a treaty the state has not ratified.<sup>63</sup> Having a single report might raise the status of the report itself, as it would be “the” report, followed by “the” concluding observations. This format may be more accessible to the media and civil society.<sup>64</sup> A single body would also send an important message about the indivisibility and interconnectedness of human rights. Such a body would be more equipped to handle inquiries into intersectional issues that may impinge on more than one treaty.<sup>65</sup>

Overlap between treaties is a problem of particular concern. The two covenants, the ICCPR and ICESCR, can be considered the parent treaties, upon which all other treaties simply expand.<sup>66</sup> For instance, one could argue that CEDAW does not add anything new to the rights found in the two Covenants, but only clarifies how the provisions apply to women.<sup>67</sup> The CRPD is another example. It was written under a mandate to not create new rights, but only clarify how existing rights should be put in place for people with disabilities.<sup>68</sup> While treaty bodies can therefore have a large overlap in substance, the bodies do not usually refer to each other’s concluding observations. There have also been instances of inconsistent interpretation of rights, and one body ignoring issues raised by another.<sup>69</sup> Not only would a single treaty body eliminate these problems, it would also solve the problem of repetition in reporting.<sup>70</sup>

There are also challenges to the idea of a single treaty body, as Michael O’Flaherty and Claire O’Brien noted in their article on the subject. First, the process of reform would not be simple. Any reforms, such as consolidation, that deal with the legal foundations of the UN treaty body system, could expose the system to political tampering, particularly by groups hostile to a stronger framework for human rights protection.<sup>71</sup> In addition, even if the reform process successfully created a strong unified treaty body, there are concerns that a single body might be subject to superficiality and loss of diversity.<sup>72</sup> A single body may also pay less attention to the concerns of certain

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<sup>62</sup> O’Flaherty & O’Brien, *supra* note 8, at 149.

<sup>63</sup> Johnstone, *supra* note 2, at 183.

<sup>64</sup> Johnstone, *supra* note 2, at 184.

<sup>65</sup> Johnstone, *supra* note 2, at 184-5.

<sup>66</sup> Johnstone, *supra* note 2, at 181.

<sup>67</sup> Johnstone, *supra* note 2, at 181.

<sup>68</sup> Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 Hum. Rts. L. R. 1, 20 (2008).

<sup>69</sup> Johnstone, *supra* note 2, at 181-2; Tistounet, *The Problem of Overlapping Among Different Treaty Bodies*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING*, 389 (Alston and Crawford eds. 2000).

<sup>70</sup> Johnstone, *supra* note 2, at 184.

<sup>71</sup> O’Flaherty & O’Brien, *supra* note 8, at 144.

<sup>72</sup> O’Flaherty & O’Brien, *supra* note 8, at 150.

groups of rights holders. The need for the treaty body to look at all treaties may mean that depth is lost in some areas.<sup>73</sup> On the other hand, the current situation is not immune to problems of overlooking certain rights holders. For instance, it has been claimed that some groups within the UN use the existence of CEDAW as an excuse to ignore or minimise women's rights in mainstream human rights work. The logic being that those problems are dealt with elsewhere, thus relieving other groups from that responsibility.<sup>74</sup> A single treaty body would also have less time than the separate bodies. As of 2007, all treaty bodies were meeting for a combined total of 57 weeks a year, a number a single body obviously couldn't match.<sup>75</sup> There is also the question of funding. To operate successfully, a single body would need generous, reliable funding. However, this may, in the end, be less expensive than the cost of maintaining several separate treaty bodies.<sup>76</sup>

There is also the problem of determining the membership of a single treaty body. Presumably, such a body would be staffed full time, and therefore require that committee members be remunerated.<sup>77</sup> Paid positions may attract a different kind of committee member. While this could broaden the expertise of the committee, there is also a risk that the positions will attract people with no real commitment to human rights.<sup>78</sup>

Finally, there are the legal difficulties of establishing a single treaty body. All treaties bodies, with the exception of the CESCR, are established in their particular treaty. Abolishing them for a single treaty body poses legal questions. In theory, the treaties could be amended, but this option is both impractical and undesirable. It would require, in most cases, the approval of two thirds of state parties. This process could take over a decade, and states could use the process to hide abuses, or refuse to ratify the amendments to avoid monitoring.<sup>79</sup> Furthermore, states are clearly not open to the idea of improving the treaty body system through amendment. The language used by states in discussing human rights is on its face supportive of human rights monitoring, but in practice used to push for the opposite result.<sup>80</sup> At other times, states have voiced concern that a single treaty body could be an unwelcome first step towards a world court of human rights.<sup>81</sup> There is also the fact that even if states could be persuaded to amend all human rights treaties, the amendments would only be binding on the states that had accepted them, meaning the pre-existing treaty body system would have to be maintained

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<sup>73</sup> O'Flaherty & O'Brien, *supra* note 8, at 165-166.

<sup>74</sup> O'Flaherty & O'Brien, *supra* note 8, at 168.

<sup>75</sup> Johnstone, *supra* note 2, at 193.

<sup>76</sup> Johnstone, *supra* note 2, at 189.

<sup>77</sup> Johnstone, *supra* note 2, at 187.

<sup>78</sup> Johnstone, *supra* note 2, at 188; Anne Leckie, *The Committee on Economic, Social and Cultural Rights: Catalyst for Change in a system Needing Reform*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING*, 131 (Alston and Crawford eds. 2000).

<sup>79</sup> Johnstone, *supra* note 2, at 198-9.

<sup>80</sup> Bayefsky, *supra* note 7, at 141.

<sup>81</sup> O'Flaherty, *supra* note 1, at 325.

for all remaining states.<sup>82</sup> The best option is a General Assembly resolution to merge the treaty bodies, while they legally continue to exist.<sup>83</sup>

The treaty bodies' response to the idea of a unified body was mixed. In 2005, the Human Rights Committee ("HRC") stated that its members had an "open mind" on the proposal, but had not reached a final opinion. The members of CESCR had varied opinions. The CRC and CERD were doubtful on the need for or desirability of a single treaty body.<sup>84</sup> CEDAW spoke out against the idea, stating that the creation of a single treaty body "does not respond" to the problems identified, and could undermine the differentiation of human rights.<sup>85</sup> In general treaty body members do not, and will not, support the elimination of their position. In addition, the civil society groups that have worked with the various treaty bodies worry about a loss of attention to their particular area of rights if the bodies are consolidated.<sup>86</sup> The NGO Group for the Convention on the Rights of the Child, which works with the CRC, at one point issued a statement saying that they were "bewildered . . . by the continuing single-minded pursuit of the unified treaty body proposal". They encouraged those involved in the reform process to instead take "a more sophisticated approach" that would enhance the protection of rights holders.<sup>87</sup> Those who were opposed to the idea of a single treaty body also expressed fears that eliminating the specific treaty bodies would mean the loss of the experience those bodies had gained over the years of work.<sup>88</sup> These negative reactions meant that at a certain point, the High Commissioner for Human Rights ceased to pursue the proposal.<sup>89</sup> The most positive outcome of the debate over unification was that it galvanised the treaty bodies to consider the need to standardise their reporting guidelines, terminology, and information exchange.<sup>90</sup>

### 3.5 Harmonisation of Methods, a Difficult Task

While the treaty bodies agreed fairly early in the reform process that harmonising reporting methods was a good idea, the process dragged out for years, and often seemed to be making very little progress. This, then, lies somewhere between a success and failure, and is the final kind of reform to study to understand how the reform process

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<sup>82</sup> Michael Bowman, *Towards a Unified Treaty Body for Monitoring Compliance with UN Human Rights Conventions? Legal Mechanisms for Treaty Reform*, 7 Hum. Rts. L. Rev. 228 (2007).

<sup>83</sup> Johnstone, *supra* note 2, at 199; Scheinin, *The Proposed Optional Protocol to the Covenant of Economic, Social and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform—Without Amending the Existing Treaties*, 6 Hum. Rts. L.R. 131 (2006).

<sup>84</sup> Johnstone, *supra* note 2, at 174.

<sup>85</sup> Schopp-Schilling, *supra* note 21, at 210.

<sup>86</sup> Bayefsky, *supra* note 7, at 145.

<sup>87</sup> O'Flaherty, *supra* note 1, at 324.

<sup>88</sup> Schopp-Schilling, *supra* note 21, at 209.

<sup>89</sup> O'Flaherty, *supra* note 1, at 325.

<sup>90</sup> O'Flaherty, *supra* note 1, at 325.

would have looking to the drafters of the CRPD, and why they were so willing to consider novel ideas.

The other area identified in the initial reform effort as in need of change was the varied reporting requirements of the different UN treaty bodies. At this point in the reform effort, there were seven treaty bodies, each with its own requirements and procedures around state reports. In *Strengthening the UN*, the Secretary-General stated that this intricate network put a large burden on states making reports to the various bodies, and obscured the benefits that the treaty body system should have delivered. The Secretary-General suggested that one way to improve the system would be to standardise reporting requirements, simplifying the process of reporting to several treaty bodies.<sup>91</sup> The idea of harmonised reporting guidelines was also accepted, apparently without reservation, by a committee of experts convened to look into the reform of the treaty bodies.<sup>92</sup>

Although work on a common core document, which did coordinate the committees to some extent, was largely accomplished by 2006, standardising the terminology and requirements of the various treaty bodies took longer. For instance, as of June 2006, the issue of differing terminology had not been discussed by six of the seven treaty bodies, and while a report on the various working methods of the different treaty bodies had been prepared and published, the report showed that there was still considerable difference in each treaty body's approach.<sup>93</sup> The new guidelines also required the treaty bodies to make changes to allow for the existence of the common core document in their specific reporting guidelines. By 2008, CERD, CEDAW and The Committee on Migrant Workers ("CMW") had altered the guidelines for their treaty-body specific reports to complement the guidelines for the common core document.<sup>94</sup> The most recent set of guidelines, covering both the CCD and the guidelines for the various treaty bodies, shows that at least some common requirements have been adopted. For all treaty-specific documents, the length of the report was standardised, at 60 or fewer pages for the initial report, and 40 or fewer for all periodic reports.<sup>95</sup>

While the harmonised guidelines therefore do take some steps towards simplifying the process of preparing treaty-specific reports, the various reporting guidelines continue to differ significantly by committee, and some committees have yet

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<sup>91</sup>*Strengthening of the United Nations, an Agenda for Further Change*, *supra* note 21, at ¶ 52-54.

<sup>92</sup>*Letter dated 13 June 2003 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General*, *supra* note 27, at ¶ 16.

<sup>93</sup>*Report on the Implementation of Recommendations of the Fourth Inter-Committee Meeting and the Seventeenth Meeting of Chairpersons*, *supra* note 35, at ¶ 13.

<sup>94</sup>Twentieth meeting of chairpersons of the human rights treaty bodies, *Report on the Working Methods of the Human Rights Treaty Bodies Relating to the State Party Reporting Process*, ¶ 18-22, U.N. Doc HRI/MC/2008/4 (5 June 2008).

<sup>95</sup>Compilation of guidelines on Common Core Documents, HRI/GEN/2/Rev.6, <http://www2.ohchr.org/english/bodies/coredocs.htm>.

(as of June 2009, the last time harmonised guidelines were issued)<sup>96</sup> to update their own reporting procedure to take the new reporting regime into account. Of the eight treaty bodies, four, the HRC, CAT, CERD, and CRC, have not updated their requirements since the CCD Guidelines were accepted by the UN.

In addition to reporting requirements, the treaty bodies were encouraged to standardise their procedures around reporting. Prior to the reform effort, HRC, CESC, CRC, and CEDAW all provided state parties with a list of questions/issues that they would like to see addressed in the state party's report.<sup>97</sup> One of the earliest suggestions for reform was that all treaty bodies adopt this procedure, preparing questions at pre-sessional meeting well in advance of a state party's report, in order to allow the state party to focus their report on specific areas of concern. This list would also allow treaty bodies to target their questions during the examination of the report.<sup>98</sup> State parties were strongly supportive of this reform, as they found the pre-sessional list of questions helpful in preparing their reports.<sup>99</sup> States also encouraged the treaty bodies to hold follow-up sessions after a state has delivered its report, to both advise a state on future action and give state parties a chance to ask for technical assistance.<sup>100</sup>

By February of 2004, some progress was being made in this area. CAT had adopted pre-sessional meetings, and the HRC and CAT both had adopted follow-up procedures.<sup>101</sup> By 2008, all treaty bodies had some form of pre-sessional questions, though the exact practices still varied greatly. For instance, CMW only used pre-sessional questions on initial reports, not periodic reports. In the case of CERD, questions were drawn up by the country rapporteur, rather than by the committee itself.<sup>102</sup> In all other committees, questions were prepared for all reports, by the committee itself.<sup>103</sup> Also by 2008, all existing treaty bodies provided states with concluding observations, noting both what progress had been made and in what areas further progress was needed.<sup>104</sup>

On the other hand, treaty bodies have also made changes that bring their procedures further out of line. For instance, as of 2009, both CAT and the HRC had

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<sup>96</sup>Compilation of guidelines on Common Core Documents, HRI/GEN/2/Rev.6, <http://www2.ohchr.org/english/bodies/coredocs.htm>.

<sup>97</sup>*Methods of Work Relating to the State Reporting Process*, *supra* note 23, at ¶ 33-36.

<sup>98</sup>*Methods of Work Relating to the State Reporting Process*, *supra* note 23, at ¶ 33-36.

<sup>99</sup>*Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights*, ¶ 47-49, U.N. Doc A/58/350 (5 September 2003).

<sup>100</sup>Sixteenth meeting of chairpersons of the human rights treaty bodies, *Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights* ¶ 43, U.N.Doc A/59/254, (11 August, 2004).

<sup>101</sup>Commission on Human Rights, *Effective Functioning of Human Rights Mechanisms: Treaty Bodies*, ¶ 5, U.N. Doc. E/CH.4/2004/98 (11 February 2004).

<sup>102</sup>*Report on the Working Methods of the Human Rights Treaty Bodies Relating to the State Party Reporting Process*, *supra* note 94, at ¶ 37.

<sup>103</sup>*Report on the Working Methods of the Human Rights Treaty Bodies Relating to the State Party Reporting Process*, *supra* note 94, at ¶ 37.

<sup>104</sup>*Report on the Working Methods of the Human Rights Treaty Bodies Relating to the State Party Reporting Process*, *supra* note 94, at ¶ 17.

begun to experiment with replacing state's periodic report with a reply to a list of issues.<sup>105</sup> Thus, even in areas where the idea of reform was accepted, such as the common core document and the harmonisation of methods, progress by both treaty bodies and state parties is slow and uneven.

### 3.6 Questions About the Effectiveness of the International System

One of the largest problems facing the treaty body system, and one of the biggest reasons reform was needed, is non-reporting by member states. This problem seriously threatened the effectiveness of the system, and would have been one of the foremost reasons that those drafters who opposed creating a treaty body for the CRPD, or pushed for even more radical changes, felt that the current international system was ineffective. In 1997, around the time the effort to reform the treaty body system first began, data showed that the problem of overdue reporting had reached critical levels, with many state parties several reports behind. For instance, CERD had only 147 state parties, but 401 overdue reports.<sup>106</sup> Throughout the treaty body system, by February of 2006, there were nearly 1500 overdue reports, or a third of the total reports due.<sup>107</sup> Even for the Committee on the Rights of Persons with Disabilities, established after reform efforts were already underway, the problem is already severe. Of the 90 state reports that were due by the end of 2011, only 16 had been submitted by July of that year.<sup>108</sup> By February of 2012, this total had risen to 19 reports.<sup>109</sup> Overall, across the treaty body system only around one third of state parties submit reports on time.<sup>110</sup>

The lack of reporting by a state party can be broadly attributed either to a lack of capacity or a lack of political will.<sup>111</sup> Studies of non-reporting show that overdue reporting has a correlation with indicators of a reduced level of human rights protection, such as lower female literacy rates, female school enrolment and female GDP per capita.<sup>112</sup> In these states, lack of will may be the reason for delayed or non-reporting. In the case where a state lacks the will to report, it is important to find ways to respond that produce results and are politically acceptable. Many of the older treaty bodies, such as CERD, respond by undertaking an independent examination of the state without a report. This procedure does require that a treaty body have adequate meeting time to undertake

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<sup>105</sup> O'Flaherty, *supra* note 1, at 326.

<sup>106</sup> Commission on Human Rights, *Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments*, ¶ 37 U.N. Doc. E/CN.4/1997/74 (27 March, 1997).

<sup>107</sup> Johnstone, *supra* note 2, at 179.

<sup>108</sup> The Secretary-General *Measures to Improve Further the Effectiveness, Harmonization and Reform of the Treaty Body System*, ¶ 12, U.N. Doc A/66/344 (7 September 2011).

<sup>109</sup> [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=800&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=800&Lang=en).

<sup>110</sup> *Measures to Improve Further the Effectiveness, Harmonization and Reform of the Treaty Body System*, *supra* note 108, at ¶ 21.

<sup>111</sup> *Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments*, *supra* note 106, at ¶ 43.

<sup>112</sup> Bayefsky, *supra* note 7, at 9.

such an investigation.<sup>113</sup> In general, treaty bodies do not have an effective way to respond to non-submission of reports. Reminders are sent to state parties who have failed to submit reports, and in 1996, CAT and the HRC both published and publicised a list of state parties who had failed to meet their reporting deadlines, though there was little reason to believe that this would have a significant effect on state behaviour.<sup>114</sup> Treaty bodies also tried easing requirements in exceptional cases. CEDAW allowed a state to present an oral report (emphasising that such a report would not be allowed under normal proceedings), and the HRC suggested that it was open to provisional reports in certain cases.<sup>115</sup>

The second reason for non-reporting is lack of capacity. From the point of view of states, reporting to the various treaty bodies is time consuming and repetitive. Varied reporting procedures present another obstacle. Before a state can even begin to prepare a report, it must go through the reporting guidelines for the treaty in question. Travel time is yet another expense.<sup>116</sup> Just as there is a correlation between lower human rights protection and delayed reporting, there is also a correlation between delayed reports and states that rank lower on the Human Development Index, the Gender Related Development Index, or have lower GDP per capita.<sup>117</sup> This suggests that lowered capacity does cause problems with timely reporting. One recommendation to decrease non-reporting that was strongly supported by the state parties was the idea of more technical assistance to state parties who lacked the administrative or institutional capacity to meet reporting requirements on their own. State parties felt that such assistance was not only crucial to solving the problem of non-reporting by these states, but that it would also increase the likelihood of national implementation of the treaties and treaty body recommendations within these states.<sup>118</sup> In 2004, the Voluntary Fund for Technical Cooperation in the Field of Human Rights indicated that it would both encourage states it assisted to ratify treaties, and help these states meet reporting obligations.<sup>119</sup>

Even when reports are received, they are too often inadequate. The goal of state reporting is to present an objective evaluation of a state's human rights, and for the state to undergo a process of constructive criticism from the treaty body. In the past, however, state reports have taken the form of a recitation of the constitutional or legislative provisions; reports only three or four pages in length, or included claims that a state does

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<sup>113</sup>*Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments*, *supra* note 106, at ¶ 45.

<sup>114</sup>*Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments*, *supra* note 106, at ¶ 38-40.

<sup>115</sup>*Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments*, *supra* note 106, at ¶ 38-40.

<sup>116</sup> Johnstone, *supra* note 2, at 180.

<sup>117</sup> Bayefsky, *supra* note 7, at 9.

<sup>118</sup>*Effective Implementation of international instruments on human rights, including reporting obligations under international instruments on human rights*, *supra* note 99, at ¶ 40.

<sup>119</sup>*Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights*, *supra* note 30, ¶ 29.

not have any problems of racial or gender discrimination.<sup>120</sup> As of 2000, four of the then six treaty bodies had a procedure to encourage revision of state reports that were significantly out of line with reporting guidelines. This has at least sometimes resulted in a much improved report.<sup>121</sup> According to Bayefsky's report, state parties have also been known to manipulate the dialogue over their state report, using delaying tactics to minimise the time for questions. Answers to questions that are asked are often uninformative, with promises for more information at an unspecified later date.<sup>122</sup>

The chronic lack of reporting by state parties helped to mask another problem, namely that treaty bodies did not have the resources to examine reports in a timely fashion. If all states were to submit reports on time, the backlog would be completely unmanageable.<sup>123</sup> For instance, in 1996, CEDAW had 189 state reports due or overdue. CEDAW generally required two meetings to consider a state report, and had 18 meetings devoted to considering reports a year. If all state reports that were due were suddenly submitted, it would have taken CEDAW 21 years to work through them all.<sup>124</sup> Even with high levels of non-submission, CEDAW reported an average of three years between the submission of a report and the report being considered by the committee, and CEDAW was not unusual in this regard.<sup>125</sup> Indeed, as at least one report on the problem stated, the system had come to depend on a high level of non-reporting for its continued functioning.<sup>126</sup>

The treaty bodies are unable to keep up with the state reports they receive for a number of reasons. Committee members on the treaty bodies work part-time, and for the most part are unremunerated.<sup>127</sup> Members of CEDAW and CRC receive US\$3,000 annually, while the chairs of these two committees receive US\$5,000.<sup>128</sup> The time commitment asked of committee members can be significant, with CERD meeting seven weeks per year, HRC, CRC and CESCR meeting 12 weeks, CEDAW eight weeks, and CAT five weeks. Most committee members have other jobs, which results in members missing time during treaty meetings, and a reluctance to take on treaty work between sessions.<sup>129</sup>

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<sup>120</sup> Bayefsky, *supra* note 7, at 22.

<sup>121</sup> Bayefsky, *supra* note 7, at 23.

<sup>122</sup> Bayefsky, *supra* note 7, at 62.

<sup>123</sup> Commission on Human Rights, *Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments*, ¶ 48 U.N.Doc E/CH.4/1997/74 (27 March 1997).

<sup>124</sup> *Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments*, *supra* note 123, at ¶ 48.

<sup>125</sup> *Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments*, *supra* note 123, at ¶ 48.

<sup>126</sup> Johnstone, *supra* note 2, at 179; Crawford, *The UN Human Rights Treaty System: A System in Crisis?*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING*, 6 (Alston and Crawford eds. 2000).

<sup>127</sup> O'Flaherty & O'Brien, *supra* note 8, at 143.

<sup>128</sup> Bayefsky, *supra* note 7, at 108.

<sup>129</sup> Bayefsky, *supra* note 7, at 108.

By 2003, the treaty bodies had taken a number of steps to reduce their backlog. Funding for the bodies had been increased, and CESCR and CEDAW had both held extra meetings to catch up on reviewing their reports.<sup>130</sup> Other treaty bodies had altered their working methods to improve their review of reports. Even so, none of the treaty bodies was working fast enough to meet their obligations should any of the treaties achieve universal ratification.<sup>131</sup> By 2004, committees had taken further measures, including requesting additional meeting time, reducing the number of meetings dedicated to each report, and meeting in parallel chambers.<sup>132</sup> With these methods, the committees had succeeded in reducing their backlog. At the same time, however, each committee had been successful in encouraging state parties to turn in reports, increasing the number of reports each treaty body must consider. As a result, no committee had completely eliminated their backlog.<sup>133</sup> In 2008, committees were still working on this problem, with three committees (CEDAW, CRC, and CESCR) having requested and been granted additional time to deal with reports, and others planning to request more time in the future.<sup>134</sup> In 2011, the CAT had an additional week added to each of its sessions, as a temporary measure until a permanent reform of committee meeting times could be arranged.<sup>135</sup> CERD has received two authorisations of additional meeting time, one covering the period from August 2009 to 2011, and another extending that authorisation through 2012.<sup>136</sup> It is notable that each time these committees were given additional meeting time, the General Assembly explicitly noted that the measures were temporary, pending permanent reform in the treaty body system.

Currently (as of February, 2012), two possible permanent proposals to solve the problem of insufficient working time are under consideration.<sup>137</sup> Either a temporary increase in meeting time for all committees, lasting long enough to allow them to work through their backlog of reports, or a permanent change to the treaty body calendar, that allocates meeting time to each committee based on the number of reports that are due that year.<sup>138</sup> In the first option, each committee would request a certain amount of meeting time each biennium, depending both on the backlog of reports and the number of reports the committee expects to receive that year (currently, all treaty bodies together receive

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<sup>130</sup>*Methods of Work Relating to the State Reporting Process*, *supra* note 23, at ¶ 12-13.

<sup>131</sup>*Methods of Work Relating to the State Reporting Process*, *supra* note 23, at ¶ 13.

<sup>132</sup>*Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights*, *supra* note 30, at ¶ 6.

<sup>133</sup>*Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights*, *supra* note 30, at ¶ 6.

<sup>134</sup>*Report on the Working Methods of the Human Rights Treaty Bodies Relating to the State Party Reporting Process*, *supra* note 94, at ¶ 53.

<sup>135</sup> G.A. Res. 65/203, U.N. Doc. A/RES/65/204 (18 March 2011).

<sup>136</sup> G.A. Res. 65/200, U.N. Doc. A/RES/65/200 (11 March 2011).

<sup>137</sup> *Measures to Improve Further the Effectiveness, Harmonization and Reform of the Treaty Body System*, *supra* note 108, generally.

<sup>138</sup> *Measures to Improve Further the Effectiveness, Harmonization and Reform of the Treaty Body System*, *supra* note 108, at ¶ 22.

around 106 reports a year). Under this system, meeting time for each committee would be continually adjusted, based both on the anticipated working for the committee and the budget for that biennium.<sup>139</sup>

The other option is a permanently expanded calendar, based on the number of reports a due to each committee in a year, rather than the number it expects to receive.<sup>140</sup> This option would eliminate the need for bodies to request additional time, and would therefore provide certainty to both the bodies themselves and the process of allocating the budget for the committees. This permanently expanded calendar would (at least once the backlog of reports was dealt with) depend on states complying with their reporting obligations. There is already evidence, however, that the procedure of preparing a list of issues that some treaty bodies have adopted encourages reporting, and should help states keep up with requirements. In addition, with the extra meeting time, treaty bodies could undertake a review of a state's human rights even in the absence of a report.<sup>141</sup>

Obviously, any permanent increase in the meeting time allocated to treaty bodies will mean an increase in expenses. Currently, it costs an estimated US\$630,000 to keep a treaty body in session for five days in Geneva. Under the permanently expanded calendar, assuming 2.5 days for each report, most treaty bodies would be in session for around 15 weeks.<sup>142</sup> Raising the money needed to keep treaty bodies up to date on reporting could be a significant challenge.

### 3.7 Reservations in the Reform Process

Reservations, declarations, and interpretative statements are also a serious challenge to the implementation of the human rights treaties. (As a large number of declarations and interpretative statements deal with substantive issues and have the same effect as reservations, all three categories will be treated as one.) While reservations do not come up as an important issue in the drafting of Article 33, the attempts by the treaty bodies to address the problem of reservations is still worth studying, as the recent move to decrease their number and impact is part of the general strengthening of human rights law. As of early 2015, the ICCPR had 120 reservations by 39 state parties,<sup>143</sup> the ICESCR had 53 reservations by 27 state parties,<sup>144</sup> CERD had 35 reservations by 29 state

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<sup>139</sup> *Measures to Improve Further the Effectiveness, Harmonization and Reform of the Treaty Body System*, *supra* note 108, at ¶ 25-26.

<sup>140</sup> *Measures to Improve Further the Effectiveness, Harmonization and Reform of the Treaty Body System*, *supra* note 108, at ¶ 27.

<sup>141</sup> *Measures to Improve Further the Effectiveness, Harmonization and Reform of the Treaty Body System*, *supra* note 108, at ¶ 29.

<sup>142</sup> *Measures to Improve Further the Effectiveness, Harmonization and Reform of the Treaty Body System*, *supra* note 108, at ¶ 30-32.

<sup>143</sup> [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-4&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en).

<sup>144</sup> [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&lang=en).

parties,<sup>145</sup> CEDAW had 108 reservations by 43 state parties,<sup>146</sup> CAT had 64 reservations by 34 state parties,<sup>147</sup> and the CRC had 92 reservations by 49 state parties.<sup>148</sup>

Some of the treaties, including CERD, CEDAW, and CRC, have text that in theory does not permit reservations that are incompatible with the object and purpose of the treaty.<sup>149</sup> The CRPD also contains such a provision.<sup>150</sup>

In addition to the various reforms affecting the treaty bodies themselves, the UN attempted to improve the implementation of the core human rights treaties by encouraging states to withdraw reservations to the treaties. In 1993 the International Law Commission (“ILC” or “the Commission”) decided to include “The law and practice related to reservations to treaties” in its work programme, appointed a special rapporteur on the topic in 1994, and in 1995, at his suggestion, changed the title of the programme to “Reservations to treaties”.<sup>151</sup> The Commission’s work on reservations has reflected the consensus within the Commission that there should be no change of law from the position taken in the Vienna Convention.<sup>152</sup> In his second report (in 1996), the Special Rapporteur included a draft resolution dealing with the issue of reservations to human rights treaties, written for the purpose of drawing attention to the legal aspects of the matter.<sup>153</sup> This report considered the legal status of reservations and interpretative declarations, as well as the actions of treaty bodies, which had recently begun, as part of their reform effort, to look more critically at reservations.<sup>154</sup> The actions of the treaty bodies had resulted in some push-back from states, and the Commission felt that the issue need clarification.<sup>155</sup> The Commission concluded that the rules governing reservations in the Vienna Convention were flexible enough to encompass normative human rights treaties without damaging the essence of these treaties<sup>156</sup>, and that the question of whether reservations were desirable or necessary for such treaties was largely one of philosophy and values, and so did not have an objective answer.<sup>157</sup>

Nevertheless, by 2004 the treaty bodies had determined that it was appropriate for them to review reservations that state parties took to human rights treaties and request

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<sup>145</sup> [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-2&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&lang=en).

<sup>146</sup> [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&lang=en).

<sup>147</sup> [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en).

<sup>148</sup> [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en).

<sup>149</sup> Bayefsky, *supra* note 7, at 72-73.

<sup>150</sup> United Nations Convention on the Rights of Persons with Disabilities, art. 46, 3 May 2008, 2515 U.N.T.S 3 (2008).

<sup>151</sup> International Law Commission, *Chapter IV Reservations to Treaties*, ¶ 30, U.N.Doc. A/65/10 (3 May to 4 June and 5 July to 6 August 2010). 2010 - Reservations Chapter, p 1.

<sup>152</sup> *Chapter IV Reservations to Treaties*, *supra* note 151, at ¶ 30.

<sup>153</sup> *Chapter IV Reservations to Treaties*, *supra* note 151, at ¶ 30-31.

<sup>154</sup> International Law Commission, *The Law and Practice Relating to Reservations to Treaties*, 2, Yearbook on the International Law Commission, 1, 17, (1996).

<sup>155</sup> International Law Commission, *supra* note 154, at 18.

<sup>156</sup> International Law Commission, *supra* note 154, at 27-28.

<sup>157</sup> International Law Commission, *supra* note 154, at p 25.

their withdrawal.<sup>158</sup> The OHCHR also supported the withdrawal of reservations, and planned to make it a part of their campaign to improve human rights worldwide.<sup>159</sup> During this time, the Inter-committee's working group on reservations kept in touch with the ILC's special rapporteur, to discuss issues related to reservations and the guidelines adopted by the ILC.<sup>160</sup> The treaty bodies also made some progress in their campaign to have reservations withdrawn, with several states withdrawing reservations in 2008, though many more states refused.<sup>161</sup> In 2009, treaty bodies made less progress, with only one state party agreeing to withdraw its reservation (to the CRC).<sup>162</sup>

Despite the treaty bodies' work to discourage reservations, several state parties to the CRPD have made reservations and interpretative declarations. As of early 2014, 30 state parties have some kind of reservation or interpretive declaration to the Convention.<sup>163</sup> While some of these do not affect the rights afforded to people with disabilities under the treaty—for instance, Belgium made a declaration stating that the treaty was equally binding on all regions of the state—several could potentially have some effect on the rights the treaty provides. Some of the most common reservations and declarations were those stating that the Convention did not create a right to abortion (made by Malta, Monaco, and Poland) and statements related to Article 12, which addresses legal capacity. Canada and Australia both declared that they interpreted this article as compatible with assisted and substituted judgement making when appropriate, and other countries offered their own interpretations.<sup>164</sup> Article 29, dealing with elections, was also the subject of many interpretive statements.<sup>165</sup>

### 3.8 Effects of reform on the CRPD

The reform effort, which was on going while the CRPD was being drafted, had an effect on the drafting process, particularly on discussions of international and national monitoring. While this will be discussed in more detail in the chapter on the drafting process, a few points can be made here. There was a general recognition that the monitoring system of the old treaty bodies had proven not effective enough.<sup>166</sup> In light of this, some states favoured a radical departure from the current system, and argued that a

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<sup>158</sup>*Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations Under International Instruments on Human Rights*, *supra* note 30, at ¶ 18.

<sup>159</sup>The United Nations High Commissioner for Human Rights, *The OHCHR Plan of Action: Protection and Empowerment*, ¶ 140, <http://www2.ohchr.org/english/planaction.pdf>.

<sup>160</sup>Twenty-first meeting of chairpersons of the human rights treaty bodies, *Report on Reservations*, ¶ 1-3, U.N.Doc HRI/MC/2008/5 (29 May 2008).

<sup>161</sup>*Report on Reservations*, *supra* note 160, at Annex I.

<sup>162</sup>Twenty-first meeting of chairpersons of the human rights treaty bodies, *Report on Reservations*, Annex I, U.N.Doc HRI/MC/2009/5 (17 June 2009).

<sup>163</sup><http://www.un.org/disabilities/default.asp?id=475>.

<sup>164</sup><http://www.un.org/disabilities/default.asp?id=475>.

<sup>165</sup><http://www.un.org/disabilities/default.asp?id=475>.

<sup>166</sup><http://www.un.org/esa/socdev/enable/rights/ahc4sumart25.htm>.

treaty body should not even be created.<sup>167</sup> Others, however, felt that this would send the wrong signal, and make the convention appear less important than previous conventions.<sup>168</sup> An alternative proposal was to create a different kind of treaty body, one that actively collected information on implementation, rather than passively collecting reports.<sup>169</sup> This idea had merit in that it both made the treaty body more active, and reduced the reporting burden on state parties. There was also fear that some states were using the reform process to delay discussion and decisions on international monitoring.<sup>170</sup> In the end, the CRPD developed a fairly standard treaty body,<sup>171</sup> and most of the innovation in the treaty regarding monitoring and implementation was made at the national level, in Article 33.

### 3.9 The Reform Process after the Drafting

At the time the CRPD was drafted, the reform process seemed in many ways to have stalled, with a few small changes made, many larger reforms failed, and little progress to show for a decade of work. In 2012, after the CRPD was drafted, a new more successful effort at reform began. It is worth addressing in this thesis for two reasons. First, the changes made to the treaty body system included changes to the way that treaty bodies would interact with national level bodies, and these changes may affect the that bodies involved in the Article 33 framework interact with the international human rights system. This is important because one measure of the effectiveness of this framework will be in its interactions with the international system, so any changes that may improve this interaction should be noted. Secondly, this more successful reform effort is part of a larger theme of improving attention to human rights by states, and the general strengthening of human rights law at all levels.

In February of 2012, The General Assembly of the UN launched a new effort to reform the treaty body system.<sup>172</sup> This process lasted for until April of 2014, when the final report was delivered to the General Assembly. In this report, all of the reforms considered, and the outcome of that consideration, is detailed. The reforms considered were wide-ranging and extensive. For instance, the report addressed the need for aligned methodology in all treaties bodies,<sup>173</sup> and included some ideas for the methods that the treaty bodies should adopt, such as a standard length of time for meeting state parties, thematic lists of questions, and a focus on only the most serious human rights issues in

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<sup>167</sup><http://www.un.org/esa/socdev/enable/rights/ahc4sumart25.htm>.

<sup>168</sup><http://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

<sup>169</sup><http://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

<sup>170</sup><http://www.un.org/esa/socdev/enable/rights/ahc6sum11aug.htm>.

<sup>171</sup>United Nations Convention on the Rights of Persons with Disabilities, *supra* note 145, at art. 34.

<sup>172</sup> General Assembly, *Report of the co-facilitators on the intergovernmental process of the General Assembly on strengthening and enhancing the effective functioning of the human rights treaty body system*. 68<sup>th</sup> session, U.N. Doc. A/68/832 (9 April 2014).

<sup>173</sup> *General Assembly*, *supra* note 172, at 7.

each state.<sup>174</sup> The report also discusses the idea that state parties establish a standing national reporting body, to cope with the increasing burden of treaty body reports, as well as the universal periodic review. In the end, no firm recommendation is made, because the diversity among states makes it difficult to create a model. The report does note that such bodies could be beneficial.<sup>175</sup>

Some of the recommendations in the report could be relevant to Article 33, and national human rights bodies more generally. For instance, the need for a unified treatment of NHRIs and civil society organisations is discussed. At the time of reform, as discussed in this thesis, each treaty body had its own method for interacting with these bodies. The reform proposal was that formal meetings be scheduled during the meeting with the state parties, private lunchtime briefings take place, and NHRIs and civil society organisations submit reports to each treaty body.<sup>176</sup> This proposal is based on a report from the OHCHR. This report noted that pre-reform, it was difficult for national human rights groups to interact with the treaty bodies, and the different rules of interaction for each treaty body were a large factor in this, as organisations could not learn from their experience with one treaty body, but must learn a new rule set each time.<sup>177</sup> In addition to proposing a standard model of interaction, based on the best practices of different treaty bodies, the OHCHR pledged to provide stakeholders with all the necessary information about the procedures of the treaty bodies and the steps needed to participate in treaty body sessions.<sup>178</sup> The NHRIs themselves were also able to contribute to the reform process. In their contribution, the NHRIs suggested that the practices of the CERD and CAT were considered the best by NHRIs themselves, and that other treaty bodies should adopt similar practices. The NHRIs also supported increased information-sharing and training for stakeholders on engaging with the treaty body system.<sup>179</sup>

In April of 2014, the General Assembly adopted a final resolution, reforming the treaty body system significantly. The resolution encouraged the adoption of a unified methodology among the treaty bodies,<sup>180</sup> and created a permanently expanded meeting calendar, in an effort to prevent backlog. The new calendar would grant each treaty body the number of weeks needed to review the average number of reports that body had received from 2009-2012, assuming a body could review 2.5 main treaty reports, and five Optional Protocol reports a week. Two weeks for other treaty body business would also

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<sup>174</sup> General Assembly, *supra* note 172, at 7.

<sup>175</sup> General Assembly, *supra* note 172, at 10.

<sup>176</sup> General Assembly, *supra* note 172, at 14.

<sup>177</sup> Navanethem Pillay, *Strengthening the United Nations Human Rights Treaty Body System: A report by the United Nations High Commissioner for Human Rights*, 65 (June 2012).

<sup>178</sup> Navanethem Pillay, *supra* note 177, at 65.

<sup>179</sup> Mousa Burayzat, *Inter-governmental treaty body strengthening process, 16 July, Opening Statement by ICC Chair Dr. Mousa Burayzat*, (16 July 2014).

<sup>180</sup> General Assembly, *Strengthening and enhancing the effective functioning of the human rights treaty body system*, U.N. Doc. A/RES/68/268 ¶5 (21 April 2014).

be granted.<sup>181</sup> Many other reforms were also adopted, and the General Assembly plans to review the effectiveness of the reforms in 2020.<sup>182</sup>

### 3.10 Conclusion

The treaty body reform process is important both in how it shaped Article 33 of the CRPD, and in how it is part of a larger theme of the strengthening of human rights law. While the system as designed was often ineffective and unable to meet obligations, efforts have been made to improve it, and states have often actively worked to support these reforms. Article 33 was drafted at a particular time in the reform process, during which it seemed that little progress had been made, and many ambitious reforms had been abandoned. This led to a particular mindset among the drafters, which made many of them more open to new, national based mechanisms that would not have to rely on the framework of the UN. This led to the creation and acceptance of Article 33 in its final form.

The process of treaty reform also combined with the CRPD negotiations to reveal areas of concern that should be watched closely going forward. The negotiations revealed a reluctance on the part of many parties to try innovations that depart too radically from the established treaty body model. There was concern that a departure could send a signal that the Convention is less important than previous treaties, as well as fears that innovation could mean abandoning a known system, even with all of its defects, for an unknown system that has the possibility of being less effective. As human rights efforts move forward, this unwillingness to innovate could further hamper the system, and slow progress on human rights. In addition, the reform effort clearly showed that while a lack of political will is sometimes the cause of non-reporting, another common cause is state parties becoming overwhelmed with their reporting requirements, particularly if the state is party to more than one treaty. At the moment, it appears the treaty body system will only expand, which means that solutions to the problem of overwhelmed states need to be found. Otherwise, the neglect of reporting obligations will only become more common, even in states that are making a sincere effort to implement treaties. Given this, it is troubling that the UN seems to have abandoned any drastic reform that could remake the system, in favour of small changes that seem more achievable, even if they accomplish less.

In the end, the treaty body reform process had little effect on the international monitoring of the CRPD. The fact that reform was producing only small changes, combined with an unwillingness to be seen as a “lesser” treaty, created a fairly standard treaty body. On the other hand, the realisation that international monitoring was not going

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<sup>181</sup> *Strengthening and enhancing the effective functioning of the human rights treaty body system*, supra note 180, at ¶26.

<sup>182</sup> *Strengthening and enhancing the effective functioning of the human rights treaty body system*, supra note 180, at ¶41.

to make any great gains in effectiveness, at least in the short term, may have helped in the creation of Article 33, and a national monitoring system.

With the future of the international monitoring system uncertain, states were more open to the idea of a national monitoring system. It is clear that some kind of monitoring is needed, and a national system may provide some level of accountability, without the problems that currently plague the international system. As long as international monitoring mechanisms remain largely ineffective, the importance of national mechanisms for monitoring and implementation, such as those found in Article 33, will increase. The realisation that the international system suffers from long-standing problems, and there is little prospect of improvement in the short term, may have both galvanised state parties and civil society to come up with alternate ideas to improve implementation, and left these parties more open to new ideas than they would have been in the past. Other changes in the area of international human rights law, like the rapid increase in the number of national human rights institutions, would also have encouraged this willingness to accept new mechanisms.

## **4. NHRIs, an Important Driver of Change**

### **4.1 Introduction**

In the early 1990s, many parties in the international community began to focus on the need for reform in the way that international human rights law was handled. Two major outcomes of this need for change were the reform of the treaty body system in the UN, and a rapid increase in the number and influence of National Human Rights Institutions (“NHRIs”). While the UN reform effort would focus on existing international mechanisms and attempt to improve them, the work to promote NHRIs was an attempt to take the rights and standards laid down in human rights treaties and bring them into the domestic sphere. At their best, NHRIs are designed to apply the standards of international human rights law in a national context, to encourage the government to take up these standards and make them part of national law, and to monitor the human rights situation in their country of operation. Ideally, a NHRI can act as a bridge between national and international law. NHRIs are also an important part of Article 33, and helped set many of the ideas and standards around national human rights mechanisms in general. Studying their history, use, and practices is useful both because it provides a greater understanding of how Article 33 developed and what can be expected from the article, and because NHRI are an important part of the general strengthening of human right law. They are particularly important to the idea of stronger human rights law at the domestic level.

NHRIs are the most studied body designed to bring international law to the domestic level. As this is the goal of Article 33, it is to be hoped that many of the lessons learned about NHRIs can be applied to the Article 33 framework, to improve its effectiveness. NRHIs are also, in many states, likely to be a part of the Article 33 framework. It is therefore important to understand how they developed, what they are, and how they are perceived and used by both governments and civil society. The purpose of this chapter is to establish a through knowledge of NHRIs, to better facilitate understanding their role in Article 33, both within the article itself, as part of the framework, and as a force in human rights law that helped to shape both the legal landscape in such a way that Article 33 could exist, and the article itself, in the drafting process. It is important to study NHRIs to understand Article 33 for several reasons. First, NHRIs are the most popular, and most studied, of the domestic mechanisms to promote international human rights that have been created over the years. Other mechanisms do exist, and will be discussed in later chapter, but none have the reach or influence of NHRIs. Therefore, these institutions provide the most knowledge in how domestic mechanism work, knowledge that can be generalised to other mechanisms, including Article 33. Secondly, as will be discussed in greater detail in the next chapter, NHRIs had a large influence on the drafting of Article 33. Because they had a hand in shaping the

article that is the subject of this thesis, it is important to understand what they are to understand how and why they took an interest in the drafting of this article. Finally, which will also be explored in the next chapter, in many states, NHRIs will play an active role in the Article 33 framework. This being the case, in these states it will be difficult to understand the full framework without a clear grasp on what a NHRIs is and how it operates. For all of these reasons, studying NHRIs is vital to a full understanding of Article 33.

In theory, NHRIs are a perfectly independent body that monitors and advises government practice on human rights, acting as a force for change. In practice, institutions often fail to live up to this ideal of the independent human rights body. It is not easy to ask a government to establish and fund a body that will be critical of its actions and bring human rights violations to international attention, and there are many potential points of failure. The standards to which NHRIs are held are imperfect, failing to account for many of the problems that institutions might encounter, or to regulate NHRIs in a way that ensures their effectiveness. Research on the effectiveness of NHRIs shows just how difficult it is for an institution to strike the proper balance between government and civil society, or domestic and international responsibilities. And yet, despite these problems and imperfections, NHRI remain one of the few links between international human rights law and domestic practice, and as such are an important tool in the effort to improve the implementation of human rights treaties.

There is no set definition of a NHRI, though efforts have been made to create one. The UN defines a NHRI as “a body which is established by a government under the constitution, or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights.”<sup>1</sup> While they vary widely in terms of their exact organisation and functions, these bodies are independent national institutions created within states to promote and protect human rights, as well as monitor progress on the implementation of human rights treaties. The lack of any set definition means that there is still debate over exactly what bodies involved in human rights protection should be considered NHRIs.<sup>2</sup>

The first proto-NHRI can be considered the Swedish Ombudsman, established in 1809.<sup>3</sup> The specific idea of establishing institutions to ensure the implementation of international human rights treaties dates back to 1946, when, at its second meeting, the Economic and Social Council of the UN (“ECOSOC”) invited its member states to consider setting up “human rights committees” to work with both the states and the

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<sup>1</sup> United Nations, *National Human Rights Institutions, A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, ¶39, Professional Training Series No 4., (1995).

<sup>2</sup> Linda C. Reif, *The Shifting Boundaries of NHRI Definition in the International System*, in *HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE*. 52, 52 (Ryan Goodman & Thomas Pegram, eds., 2012).

<sup>3</sup> Richard Carver, *A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law*, 10 *Hum. Rts. L. R.* 1, 5 (2001).

Commission on Human Rights.<sup>4</sup> One year later, France established the first NHRI, The French National Advisory Commission for Human Rights, although until 1986, the Commission did not have the kind of national responsibilities that are now associated with NHRIs.<sup>5</sup> In 1960, ECOSOC passed a resolution that recognised the role national institutions could play in protection and promoting human rights, and urged governments to form NHRIs.<sup>6</sup> Throughout the 1960s, many countries established commissions, as part of their anti-discrimination legislation, that dealt with some human rights issues, though not as broadly as modern NHRIs.<sup>7</sup> It was not until 1978 that further action was taken to encourage states to establish NHRIs, when the Human Rights Commission established the first set of guidelines for the institutions, and first used the name National Human Rights Institution.<sup>8</sup> These guidelines were later replaced with the Paris Principles, written at the first International Workshop on Institutions for the Promotion and Protection of Human Rights, held in Paris in October of 1991. The guidelines were written by the currently existing NHRIs themselves, and later adopted by the UN General Assembly.<sup>9</sup> Since the drafting of the Paris Principles, the number of NHRIs has increased rapidly. It is estimated that, depending on how the term is used, there are between 120 to 178 institutions in the world, in 130 countries.<sup>10</sup>

After drafting and adopting the Paris Principles, which set the minimum for what is expected from a NHRI, the NHRIs next formed the International Coordinating Committee (“ICC”) in 1993, which gave the institutions a forum for meeting and exchanging information and ideas, as well as encouraging the formation of new institutions.<sup>11</sup> The ICC coordinates NHRIs at the national level and encourages cooperation. It also allows regular contact between the OHCHR and NHRIs.<sup>12</sup> Since the ICC was created, and particularly since the OHCHR has provided secretarial support through its National Institutions Unit, the ICC has been increasingly involved in UN activities.<sup>13</sup>

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<sup>4</sup>Gauthier de Beco, *National Human Rights Institutions in Europe*, 4 <http://cridho.uclouvain.be/documents/Working.Papers/CRIDHO.WP.2007-1.pdf>.

<sup>5</sup>de Beco, *supra* note 4. at 4.

<sup>6</sup> C. Raj Kumar, *National Human Rights Institutions: Good Governance Perspectives on Institutionalisation of Human Rights*, 10 Am. U. Int'l. L. Rev. 266 (2003-2004).

<sup>7</sup> Carver, *supra* note 3, at 5.

<sup>8</sup>de Beco, *supra* note 4. at 4-5.

<sup>9</sup>de Beco, *supra* note 4. at 5.

<sup>10</sup> Ryan Goodman & Thomas Pegram, *Introduction: National Human Rights Institutions, State Conformity, and Social Change*, in HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE, 1,1 (Ryan Goodman & Thomas Pegram eds., 2012); Jeong-Woo Koo and Francisco O. Ramirez, *National Incorporation of Global Human Right: Worldwide Expansion of National Human Rights Institutions, 1966 – 2004*, 87 Social Forces 1326 (2009).

<sup>11</sup>de Beco, *supra* note 4. at 6.

<sup>12</sup>Rachel Murray. THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS AT THE INTERNATIONAL AND REGIONAL LEVELS: THE EXPERIENCE OF AFRICA, 30 (2007).

<sup>13</sup>Murray, *supra* note 12, at 30.

## 4.2 The Paris Principles, The Gold Standard for Independence

The Paris Principles are a set of guidelines adopted by the UN in 1993 that are meant to govern the creation and operation of NHRIs.<sup>14</sup> It is impossible to fully understand NHRIs without understanding the main principles governing them. The Paris Principles also play a large role in Article 33, which will be discussed later in this thesis. The full title of the document is “Principles Relating to the Status of National Institutions, Competence and Responsibilities”<sup>15</sup> The Paris Principles require a NHRI to have “as broad a mandate as possible”, “clearly set forth in a constitutional or legislative text”,<sup>16</sup> to be independent of the state’s government,<sup>17</sup> and to be adequately funded, which includes enough funding to “enable it to have its own staff and premises”.<sup>18</sup> The Paris Principles also lay out the areas a NHRI should be responsible for, including but not limited to submitting opinions and proposals to the government, working on the ratification, promotion, and implementation of human rights treaties,<sup>19</sup> cooperating with the UN, and educating the public on human rights.<sup>20</sup> To meet all of its responsibilities, a NHRI must, among other things, be free to consider all questions and obtain all information that falls within its mandate, address the public, consult with other bodies, and develop relationships with NGOs.<sup>21</sup> A NHRI may also be authorised to hear individual complaints, but this is not a requirement for an institution to be considered in compliance with the Paris Principles.<sup>22</sup>

The broad mandate was included in the principles to address a concern that many governments were establishing small human rights institutions, such as children’s commissions, that were designed to deflect international criticism while not addressing the rights of many in the community, such as women, indigenous groups, people with

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<sup>14</sup>The Paris Principles,  
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

<sup>15</sup>The Paris Principles,  
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

<sup>16</sup>The Paris Principles,  
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

<sup>17</sup>The Paris Principles,  
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

<sup>18</sup>The Paris Principles,  
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

<sup>19</sup>The Paris Principles,  
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

<sup>20</sup>The Paris Principles,  
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx..>

<sup>21</sup>The Paris Principles,  
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

<sup>22</sup>The Paris Principles,  
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

disabilities, etc.<sup>23</sup> That the mandate be clear was also important, so that both the NHRI itself and the public are aware of the exact powers and responsibilities of the institution.<sup>24</sup> The Principles require that a NHRI be established either in the constitution or by legislative mandate, and discourage establishment by executive decree, because an institution so established is vulnerable to being abolished if it offends the executive.<sup>25</sup>

Within the guidelines of the Paris Principles there is still considerable room for states to manoeuvre and create NHRIs that are best suited to their particular state. For instance, within the EU there are 3 different broad types of NHRI – Commissions, Ombudsmen, and Institutes. All three types can be and have been fully accredited under the Paris Principles by the ICC.<sup>26</sup> Commissions are multi-member institutions that operate by consensus. They tend to have broad mandates and wide-ranging responsibilities, covering investigation of human rights abuses, public education, and the review of legislation.<sup>27</sup> Ombudsman NHRIs are typically single-member institutions, which focus largely on hearing complaints of human rights abuses. Although the single-member model makes it more difficult to meet the standards of pluralism required by the Paris Principles, these institutions can be accredited.<sup>28</sup> The final type of NHRI is the institute. Institutes focus on research, education, and advising, and typically do not have the power to investigate abuses or handle individual complaints. They are multi-member bodies and generally have a broad mandate.<sup>29</sup>

While the Paris Principles remain an extremely important part of what defines a good NHRI, there has been some dissatisfaction with using them as the sole tool by which institutions are evaluated. One reason for this dissatisfaction is that the Principles are very much a product of the time and place in which they were drafted. Even the location of the meeting—in Paris—is believed to have biased the Principles in favour of the kind of institutions common in Europe, ensuring that these bodies were covered at the expense of weakening the Principles as a whole.<sup>30</sup> This has given the Paris Principles a bias towards commissions over other types of institutions.<sup>31</sup> Even when this bias is taken into account, the Principles remained extremely broad to accommodate other types of institutions, and while this may have encouraged acceptance of the Principles, it further

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<sup>23</sup>Brian Burdekin, NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE ASIA-PACIFIC REGION, 17 (2007).

<sup>24</sup>Burdekin, *supra* note 23, at 18.

<sup>25</sup>Burdekin, *supra* note 23, at 18.

<sup>26</sup>*National Human Rights Institutions in the EU Member States*, 26,

<http://fra.europa.eu/en/publication/2012/national-human-rights-institutions-eu-member-states-strengthening-fundamental>.

<sup>27</sup>*National Human Rights Institutions in the EU Member States*, *supra* note 26, at 28.

<sup>28</sup>*National Human Rights Institutions in the EU Member States*, *supra* note 26, at 29-30.

<sup>29</sup>*National Human Rights Institutions in the EU Member States*, *supra* note 26, at 30.

<sup>30</sup>Goodman & Pogram, intro *supra* note 10, at 7.

<sup>31</sup> Reif, *supra* note 2, at 54.

weakened them to the point that many observers feel that the Principles are now too vague to provide a standard by which to judge NHRIs.<sup>32</sup>

In order to correct some of the weaknesses found in the Paris Principles, the ICC has continued to expand on their original framework through its interpretations.<sup>33</sup> The ICC's Sub Committee on Accreditation ("SCA") has adopted a set of General Observations, that set out the SCA's interpretation of the Paris Principles for the purposes of accrediting or reaccrediting NHRIs.<sup>34</sup> These General Observations are designed to help new institutions develop their own processes so that they are in compliance with the Paris Principles, persuade governments to fix problems with existing institutions and bring them in line with the Principles, and guide the decisions of the SCA.<sup>35</sup> The General Observations are split into three sections. The first section contains the SCA's observations on the "essential requirements" of the Paris Principles. The second section contains practices that "directly promote" the Paris Principles. The final section is procedural, outlining the accreditation process.<sup>36</sup> The General Observations not only help the SCA in the accreditation process, but can also be useful to NHRIs advocating for changes in their own state.<sup>37</sup>

The first section of the General Observations is fairly straightforward, explaining what the SCA has decided the Paris Principles require, and why that requirement is important. For instance, in interpreting the requirement that a NHRI should have as broad a mandate as possible, the SCA writes that this means that a NHRI should be given functions that both protect and promote human rights. Promotion includes functions such as education, advising, outreach and advocacy. Protection includes monitoring, investigation, and reporting.<sup>38</sup> A broad mandate should allow the institution to respond to both acts and omissions in the public and private sphere, to carry out education and awareness raising activities, and to make recommendations to public authorities on its assessment of the human rights situation in the country. The institution should also be able to access any public building, documents and other assets without prior notice, and investigate any abuse of human rights.<sup>39</sup> The first section of the General Observations

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<sup>32</sup> Meg Brodie, *Progressing Norm Socialisation: Why Membership Matters. The Impact of the Accreditation Process of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights*, 80 *Nordic J. Int'l L.* 149 (2011).

<sup>33</sup> Goodman & Pegrum, intro *supra* note 10, at 6.

<sup>34</sup><http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/ICC%20SCA%20General%20Observations.pdf>

<sup>35</sup><http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/ICC%20SCA%20General%20Observations.pdf>,

<sup>36</sup><http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/ICC%20SCA%20General%20Observations.pdf>.

<sup>37</sup> <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/default.aspx>

<sup>38</sup><http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/ICC%20SCA%20General%20Observations.pdf>.

<sup>39</sup><http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/ICC%20SCA%20General%20Observations.pdf>.

performs this kind of breakdown for each requirement of the Paris Principles, making it clear what the SCA expects from institutions on each point.

The next section of the General Observations deals with practices that “directly promote” the Paris Principles. These are practices that are not included in the Principles, but which the SCA still considers necessary for a functioning, effective NHRI. These include practices involving the staffing of the NHRI, such as a guarantee of tenure for members of the institution,<sup>40</sup> a minimum term of appointment,<sup>41</sup> and a guarantee of immunity for actions undertaken in an official capacity.<sup>42</sup> Staff should also not be taken exclusively, or even mostly, from branches of the public service.<sup>43</sup> This section also deals with the actions of the NHRI in extraordinary circumstances. For instance, it is permissible to limit the mandate of the institution for reasons of national security.<sup>44</sup> During a state of emergency or a coup d’etat, a NHRI is expected to continue operations, with a heightened level of vigilance and independence.<sup>45</sup>

Most importantly, for the purpose of Article 33, the General Observations discuss the process of appointing a NHRI as a monitoring mechanism for a treaty, and how an institution should carry out its duties in this role.<sup>46</sup> “Where, pursuant to an international human rights instrument, a national human rights institution has been designated as, or as part of, a national preventive or monitoring mechanism, the Sub-Committee on Accreditation will assess whether the applicant has provided sufficient information to demonstrate that it is carrying out its functions in compliance with the Paris Principles.”<sup>47</sup> Factors the SCA will consider include whether a formal legal mandate exists, whether the mandate is appropriate, given the treaty involved, whether the institution possesses the necessary expertise and resources to carry out the mandate, and any evidence provided that shows the NHRI has been effectively carrying out its functions under the treaty.<sup>48</sup>

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<sup>40</sup><http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/ICC%20SCA%20General%20Observations.pdf>.

<sup>41</sup><http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/ICC%20SCA%20General%20Observations.pdf>.

<sup>42</sup><http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/ICC%20SCA%20General%20Observations.pdf>.

<sup>43</sup><http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/ICC%20SCA%20General%20Observations.pdf>.

<sup>44</sup><http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/ICC%20SCA%20General%20Observations.pdf>.

<sup>45</sup><http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/ICC%20SCA%20General%20Observations.pdf>.

<sup>46</sup><http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/ICC%20SCA%20General%20Observations.pdf>.

<sup>47</sup><http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/ICC%20SCA%20General%20Observations.pdf>.

<sup>48</sup><http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/ICC%20SCA%20General%20Observations.pdf>.

The SCA may also consider any guidance on the issue that has been produced by the treaty body, assuming the guidance is applicable to a NHRI.<sup>49</sup>

In addition to the General Observations, while no new framework has been accepted officially as part of the evaluation process, additional principles have been proposed. In Belgrade in February of 2012, a seminar organised by, among other groups, the OHCHR and the ICC, produced the Belgrade Principles on the Relationship Between National Human Rights Institutions and Parliaments (“The Belgrade Principles”), which address the relationship between NHRIs and parliaments.<sup>50</sup> The first section of the Belgrade Principles addresses Parliament's role in ensuring that the NHRI is effective and independent. This begins with the founding legislation for the institution, which should be created in consultation with stakeholders, follow the Paris Principles, and establish that the institution is both independent and directly accountable to Parliament. Only Parliament should have the power to amend this founding legislation.<sup>51</sup> The founding legislation should ensure the financial independence of the NHRI by ensuring that the institution has enough funds to perform all functions assigned to it. The institution should complete and submit to Parliament a Strategic Plan or Programme of Activities. This should be taken into account when the funding for the institution is decided.<sup>52</sup>

Appointments to the institution should be made in an open and transparent way, with all vacancies filled within a reasonable time frame. People appointed to the NHRI should have immunity for acts carried out in an official capacity.<sup>53</sup> The institution should report on its activities annually to Parliament. Parliament should debate and respond to the reports of the NHRI, as well as holding open discussions. Parliament should follow up on reports, discovering how public officials have reacted to the reports of the institution.<sup>54</sup> The goal of the Belgrade Principles is to improve the implementation of human rights standards at the national level, by improving the relationship between parliament and the NHRI.<sup>55</sup>

The second section of the Belgrade Principles addresses how the NHRI and Parliament cooperate. The institution and Parliament should agree on a framework for cooperation. A specialised parliamentary committee should be created, to liaise and form and close working relationship with the NHRI. Members of the institution and the committee should meet regularly, and Parliament should seek expert advice from the

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<sup>49</sup><http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/ICC%20SCA%20General%20Observations.pdf>.

<sup>50</sup><http://www.theioi.org/news/serbia-belgrade-principles-on-the-relationship-between-nhris-and-parliaments>.

<sup>51</sup> <http://www.theioi.org/news/serbia-belgrade-principles-on-the-relationship-between-nhris-and-parliaments>.

<sup>52</sup> <http://www.theioi.org/news/serbia-belgrade-principles-on-the-relationship-between-nhris-and-parliaments>.

<sup>53</sup> <http://www.theioi.org/news/serbia-belgrade-principles-on-the-relationship-between-nhris-and-parliaments>.

<sup>54</sup> <http://www.theioi.org/news/serbia-belgrade-principles-on-the-relationship-between-nhris-and-parliaments>.

<sup>55</sup> <http://www.ohchr.org/EN/NewsEvents/Pages/ParliamentsAndNHRIs.aspx>

NHRI on matters of human rights.<sup>56</sup> Parliament should also consult the NHRI about the human rights implications of proposed legislation. The institution should propose amendments to pending legislation where necessary, and encourage legislation to implement human rights treaties.<sup>57</sup> The NHRI should be involved in the process of ratifying new human rights treaties. The institution should provide Parliament with recommendations on any reservations, understandings, or declarations. The NHRI and Parliament should cooperate to ensure that treaty bodies are informed of implementation progress, and work together to implement treaty body recommendations.<sup>58</sup> The Belgrade Principles also require that NHRIs and Parliament work together on public education and the response of the executive to human rights concerns.<sup>59</sup> The Belgrade Principles are a response to a perceived problem with the Paris Principles. While the Paris Principles contain much detail about the establishment and composition of a NHRI, they do not provide much detail on its continued functioning, or what makes for an effective institution over the long term. Since the Principles were drafted in 1991, and the number of NHRI began to increase, they has been much research and scholarship on the issues around the role and effectiveness of NHRIs. This research, like the observations of the ICC and the Belgrade Principles, aims to fill the gaps left by the Paris Principles.

#### 4.3 International Organisation of NHRIs: Self-Regulation and Independence

As NHRIs have grown and developed, a regional and international framework has developed to support and coordinate their actions. The development of this framework both demonstrates the increasingly important role that NHRIs play as a human rights mechanism, and is another piece in the theme of the growing importance of human rights law. At the international level, NHRIs can be accredited by both the ICC and regional bodies.<sup>60</sup> The ICC reviews the NHRIs compliance with the Paris Principles, and issues statements interpreting the Paris Principles.<sup>61</sup> The board of the ICC is composed of 16 NHRIs, four from each of the four regions within the ICC. The Chair and Vice-Chair are chosen from these 16 members.<sup>62</sup> The ICC is part of the National Human Rights Institutions Forum, a coordinating body for NHRIs worldwide, that works closely with both the OHCHR and the UN Human Rights Council.<sup>63</sup> There are three levels of

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<sup>56</sup> <http://www.theioi.org/news/serbia-belgrade-principles-on-the-relationship-between-nhris-and-parliaments>.

<sup>57</sup> <http://www.theioi.org/news/serbia-belgrade-principles-on-the-relationship-between-nhris-and-parliaments>.

<sup>58</sup> <http://www.theioi.org/news/serbia-belgrade-principles-on-the-relationship-between-nhris-and-parliaments>.

<sup>59</sup> <http://www.theioi.org/news/serbia-belgrade-principles-on-the-relationship-between-nhris-and-parliaments>.

<sup>60</sup> <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/default.aspx>.

<sup>61</sup> <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/default.aspx>.

<sup>62</sup> Murray, *supra* note 12, at 30.

<sup>63</sup> <http://www.nhri.net>.

accreditation awarded to NHRIs by the ICC. A NHRI that is designated a level A NHRI is considered fully in compliance with the Paris Principles, and is a voting member of the ICC. A level B accreditation designates a NHRI that is not in full compliance, and is a non-voting member of the ICC. Level C accreditation is given when a NHRI is not in compliance with the Paris Principles, and these institutions have no status within the ICC.<sup>64</sup> Currently (as of January 2014), there are a total of 105 NHRIs registered with the ICC. Of these, 70 have full A accreditation, 25 have B accreditation, and 10 have C accreditation.<sup>65</sup> This shows a marked increase in the number of NHRIs in the world, as in 2009, only 89 NHRIs were registered with the ICC.<sup>66</sup> Accreditation is reviewed every five years.<sup>67</sup> The accreditation sub-committee of the ICC is made up of one A status NHRI from each of the four regions: Africa, Americas, Asia-Pacific, and Europe, with each member appointed for 3 years (renewable). The OHCHR is a permanent observer of the committee.<sup>68</sup> Each regional member is responsible for supplying NHRIs in their region with all the necessary information on the accreditation process.<sup>69</sup>

Over the years, accreditation has come to play a more important role in the participation of NHRIs at the UN. For instance, prior to 2005, representatives of NHRIs could participate at the UN Human Rights Commission simply with a letter from their institution, but after 2005, a rule was adopted that a NHRI could only participate fully if the institution was accredited.<sup>70</sup> Unaccredited NHRIs were still allowed to participate in a limited capacity.<sup>71</sup> Since the abolishment of the Human Rights Commission in 2006, and the creation of the Human Rights Council in its place, the Human Rights Council has adopted an even stricter stance, only allowing the participation of A status NHRIs, or the ICC acting on behalf of A status NHRIs.<sup>72</sup>

In addition to the UN-based National Human Rights Institutions Forum, there are a number of regional bodies of NHRIs. There is the Network of African National Human Rights Institutions (“NANHRI”), which coordinates and supports NHRIs in Africa, as well as encourages their creation in states where they do not currently exist.<sup>73</sup> The membership of NANHRI includes many NHRIs that are not accredited by the ICC,<sup>74</sup>

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<sup>64</sup><http://nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC%20Statute%20as%20amended%20at%20ICC%2025.pdf>.

<sup>65</sup>Chart of the Status of NIs (2011) (on file with author).

<sup>66</sup> Chart of the Status of NIs (2009) (on file with author).

<sup>67</sup><http://nhri.ohchr.org/EN/AboutUs/ICC%20Accreditation/Documents/ICC%20SCA%20General%20Observations.pdf>.

<sup>68</sup><http://nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC%20Statute%20as%20amended%20at%20ICC%2025.pdf>.

<sup>69</sup><http://nhri.ohchr.org/EN/AboutUs/Governance/Documents/ICC%20Statute%20as%20amended%20at%20ICC%2025.pdf>.

<sup>70</sup>Murray, *supra* note 12, at 31-32.

<sup>71</sup>Murray, *supra* note 12, at 32.

<sup>72</sup><http://www.ohchr.org/EN/HRBodies/HRC/Pages/NHRIParticipation.aspx>.

<sup>73</sup><http://www.nanhri.org/>.

<sup>74</sup>[http://www.nanhri.org/index.php?option=com\\_content&view=article&id=107&Itemid=828&lang=en](http://www.nanhri.org/index.php?option=com_content&view=article&id=107&Itemid=828&lang=en).

The level of membership in the NANHRI, however, varies according to the accreditation that the NHRIs have received from the ICC.<sup>75</sup>

The Asia Pacific Forum of National Human Rights Institutions (APF) is the regional body of the Asia Pacific region, and works to coordinate NHRIs within that region.<sup>76</sup> The APF was created in July of 1996, by representatives from the NHRIs of Australia, India, Indonesia and New Zealand at a meeting sponsored by the OHCHR.<sup>77</sup> These NHRIs decided to form the APF, and created the Larrakia Declaration, which stated that, among other things, NHRIs should work closely with NGOs and government, regional cooperation is essential to the effective promotion and protection of human rights, and that NHRIs should comply with the Paris Principles.<sup>78</sup>

The APF has three levels of membership. Full members are NHRIs considered in full compliance with the Paris Principles.<sup>79</sup> Each full member is represented on the Forum Council, the decision making body of the APF. There are currently 15 full members, and the list of full members<sup>80</sup> corresponds exactly to those states in the Asia Pacific region who hold A status on the ICC.<sup>81</sup> Candidate Members are NHRIs who do not fully comply with the Paris Principles, but could do so within a reasonable period of time.<sup>82</sup> Associate Members are members who do not comply with the Paris Principles, and are unlikely to do so within a reasonable period of time. To qualify as an Associate Member, a NHRIs must still have a broad mandate on human rights, and only one organization will be admitted from each member state.<sup>83</sup> Associate and Candidate members can participate in APF activities, but cannot participate in decision making.<sup>84</sup> There are no current Candidate members of the APF, and the two current Associate members are NHRIs who currently have B status at the ICC.<sup>85</sup> The APF is unique among the regional bodies in two ways. First, it is the only body to create a formalised process for NGOs and NHRIs to engage with each other.<sup>86</sup> Second, it is the only regional body that must operate without the support of any inter-governmental regional human rights mechanism.<sup>87</sup>

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<sup>75</sup>[http://www.nanhri.org/index.php?option=com\\_content&view=article&id=113&Itemid=621&lang=en](http://www.nanhri.org/index.php?option=com_content&view=article&id=113&Itemid=621&lang=en).

<sup>76</sup><http://www.asiapacificforum.net/about>

<sup>77</sup> Catherine Renshaw & Kieren Fitzpatrick, *National Human Rights Institutions in the Asia Pacific Region: Change Agents Under Conditions of Uncertainty*, in HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE, 150,150, (Ryan Goodman & Thomas Pogram eds., 2012).

<sup>78</sup> Renshaw & Fitzpatrick, *supra* note 77, at 150-151.

<sup>79</sup><http://www.asiapacificforum.net/members>

<sup>80</sup><http://www.asiapacificforum.net/members/apf-member-categories/full-members>

<sup>81</sup><http://nhri.ohchr.org/EN/Contact/NHRIs/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2828%20January%202014%29.pdf>.

<sup>82</sup><http://www.asiapacificforum.net/members/apf-member-categories/candidate-members>

<sup>83</sup><http://www.asiapacificforum.net/members/apf-member-categories/associate-members>

<sup>84</sup><http://www.asiapacificforum.net/members/apf-member-categories/associate-members>,

<http://www.asiapacificforum.net/members/apf-member-categories/candidate-members>

<sup>85</sup><http://nhri.ohchr.org/EN/Contact/NHRIs/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2828%20January%202014%29.pdf>.

<sup>86</sup> Renshaw & Fitzpatrick, *supra* note 77, at 151.

<sup>87</sup> Renshaw & Fitzpatrick, *supra* note 77, at 165.

In the Americas, NHRIs are organized in the Network of National Institutions for the Promotion and Protection of Human Rights on the American Continent.<sup>88</sup> Rather than accredit NHRIs itself, the Network will only accept members who have been accredited by the ICC.<sup>89</sup> Currently, the Network has 15 members,<sup>90</sup> which are the same 15 NHRIs accredited with A status by the ICC.<sup>91</sup>

The European regional body is the European Network of National Human Rights Institutions (“ENNHRI”).<sup>92</sup> It is made up of 40 NHRIs, which seems to include not only A status European NHRIs, but also those granted B or C status by the ICC.<sup>93</sup> The European Group works with other organisations in Europe, include the EU’s Fundamental Rights Agency and the Organisation for Security and Cooperation in Europe.<sup>94</sup> The ENNHRI is currently chaired by the Scottish Human Rights Commission.<sup>95</sup>

#### 4.4 NHRIs and Human Rights Law

The broad role of NHRIs is to promote and protect human rights. Exactly what tasks it should take on, and what roles it should fill to achieve these goals, however, remains a matter of debate. The place of national mechanisms in human rights law is very much in flux at this moment, and Article 33 adds to that, by created new mechanisms and new roles for old ones. Under Article 33, NHRIs will also be responsible for monitoring the implementation of the CRPD. It is clearly desirable that NHRIs be as effective as possible in meeting their human rights mandate. The Paris Principles remain the main standard by which NHRIs are judged. More recently, however, there has been some criticism of this approach. While the Paris Principles focus on the establishment and functions of a NHRI, they do not do as much to address the effectiveness and operations of a NHRIs once it has been established.<sup>96</sup> This raises the question of how, exactly, the effectiveness of a NHRI can be determined. According to Rachel Murray, there are a number of factors, both within and outside of the Paris Principles, which have been found by researchers to contribute to the effectiveness of a NHRI. Before a NHRI can be judge on how effectively it is fulfilling its role in society, however, the exact nature of that role must be determined. First, a NHRI needs to occupy a semi-official role that allows the

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<sup>88</sup><http://www.rindhca.org.ve>

<sup>89</sup><http://www.rindhca.org.ve/red/index.php/component/content/article/102-destacados/1216-miembros>

<sup>90</sup><http://www.rindhca.org.ve/red/index.php/component/content/article/102-destacados/1216-miembros>

<sup>91</sup><http://nhri.ohchr.org/EN/Contact/NHRIs/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2828%20January%202014%29.pdf>.

<sup>92</sup> <http://scottishhumanrights.com/international/eurochair>

<sup>93</sup> <http://www.ihrc.ie/international/euronhrgroups.html>

<sup>94</sup> <http://www.ihrc.ie/international/euronhrgroups.html>

<sup>95</sup> <http://scottishhumanrights.com/international/eurochair>

<sup>96</sup> Rachel Murray, *National Human Rights Institutions, Criteria and Factors for Assessing Their Effectiveness*, 25 *Netherlands Q. of Hum. Rts.*, 2, 190 (2007); Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa*, Human Rights Watch (2001).

institution to work closely with government, without compromising its independence. A NHRI should have more political clout than an NGO, and act as a bridge between NGOs and government.<sup>97</sup> A NHRI should also have an educational role within its state, promoting human rights and acting as the primary focal point for rights within its state.<sup>98</sup> Finally, a NHRI should facilitate the adoption of international human rights standards at the national level.<sup>99</sup> It is this last role that is most important for NHRIs in the context of Article 33.

The role of NHRIs in creating a bridge between national and international law is often seen as self-evident by the international community. For this reason, the OHCHR has invested a great deal of energy in creating and maintaining these institutions.<sup>100</sup> Additionally, the Universal Periodic Review of states by the Human Rights Council routinely involves governments encouraging other states that have not yet established a NHRI to do so.<sup>101</sup> Simply by creating a NHRI, a state is already choosing to comply with international standards, as there is arguably an international expectation that states will create institutions that comply with the Paris Principles to implement international human rights norms.<sup>102</sup>

Currently, according to research by Richard Carver, many, if not most, NHRIs use international standards when handling cases, and promote these standards within their country, including monitoring legislation for compliance with human rights treaties.<sup>103</sup> While NHRIs are generally expected by the international community to uphold international, rather than domestic, standards, this is not always reflected in their founding documents. A survey conducted in 2010 found that 45% of institutions have a mandate that explicitly requires the application of international standards, while 10% are explicitly required to hold to national standards. The remaining institutions did not have mandates that specified which human rights standards to apply.<sup>104</sup> 45% of mandates also included either promoting treaties for ratification, or offering recommendations to bring domestic law in line with treaties, as duties of the NHRI.<sup>105</sup> Generally, NHRIs will go to the limit of their mandate to bring international human rights standards into their cases. Australia's human rights commission, for example, has a mandate that allows it to take into account a set of human rights treaties, not all of which Australia has ratified, and most of which are not incorporated into national law. When the commission reports on cases handled, it references the treaty provision breached, rather than any domestic

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<sup>97</sup> Murray, *supra* note 96, at 191-192.

<sup>98</sup> Murray, *supra* note 96, at 191.

<sup>99</sup> Murray, *supra* note 96, at 191.

<sup>100</sup> Carver, *supra* note 3, at 2.

<sup>101</sup> Goodman & Pegram, *supra* note 10, at 1.

<sup>102</sup> Sonia Cardenas, *Nations Human Rights Institutions and State Compliance*, in HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE, 29,30 (Ryan Goodman & Thomas Pegram eds., 2012).

<sup>103</sup> Carver, *supra* note 3, at 2.

<sup>104</sup> Carver, *supra* note 3, at 6.

<sup>105</sup> Carver, *supra* note 3, at 7.

law.<sup>106</sup> In another example, the human rights commission in Malaysia, which is confined to national human rights standards under its mandate, nevertheless frequently finds ways to invoke international law.<sup>107</sup> There are, however, also examples of NHRIs who fail to use the full extent of their mandates. The National Human Rights Commission in Mexico is an example of an institution that has an international mandate, but has failed to make full use of it.<sup>108</sup> While the willingness of many NHRIs to use international human rights standards is encouraging, there has been some criticism of NHRIs for focusing on civil and political rights at the expense of economic, social and cultural rights. C. Raj Kumar feels that this is a reflection of the general tendency of the international community as a whole to ignore economic rights in favour of civil and political rights.<sup>109</sup>

Besides using international standards in its casework, a NHRI can also act as a bridge between national and international law by monitoring legislation for compliance with international standards. This monitoring can either be negative, identifying existing laws which are not in conformity with international law, or positive, proposing new laws to bring state practice in line with prevailing international standards.<sup>110</sup> Monitoring also allows a NHRI to consistently and forcefully call for its state to bring its practices in line with international human rights law, which is one of the most effective actions a NHRI can take.<sup>111</sup> The influence that a NHRI has over government policy is affected both by the government perception of how politically desirable it would be to implement a particular recommendation, and by the political accountability of the system in the state as a whole.<sup>112</sup>

NHRIs have the ability to exert social pressure on their state governments, and indications that they are doing so may include critical media coverage, shifts in public policy, state agents, such as the police and judges, attaining human rights education, complaints from the public framed in human rights language, and an increase in membership in human rights organisations.<sup>113</sup> Even the establishment of a NHRI can send an important social message. The establishment of an institution can be seen as an official statement that human rights are considered important in that state. Having a venue for human rights based action can encourage and legitimise human rights activism. This can also both encourage citizens to pay more attention to issues around human rights, and give notice to rights violators.<sup>114</sup> NHRIs can also create networks that allow

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<sup>106</sup> Carver, *supra* note 3, at 13.

<sup>107</sup> Carver, *supra* note 3, at 12.

<sup>108</sup> Carver, *supra* note 3, at 12.

<sup>109</sup> C. Raj Kumar, *National Human Rights Institutions and Economic, Social and Cultural Rights: Towards the Institutionalization and Developmentalisation of Human Rights*, 28 Hum. Rts. Q. 757 (2006).

<sup>110</sup> Carver, *supra* note 3, at 17.

<sup>111</sup> Cardenas, *supra* note 102, at 45

<sup>112</sup> Renshaw & Fitzpatrick, *supra* note 77, at 177.

<sup>113</sup> Julie Mertus, *Evaluating NHRIs: Considering Structure, Mandate and Impact*, in HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE, 74, 87, (Ryan Goodman & Thomas Pegram eds., 2012).

<sup>114</sup> David S. Meyer, *National Human Rights Institutions, Opportunities, and Activism*, in HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE, 324, 330, (Ryan Goodman & Thomas Pegram eds., 2012).

local civil society groups to interact with regional and international human rights institutions.<sup>115</sup>

#### 4.5 Problems Encountered by NHRIs: Establishment and Independence

If there are particular roles that an effective NHRI must be able to fulfil, then the question of how a NHRI can properly fulfil these roles must be asked. National mechanisms cannot contribute to human rights unless they are effective, and NHRIs, as the most visible and well-known mechanism, are particularly important here. Their success or failure will likely determine how many people view national mechanisms, and so may have effects beyond NHRIs themselves. The mere existence of a NHRI is not a panacea, nor does it guarantee that the human rights situation in a country will improve. In Africa, for instance, there are countries that improve their human rights situation without a NHRI, and there are countries that establish a NHRI while continuing to violate human rights and suppress other human rights mechanisms.<sup>116</sup> Furthermore, there are difficulties in holding these institutions accountable for their actions. NHRIs operate in a complicated environment where their mandate—to promote and protect human rights—can be influenced by other actors (such as the state) so it is difficult to simply apply an outcomes based test to check their effectiveness.<sup>117</sup> There is, however, research on what conditions make for an effective institution, much of it conducted by Murray. First, the conditions under which the institution is established can have a great impact on its effectiveness.<sup>118</sup> An effective institution is protected from interference when it is established with a clear legal foundation. Preferably, the institution is incorporated into the constitution, but a legislative establishment is also possible.<sup>119</sup>

Not only is the legal foundation of the institution important, but so is the political context in which it is created. Questions of how and why a NHRI was established can have a strong impact on how the institution is perceived, and therefore how effective it will be. If the process of establishment is inclusive, consultative, and transparent, with support both from the highest levels of government and all sections of the state and civil society, then a sense of ownership and legitimacy is created.<sup>120</sup> On the other hand, when a NHRI has been established as part of a peace agreement, this sense of ownership is often lacking, as the institutions is perceived as the product of negotiations, or a solution

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<sup>115</sup> Buhm-Suk Baek, *RHRIs, NHRIs and Human Rights NGOs*, 24 Fla. J. Int'l L. 237 (2012).

<sup>116</sup> Peter Rosenblum, *Tainted Origins and Uncertain Outcomes: Evaluating NHRIs*, in HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE, 297, 308 (Ryan Goodman & Thomas Pegrum eds., 2012).

<sup>117</sup> Murray, *supra* note 12, at 71.

<sup>118</sup> Murray, *supra* note 96, at 194.

<sup>119</sup> Murray, *supra* note 96, at 194-195.

<sup>120</sup> Murray, *supra* note 96, at 198.

created by the international community.<sup>121</sup> Overemphasis on the creation of the NHRI, without enough focus on how it is created, can also lead to the creation of institutions that are not suited to the local context, or that are inaccessible to segments of society.<sup>122</sup> However an institution is created, it must be done in such a way that all parties feel part of the process. If, for instance, the creation of a NHRI is largely the result of work by NGOs, then political forces may not feel the necessary sense of ownership.<sup>123</sup>

There is also evidence that some states, particularly those with poor human rights records, will establish NHRIs largely to appease more powerful states. These institutions are more likely to be largely ineffective and powerless, as the main goal is to quell critics, rather than improve human rights.<sup>124</sup> In these cases, where the bodies creating the NHRI are also responsible for violating human rights, it is also difficult to convince the state to create an institution that meets the requirements for independence, and the institution will likely suffer from interference, lack of funding, and poor leadership.<sup>125</sup> Research shows that the strongest NHRIs are established when two conditions are met. First the state must have some incentive to create a strong NHRI, and pressure to create a NHRI must come both from domestic and international sources.<sup>126</sup> It is worth noting, however, that even in cases where a NHRI is established to deflect criticism, it can still be valuable, as its creation may provide a way to mobilise domestic actors, and provide access to human rights networks outside the state.<sup>127</sup>

How appointments to the NHRI are handled can also have an affect on its effectiveness. Positions in the institution should be widely advertised, and offered on an equal opportunity basis. Positions should be filled quickly through a highly public process.<sup>128</sup> There are examples of both appointments by the executive and the legislature that are effective, but also examples that are seen as too close to government, or bowing to government pressure. Therefore, it is most important that the process is transparent, and open to the media and civil society.<sup>129</sup>

It is also important that an institution have the power to control its own budget. A NHRI must of course be given enough funding to meet its mandate, but should also be given control over how to best allocate that funding to specific areas.<sup>130</sup> It is often suggested that the legislature, rather than the executive, provide funding for the NHRI,

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<sup>121</sup> Murray, *supra* note 96, at 198; <http://constitutios.uct.ac.za/cgi-bin/catdoc.sh/cama/data/data/subs/1253.doc>.

<sup>122</sup> Cardenas, *supra* note 102, at 48.

<sup>123</sup> Murray, *supra* note 96, at 199.

<sup>124</sup> Cardenas, *supra* note 102, at 34; Sonia Cardenas and Andrew Fillbert, *National Human Rights Institutions in the Middle East*, 59 *Middle East Journal* 411 (2005).

<sup>125</sup> Meyer, *supra* note 11, at 324.

<sup>126</sup> Cardenas, *supra* note 102, at 42.

<sup>127</sup> Brodie, *supra* note 34, at 150.

<sup>128</sup> Murray, *supra* note 96, at 196.

<sup>129</sup> Murray, *supra* note 96, at 196-197.

<sup>130</sup> Murray, *supra* note 96, at 197; Joint Committee on Human Rights, *Fourteenth Report. Work of the Northern Ireland Human Rights Commission*, 15 July 2003, HL 142, HC 132, para. 39.

and that the NHRI must vouch to the legislature for the funding it has used. This is not enough to guarantee independence, however. A system for the institution to gain extra funding, either from government or an outside source, should be put in place.<sup>131</sup> It is important that the capacity of an institution is matched to the expectations that have been placed on the NHRI. If a large gap exists between the two, it can undermine the legitimacy of the institution, as well as perpetuating the view that human rights are merely are rhetorical tool.<sup>132</sup>

Research has shown that the effectiveness of a NHRI depends not just on funding and how the institutions goes about carrying out its mandate, but also relies on a variety of other factors, such as how the institute is perceived by other stakeholders, its resources and power, and the political and social context it operates in.<sup>133</sup> A NHRI can only effectively fulfil its role as an independent body, for instance, when the state understands and respects this role. Without the support of the state, the institution will find it difficult to be effective in any of its work.<sup>134</sup> The social context around the NHRI can also affect the expectations the institution is met with. Factors that can influence this include the effectiveness of other institutions, the general rule of law in a state, and the nature of the government and legal system.<sup>135</sup>

The state plays a part in determining the effectiveness of a NHRI, but so does the institution itself and other members of society.<sup>136</sup> While many of the factors that go into the effectiveness of a NHRI are outside if its control, there are actions an institution can take to make itself more or less effective. For instance, a NHRI must have a clear plan to make the best use of its resources and powers.<sup>137</sup> It must use all of its powers to their full potential.<sup>138</sup> A NHRI should also self-check. It must regularly monitor its effectiveness, noting how it has responded to matters, and how any changes are being implemented.<sup>139</sup> The institution should develop the ability to work with and influence government officials and civil servants. Although a NHRI must not compromise its independence, it cannot be effective without the support of government.<sup>140</sup> A NHRI must also strive to be as accessible as possible to all sectors of society. All publications should be widely distributed, and all people who bring a complaint to the institution should be kept

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<sup>131</sup> Murray, *supra* note 96, at 202-203, Racheal Murray, *The Relationship Between Parliaments and National Human Rights Institutions*, in Morison J., McEvoy, K., and Anothony, G. JUDGES, TRANSITIONS AND HUMAN RIGHTS, 357 (2007).

<sup>132</sup> Cardenas, *supra* note 102, at 48.

<sup>133</sup> Murray, *supra* note 12, at 74.

<sup>134</sup> Renshaw & Fitzpatrick, *supra* note 77, at 177.

<sup>135</sup> Kumar, *supra* note 6, at 276.

<sup>136</sup> Murray, *supra* note 12, at 74.

<sup>137</sup> Murray, *supra* note 96, at 207.

<sup>138</sup> Murray, *supra* note 96, at 208.

<sup>139</sup> Murray, *supra* note 96, at 211.

<sup>140</sup> Murray, *supra* note 96, at 212; Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Right Protection*, 13 Harv. Hum. Rts. J. 7 (2000).

informed of their progress.<sup>141</sup> NHRIs also need to ensure that the most vulnerable members of society, as well as those who might be hostile or wary, are given access to the institution.<sup>142</sup> In gauging the accessibility of the institution, many factors should be considered, such as public knowledge of the institution, issues around translation and multiple languages, and the physical location of the institution, which can affect the ability of the public to contact it.<sup>143</sup> The needs of members of society who are disabled or confined should also be taken into account.<sup>144</sup>

A key feature of NHRIs is their independence. It is hard to know to whom, exactly they should be accountable, and whether being held accountable by any body is an infringement on their independence.<sup>145</sup> A NHRI is most able to maintain its independence when it is accountable to the legislature and the public, rather than the executive. Many institutions accomplish this by submitting an annual report to the legislature, which provides an opportunity to engage with the legislature.<sup>146</sup> This does not, however, solve the entire problem, as other stakeholders are involved with the NHRI and have a stake in whether it is truly effective. In addition, a NHRI must be accountable to forces outside of government, as they are meant to be independent, which makes it difficult for the government alone to hold them accountable. Many NHRIs in developing countries, particularly in Africa, are supported financially by external donors, but having the institutions be accountable to these donors also raises concerns.<sup>147</sup> One solution is to consider a NHRI as accountable to the various stakeholders within a country. This can create its own problems, however, as an institution may have trouble pleasing all factions within a group of stakeholders and become ineffective or over-bureaucratic in the attempt.<sup>148</sup> There is also the option of the international community holding NHRIs accountable. Currently, however, NHRIs at the international and regional level are largely self-regulating, and held accountable only to the extent that they comply with the Paris Principles.<sup>149</sup>

There has also been some discussion of whether NHRIs should be treated as part of the state that created them. On the one hand, NHRIs are created by the state, and the state delegates power and authority to them. On the other hand, treating NHRIs as part of the state conflicts with the requirement that such institutions be independent of their government. For this reason, NHRIs are often grouped with other non-state actors, such as NGOs.<sup>150</sup> This can be seen in the treatment of NHRIs by UN Treaty bodies, where

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<sup>141</sup> Murray, *supra* note 96, at 216.

<sup>142</sup> Murray, *supra* note 96, at 213.

<sup>143</sup> Murray, *supra* note 96, at 217.

<sup>144</sup> Reif, *supra* note 2, at 26.

<sup>145</sup> Murray, *supra* note 12, at 71.

<sup>146</sup> Murray, *supra* note 96, at 213.

<sup>147</sup> Murray, *supra* note 12, at 77.

<sup>148</sup> Murray, *supra* note 12, at 77.

<sup>149</sup> Murray, *supra* note 12, at 77-78.

<sup>150</sup> Murray, *supra* note 12, at 60.

NHRIs and NGOs are often given identical roles in the reporting process.<sup>151</sup> This is still not an ideal solution as NHRIs, unlike NGOs and other non-state actors, are created by the state, often either through the state constitution or legislation. Still, because independence is an important part of a NHRI's mandate, they must be seen as somehow separate from the state.<sup>152</sup> One solution is to view responsibility for human rights within a state as the joint responsibility of NHRIs and states, with both states and the NHRIs themselves responsible for the effectiveness of the NHRI.<sup>153</sup>

Despite these problems, the effectiveness and accountability of NHRIs is becoming increasingly important as they take a larger role in international, regional and national human rights.<sup>154</sup> Accreditation by the ICC is clearly one international mechanism for effectiveness, requiring NHRIs to meet the Paris Principles in order to fully participate in many activities at the UN.<sup>155</sup> Most regional bodies also require some kind of accreditation before a NHRI can become a full member.<sup>156</sup> UN treaty bodies often seem to hold states responsible for their NHRIs, asking them not only to establish such institutions, but to fully support them and implement their recommendations. However, this again raises the question of the NHRIs independence. If a NHRI is truly independent, then should the state be held responsible for its actions?<sup>157</sup> One answer is that states are ultimately responsible for human rights within their borders, and as this includes responsibly for the actions of non-state actors such as NGOs, it must also include NHRIs. This is the approach that the UN and many regional bodies have taken. For instance, the CRC has held Kenya responsible for ensuring that its NHRI is "accessible and child-friendly", even though this meant the state must exercise oversight over some of the internal functions of the NHRI.<sup>158</sup>

#### 4.6 NHRIs and the UN: Interaction Between National and International Bodies

While national mechanisms are becoming more popular, the UN remains the driving force behind international human rights law. UN human rights treaties set the standards for human rights worldwide, and most national mechanisms, including NHRIs, retain some ties to the UN. As Anne Gallagher notes, given the fact that human rights, while international law, must ultimately be implemented on a national level, it makes sense that much of the work of the treaty bodies should be focused on the creation and

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<sup>151</sup>See section 4.6 of this thesis.

<sup>152</sup>Murray, *supra* note 12, at 60.

<sup>153</sup>Murray, *supra* note 12, at 61.

<sup>154</sup>Murray, *supra* note 12, at 71.

<sup>155</sup>Murray, *supra* note 12, at 71.

<sup>156</sup> e.g. <http://www.asiapacificforum.net/members/becoming-a-member>

<sup>157</sup>Murray, *supra* note 12, at 72.

<sup>158</sup>Murray, *supra* note 12, at 72 - 74.

development of state-level institutions to promote and enforce human rights.<sup>159</sup> This interface is important in all cases for national mechanisms, as they seek to implement international standards in a national context. For a treaty-based framework like Article 33, UN involvement in setting the standards and expectations for the framework is inevitable. It is not yet clear how Article 33 bodies will relate to the UN, but NHRIs' relationship with the UN may provide some guidance. Since the 1970s, and particularly since the 1990s and the creation of the Paris Principles, the UN has encouraged countries to set up NHRIs.<sup>160</sup> There is evidence that this encouragement has led to an increase in NHRIs around the world. One reason states may respond to UN calls for NHRIs is that these institutions create a buffer to prevent erosion of national sovereignty.<sup>161</sup> The UN has also worked to create links between NHRIs, and supported workshops and capacity building.<sup>162</sup> The treatment of NHRIs at the UN, however has not been consistent, either over time or by different UN bodies. Early in the history of NHRIs, they were treated as a support for the work of the Commission on Human Rights, rather than as independent bodies in their own right.<sup>163</sup> In 1999 the Commission on Human Rights decided that NHRIs should be in a separate category and gave them their own section at the Commission.<sup>164</sup> Since then, the Commission on Human Rights has been disbanded, and replaced by the Human Rights Council, which has yet to adopt its own resolution on NHRIs.<sup>165</sup> The Human Rights Council has, however, developed a practice towards NHRIs. Since the Council's first year, institutions have had the right to full participation in the Council's activities. The official Rules of Procedure allow institutions to submit documents for the consideration of the Council, make written or oral statements on items on the agenda, and sponsor parallel events.<sup>166</sup> More recently, NHRIs have been treated, by various bodies and various times, as specialised agencies, NGOs, or part of government delegations.<sup>167</sup> The OHCHR has, since 2003, had a specialist unit, called the National Institutions and Regional Mechanisms Section, to assist and liaise with NHRIs. While staffing for this unit increased from 2003 to 2010, staffing levels remained well below what would be required to effectively relate to over 100 institutions around the world.<sup>168</sup>

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<sup>159</sup> Anne Gallagher, *Making Human Rights Treaty Obligations a Reality: Working with New Actors and Partners*, in *The Future of UN Human Rights Treaty Monitoring*, 201 (eds. Philip Alston and James Crawford, 2000).

<sup>160</sup> Murray, *supra* note 12, at 27.

<sup>161</sup> Murray, *supra* note 12, at 27.

<sup>162</sup> Murray, *supra* note 12, at 27.

<sup>163</sup> Murray, *supra* note 12, at 28.

<sup>164</sup> Murray, *supra* note 12, at 29.

<sup>165</sup> Chris Sidoti, *National Human Rights Institutions and the International Human Rights System*, in *HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE*, 93, 94 (Ryan Goodman & Thomas Pegrum eds., 2012).

<sup>166</sup> Sidoti, *supra* note 165, at 105.

<sup>167</sup> Murray, *supra* note 12, at 29.

<sup>168</sup> Sidoti, *supra* note 165, at 94.

The relationship between the UN and the NHRIs, and the UN Treaty bodies and the institutions in particular, is important because one of the roles NHRIs were designed to fill is a body to ensure the implementation of human rights treaties.<sup>169</sup> The treaty bodies also offer NHRIs important ways to further their own work. These bodies are composed of independent experts, rather than representatives of states, and their observations are based on human rights law rather than the interests of individual states.<sup>170</sup> This was recognised in the Paris Principles, though many treaty bodies have been slow to appreciate the role of NHRIs. Still, the statements issued by the treaty bodies regarding NHRIs show a gradual progression towards recognising their unique role and encouraging the contributions and participation of the institutions.<sup>171</sup> The ICC has described the optimum process for NHRI engagement with treaty bodies. In the view of the ICC, the NHRI should contribute to the information used to draft the list of issues, participate in the pre-sessional working group to raise particular areas of concern, as well as the informal briefings, be granted a right of reply similar to NGOs, and follow up on concluding observations.<sup>172</sup>

This engagement is also important, notes Chris Sidoti, because the international human rights system is often ineffective and plagued by serious problems.<sup>173</sup> According to the General Assembly, on human rights issues, it is important the issues be addressed with “universality, objectivity and non-selectivity” as well as with the “elimination of double standards and politicisation”<sup>174</sup> This is a standard that the international human rights community, and particularly the Human Rights Council, too often fails to meet. NHRIs are capable of providing the international community with independent, objective information about human rights standards within their states.<sup>175</sup> In 2000, Anne Gallagher noted that NHRIs were less engaged with treaty bodies than NGOs, as they seldom provided treaty bodies with independent information, and were rarely present during dialogue with the treaty body about state reports.<sup>176</sup> This was, however, before treaty bodies began changing their procedures to account the large number of NHRIs.

In 2002, the Committee on the Rights of the Child issued a General Statement calling for the establishment of NHRIs, and in states where such institutions already exist, to review their mandate and effectiveness particularly in the area of children’s rights.<sup>177</sup> The CRC wrote that because NHRIs are an important mechanism in the implementation and promotion of treaties such as the CRC, the Committee felt that the

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<sup>169</sup>Burdekin, *supra* note 23, at 90.

<sup>170</sup> Sidoti, *supra* note 165, at 115.

<sup>171</sup>Burdekin, *supra* note 23, at 90.

<sup>172</sup> Sidoti, *supra* note 165, at 119; <http://www.nhri.net/default.asp?PID=281&DID=O>.

<sup>173</sup> Sidoti, *supra* note 165, at 99.

<sup>174</sup> Sidoti, *supra* note 165, at 99.

<sup>175</sup> Sidoti, *supra* note 165, at 99; <http://www.quino.org/humanrights/UN-CHR/commissionsLinks.htm>.

<sup>176</sup> Gallagher, *supra* note 159, at 208.

<sup>177</sup>Committee of the Rights of the Child, *General Comment*,

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2002%2f2&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2002%2f2&Lang=en).

establishment of a NHRI fell within the state's obligations under the treaty.<sup>178</sup> NHRIs, they explained are particularly important in the area of children's rights, because children are particularly vulnerable to human rights abuses, as they had fewer ways to seek recourse than adults, and their opinions are often ignored.<sup>179</sup>

This General Comment also lays out the role that NHRIs should have in reporting to the CRC. According to the CRC, the state can consult its NHRI when drafting its report, but it is important that the NHRI remain independent, and the task of drafting the report should not be delegated to the institution. Instead, the NHRI should provide information independently to the CRC, in forums such as pre-sessional meetings. In addition, a state party's report should include information on the constitutional or legislative mandate that establishes the NHRI, as well as information about its mandate and functioning.<sup>180</sup>

The Committee on the Elimination of Discrimination Against Women CEDAW has not issued a general comment or recommendation on the role of NHRI in regards to CEDAW, but did issue a brief statement on the subject in 2008.<sup>181</sup> In this statement, CEDAW recognized the important role that NHRIs can play, and in particular their role in monitoring human rights.<sup>182</sup> The statement does not set formal procedures for the role of NHRIs in state reporting, but does agree that NHRIs have a role to play in state reporting. Their ideas include a NHRI commenting on state reports, and aiding individuals who feel that their rights have been violated in contacting the CEDAW.<sup>183</sup> CEDAW also invites NHRIs to submit information to the committee at pre-sessional meetings, and includes time to meet with NHRIs in the agenda for pre-sessional meeting.<sup>184</sup>

The Committee on the Elimination of Racial Discrimination issued a General Comment in 1993 recommending the establishment of NHRIs. This general comment recommends that the NHRI be part of the government delegation to prepare and present reports to the Committee.<sup>185</sup> CERD's position on this appears to have changed, however, as current working methods group NHRIs with NGOs, rather than the state party. CERD invites information from NGOs and NHRIs on an informal basis, and provides them with copies of reports the Committee will be considering. CERD also reserves the right to

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<sup>178</sup>Committee of the Rights of the Child, *supra* note 177.

<sup>179</sup>Committee of the Rights of the Child, *supra* note 177.

<sup>180</sup>Committee of the Rights of the Child, *supra* note 177.

<sup>181</sup>Committee on the Elimination of Discrimination Against Women, [www.ohchr.org/Documents/HRBodies/CEDAW/NHRI\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/CEDAW/NHRI_en.pdf)

<sup>182</sup>Committee on the Elimination of Discrimination Against Women.

<sup>183</sup>Committee on the Elimination of Discrimination Against Women.

<sup>184</sup>Committee on the Elimination of Discrimination Against Women.

<sup>185</sup>Committee on the Elimination of Racial Discrimination,

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f48%2f18\(SUPP\)&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f48%2f18(SUPP)&Lang=en).

organize meeting with NGOs and NHRIs, though it states that state parties will be invited to these meetings.<sup>186</sup>

The Committee on Economic, Social and Cultural Rights issued a general comment on the role of NHRIs in 1998. In it, the committee encourages the establishment of NHRIs, and writes that many of those already established do not give economic, social, and cultural Rights a high enough priority, and encourages states to include appropriate levels of attention to these rights in the mandate of NHRIs.<sup>187</sup> Like most committees, the CESCR groups NHRIs with NGOs, and allows them to present information at pre-sessional meetings.<sup>188</sup>

The Committee Against Torture recently altered their rules on NHRIs and NGOs role in the state reporting process. CAT treats NGOs and NHRIs separately. As of November of 2010, the committee has arranged meetings between members of the Committee, state rapporteurs, and NHRIs. NHRIs and NGOs are also able to submit written reports before and after a state parties report is examined.<sup>189</sup>

The Committee on the Rights of Persons with Disabilities has also not made a general comment on NHRIs<sup>190</sup>, but NHRIs are incorporated, at least implicitly, into the treaty with Article 33, which designates that an independent national body must monitor the implementation of the treaty.<sup>191</sup> While the treaty does not explicitly state that this body must be a NHRI, the negotiations make clear that NHRIs were what most of the parties had in mind, with, for instance, references to the bodies need to be in compliance with the Paris Principles.<sup>192</sup> The CRPD does have an explicit role for NHRIs in its Working Procedures. NHRIs are invited to participate in the reporting procedure in an “active and independent manner”.<sup>193</sup> NHRIs are reminded to take into account “the diversity of people with disabilities”.<sup>194</sup> The Committee may designate focal points to interact with NHRIs, when it believes this is necessary.<sup>195</sup>

NHRI engagement with the international community is important for both sides. For treaty bodies and other international actors, NHRIs can be an important source of information about the human rights situation on the ground in a particular state. For the institutions themselves, engaging with the international community can have a number of

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<sup>186</sup> <http://www.ohchr.org/EN/HRBodies/CERD/Pages/WorkingMethods.aspx>.

<sup>187</sup> Committee on Economic, Social, and Cultural Rights, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1998%2f25&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1998%2f25&Lang=en).

<sup>188</sup> [www.ohchr.org/EN/HRBodies/CESCR/Pages/WorkingMethods.aspx](http://www.ohchr.org/EN/HRBodies/CESCR/Pages/WorkingMethods.aspx).

<sup>189</sup> [www.ohchr.org/EN/HRBodies/CAT/Pages/NGOsNHRIs.aspx#section3](http://www.ohchr.org/EN/HRBodies/CAT/Pages/NGOsNHRIs.aspx#section3).

<sup>190</sup> <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>.

<sup>191</sup> United Nations Convention on the Rights of Persons with Disabilities, art. 33, 3 May 2008, 2515 U.N.T.S 3 (2008).

<sup>192</sup> See section 5.4 of this thesis

<sup>193</sup> CRPD Working Methods, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/5/4&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/5/4&Lang=en).

<sup>194</sup> CRPD Working Methods, *supra* note 193.

<sup>195</sup> CRPD Working Methods, *supra* note 193.

benefits, including allowing the NHRI to participate in the development of international law, which can provide a legal basis for national debates, increasing the international accountability of the state, identifying issues of common concern, and creating a regional or international strategy, and building international support networks.<sup>196</sup> Unfortunately, a study in 2009 concluded that NHRIs were not heavily engaged with the international community. Although engagement with the Universal Periodic Review process, in which the Human Rights Council undertakes a review of a state's fulfilment of all of its human rights obligations, was high, engagement with treaty bodies was only moderate, and interaction with other types of UN bodies, including the Human Rights Council outside of the Universal Review Process, was low.<sup>197</sup> One reason for this low level of engagement could be various obstacles that NHRIs may face as they attempt to engage the international community. Governments may resent work by institutions that brings human rights violations to international attention. Both governments and civil society may criticise institutions that are believed to spend time on international work at the expense of their domestic work.<sup>198</sup> Travel can be both expensive and time consuming, and institutions may rightly worry about spending limited resources on travel that could be spent on domestic work. Some institutions, particularly newer ones, may lack knowledge of and experience with the international system.<sup>199</sup> The problem of limited resources demonstrates that a tension exists between a NHRI's domestic and international priorities. This will continue to be the case unless the international community recognised that international engagement is a necessary part of the work of a NHRI, and provides resources to alleviate that tension.<sup>200</sup>

#### 4.7 Conclusion

Since the drafting of the Paris Principles, the UN and the rest of the international human rights community has been quite successful in encouraging the creation of NHRIs. This time period has also seen the creation of a framework of international and regional bodies to coordinate, monitor and accredit these institutions. While these are positive developments, which could speed and improve the implementation of human rights in many countries, some of the fundamental problems in the relationship between domestic and international law remain. NHRIs have no way to compel action from their governments, meaning that no matter how effective an institution is, an unwilling or hostile government could still thwart progress on human rights. Furthermore, NHRIs are still new enough that questions about best and most effective practices remain, though

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<sup>196</sup> Sidoti, *supra* note 165, at 100.

<sup>197</sup> Sidoti, *supra* note 165, at 101-102

<sup>198</sup> Sidoti, *supra* note 165, at 102-103.

<sup>199</sup> Sidoti, *supra* note 165, at 103.

<sup>200</sup> Sidoti, *supra* note 165, at 103.

these are being actively studied. Currently, NHRIs may provide the extra push some governments need to take their international human rights obligations seriously, but they do not solve the entire problem. Their role in international human rights is still evolving and developing, however, so they may play an even greater role in the future.

Within the specific context of Article 33, NHRIs are particularly important, as they are the most obvious body to fulfil the role of monitoring mechanism under Article 33.2. Here, as in other areas, NHRIs present both promise and problems. At this point, the best strategies for effective action by a NHRI have been well studied, and a well led, well funded institution has a good chance at improving the implementation of the CRPD within its state. As an independent body, the NHRI can monitor government behaviour, advise the government on necessary changes to bring the country in line with the Convention, and use public education to spread awareness of the new rights and norms found in the treaty, thus increasing public pressure on the government to comply.

Problems still persist, however. First, not every country has a NHRI to serve as the monitoring mechanism, and it is not clear that establishing an institution simply to meet the requirements of the treaty is a good idea. Institutions are sensitive to the circumstances in which they are established, and are most effective when they are desired by and pushed for by all sectors of society. If civil society, or certain stakeholders, are not fully behind the idea of a NHRI, but one is established anyway to fulfil the requirements of the CRPD, that institution may find it difficult to fully establish its legitimacy and form good working relations with all sectors of society.

Even when a NHRI does exist, not all institutions are effective, or have the expertise and resources to properly fulfil a new mandate as a monitoring mechanism for the CRPD. If an institution was established purely as a kind of international cover for a rights-violating government, then it is likely ineffective, and unlikely to fulfil a new monitoring role. If an institution is chronically understaffed or underfunded, adding new duties will not help matters. All of these factors need to be considered when NHRIs are viewed in relation to Article 33 of the CRPD.

## **Part Two: Article 33: It's Creation and Use**

### **5. The Creation of Article 33 of the CRPD**

#### **5.1 Introduction**

At the time that the Convention on the Rights of Persons with Disabilities was drafted, the climate around international human rights law was one of reform. In the 1990s, the end of the Cold War had helped to heal rifts in the human rights community, and the drafting of the Paris Principles had helped to encourage the rise and proliferation of NHRIs. Furthermore, the UN had begun a process of internal reform, focusing on improving the treaty body system that had been the primary method by which states were evaluated on their compliance with human rights treaties. This reform process had also exposed many of the weaknesses of the treaty body system, convincing many participants participating in the drafting that new ideas were needed. In this atmosphere, there was room for innovation that would improve the link between international and domestic law.

Two major factors drove the desire to create a national framework to implement and monitor the CRPD. First, NHRIs had recently achieved both enough prominence and numbers that, for the first time, they were able to join the treaty negotiations as a group. These institutions were very focused on making national monitoring a key part of the Convention. To do so, the main model the drafters had to draw on was the National Preventative Mechanism (“NPM”) in the Optional Protocol to the Convention Against Torture (“OPCAT”). The NPM was the first national monitoring mechanism included in a UN human rights treaty, and was cited often during the negotiations as a model of what such a mechanism should look like. Many states, however, were wary of a mechanism based too heavily on the NPM. The NPM, after all, had been located in the Optional Protocol, separate from the main treaty, and generally a much less ratified document. Because of this, states might accept a level of detail and prescription in a monitoring mechanism located in an optional protocol that they would object to in the main treaty document. Nevertheless, while changes clearly needed to be made, the NPM provided an important precedent for Article 33.

Another incentive for a national framework to monitor the CRPD was the recognition, spurred by the on going reform effort, that international efforts at monitoring human rights conventions had so far proven inadequate in many ways. Indeed, the situation was such that during the negotiations for the CRPD, there was serious consideration of leaving out international monitoring altogether, to focus on the national component. In the end, the Convention was written with a standard monitoring body, but

concerns about the international monitoring system contributed to a desire to create a national system to improve the implementation and monitoring process.

The result of these various forces was the final form of Article 33. Unlike both the NPM that it is partially based on, and the international monitoring regime that it is meant to supplement and improve, Article 33 is not solely focused on monitoring. Instead, it has two main components designed to address defects in both the monitoring of states as they implement human rights conventions, and the process of implementation itself. The goal is not only to improve oversight of state parties, but to put in place mechanisms that will improve the functioning of the government's implementation process, as well.

## 5.2 Thematic National Human Rights Bodies

The CRPD is not the first time that the drafters of a treaty have considered the role of domestic mechanisms in implementation. The Ad Hoc Committee that drafted the Convention on the Rights of the Child ("CRC") discussed including a provision that would have required states to support national mechanism that could assist in the implementation of the CRC, but ultimately decided not to include the provision.<sup>1</sup> Although this provision was not included, the CRC did, when offering recommendations after hearing state reports, occasionally recommend that states that lacked a national institution for children establish one.<sup>2</sup> UNICEF and the CRC have continued to encourage states to establish specialised bodies to handle children's rights. For instance, in 2010, a report by the CRC criticised the lack of such a body in Israel.<sup>3</sup> Development of these bodies is also encouraged at a regional level in Europe by the European Network of Ombudspersons for Children (ENOC).<sup>4</sup> The CRC lays out its position on NHRIs and specialised human rights bodies for children in its second General Comment. The CRC argues that while independent bodies are important to protect the rights of all people, they are particularly important in the context of children's rights, as children are uniquely vulnerable: "their opinions are still rarely taken into account; most children have no vote [ . . . ] children encounter significant problems in using the judicial system to protect their rights".<sup>5</sup> The CRC notes that while many states have established thematic human rights bodies, such as ombudspersons or commissions, specifically for children's rights, this may not be an option in states that lack resources. In this case, the CRC recommends the

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<sup>1</sup> LINDA C. REIF, *THE OMBUDSMAN, GOOD GOVERNANCE AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM* 295 (2004).

<sup>2</sup> Reif, *supra* note 1, at 296.

<sup>3</sup> Or Kashti, *UNICEF: Israel negligent in guarding children's rights*, HAARETZ, <http://www.haaretz.com/print-edition/news/unicef-israel-negligent-in-guarding-children-s-rights-1.325790>.

<sup>4</sup> <http://www.crin.org/en/enoc>.

<sup>5</sup> Committee on the Rights of the Child, General Comment No. 2, The role of independent national human rights institutions in the promotion and protection of the rights of the child, U.N. Doc. CRC/GC/2002/2 ¶5 (2002).

establishment of a single human rights body, which has a division devoted to children's rights.<sup>6</sup> The CRC reiterated the importance of national level children's rights bodies in General Comment 5, where these bodies were mentioned in a discussion of measure of implementation: "One of the satisfying results of the adoption and almost universal ratification of the Convention has been the development at the national level of a wide variety of new child-focused and child-sensitive bodies" including "children's ombudspersons and children's rights commissioners".<sup>7</sup> The CRC clearly sees the development of thematic bodies devoted to children's rights as a positive development, and continues to encourage their creation. These bodies are another example of a national human rights body that preceded Article 33, and may have helped to shape the article. In this case, children's rights bodies are, in their modern form, heavily influenced by NHRIs.

Another example of a thematic national human rights body is bodies created for the protection of minorities. These are largely found in Europe, where some states have established thematic ombudsmen for the protection of minorities.<sup>8</sup> This trend began in the 1990s, when problems around the protection of minorities were brought to the surface in Central and Eastern Europe by the collapse of communist regimes.<sup>9</sup> The creation of these bodies was further encouraged in Europe by Council Directive 2000/43/EC. This directive, which addresses racial and ethnic discrimination, requires member states to "designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin."<sup>10</sup> The directive does not require that this be a separate body, in fact it specifically allows the body to "form part of agencies charge at national level with the defence of human rights",<sup>11</sup> which would mean that the body could be part of the state's NHRI. Nevertheless, many European states have chosen to erect separate bodies for this purpose.

The Committee on the Elimination of Racial Discrimination ("CERD"), has also encouraged states to establish bodies to aid in the implementation of the Convention on the Elimination of Racial Discrimination ("CERD"). CERD's General Recommendation 17 advises state parties to establish national bodies to facilitate the implementation of CERD. The General Recommendation references the Paris Principles, and while CERD focuses on how the body will operate in relation to racial discrimination, it does not

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<sup>6</sup> Committee on the Rights of the Child, General Comment No. 2, The role of independent national human rights institutions in the promotion and protection of the rights of the child, U.N. Doc. CRC/GC/2002/2 ¶8 (2002).

<sup>7</sup> Committee on the Rights of the Child, General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), U.N. Doc. CRC/GC/2003/5 ¶9 (2003).

<sup>8</sup> Reif, *supra* note 1, at 36 – 37.

<sup>9</sup> Reif, *supra* note 1, at 36.

<sup>10</sup> Council Directive 2000/43/EC, Art 13.

<sup>11</sup> Council Directive 2000/43/EC, Art. 13.

suggest whether CERD would prefer a separate, thematic body, or that the state's existing board based NHRI make racial discrimination a priority.<sup>12</sup>

These national thematic human rights bodies bear some resemblance to Article 33 of the CRPD. Unlike Article 33, they are not required by the treaty itself, but recommended by the treaty body. These bodies are, however, national bodies, independent from government, as they rely on the Paris Principles, that oversee the implementation process. In their creation, one can see both the increasing importance of national level human rights bodies to international human rights law, and the beginnings of the idea that treaties should have specific monitoring bodies at the national level. These idea would both be important to the creation of Article 33.

### 5.3 National Preventive Mechanisms, Precursor to Article 33

While the thematic human rights bodies are recommended by treaty bodies, there is also a precedent for a national body within a human rights treaty. With its framework both in and outside of government, dealing with both monitoring and implementation, Article 33 has been rightly hailed as a unique development in international law. However, it came about in an environment increasingly aware that current methods of promoting and monitoring implementation were inadequate, and, with the proliferation of NHRIs, increasingly interested in finding new ways to monitor and encourage progress.

Article 33 of the CRPD is not the first time that a UN human rights treaty has required a monitoring mechanism. Article 17 of OPCAT requires states to set up an independent body to prevent torture at the domestic level.<sup>13</sup> The establishment and functions of the NPM are set out in articles 17 through 23. According to the Optional Protocol, “Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level”.<sup>14</sup> State Parties must “guarantee the functional independence of the national preventive mechanisms”, and “make available the necessary resources for the functioning”, as well as ensuring that the staff “have the required capabilities and professional knowledge”, and are sufficiently representative of the various ethnic and other minority groups in the state.<sup>15</sup> The Optional Protocol asks that states give “due

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<sup>12</sup> Committee on the Elimination of Racial Discrimination, General Recommendation 17, The establishment of national institutions to facilitate the implementation of the Convention (Forty-second session, 1993), U.N. Doc. A/48/18 at 116 (1994).

<sup>13</sup> Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 17, 18 December 2002, 2375, U.N.T.S. 237 (2002).

<sup>14</sup> Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 13, at art. 17.

<sup>15</sup> Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 13, at art. 18.

consideration” to the Paris Principles when establishing this NPM.<sup>16</sup> While the functions of the NPM are different from those of the Art 33.2 body in the CRPD, there are parallels between the two: both are independent bodies established under a UN treaty to monitor compliance with that treaty, and both make some mention of the Paris Principles. This allows NPMs to be viewed as a precursor to 33.2, and makes it worthwhile to look at how states treated their responsibility to establish and maintain NPMs.

OPCAT was the first international human rights instrument to include a preventative mechanism. It was also the first treaty to ask that complementary effort be made between national and international structures.<sup>17</sup> There are clear benefits to including a national mechanism to prevent torture. No matter how well the Sub-Committee for the Prevention of Torture (“SPT”) functions, it will only visit countries on a rare basis. A national mechanism, by contrast, is there all the time.<sup>18</sup> At the time of the drafting of OPCAT, the drafting countries were split into two camps. The Mexican proposal, backed by one camp, put NPMs in the spotlight, as a nod to state sovereignty, and the fact that it is ultimately the state that must implement international law. The proposal downplayed the role of the SPT.<sup>19</sup> The other camp, led by the EU, kept the NPM, but gave the main role in enforcement to the SPT. The final treaty struck a compromise, giving the NPM and SPT about equal powers.<sup>20</sup>

States have taken a wide variety of approaches to establishing NPMs, according to research conducted by Rachael Murray. The approaches to NPMs fall broadly into four categories, and are: (1) using a NHRI as the NPM; (2) using an already existing Ombudsman; (3) using some other already existing statutory body whose duties can be expanded to encompass those of a NPM; or finally (4) creating an entirely new body.<sup>21</sup> When looking at the solutions states have arrived at for establishing a NPM, the most important question is whether the designated body will be able to fulfil the functions required by the Optional Protocol. Under the Optional Protocol, the NPM must be allowed “[t]o regularly examine the treatment of the persons deprived of their liberty in places of detention”.<sup>22</sup> The NPM should then be able to make recommendations on how to improve the welfare of such persons, as well as examine and comment upon draft

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<sup>16</sup> Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 13, at art. 18.

<sup>17</sup> Frank Ledwidge, *The Optional Protocol to the Convention Against Torture (OPCAT): A Major Step Forward in the Global Prevention of Torture*, 17 Helsinki Monitor 73 (2006).

<sup>18</sup> Ledwidge, *supra* note 17, at 75.

<sup>19</sup> Elina Steinerte, *The Jewel in the Crown and Its Three Guardians: Independence of National Preventive Mechanisms Under the Optional Protocol to the UN Torture Convention*, 14 Hum. Rts. L. R. 4 (2014).

<sup>20</sup> Steinerte, *supra* note 19, at 4.

<sup>21</sup> Rachel Murray, *National Preventive Mechanisms Under the Optional Protocol to the Torture Convention: One Size Does Not Fit All*. 24 Netherlands Quarterly of Hum. Rts., 6, 487-488, (2008).

<sup>22</sup> Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 13, at art. 19.

legislation.<sup>23</sup> To ensure that it can carry out these activities effectively, the NPM must have access to information concerning the number of people in detention, their treatment, the ability to privately interview persons deprived of their liberty, the right to visit any place of detention they wish, and the ability to contact the SPT.<sup>24</sup> Given the wide variety of bodies chosen to serve as NPMs, there are a number of questions that must be answered, in determining whether a given body can fulfil its function properly. Bodies that existed before they were designated as the NPM must resolve any conflicts between their previous mandate and their new responsibilities. Newly designated bodies need to quickly establish a reputation in order to work effectively with both the government and civil society.<sup>25</sup> To help NPMs and governments navigate these issues, the SPT has issued guidelines on the establishment and functioning of these bodies. While it is not the job of the SPT to ensure that NPMs are in compliance with OPCAT, it created and maintains these guidelines as way of providing advice and assistance.<sup>26</sup> While many of the guidelines reiterate the principles laid down in the Optional Protocol, there are a few extra suggestions, including the establishment of a clear work programme, and the need for existing organisations that were designated as a NPM to keep these duties separate from previous mandates.<sup>27</sup>

When establishing the NPM, the SPT asks that the mandate and powers of the NPM be “clearly set out in a constitutional or legislative text.”<sup>28</sup> In practice, states have varied widely in their approach to appointing their NPM, from adopting or amending legislation, adopting a decree that might later require legislation to endorse it, or simply making an announcement of the choice in parliament.<sup>29</sup> The SPT also recommends that the process of choosing a NPM be open and transparent, with the involvement of civil society.<sup>30</sup> This requirement is also found in the Paris Principles, which states were asked to consider when making their choice.<sup>31</sup> This, too has varied greatly, with the choice of the NPM being a foregone conclusion with little to no consultation in some states, while in others an extensive process was followed before the choice was made.<sup>32</sup>

With its requirement that states establish a body to monitor the treatment of people deprived of their liberty, the OPCAT NPM is a clear precursor to the Article 33.2

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<sup>23</sup> Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 13, at art. 19.

<sup>24</sup> Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 13, at art. 20.

<sup>25</sup> Murray, *supra* note 21, at 488.

<sup>26</sup> Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Guidelines on National Preventive Mechanisms*, ¶ 2, U.N.Doc CAT/OP/12/5, (9 December 2010).

<sup>27</sup> *Guidelines on National Preventive Mechanisms*, *supra* note 26, at ¶ 32-33.

<sup>28</sup> *Guidelines on National Preventive Mechanisms*, *supra* note 26, at ¶ 7.

<sup>29</sup> Murray, *supra* note 21, at 491.

<sup>30</sup> *Guidelines on National Preventive Mechanisms*, *supra* note 26, at ¶ 16.

<sup>31</sup> Murray, *supra* note 21, at 492.

<sup>32</sup> Murray, *supra* note 21, at 491-492.

body required in the CRPD. Article 33.2 reads, in its entirety, that “States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.”<sup>33</sup> Looking at the treaties establishing both the NPM and the Article 33.2 body, it’s possible to see both parallels between the two bodies, as well as some important differences. Examining these allows one to see where an examination of NPMs may help guide the process of appointing and running the CRPD monitoring mechanism. The most obvious difference is the requirement for a NPM is located in the Optional Protocol to the Convention Against Torture, rather than the main treaty. Optional Protocols tend to receive fewer ratifications. According to the Association for the Prevention of Torture (APT), in 2012, OPCAT has been ratified by 63 states, signed by 22 others, and of those 44 have designated a NPM.<sup>34</sup> The CRPD, by contrast, has 119 ratifications, with an additional 34 signatories.<sup>35</sup> Thus far, there is no official database keeping track of how many states have appointed an Article 33.2 body.

In the text itself, the NPM is set out in much more detail than the Article 33.2 body in the CRPD. OPCAT details the powers that the NPM must have,<sup>36</sup> and its relationship to with the government and the SPT. The discussion of the NPM covers several articles, and is given its own section within the Optional Protocol. These articles provide much more guidance than the CRPD, which only devotes a single sub-article to the 33.2 body. This necessarily leaves the functions of the 33.2 body somewhat vague, as well as it’s relationship to its government, and the Committee on the Rights of Persons with Disabilities. Rather than a detailed list of functions, the Article 33.2 body is simply instructed to “promote, protect and monitor” the implementation of the Convention. Whether the vagueness of the activities of the Article 33.2 works in its favour, giving it more scope than the NPM, or against it, has yet to be demonstrated. As far as guidance for the establishment of such a body, states are given only an indirect reference to the Paris Principles.<sup>37</sup> It is worth noting, however, that the UN itself has treated this indirect reference as fairly binding, and only considers bodies that comply with the Paris Principles to be in line with Article 33.2.<sup>38</sup>

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<sup>33</sup> United Nations Convention on the Rights of Persons with Disabilities, art. 33, 3 May 2008, 2515 U.N.T.S 3 (2008).

<sup>34</sup> <http://www.apr.ch/en/opcat-database/>.

<sup>35</sup> <http://www.un.org/disabilities/countries.asp?id=166>.

<sup>36</sup> Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 13, at art. 19.

<sup>37</sup> United Nations Convention on the Rights of Persons with Disabilities, *supra* note 33, at art. 33.

<sup>38</sup> See, e.g., Human Rights Council, *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on the Structure and Role of National Mechanisms for the Implementation and*

NPMs are an important precursor to the monitoring mechanism in Article 33 of the CRPD. They are the first attempt in a UN human rights treaty to erect a national level body to monitor compliance with international law. Like the CRPD, OPCAT is a treaty of the 21st century (adopted 18 December, 2002), meaning it was written after the rise of NHRIs and during the current push to create a stronger bridge between international and domestic law, and so improve the implementation of human rights treaties. The NPM, with its highly detailed role, is in some ways a more limited version of the Article 33.2 body in the CRPD. In that sense, it could be seen as a first step, paving the way for the larger and more expansive role that 33.2 bodies are expected to play in the implementation of the CRPD. While the NPM of OPCAT is the most direct precursor of Article 33, it was not the only precedent drawn on during negotiations.

#### 5.4 UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities

In addition to looking to previous human rights treaties for principles that could improve the implementation of the CRPD, the drafters also referred to prior international instruments that addressed disability rights. During the negotiations on both international and national monitoring, one of the most commonly referenced of these instruments was the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (“Standard Rules”). As a soft law document, the Standard Rules was not as influential as a binding treaty, but some of its ideas would have an effect on the development of Article 33 of the CRPD.

Prior to the adoption of the CRPD, the Standard Rules were the most influential and far-reaching international document on disability rights.<sup>39</sup> The adoption of the Standard Rules in 1993 was one of the major outcomes of the Decade of Disabled Persons. The Standard Rules set out in 22 rules the message of the World Programme of Action,<sup>40</sup> which was an earlier document, adopted in 1982, that set out a global strategy related to the full participation in public life of people with disabilities.<sup>41</sup> For a time, at least, the Standard Rules were perceived as a substitute for a binding international treaty.<sup>42</sup> The Standard Rules are not a binding document, but were instead intended to set the standard for national and international disability laws and policies.<sup>43</sup> Lisa Waddington notes that they helped to set the stage for the CRPD in that the Standard Rules place emphasis on equality for people with disabilities, and take a fully rights-based

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*Monitoring of the Convention on the Rights of Persons with Disabilities*, ¶ 44, U.N.Doc A/HRC/13/29 (22 December, 2009).

<sup>39</sup> Lisa Waddington, *Evolving Disability Policies: From Social-Welfare to Human Rights: An International Trend from a European Perspective*. 19 Neth. Q. Hum. Rts. 146 (2001).

<sup>40</sup> <http://www.un.org/esa/socdev/enable/dissre00.htm>.

<sup>41</sup> <http://www.un.org/disabilities/default.asp?id=23>.

<sup>42</sup> Waddington, *supra* note 39, at 146.

<sup>43</sup> Waddington, *supra* note 39, at 146.

approach.<sup>44</sup> However, the Standard Rules drew criticism from many activists for their focus on medical treatment and prevention of disability.<sup>45</sup> The biggest flaw with the Standard Rules, however, was their non-binding nature, which greatly limited any impact they may have had.<sup>46</sup> The Standard Rules were important to the development of Article 33 because they also addressed the issue of monitoring.

Section IV of the Standard Rules is devoted to setting out a monitoring mechanism, “to further the effective implementation of the Rules”.<sup>47</sup> The Standard Rules were monitored by the Commission for Social Development, as well as a Special Rapporteur for Disability.<sup>48</sup> While most of the section on monitoring focuses on the duties and powers of the Special Rapporteur, a small section does mention the need for monitoring at the national level. States, according to the Standard Rules “should encourage national coordinating committees or similar bodies to participate in implementation and monitoring.”<sup>49</sup> States should encourage these bodies “to establish procedures to coordinate the monitoring of the Rules.”<sup>50</sup> The participation of civil society is also mentioned, as “[o]rganisations of persons with disabilities should be encouraged to be actively involved in the monitoring of the process at all levels.”<sup>51</sup> Rule 20 of the Standard Rules also mentions the responsibility of states to implement and monitor the rules on a national level.<sup>52</sup>

While the Standard Rules did in some ways address the need for national level monitoring and bodies to guide implementation, they were severely limited. Adopted in 1993, the idea of an independent monitoring body such as a NHRI is not mentioned, although the Paris Principles had been drawn up by this point. The discussion of national bodies is also both more brief and more vague here than in either the OPCAT or the CRPD, suggesting that ideas around national bodies to encourage the adoption of international human rights instruments were still being formed. The most limiting factor, however, is that as a soft law document, the Standard Rules had less force than a binding treaty, and therefore very little influence on governments. Despite these weaknesses, the Standard Rules still served an important role at the negotiations, serving as a precedent for the idea of national bodies, as well as the need for novel monitoring mechanisms if instruments of international law are to succeed.

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<sup>44</sup> Waddington, *supra* note 39, at 147.

<sup>45</sup> Rosemary Kayess and Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*. 8 Hum. Rts. Law Review 1, 16.

<sup>46</sup> Kayess & French, *supra* note 45, at 16.

<sup>47</sup> <http://www.un.org/esa/socdev/enable/dissre06.htm>.

<sup>48</sup> <http://www.un.org/esa/socdev/enable/dissre06.htm>.

<sup>49</sup> <http://www.un.org/esa/socdev/enable/dissre06.htm>.

<sup>50</sup> <http://www.un.org/esa/socdev/enable/dissre06.htm>.

<sup>51</sup> <http://www.un.org/esa/socdev/enable/dissre06.htm>.

<sup>52</sup> <http://www.un.org/esa/socdev/enable/dissre05.htm>.

## 5.5 NHRIs in the Drafting Process

The CRPD is the first human rights treaty of the 21st century. As such, it is, among other things, the first treaty to incorporate the changes to human rights law that began with the end of the Cold War. Two of the biggest changes, which were previously discussed, were the reform effort at the UN, and the rapid increase in the number of NHRIs, as well as the development of a global and regional framework that allowed these institutions to cooperate and enforce standards. The drafting of the CRPD was the first time the NHRIs could negotiate as a group, without their state parties, to give input on the creation of a treaty. For this reason, NHRIs were in a unique position during the drafting of the CRPD. Since the drafting of the Paris Principles, their numbers had grown greatly, with the UN encouraging the establishment of the institutions. Furthermore, the potential for NHRIs (as well as other bodies established according to the Paris Principles) to monitor treaties had been raised in OPCAT. Thus, for the first time NHRIs were in a position to take an active and assertive part in the drafting of a human rights convention at the negotiations for the CRPD.

At the 6th Ad Hoc Committee session, the NHRIs as a group offered a proposal covering national and international monitoring. This proposal was far more detailed and comprehensive than anything that had been proposed before this point, and combined the national and international levels of monitoring in innovative ways. The proposal by the NHRIs would first have required states to establish a baseline report, to make clear what steps would need to be taken to bring the states in line with the Convention.<sup>53</sup> The baseline report would cover legislative, judicial, administrative, and other measures needed to bring national practice into line with the Convention. It must be submitted within 18 months of ratification, and a state must consult with national monitoring bodies and DPOs in the creation of the report, as well as making the final report available to the public.<sup>54</sup> Based on this baseline report, states were required to develop a National Action Plan, with the input of both their national monitoring body and other civil society organisations.<sup>55</sup> The National Action Plan would be updated no less than every 5 years, and would contain reasonable time frames and indicators of success.<sup>56</sup>

On national monitoring bodies, the NHRIs require that “1. Each State Party shall maintain, designate or establish within one year after the entry into force of this Convention for that State, an independent national body responsible for the monitoring of the implementation of this Convention, and for promotion and protection of the rights of persons with disabilities at the domestic level. Where an independent national human rights institution already exists in the State party, its mandate shall be extended to comply

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<sup>53</sup> <https://www.un.org/esa/socdev/enable/rights/documents/ahc6nhrida25.doc>.

<sup>54</sup> <https://www.un.org/esa/socdev/enable/rights/documents/ahc6nhrida25.doc>.

<sup>55</sup> <https://www.un.org/esa/socdev/enable/rights/documents/ahc6nhrida25.doc>.

<sup>56</sup> <https://www.un.org/esa/socdev/enable/rights/documents/ahc6nhrida25.doc>.

with this convention.”<sup>57</sup> This comes close to the existing article 33.2, in that both require the designation of an independent national body to promote, protect and monitor the Convention, although the version proposed by the NHRIs is substantially more detailed. The duties of the national monitoring body are also laid out in more detail, and include the power to “monitor compliance with this convention”,<sup>58</sup> “submit proposals and observations concerning existing or draft legislation”,<sup>59</sup> “entertain or support complaints at national level”,<sup>60</sup> and “make recommendations to the relevant authorities with the aim of improving the promotion and protection of the rights of persons with disabilities”.<sup>61</sup> Most of these duties, such as the ability to comment on draft legislation, and make recommendations, are common powers of NHRIs, though not all NHRIs have the power to hear complaints. In addition to the powers of the monitoring body, the NHRI proposal also requires that state parties “guarantee the functional independence of the national monitoring body”,<sup>62</sup> ensure that the body has the necessary resources to carry out its functions, and “[t]he establishment, composition and operation of the national monitoring body shall be in compliance with the Principles relating to the Status and Functioning of National Institutions for Protection and Promotion of Human Rights”.<sup>63</sup> While the proposal never explicitly states that the national monitoring body must be a NHRI, it does require that the body conform entirely to the Paris Principles. Compare that to the final form of Article 33, which required states to conform to the Paris Principles only in that the monitoring body must meet the same level of independence as a NHRI.<sup>64</sup> Under the proposal of the NHRIs, it is difficult to imagine any body but a NHRI meeting the stated requirements.

On international monitoring, the proposal spends several articles detailing the work and composition of the Committee on the Rights of Persons with Disabilities.<sup>65</sup> The role that the proposal envisioned for the Committee includes consulting with States Parties about the progress they made under their national action plans,<sup>66</sup> and maintaining a dialogue with national monitoring mechanisms.<sup>67</sup> The proposal also calls for a Global Disability Rights Advocate, with the responsibility of encouraging national implementation of the Convention.<sup>68</sup> Finally, the NHRIs would have added both an

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<sup>57</sup> <https://www.un.org/esa/socdev/enable/rights/documents/ahc6nhrida25.doc>.

<sup>58</sup> <https://www.un.org/esa/socdev/enable/rights/documents/ahc6nhrida25.doc>.

<sup>59</sup> <https://www.un.org/esa/socdev/enable/rights/documents/ahc6nhrida25.doc>.

<sup>60</sup> <https://www.un.org/esa/socdev/enable/rights/documents/ahc6nhrida25.doc>.

<sup>61</sup> <https://www.un.org/esa/socdev/enable/rights/documents/ahc6nhrida25.doc>.

<sup>62</sup> <https://www.un.org/esa/socdev/enable/rights/documents/ahc6nhrida25.doc>.

<sup>63</sup> <https://www.un.org/esa/socdev/enable/rights/documents/ahc6nhrida25.doc>.

<sup>64</sup> United Nations Convention on the Rights of Persons with Disabilities, *supra* note 33, at art. 33.

<sup>65</sup> <https://www.un.org/esa/socdev/enable/rights/documents/ahc6nhrida25.doc>.

<sup>66</sup> <https://www.un.org/esa/socdev/enable/rights/documents/ahc6nhrida25.doc>.

<sup>67</sup> <https://www.un.org/esa/socdev/enable/rights/documents/ahc6nhrida25.doc>.

<sup>68</sup> <https://www.un.org/esa/socdev/enable/rights/documents/ahc6nhrida25.doc>.

individual and a collective complaints procedure to the main Convention, rather than confining the complaints system to the Optional Protocol.<sup>69</sup>

At the negotiations themselves, the NHRIs spoke as a group. From the beginning of the negotiations, they called for both national and international monitoring, with the national body taking the Paris Principles into account. The NHRIs were also a strong supporter of changing the form of the treaty body to reflect the problems uncovered in the treaty body reform process.<sup>70</sup> In the 4th session of the ad hoc committee, NHRIs called for a monitoring article that would recognise the importance of NHRIs in monitoring, and the creation of an international monitoring body that took the reforms into account, though the NHRIs still supported the idea that complaint mechanisms should be optional for state parties, with mandatory reporting.<sup>71</sup>

When the NHRIs submitted their proposed text at the 6th Ad Hoc Committee meeting, they explained that they had attempted to create a monitoring process, containing both national and international monitoring, that would “steer a process of domestic reform, rather than create a layer of administrative burdens.”<sup>72</sup> They stated that their proposal respected domestic sovereignty, and that requiring government to create action plans “would allow governments to take ownership over the process of change and the crafting of an action plan would embed a positive dynamic of change.”<sup>73</sup> The national monitoring mechanism would, they said, “illuminate domestic reform efforts and provide local knowledge and constructive advice to governments.”<sup>74</sup> The overriding theme of the NHRIs presentation of their proposal was that it would improve on old processes, and rely more heavily on domestic mechanisms, in the form of the action plan and national monitoring mechanism, than past treaties. Even on international monitoring, the NHRIs stressed the role the committee and other international bodies would have in helping the national government find solutions to domestic problems. The complaints procedure was framed as a way to address structural inequalities and promote a dialogue between the Committee, state parties, national monitoring mechanisms, and DPOs.<sup>75</sup> This framing shows the effects of the UN reform process, as states and other bodies looked for new ideas. The reassurances about state sovereignty, and the continued placing of the state party at the centre of the implementation process, may also have been part of an effort to convince states that these new ideas around treaty implementation wouldn’t threaten the role of the state.

At the 7th Session of the Ad Hoc Committee, the final time that Article 33 was discussed at the negotiations, the NHRIs largely repeated their past position. At this point, their main concerns were “that implementation and monitoring must be distinct

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<sup>69</sup> <https://www.un.org/esa/socdev/enable/rights/documents/ahc6nhrida25.doc>.

<sup>70</sup> <https://www.un.org/esa/socdev/enable/rights/ahc4sumart25.htm>.

<sup>71</sup> <https://www.un.org/esa/socdev/enable/rights/ahc4sumart25.htm>.

<sup>72</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

<sup>73</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

<sup>74</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

<sup>75</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

institutionally and conceptually”,<sup>76</sup> which included support for separate articles for implementation and monitoring. In addition, the NHRIs continued to advocate for a requirement for national action plans to be included in the Convention.<sup>77</sup> Ultimately, neither of these suggestions would be included in the final text. The final form of Article 33 separates international and national monitoring, with national monitoring grouped with implementation, and there is no mention of national action plans. Nonetheless, the NHRIs did succeed in creating a space for national monitoring, and even secured a mention, albeit indirect, of the Paris Principles.

The NHRIs used their time during the drafting of the CRPD to push for sweeping changes to both international and national monitoring schemes. Their international reform efforts showed an effort to use the on going reform process, targeting some of the weakest areas of the treaty system, such as a lack of oversight and enforcement, and addressing them with clear solutions, including the mandatory national action plan, and a robust complaint system. The national monitoring mechanism in the NHRIs' proposal is far more detailed than the one that would ultimately become Article 33.2, but many of its basic components: the 3 three duties of the mechanism to promote, protect, and monitor, as well as the importance of the Paris Principles, are fairly similar. While the NHRIs were unable to make many of the changes they wished for to the Convention, their presence may have helped to drive home the importance of national level independent bodies in ensuring that the rights in the Convention are properly implemented.

### 5.6 Drafting of Article 33

The drafting of the CRPD took place over many years and encompassed a huge number of issues, including the need for some kind of monitoring framework. Because of the timing of the Convention—the first human rights convention of the 21st century, the first post-Cold War convention, the general atmosphere of reform at the UN—there was a push for new ideas, particularly around implementation and monitoring. This push extended to both the national and international spheres. It was this desire for innovation, combined with the enlarged role of NHRIs, and the precedents already covered, that would eventually lead to the final form of Article 33. The desire for change also created tension, and led to many of the negotiations around monitoring being put off until the very end of the drafting process. For the international mechanism, this led to a fairly conservative result.<sup>78</sup> The result for the national mechanisms was more positive, leading to many novel innovations.

The language of the CRPD was negotiated and drafted during a series of Ad Hoc Committee meetings, starting on 19 December 2001, after the General Assembly of the

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<sup>76</sup> <https://www.un.org/esa/socdev/enable/rights/ahc7sum27jan.htm>.

<sup>77</sup> <https://www.un.org/esa/socdev/enable/rights/ahc7sum27jan.htm>.

<sup>78</sup> Michael Ashley Stein & Janet E. Lord, *Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential*, 32 Hum. Rts. Q. 693 (2010).

UN approved resolution 56/168, which created a committee to consider the idea of establishing a comprehensive convention on the rights of people with disabilities. The first two Ad Hoc Committee meetings were dedicated to gathering input from states and national and international organisations.<sup>79</sup> The first Ad Hoc Committee meeting was largely dedicated to the question of whether a disability specific convention was necessary. One of the largest concerns at this meeting, according to Stefan Trömel, was whether a convention focused on the rights of people with disabilities would undermine efforts to mainstream these rights, by creating a space separated from broader human rights treaties. Over the course of the meeting, it became clear that the existing human right framework was not adequately responding to the needs of people with disabilities, and that a disability-focused treaty would be able to address this problem.<sup>80</sup>

At the second Ad Hoc Committee meeting, a Working Group was established to prepare a draft text. The Working Group was presented with the Chair's Draft Elements for a Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities ("Chair's Draft Text"), as a guide to begin the process of creating a draft text. Even in this very early stage, ideas about domestic implementation already appear in the text. Article 29 of the Chair's Draft Text requires states to establish a framework to "monitor, promote and enforce compliance with this Convention."<sup>81</sup> This framework must include an independent body which complies with the Paris Principles, was established after consultation with people with disabilities, and will continue to "facilitate the involvement on an on-going basis of persons with disabilities in the formation of the national institution's policies and processes"<sup>82</sup> This article also required states to assign responsibility for the implementation to a focal point within government, and to assess all future policies and laws for their impact on people with disabilities.<sup>83</sup> In this article, many of the ideas that would go into Article 33 are already present. There is a focal point, although it's not described in any detail. There is an independent body, not yet called a monitoring mechanism, with an explicit mention of the Paris Principles. There is some consideration given to the involvement of people with disabilities in the implementation and monitoring process, though not to the extent of the final article.

The draft text produced by the Working Group at the end of its meeting, by contrast, scaled down this article. At the end of the Working Group, the article had become two sub articles. The first required states parties to designate "a focal point within Government for matters relating to the implementation of the present Convention, and give due consideration to the establishment or designation of a coordination

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<sup>79</sup> <http://www.un.org/esa/socdev/enable/rights/adhoccom.htm>.

<sup>80</sup> Stefan Trömel, *A Personal Perspective on the Drafting History of the United Nations Convention on the Rights of Persons with Disabilities*, 1, *European Yearbook of Disability Law*, 116, (2009).

<sup>81</sup> <http://www.un.org/esa/socdev/enable/rights/wgcontrib-chair1.htm#29>.

<sup>82</sup> <http://www.un.org/esa/socdev/enable/rights/wgcontrib-chair1.htm#29>.

<sup>83</sup> <http://www.un.org/esa/socdev/enable/rights/wgcontrib-chair1.htm#29>.

mechanism to facilitate related action in different sectors and at different levels”,<sup>84</sup> wording that is almost identical to the final article. The second required state parties to “maintain, strengthen, designate or establish at the national level a framework to promote, protect and monitor implementation of the rights recognised in the present Convention.”<sup>85</sup> While this is similar to the final article, this provision contains no requirement for an independent body, or any mention of the Paris Principles. In the notes from the Working Group, it is stated that the group could not reach agreement about the role of NHRIs in the monitoring process.<sup>86</sup> The Working Group draft also leaves out any requirement that civil society be involved in the implementation or monitoring process.

While Article 33 was not specifically discussed at the Third Ad Hoc Committee Meeting, a new draft of the article had emerged by the end. By this point, it was Article 25, and was a combination of national and international monitoring frameworks. The text that existed after the Ad Hoc Committee meeting combined the views of several state parties, most notably the EU, Japan, and Israel, and therefore contains many overlapping provisions.<sup>87</sup> Japan suggesting replacing “focal point” with “focal points”, and adding a statement that the focal point should be informed of the views of people with disabilities.<sup>88</sup> The EU’s suggestions would have added data collection to the monitoring requirements, and added a requirement that state parties consult with people with disabilities.<sup>89</sup> Israel focused on international monitoring, and their suggestion combined national and international monitoring into a single article.<sup>90</sup> By this point, the provisions relating to the focal point and coordination mechanism are more or less in what would be their final form.<sup>91</sup> The sections on monitoring and the involvement of civil society, however, are still being developed. With regard to monitoring, at the point in the drafting process, national and international monitoring are still in a single article. Furthermore, the role of NHRIs in the convention monitoring process is not clear, and therefore references to independent mechanisms or the Paris Principles do not appear. Neither of the provisions on the involvement of civil society—Japan’s requirement that government be informed of views, and the EU’s requiring consultation—is as all-encompassing at the final draft that made it into Article 33.

At the Forth Ad Hoc Committee Meeting, most of the discussion around monitoring focused on the need for international monitoring. Much of the discussion around international monitoring included the need for new ideas, and for the reform effort to be taken into account. New Zealand stated that any international monitoring mechanism must be “consistent with substantive articles; be flexible enough to address

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<sup>84</sup> <http://www.un.org/esa/socdev/enable/rights/ahcwgreporta25.htm>.

<sup>85</sup> <http://www.un.org/esa/socdev/enable/rights/ahcwgreporta25.htm>.

<sup>86</sup> <http://www.un.org/esa/socdev/enable/rights/ahcwgreporta25.htm>.

<sup>87</sup> <http://www.un.org/esa/socdev/enable/rights/ahcstata33tscompilation.htm>.

<sup>88</sup> <http://www.un.org/esa/socdev/enable/rights/ahcstata33tscompilation.htm>.

<sup>89</sup> <http://www.un.org/esa/socdev/enable/rights/ahcstata33tscompilation.htm>.

<sup>90</sup> <http://www.un.org/esa/socdev/enable/rights/ahcstata33tscompilation.htm>.

<sup>91</sup> <http://www.un.org/esa/socdev/enable/rights/ahcstata33tscompilation.htm>.

treaty body reform and draw on their best practices; take into account funding shortages for the system as a whole; be funded from the general budget.”<sup>92</sup> There had been some discussion of whether, given the known problems with the treaty body system, the Convention should have a treaty body at all, but some states felt that that not including a treaty body would send a message that this convention was less important, or second class. New Zealand agreed that, if those concerns were valid, then a treaty body was needed, especially as it was not clear that any alternative to a treaty body would be less resource intensive or pose less of an administrative burden.<sup>93</sup> Canada agreed that the treaty body reform process must be taken into account, but also felt that the treaty should look beyond simply monitoring, towards ideas that would encourage progressive implementation of the treaty.<sup>94</sup> Canada and Yemen both noted the need for any monitoring mechanism to include organisations of people with disabilities. India did not support the creation of a committee, as it felt that the current treaty body system already imposed enough of a burden on state parties.<sup>95</sup> There was also some discussion of Article 25 as it was set out at the Third Ad Hoc Committee meeting. At the end of the Third Ad Hoc meeting, Article 25 had two sub articles, one addressing the need for a focal point and due consideration for the coordination mechanism, and one addressing the monitoring mechanism.<sup>96</sup> Japan wanted the ability to have more than one focal point.<sup>97</sup> Chile stated that they would support links between any national and international monitoring mechanisms.<sup>98</sup> Thailand supported many of the ideas proposed, and more broadly recognised the need for stronger monitoring at both the national and international levels.<sup>99</sup> NGOs, as a group, were broadly supportive of the idea of a national monitoring mechanism, stressing the need for civil society’s involvement in any monitoring. The NHRIs, negotiating as a group, pushed for the inclusion of some reference to NHRIs and the Paris Principles in the national monitoring framework.<sup>100</sup>

As discussions continued the next day, the Netherlands, representing the EU, discussed ideas for an innovative treaty body. “The body should accommodate constructive dialogue with and between States Parties. It should be empowered to request thematic reports as well as to examine periodic reports, request supplementary information and transmit comments and recommendations to the State Party concerned[. . .]The mechanism could offer expert advice and identify good practices to national level implementation mechanisms, and states’ reporting obligations should cover its efforts at

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<sup>92</sup> <https://www.un.org/esa/socdev/enable/rights/ahc4sumart25.htm>.

<sup>93</sup> <https://www.un.org/esa/socdev/enable/rights/ahc4sumart25.htm>.

<sup>94</sup> <https://www.un.org/esa/socdev/enable/rights/ahc4sumart25.htm>.

<sup>95</sup> <https://www.un.org/esa/socdev/enable/rights/ahc4sumart25.htm>.

<sup>96</sup> <https://www.un.org/esa/socdev/enable/rights/ahc3reporte.htm>

<sup>97</sup> <https://www.un.org/esa/socdev/enable/rights/ahc4sumart25.htm>.

<sup>98</sup> <https://www.un.org/esa/socdev/enable/rights/ahc4sumart25.htm>.

<sup>99</sup> <https://www.un.org/esa/socdev/enable/rights/ahc4sumart25.htm>.

<sup>100</sup> <https://www.un.org/esa/socdev/enable/rights/ahc4sumart25.htm>.

implementation as well.”<sup>101</sup> On national monitoring, the Netherlands felt that the section on focal points and coordination mechanisms should be more general, and that data collection and statistics should be included here, rather than a separate article.<sup>102</sup> This was supported by South Korea.<sup>103</sup> There was also discussion about the role of civil society in national monitoring. Bahrain supported the idea of a national monitoring mechanism made up of DPOs, which would have the role of verifying state reports.<sup>104</sup> Mali stated that multiple reports are “risky” and that civil society should work with the state to produce a single report on progress.<sup>105</sup> Malaysia supported the idea of an implementation mechanism, as long as cultural differences were taken into account and recommendations were not binding.<sup>106</sup> Jamaica suggested integrating the monitoring mechanism of the Standard Rules with the new treaty, on the grounds that only one system should be overseeing the implementation of policies related to PWDs.<sup>107</sup>

The next discussion of Article 25 took place at the 6th Ad Hoc Committee meeting. Discussion of national monitoring focused on two points: what the national mechanism would look like, and the involvement of people with disabilities. Yemen suggested adding the phrase “private institutions that work on behalf of PWDs” to the article.<sup>108</sup> Sierra Leone supported adding to the article to ensure the participation of people with disabilities, but suggested slightly different language. Their suggestion was “with the full participation of PWD.”<sup>109</sup> Senegal called for NGOs to be involved in the monitoring process, and the idea was also supported by Thailand, who stated that “States have a responsibility to implement the Convention, but monitoring should be done by those affected by it.”<sup>110</sup> Wide consensus on this issue was expressed, with Russia, Peru, Iran and Qatar, among others, joining in these calls for the participation of people with disabilities.<sup>111</sup> At the end of the morning session, the Chair noted this consensus.<sup>112</sup>

On the structure of the national monitoring mechanism, the main points of contention seemed to be whether the national monitoring mechanism would be government based, or independent, and that the requirement be flexible, and not too prescriptive. Many states at the drafting spoke as if a government based monitoring mechanism was preferable. South Africa, for instance, spoke of monitoring being done by “statutory commissions”.<sup>113</sup> Canada did not express a preference for government versus

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<sup>101</sup> <https://www.un.org/esa/socdev/enable/rights/ahc4sumart25.htm>.

<sup>102</sup> <https://www.un.org/esa/socdev/enable/rights/ahc4sumart25.htm>.

<sup>103</sup> <https://www.un.org/esa/socdev/enable/rights/ahc4sumart25.htm>.

<sup>104</sup> <https://www.un.org/esa/socdev/enable/rights/ahc4sumart25.htm>.

<sup>105</sup> <https://www.un.org/esa/socdev/enable/rights/ahc4sumart25.htm>.

<sup>106</sup> <https://www.un.org/esa/socdev/enable/rights/ahc4sumart25.htm>.

<sup>107</sup> <https://www.un.org/esa/socdev/enable/rights/ahc4sumart25.htm>.

<sup>108</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

<sup>109</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

<sup>110</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

<sup>111</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

<sup>112</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

<sup>113</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

independent, but did note that a monitoring mechanism must be flexible enough to accommodate all kinds of state organisation, including federal states.<sup>114</sup> New Zealand and Sierra Leone also noted that the national monitoring mechanism should not be too prescriptive.<sup>115</sup> Thailand stated that the national monitoring mechanism should be independent, as well as involving civil society.<sup>116</sup> Israel stated that the monitoring mechanisms should be based on NHRIs.<sup>117</sup> Iran, on the other hand, saw the national monitoring mechanism as a focal point for government ministries.<sup>118</sup> Ukraine, as well, felt that government should be involved in the monitoring mechanism.<sup>119</sup> While at least some governments felt that the monitoring mechanism should be a governmental body, the NGOs at the drafting were largely united in their desire for an independent body. The International Disability Caucus (“IDC”), in particular, stated its support for a body that complied with the Paris Principles.<sup>120</sup> The IDC was made up of nearly a hundred NGOs and DPOs that had decided to negotiate as a group, to increase their influence at the drafting.<sup>121</sup>

There was also discussion of international monitoring at the drafting. Costa Rica supported the idea of creating some kind of explicit link between the national and international monitoring mechanisms,<sup>122</sup> an idea also supported by China.<sup>123</sup> So far, the draft convention did not contain any article on international monitoring, partly because state parties were waiting for the results of the reform process. Many countries, including Mexico, argued that the committee could no longer wait, but must come up with something.<sup>124</sup> Brazil argued that if the committee could not think of a better idea than the current system, monitoring on this Convention “at least cannot be allowed to be less effective than other treaties; this cannot be seen as a second-rate treaty. This Convention could use the same monitoring system as others and could integrate reforms as they develop.”<sup>125</sup> Liechtenstein agreed that some action must be taken, as they could no longer wait on the reform process.<sup>126</sup>

Several proposals were put forward by various states and organisations. One proposal put forward by the Asia-Pacific NHRIs was the “Bangkok Recommendations on the Elaboration of a Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities”. At the negotiations, it

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<sup>114</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

<sup>115</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

<sup>116</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

<sup>117</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

<sup>118</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

<sup>119</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

<sup>120</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

<sup>121</sup> Trömel, *supra* note 80, at 117.

<sup>122</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

<sup>123</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

<sup>124</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

<sup>125</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

<sup>126</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

was generally referred to as the Bangkok proposal.<sup>127</sup> The Bangkok proposal was prepared at in June 2003, at the Asia-Pacific Forum of National Human Rights Institutions.<sup>128</sup> While the proposal is very broad, as it covers all areas that the meeting felt needed to be addressed in a treaty on the rights of persons with disabilities, it does include a brief paragraph on the idea of national monitoring.<sup>129</sup> The proposal supports the idea of national level frameworks to oversee implementation, and particularly the use of NHRIs to monitoring the process.<sup>130</sup> Within a national monitoring framework, the proposal calls for a mechanism to handle individual complaints, litigation, and enforcement mechanisms, as well as the promotion, protection, and monitoring of the treaty. The importance of adequate funding and the involvement of DPOs is also noted.<sup>131</sup> The NGO Mental Disability Rights International noted that the Standard Rules included a guarantee that people with disabilities would be involved in the monitoring of their rights, and suggested using this as a basis for a similar guarantee in the Convention.<sup>132</sup>

The IDC also put forward a draft Article 25, which covered both international and national monitoring. At 19 pages long, this draft article covers both issues in substantially more detail than the final version of Article 33.<sup>133</sup> Most of this length is dedicated to international monitoring, but a national framework is also addressed. The proposal does not seem to distinguish between the monitoring mechanism and the focal point, but instead calls the monitoring mechanism the focal point. The IDC proposal is explicit about the monitoring mechanism being a body independent from government, and uses the Paris Principles as the standard for the “establishment, composition and operation of the national mechanism”.<sup>134</sup> The proposal is more stringent when it comes to the establishment of the monitoring mechanism, stating that the state party must “maintain, designate or establish within one year after the entry into force of this Convention or its ratification or accession” a monitoring mechanism “in consultation with persons with disabilities and organizations representing persons with disabilities and structured so as to facilitate the involvement on an on-going basis of persons with disabilities”.<sup>135</sup> The duties and powers of the monitoring mechanism are laid out in great detail, and include the ability make recommendations and submit proposals to the state party, the power to contact the Committee, awareness raising, contact with civil society and other UN bodies, and the power to hear individual complaints.<sup>136</sup>

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<sup>127</sup> [https://www.un.org/esa/socdev/enable/rights/a\\_ac265\\_2003\\_crp10.htm](https://www.un.org/esa/socdev/enable/rights/a_ac265_2003_crp10.htm).

<sup>128</sup> [https://www.un.org/esa/socdev/enable/rights/a\\_ac265\\_2003\\_crp10.htm](https://www.un.org/esa/socdev/enable/rights/a_ac265_2003_crp10.htm).

<sup>129</sup> [https://www.un.org/esa/socdev/enable/rights/a\\_ac265\\_2003\\_crp10.htm](https://www.un.org/esa/socdev/enable/rights/a_ac265_2003_crp10.htm).

<sup>130</sup> [https://www.un.org/esa/socdev/enable/rights/a\\_ac265\\_2003\\_crp10.htm](https://www.un.org/esa/socdev/enable/rights/a_ac265_2003_crp10.htm).

<sup>131</sup> [https://www.un.org/esa/socdev/enable/rights/a\\_ac265\\_2003\\_crp10.htm](https://www.un.org/esa/socdev/enable/rights/a_ac265_2003_crp10.htm).

<sup>132</sup> <https://www.un.org/esa/socdev/enable/rights/ahc6sum9aug.htm>.

<sup>133</sup> <http://www.un.org/esa/socdev/enable/rights/documents/ahc6idcda25.doc>.

<sup>134</sup> <http://www.un.org/esa/socdev/enable/rights/documents/ahc6idcda25.doc>.

<sup>135</sup> <http://www.un.org/esa/socdev/enable/rights/documents/ahc6idcda25.doc>.

<sup>136</sup> <http://www.un.org/esa/socdev/enable/rights/documents/ahc6idcda25.doc>.

The discussion, and the proposals that were put forward, show a few trends. First, states were extremely receptive to the idea of including civil society, and setting up internal monitoring mechanisms. At the same time, many states still held reservations, which often seemed about the state's desire to have some control over the monitoring process. For instance, the number of states that wanted a government based monitoring mechanism. Civil society and NHRIs, meanwhile, continued to push for an independent, empowered monitoring mechanism, which would give them a strong role in the monitoring process.

At the 7th session of the Ad Hoc Committee, the Chair submitted a proposed text on monitoring to encourage discussion.<sup>137</sup> This draft mainly deals with international monitoring, including the establishment and functioning of the Committee on the Rights of Persons with Disabilities, as well as laying out a complaint mechanism.<sup>138</sup> One article, however, does deal with a national monitoring mechanism. This article is based heavily on the monitoring mechanism in OPCAT, and is therefore far more prescriptive and detailed than the final version that would find its way into the treaty. However, unlike both Article 33.2 of the treaty, and OPCAT, the Chair draft text does not make any mention of the Paris Principles.<sup>139</sup>

By this time in the discussions, Article 33 was called Article 33, and the text under discussion appears to largely be the text that would be found in the final draft. The final discussion of Article 33 took place at the seventh Ad Hoc Committee meeting. The Chair began the session by drawing attention to the proposals of the EU and the IDC.<sup>140</sup> The EU proposal is almost identical to the final version. The main difference is that the EU version does not have any requirement that the monitoring mechanism be independent.<sup>141</sup> The IDC's final proposal is similar to its earlier suggestions. It is close to the final version of Article 33 on the language it uses for the focal point and coordination mechanism. The monitoring mechanism, on the other hand, is laid out in great detail, with strong requirements for independence, a requirement that a majority of those serving on the mechanism be people with disabilities, and the rights and duties of the mechanism laid out in detail. These are the same rights and duties that the IDC included in their first proposal.<sup>142</sup>

The discussion began with Austria, speaking on behalf of the EU, stating that the EU would prefer that 33.1 be replaced with language from Article 24 of CEDAW.<sup>143</sup> Article 24 of CEDAW reads "States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the

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<sup>137</sup> <http://www.un.org/esa/socdev/enable/rights/ahc7discussmonit.htm>.

<sup>138</sup> <http://www.un.org/esa/socdev/enable/rights/ahc7discussmonit.htm>.

<sup>139</sup> <http://www.un.org/esa/socdev/enable/rights/ahc7discussmonit.htm>.

<sup>140</sup> <https://www.un.org/esa/socdev/enable/rights/ahc7sum27jan.htm>.

<sup>141</sup> <http://www.un.org/esa/socdev/enable/rights/ahc7eu.htm>.

<sup>142</sup> <http://www.un.org/esa/socdev/enable/rights/ahc7docs/ahc7idcart33-34-2.doc>.

<sup>143</sup> <https://www.un.org/esa/socdev/enable/rights/ahc7sum27jan.htm>.

present Convention.”<sup>144</sup> Australia expressed concern over Article 33.3, stating that while the full involvement of people with disabilities in the monitoring process was “a worthwhile objective” it might be too “resource intensive and unrealistic”.<sup>145</sup> Australia also stated that the discussion text presented by the Chair was too prescriptive, a view supported by several other states, including Serbia and Montenegro and Japan.<sup>146</sup> Many states voiced support for Article 33 as written, including New Zealand, Japan, Norway, and Kenya.<sup>147</sup> Chile supported the idea of the monitoring mechanism adhering to the Paris Principles as closely as possible.<sup>148</sup> Many states, including Canada and South Africa, asked for the text of Article 33 to accommodate the appointment of more than one focal point.<sup>149</sup> Jordan stated that it would prefer “a diverse body, including government, the private sector and civil society” in place of the focal point in 33.1.<sup>150</sup> Many of the NGOs present, including IDC and Amnesty International, were broadly supportive of Article 33, but stated that the coordination mechanism should be a requirement, rather than asking states to give “due consideration” to the idea.<sup>151</sup> At the end of this final session, the Chair noted consensus in several areas. First, there was strong support for changing the wording of Article 33.1 to allow for multiple focal points. There has been some discussion over the difference between a monitoring “framework” and “mechanism”, and the Chair suggested using the term “independent national mechanism”. There was support for changing the wording of 33.2 to including the entire Convention, rather than the wording that existed prior, which talked only about the “rights” in the Convention.<sup>152</sup>

At first glance, it might seem odd that states were not only willing to accept Article 33, but many seemed eager for changes to the way treaties were implemented that would make it more difficult for states to avoid their obligations under these treaties. However, states have, for the most part, accepted the idea of human rights, and the problems of the system had become impossible to ignore. It is possible that many states felt that, if they were going to continue to be seen as a state that takes human rights seriously, they would have to participate in the process of strengthening human rights law. The CRPD’s biggest contribution to the reform of the UN treaty system is Article 33. Furthermore, there is the role of civil society. At one point, according to Trömel the Ambassador from New Zealand, who served as Chair for four sessions of the Ad Hoc Committee, indicated that, in his opinion, 70% of the text was due to the contribution of

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<sup>144</sup> United Nations Convention on the Elimination of Discrimination Against Women, art. 24, 18 December 1979, 1249 U.N.T.S. 13 (1979).

<sup>145</sup> <https://www.un.org/esa/socdev/enable/rights/ahc7sum27jan.htm>.

<sup>146</sup> <https://www.un.org/esa/socdev/enable/rights/ahc7sum27jan.htm>.

<sup>147</sup> <https://www.un.org/esa/socdev/enable/rights/ahc7sum27jan.htm>.

<sup>148</sup> <https://www.un.org/esa/socdev/enable/rights/ahc7sum27jan.htm>.

<sup>149</sup> <https://www.un.org/esa/socdev/enable/rights/ahc7sum27jan.htm>.

<sup>150</sup> <https://www.un.org/esa/socdev/enable/rights/ahc7sum27jan.htm>.

<sup>151</sup> <https://www.un.org/esa/socdev/enable/rights/ahc7sum27jan.htm>.

<sup>152</sup> <https://www.un.org/esa/socdev/enable/rights/ahc7sum27jan.htm>.

civil society.<sup>153</sup> This is not as surprising as it sounds, as Rosemary Kayess and Phillip French argue that the CRPD had the largest participation of civil society of any human rights treaty.<sup>154</sup> Still, despite the fact that civil society had a great influence on the final shape of Article 33, states remained wary. They resisted anything too prescriptive, or too detailed. States wanted to be sure that the national framework was flexible enough to accommodate all forms of government. They also rejected any idea that would place the complaint mechanism in the main treaty, rather than the optional protocol. Even with this resistance, however, the drafters were able to craft a novel mechanism that, if used properly and successfully, could change the way that states interact with international human right law permanently.

### 5.7 Article 33 in its Final Form

At the end of the negotiations, Article 33 appeared in the Convention in its final form. The article has three subsections, and contains four elements that make up the Article 33 framework. It reads as follows:

1. States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.
2. States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.
3. Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.<sup>155</sup>

Article 33 is made up of four parts. The first part is the focal point, located within government, that is tasked with overseeing the implementation process. The second part is the coordination mechanism, also located within government, that ensures that

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<sup>153</sup> Trömel, *supra* note 80, at 117.

<sup>154</sup> Rosemary Kayess and Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 Human Rights Law Review 1, 3 (2008).

<sup>155</sup> United Nations Convention on the Rights of Persons with Disabilities, *supra* note 33, at art. 33.

government action on the Convention is properly organised, with no conflicts arising through shared areas of responsibility. Outside of government, the article calls for an independent monitoring framework. In defining the word “independent”, the article makes reference to the Paris Principles. Article 33 does not, however, state directly that the independent mechanism must be a NHRI. The fourth part of the framework is civil society. Article 33.3 requires that people with disabilities and their organisations be involved in all parts of the monitoring process.

Article 33 is designed to address the gap that often appears between the goals of a human rights treaty, and the policies and practices of states that have ratified that treaty. This gap is the result of many factors, including a lack of awareness of human rights standards among the general public, a lack of national level monitoring to hold government accountable for treaties they have ratified, and a lack of coordination among various branches and levels of government.<sup>156</sup> Furthermore, as a framework to guide the implementation process, Article 33 is, or should be, one of the first steps a state party will take when it begins the implementation process. For this reason, Luis Fernando Astorga Gatjens, argues, many DPOs and other civil society actors attach great importance to Article 33, seeing it as a bellwether of how committed a state party is to bringing about full enjoyment of the rights enshrined in the CRPD.<sup>157</sup> For these reasons, action on the monitoring and implementation framework laid out in Article 33 of the CRPD is crucial.

The first part of the monitoring and implementation framework of Article 33 is the focal point within government. According to Article 33.1, “State Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention”. The appointment of focal points to address the needs of specific vulnerable groups is not a new concept. Within the field of disability rights, the concept first appears in the Standard Rules, which encouraged states to establish coordination committees.<sup>158</sup> This is, however, the first time an international human rights treaty has required states to take this action.<sup>159</sup> The purpose of a focal point, according to Gauthier de Beco, is twofold. First, it ensures that there is a place within government that always has the rights of people with disabilities on its agenda. For this reason, the focal point must be highly placed, and influential enough to compel government action. In addition to this, the designation of a

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<sup>156</sup> Mental Disability Advocacy Centre, *Building the Architecture for Change: Guidelines on Article 33 of the UN Convention on the Rights of Persons with Disabilities*, 15, [http://mdac.info/sites/mdac.info/files/Article\\_33\\_EN.pdf](http://mdac.info/sites/mdac.info/files/Article_33_EN.pdf).

<sup>157</sup> Luis Fernando Astorga Gatjens, *Analysis of Article 33 of the UN Convention: The Critical Importance of National Implementation and Monitoring*, 8 *Int'l J. on Hum. Rts.* 14, 71 (2011).

<sup>158</sup> Gauthier de Beco & Alexander Hoefmans, *National Structures for the Implementation and Monitoring of the UN Convention on the Rights of Persons with Disabilities*, in *ARTICLE 33 OF THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: NATIONAL STRUCTURES FOR THE IMPLEMENTATION AND MONITORING OF THE CONVENTION*, 9, 22 (Gauthier de Beco, ed. 2013); <http://www.un.org/esa/socdev/enable/dissre05.htm>

<sup>159</sup> Gauthier de Beco, *Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities*, [http://europe.ohchr.org/Documents/Publications/Art\\_33\\_CRPD\\_study.pdf](http://europe.ohchr.org/Documents/Publications/Art_33_CRPD_study.pdf).

focal point centralises the implementation process.<sup>160</sup> In order to leave room for all types of governmental organisation, the treaty does not provide any specific guidance on where the focal point should be located, or how many focal points should exist. Since the treaty was drafted, the UN has studied the issue and put forward some recommendations, while acknowledging that different governments will have different needs. For states that wish to appoint multiple focal points, the UN recommends placing them within each ministry, to address the fact that full implementation of the Convention will require action by most ministries or departments of government. Federal states may also consider placing a focal point at each level of government.<sup>161</sup> Multiple focal points can have several benefits. The nature of the Convention, and the rights it lays out, is such that in most governments, several ministries or departments are likely to be involved in the implementation process. Furthermore, in federal states, or other states with more than one level of government, all levels may be involved in implementation. In this case, it may be best to appoint a focal point in each ministry, at each level.<sup>162</sup>

One overarching focal point also has benefits, as it ensures that there is general oversight of government action. In this case, the UN discourages the use of the Ministry of Health, as this would promote a medical model of disability. Instead, it recommends the Ministry of Justice.<sup>163</sup> Using the Ministry of Justice has other advantages, as well. First, it is consistent with the social model of disability. Civil society and DPOs, pushing for a shift from the medical to the social model, have criticised the use of ministries such as those concerned with health, welfare or labour, as focal points.<sup>164</sup> Furthermore, it is important for states to consider the long-term implications of their choice. If Article 33 is successful in improving the implementation of the CRPD, similar tools will likely be used in future conventions, or applied to past ones. Placing the focal point in a neutral location now will make it easier for states to later incorporate any new human rights duties. As a matter of internal administration, it is not necessary that a focal point be appointed by law, as long as it is given the resources it requires to meet its goals.<sup>165</sup> States should also consider how appointing a particular ministry or other body as a focal point will change the way the body operates, and make any necessary changes to its mandate or

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<sup>160</sup> de Beco, *supra* note 158, at 23.

<sup>161</sup> Human Rights Council, *Thematic Study By the Office of the High Commissioner for Human Rights on the Structure and Role of National Mechanisms for the Implementation and Monitoring of the Convention on the Rights of Persons with Disabilities*, ¶ 32, U.N.Doc. A/HRC/13/29 (22 December 2009).

<sup>162</sup> de Beco, *supra* note 158, at 23.

<sup>163</sup> *Thematic Study By the Office of the High Commissioner for Human Rights on the Structure and Role of National Mechanisms for the Implementation and Monitoring of the Convention on the Rights of Persons with Disabilities*, *supra* note 161, ¶ 27.

<sup>164</sup> de Beco, *supra* note 158, at 24:

<http://www2ohchr.org/english/issues/disability/consultations26102009.htm>

<sup>165</sup> Gauthier de Beco, *Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities*, [http://europe.ohchr.org/Documents/Publications/Art\\_33\\_CRPD\\_study.pdf](http://europe.ohchr.org/Documents/Publications/Art_33_CRPD_study.pdf).

funding.<sup>166</sup> It is also important that the focal point be accessible to civil society, so that the participation of DPOs and persons with disabilities can be assured.<sup>167</sup>

The second part of Article 33.1 is the coordination mechanism. According to the text of the article, state parties “shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.” The first thing to note about the coordination mechanism that unlike the other parts of the implementation and monitoring framework, it is optional. If a state feels it does not require a coordination mechanism, it is not compelled to create one. The creation of a coordination mechanism is generally recommend, however, because such a mechanism can help the state ensure that action among ministries is properly coordinated, and no ministry takes isolated action.<sup>168</sup> The UN itself recommends that whenever a state has appointed more than one focal point, the focal points should form a coordinating committee.<sup>169</sup> In a state with more than one focal point, a coordination mechanism can serve several functions, distinct from those of the focal points. Most obviously, according to de Beco, the coordination mechanism helps the various focal points organise their action, so that it is clear who is responsible for what, what has been done, and what needs to be done. Second, the coordination mechanism can act as a neutral platform, where various factions on issues of policy can meet. To properly serve this function, the coordination mechanism should not be situated in any particular ministry.<sup>170</sup> In a system with several focal points, the coordination mechanism can act as a place where the monitoring mechanism, civil society, and others can communicate with the government on issues of policy. As the coordination mechanism is at the centre of the government’s actions on the implementation of the Convention, it can also act a liaison with the international community.<sup>171</sup> As the coordination mechanism and focal point are both located within government, and will work closely together, it is important to keep their functions separate. In this view, the focal points are the drivers of policy change within their various areas of competence, while the coordination mechanism ensures smooth communication between the focal points, and acts as a point of communication for actions outside of government.<sup>172</sup>

Article 33.2 of the CRPD deals with the establishment of an independent monitoring framework. The first part of 33.2 requires that “States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or

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<sup>166</sup>de Beco, *supra* note 158, at 22.

<sup>167</sup> Gauthier de Beco, *Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities*, [http://europe.ohchr.org/Documents/Publications/Art\\_33\\_CRPD\\_study.pdf](http://europe.ohchr.org/Documents/Publications/Art_33_CRPD_study.pdf).

<sup>168</sup> Gauthier de Beco, *Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities*, [http://europe.ohchr.org/Documents/Publications/Art\\_33\\_CRPD\\_study.pdf](http://europe.ohchr.org/Documents/Publications/Art_33_CRPD_study.pdf).

<sup>169</sup> *Thematic Study By the Office of the High Commissioner for Human Rights on the Structure and Role of National Mechanisms for the Implementation and Monitoring of the Convention on the Rights of Persons with Disabilities*, *supra* note 161, ¶ 36.

<sup>170</sup> de Beco, *supra* note 158, at 26.

<sup>171</sup> de Beco, *supra* note 158, at 26-27.

<sup>172</sup> de Beco, *supra* note 158, at 29-30.

establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention.” This section of Article 33.2 makes clear that a framework independent of government must be created to promote, protect, and monitor the Convention. The next part of Article 33.2 clarifies what is meant by independent: “When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.” The principles referred to in Article 33.2 are the Paris Principles, originally written to establish the functioning and creation of NHRIs. This article raises several questions about the appropriate way to set up a monitoring framework. First, there are the questions raised by using the Paris Principles as the standard for independence. As these principles were originally written to apply to NHRI, can they apply to other bodies? Or does their use mean that only NHRIs can serve as the independent mechanism? By using these principles as the standard for independence, they have been abstracted from their original purpose, and will have to be adapted to suit their new role.<sup>173</sup> As the Paris Principles, and the standard by which they judge independence, were discussed earlier in this thesis, it not necessary to do so again. Suffice to say, the independence standard of the Paris Principles can be easily applied to other types of human rights organisations that states may establish.<sup>174</sup>

The second question is, can bodies other than NHRIs serve as the independent mechanism? Certainly, a NHRI accredited by the ICC fulfils the independence requirement of Article 33.2, and where a state already possesses such a body, appointing it as the monitoring mechanism saves the state the trouble of creating a new independent body. Furthermore, it was the work of the NHRIs at the drafting, at least in part, that led to the reference to the Paris Principles in the text, and many parties at the drafting clearly had NHRIs in mind when thinking of a monitoring mechanism. Therefore, it can be safely assumed that when one exists, the NHRI should at least be a part of the monitoring framework.<sup>175</sup> On the other hand, the CRPD does not require states to create a NHRI, though it might provide the incentive to do so.<sup>176</sup> And it is possible, at least in theory, for a non-NHRI to reach the same level of independence. So within states that do not have an NHRI, it is possible to appoint or create a different body, and still fulfil the requirements of Article 33.2.

Of course, Article 33.2 calls for “a framework, including one or more independent mechanisms”, meaning that state bodies may appoint multiple bodies. This raises the question of whether all bodies in the framework must be independent. The wording of the

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<sup>173</sup> de Beco, *supra* note 158, at 38.

<sup>174</sup> de Beco, *supra* note 158, at 38.

<sup>175</sup> Gerard Quinn, *The UN Convention on the Rights of Persons with Disabilities. National Institutions as Key Catalyst of Change*, in NATIONAL MONITORING MECHANISMS OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, 130. (Mexico: Comisión Nacional de los Derechos Humanos, ed., 2008).

<sup>176</sup> de Beco, *supra* note 158, at 45.

English version of Article 33.2 seems to allow for non-independent bodies, as long as at least one independent body is present. This is also the interpretation of the UN, which states that 33.2 calls for “a framework consisting of various entities, amongst which one or more independent mechanisms are included.”<sup>177</sup> This interpretation is not universal, however. Gauthier de Beco argues that it is “against the spirit” of Article 33.2, and that all bodies within the monitoring framework must be independent.<sup>178</sup>

The final part of the implementation and monitoring framework for the CRPD is found in Article 33.3, which requires that “Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.” This article, on the involvement of civil society in the monitoring process in particular, should be read in conjunction with the broader 4.3, which applies to the entire treaty: “In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.”<sup>179</sup> Both of these articles enshrine the principle of “Nothing about us without us.”<sup>180</sup> While state parties are clearly obligated to include persons with disabilities and DPOs in the monitoring process, the exact form this participation shall take is left unclear. It should be noted, however, that Article 33.3 calls for “participation”, which is a stronger requirement than mere consultation. It should also be noted that the article allows people with disabilities to participate separate from DPOs, if they so choose.<sup>181</sup> If Article 33.3 is read in conjunction with Article 4.3, it also becomes clear that people with disabilities must not only be involved in the monitoring framework of 33.2, but also the focal point and coordination mechanism of 33.1. In addition, state parties to the Convention may have to work on capacity building, to ensure that DPOs have the ability to participate meaningfully in the process of implementation and monitoring.<sup>182</sup> In order for access to the monitoring process to be a meaningful right, people with disabilities will require the resources to make use of this access. This means ensuring that accessibility requirements for various

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<sup>177</sup> *Thematic Study By the Office of the High Commissioner for Human Rights on the Structure and Role of National Mechanisms for the Implementation and Monitoring of the Convention on the Rights of Persons with Disabilities*, *supra* note 161, ¶ 38.

<sup>178</sup> de Beco, *supra* note 158, at 38.

<sup>179</sup> United Nations Convention on the Rights of Persons with Disabilities, *supra* note 33, at art. 4.

<sup>180</sup> Gauthier de Beco, Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities, [http://europe.ohchr.org/Documents/Publications/Art\\_33\\_CRPD\\_study.pdf](http://europe.ohchr.org/Documents/Publications/Art_33_CRPD_study.pdf).

<sup>181</sup> Mental Disability Advocacy Centre, *Building the Architecture for Change: Guidelines on Article 33 of the UN Convention on the Rights of Persons with Disabilities*, 15, [http://mdac.info/sites/mdac.info/files/Article\\_33\\_EN.pdf](http://mdac.info/sites/mdac.info/files/Article_33_EN.pdf).

<sup>182</sup> Gauthier de Beco, *Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities*, [http://europe.ohchr.org/Documents/Publications/Art\\_33\\_CRPD\\_study.pdf](http://europe.ohchr.org/Documents/Publications/Art_33_CRPD_study.pdf).

disabilities are taken into account, and that both the Convention and any policy issues are put into terms that all civil society participants can understand.<sup>183</sup>

Putting all of this together, it is possible to get some idea of what a best practice Article 33 framework should look like, and some of the actions that framework should take. The focal point should be located at a ministerial level, in an office that deals with legal issues, rather than health or social issues. For most states, this likely means either the Ministry of Justice, or the Attorney General. This placement will serve two purposes. First, it complies with ideas around mainstreaming the rights of people with disabilities, treating the implementation of the treaty as a legal issue affecting everyone, rather than a niche issue for a few people. It also conforms to the social model, and does not medicalise the rights of people with disabilities. Secondly, this placement looks to the future of Article 33. If the existence of a focal point is successful in improving the implementation of the CRPD, then it is likely that similar mechanisms will be included in future treaties. It is also possible that civil society groups that deal with past treaties will demand similar mechanisms for the rights that they specialise in. While it is unlikely that past UN treaties will be amended to include focal points, states could set up such mechanisms in their own legislation. If focal points do proliferate, concentrating all the expertise in their use in a single, legal ministry will likely be more effective than citing each focal point in a specialised department that does not share expertise or practices with other departments. For all of these reasons, a legally-based focal point should be considered best practice.

It is harder to prescribe the exact form the coordination mechanism should take. While a coordination mechanism is not required, it is clearly helpful, because even the smallest states will have to coordinate action among various ministries to achieve the goals of Article 33. Therefore, it is best practice to have some kind of coordination mechanism. At the very least, it should be a place for various ministries to meet, to ensure consistent and coordinated action. Ideally, there would be some way for the monitoring mechanism and civil society to access the coordination mechanism, to facilitate their involvement with the implementation process. In federal states, this mechanism must also coordinate action between different levels of government. Beyond this, the coordination mechanism will be shaped by the needs of different types of states and governments. It is possible, however, to say that the existence of a mechanism, the proper coordination of government action, and a means by which civil society and the monitoring mechanism can participate in the implementation process, are all best practices.

For the monitoring mechanism, states can be split into two categories: those that have an ICC accredited NHRI prior to the ratification of the CRPD, and those that do not. For states that possess a NHRI, the use of that institution is clearly the best practice. Article 33.2 uses the Paris Principles as the standard for the independent body in the

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<sup>183</sup> de Beco, *supra* note 158, at 58.

monitoring framework, and the work of NHRIs at the drafting was a large part of what shaped the form Article 33.2 took. Furthermore, it is generally assumed by scholars working on Article 33 that NHRIs are the best practice, and should at least form the independent body in a monitoring framework, when a NHRI is present. For states that do not already have a NHRI, the picture is more complicated. It is not necessarily a good idea to create a NHRI just to fulfil the duties of the monitoring mechanism. As mentioned previously in this thesis, research on NHRIs shows that it is crucial that the creation of the institution be completely supported by civil society. If, instead, civil society feels that the NHRI is imposed on them, it can hamper its effectiveness. If a NHRI was perceived as imposed by the requirements of the CRPD, it may be less effective in other areas. Therefore, the creation of a NHRI solely to fulfil the requirements of Article 33.2 cannot be considered a good practice. Unfortunately, the issue of non-NHRI monitoring mechanisms has not been studied as of this point, and, as will be demonstrated in the next chapter, no state has managed to create a non-NHRI that fulfils the requirements of Article 33.2 and could act as an example. There is therefore no best practice to recommend to states in this situation.

Article 33.2 also allows for more than only one body to serve as the monitoring mechanism, and for states to create a framework of many bodies for this purpose. Again, however, the issues around this, and what bodies and framework types are best, have not yet been studied. At the moment, states should follow best practices with regards to the use of their NHRI as the independent body, and experiment with different types of framework until the effectiveness of different approaches is more clearly understood.

Article 33 is unique in international human rights law, as the first article to give states direction on how a treaty must be implemented, rather than leaving the process up to state parties. This is a promising step, as it is part of a process of strengthening international human rights law, by increasing its presence in the national environment. This process began with NHRIs, and Article 33 would not have come about without the rising prominence of NHRIs, and their desire to have a set role within the treaty. The unprecedented participation of civil society also shaped the Convention, as the various DPOs and NGOs both worked to create a novel article that would improve the implementation process, and to create a space within the Convention where these groups could continue to work. Article 33 was also shaped by the desires of state parties. While most states understood that some changes were needed to improve the implementation of human rights treaties, states were wary of any article that seemed too prescriptive. It was these competing interests, in improving implementation but ensuring states were still relatively free to implement the treaty in whichever way worked best with their system of government and administration, that created the final form of Article 33.

## 5.8 Conclusion

The final form of Article 33 reflects the influences under which it was drafted. NHRIs and many NGOs were eager to use the opportunity presented by the drafting of Article 33 to create a powerful monitoring body. State parties understood that the previous system consisting only of international monitoring was inadequate, and were therefore broadly supportive of efforts to create a national monitoring system. At the same time, many states did not wish to commit to something that seemed overly detailed, prescriptive, or that might fit poorly with existing administrative structures. Article 33 strikes a balance between these positions, leaving the structure of the framework open enough to accommodate the preferences of varying types of state government and administrative systems, but still, for instance, requiring that the monitoring mechanism meet the fairly stringent independence requirement of the Paris Principles.

Article 33 is designed to address the problem of implementation in a very specific way. Article 33 aims to first increase oversight over state parties with a monitoring framework that operates independently of government. The monitoring framework, combined with the participation of civil society in the monitoring process, should ideally allow advocates and others in society to encourage and lobby government to continually implement the rights written into the CRPD, and to ensure that these rights are written into law in a way that accords with the wishes of civil society. The focal point and the coordination mechanism within government are designed to improve the government's implementation process. While simply appointing a focal point may not encourage implementation in a government that is hostile to human rights, it might help to organise and streamline the process of implementation in a government that is willing to write a human rights treaty into its laws and policies. Ensuring that a single body is in charge of the process, or at least a single body in each ministry or each level of government, makes it less likely that mistakes will arise from conflicting responsibilities, or oversights where no one is sure who is responsible for action on a particular point.

Article 33 was never designed to act as a silver bullet for the problem of implementation. The existence of a requirement for a framework cannot force states that are hostile to the rights in the CRPD to change their minds. Indeed, if a state will not ratify the Convention, or having ratified, act on Article 33, there is no mechanism to force them to action. Article 33 is a step towards encouraging states that are willing to act to improve and strengthen their implementation process. Whether or not the goals of Article 33 are met, the process of implementing the CRPD is an improvement over past conventions, and the framework becomes a model for future good practice on human rights treaties, will depend on how state parties to the Convention use the framework.

## **6. Article 33 in Practice**

### **6.1 Introduction**

Article 33 is the most recent attempt to bridge the gap between international and domestic law, and ensure that human rights treaties are implemented in a timely manner. It builds on past efforts, most notably the sudden increase of NHRIs, and their acceptance as a unique human rights body, and precedents, such as the NPM of OPCAT. It represents the first time a treaty has given states instruction on its implementation, and mandates a domestic framework as strong as most states would accept. With all of its history, and the care taken in its drafting, the final test for Article 33 is in how states choose to use the article.

Before looking at the frameworks that states have erected under Article 33, it's important to lay out the goals of Article 33, so that a survey of its use has some direction. The most obvious goal of Article 33 is, naturally, for states to create a framework that complies with the Article. It is possible, however, to ascribe other goals to the article. First, if states take any action on Article 33 at all, it shows that they accept that its legitimacy, and the accompanying idea that states can be told how to implement treaties. This acceptance can be used to push for stronger measures in future treaties. Another goal is to change the way that states react to human rights treaties, to encourage states to think of treaty implementation as another duty of the government. Again, as long as states take any action, it is possible that setting up a framework, even one not in full compliance, will have some effect on the way the state perceives treaties. Any change in the perception of treaties is likely to be slow, and difficult to look for. Finally, the goal is to create an active, self-sustaining cycle between government, the monitoring mechanism, and civil society, that shapes the laws of the country to conform with the treaty. Again, this is a positive step regardless of total compliance with the Article. Therefore, when studying the frameworks that have been created, not only should these frameworks be tested for compliance with Article 33, but for signs that taking this action has led to any positive steps towards changing the way that states approach human rights treaties.

This chapter takes a broad look at frameworks around the world, broken up by region. It pulls from a variety of sources, looking at the mechanics of the frameworks, the reactions of civil society, and trends and patterns both regionally and worldwide. This chapter covers all frameworks that I could gain any information about as of early 2014. It is likely that some frameworks that existed at time have been left out, due to language barriers or a simple failure to discover anything about them in my research. These barriers may explain, for instance, why Europe appears to have many more states with an Article 33 framework than Africa. It's possible that this is simply an artefact of the

research, rather than a true representation of the state of Article 33 in Africa. Even with these limitations, this survey should be capable of achieving its goals. The intent of this is to gain some idea of how states are applying Article 33, how likely it is that Article 33 could become a solution to the problem of implementing human rights treaties, and if so, what kind of solution it provides.

## 6.2 Europe

Europe is most likely the region with the most studied Article 33 frameworks. Several studies have been commissioned, either of the EU only or the entire continent. Europe is also unique because the European Union is the first non-state party to a UN human rights convention, having signed and ratified the CRPD. The EU itself has not finished its Article 33 framework. Thus far, the EU has chosen the European Commission as its focal point, both for the institutions of the EU and for member states, as far as the EU's competence in matters of the Convention extends.<sup>1</sup>

For the European States, one of the most common frameworks is to use a focal point that deals specifically with disability issues, or was dealing with disability issues prior to the ratification of the CRPD. The monitoring mechanism is generally a pre-existing NHRI, as these bodies are common in Europe. For instance, Spain was the first European state to be examined by the Committee. According to their state report, Spain appointed the National Disability Council as the focal point, and the terms under which it was established were amended by Royal Decree to include the functions of a focal point.<sup>2</sup> As far as the monitoring mechanism is concerned, within the state report itself, only the NGO, the Spanish Committee of Representatives of Persons with Disabilities (CERMI), was named by the State as the independent body to monitor the Convention.<sup>3</sup>

In the lists of issues put together by the Committee in response to Spain's report, the Committee requested more information on both the focal point and monitoring mechanism. On the focal point, the Committee wished to know how the National Disability Council was mainstreamed into Spain's national human rights mechanisms. For the monitoring mechanism, the question was whether CERMI, as an NGO, was in compliance with the Paris Principles.<sup>4</sup> In its response,<sup>5</sup> Spain replied that CERMI

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<sup>1</sup> Fifth Disability High level Group Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities, [http://ec.europa.eu/justice/discrimination/files/dhlg\\_5th\\_report\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/dhlg_5th_report_en.pdf).

<sup>2</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Spain*, ¶ 252, U.N.Doc. CRPD/C/ESP/1 (05 October, 2010).

<sup>3</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Spain*, *supra* note 2, at ¶ 252-253.

<sup>4</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, List of issues to be taken up in connection with the consideration of the initial report of Spain (CRPD/C/ESP/1), concerning article 1 to 33 of the Convention on the Rights of Persons with Disabilities*, ¶ 32, U.N.Doc. CRPD/C/ESP/Q/1 (20 June, 2011).

<sup>5</sup> Available only in Spanish, read via Google Translate.

complied with the Paris Principles in terms of its independence, powers and operation. They noted, however, that CERMI did not have the power to receive or act on complaints. This power is held by the Ombudsman, which is the official NHRI in Spain. The response notes that while the Ombudsman was not officially named at the monitoring mechanism, the office will have a role in the monitoring process, as it can receive complaints of a violation of fundamental rights or equality before the law based on an individual's disability.<sup>6</sup> In its concluding observations, the Committee commends Spain for establishing a monitoring mechanism in compliance with Article 33.2, and lists no areas of concern in regards to Article 33.<sup>7</sup> Spain's shadow report was prepared by CERMI, and contains no mention of Article 33, except to note in the introduction that CERMI was named as the monitoring mechanism in September of 2009, in compliance with Article 33.<sup>8</sup>

This pattern shows up again in Sweden, which will be the next European Country examined by the Committee. In its CRPD report, Sweden names the Ministry of Health and Social Affairs as the focal point within government. A person within the Ministry of Health and Social Affairs is given the responsibility for disability policy, and regularly convenes an interdepartmental working group consisting of members of most of the departments and representatives of DPOs, for consultation and exchange of information.<sup>9</sup> For the monitoring mechanism, the government of Sweden decided, after an investigation, that the Equality Ombudsman should be the main body in the framework, but that Handisam should also have responsibilities, such as training and providing information.<sup>10</sup> Sweden's Equality Ombudsman is a B status NHRI according to the ICC.<sup>11</sup> Handisam—the government agency for disability policy coordination—is an agency within the Ministry of Health and Social Affairs, established in 2006 to implement the national disability strategy.<sup>12</sup>

The Swedish Disability Federation prepared a shadow report. This report was the effort of several DPOs and NGOs in Sweden, including the Swedish Disability Federation, the Swedish Association of the Visually Impaired, Forum Women and

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<sup>6</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, List of issues to be taken up in connection with the consideration of the initial report of Spain (CRPD/C/ESP/1), concerning article 1 to 33 of the Convention on the Rights of Persons with Disabilities*, ¶ 158-165, U.N.Doc. CRPD/C/ESP/Q/1/Add.1 (27 July, 2011).

<sup>7</sup> Committee on the Rights of Persons with Disabilities, *Consideration of reports submitted by States parties under article 35 of the Convention, Concluding observations of the Committee on the Rights of Persons with Disabilities, Spain*, ¶ 7, U.N.Doc. CRPD/C/ESP/CO/1 (19 October, 2011).

<sup>8</sup> <http://www.mindbank.info/item/1371>.

<sup>9</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Sweden*, ¶ 350-353, U.N.Doc. CRPD/C/SWE/1 (10 September, 2012).

<sup>10</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Sweden*, *supra* note 9, at ¶ 350-353.

<sup>11</sup> <http://nhri.ohchr.org/EN/Contact/NHRIs/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2828%20January%202014%29.pdf>.

<sup>12</sup> <http://www.handisam.se/english/Welcome-to-Handisam/About-Handisam/>.

Disabilities, and the Swedish Committee of Rehabilitation International.<sup>13</sup> However, the writers of the report, which was completed and submitted to the Swedish Government in April of 2011, chose to wait on the final report from the Delegation on Human Rights before making any judgement on the Article 33 framework.<sup>14</sup>

In the UK, the Office for Disability Issues (ODI) was chosen as the main focal point. In addition, each of the devolved governments chose a separate focal point, although the state report does not give any details on these separate focal points.<sup>15</sup> ODI works with the other focal points on issues relating to the implementation of the Convention, including the preparation of the state report. The focal points work to ensure that government departments are aware of their obligations under the Convention, and that these obligations are considered in the creation of new policies and legislation. The focal points are also responsible for awareness raising, as well as working with the monitoring mechanism and civil society.<sup>16</sup> For the monitoring mechanism, the UK has designated the four equality and human rights commissions: The Equality and Human Rights Commission, the Northern Ireland Human Rights Commission, The Equality Commission Northern Ireland, and the Scottish Human Rights Commission. According to the report, the government has provided additional funding to the various commissions to cover their awareness raising work with civil society.<sup>17</sup> The report also covers the ways that the government has involved civil society in the monitoring and implementation process. ODI has worked with a group of DPOs, chaired by the United Kingdom Disabled People's Council (UKDPC), holding eight meetings between 2010 and 2011. During these meetings, the groups identified issues that needed to be addressed in the implementation process. The UK's reservations to the Convention were also discussed. The government also funded training and education sessions on the CRPD run by UKDPC. During this time, ODI also met with other DPOs.<sup>18</sup>

From the UK, the DPO Deaf Ex-Mainstreamers Group (DEX) has issued a shadow report. The report commented briefly on Article 33. DEX focused on Article

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<sup>13</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2f10%2f20823&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2f10%2f20823&Lang=en).

<sup>14</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2f10%2f20823&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2f10%2f20823&Lang=en).

<sup>15</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, United Kingdom of Great Britain and Northern Ireland*, ¶ 348-364, U.N.Doc. CRPD/C/GBR/1 (3 July 2013).

<sup>16</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, United Kingdom of Great Britain and Northern Ireland*, *supra* note 15, at ¶ 348-364.

<sup>17</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, United Kingdom of Great Britain and Northern Ireland*, *supra* note 15, at ¶ 348-364.

<sup>18</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, United Kingdom of Great Britain and Northern Ireland*, *supra* note 15, at ¶ 348-364.

33.3, and its requirement that civil society be involved in the monitoring process. As a “representative organisation” under the terms of the Article, DEX put forward a number of recommendations for how the implementation process can best take into account the needs of the deaf community.<sup>19</sup>

In Denmark’s state report, The Ministry of Social Affairs, which was the coordinating ministry for disability matters prior to the Convention, was appointed as the focal point. In addition to being the coordinating ministry for issues around disability, the Minister is also responsible for an interministerial committee of civil servants, the Interministerial Committee of Civil Servants on Disability Matters. The terms of reference for this Committee were changed after the ratification of the CRPD, and now state that it is the coordination mechanism for the Convention. The Committee seems to have some consultation with DPOs.<sup>20</sup> Denmark has also appointed its NHRI as the monitoring mechanism.<sup>21</sup> The state report also addresses article 33.3, on the involvement of civil society. In Denmark, civil society is involved in the monitoring and implementation process through the Danish Disability Council. The Council is an advisory body that provided the government with advice on disability issues prior to the ratification of the Convention. Since the ratification, the Council has been tasked with looking at disability issues through the lens of them CRPD.<sup>22</sup> The Parliamentary Ombudsman is also involved in monitoring, and Denmark considers the NHRI, the Disability Council, and the Ombudsman to be a complete monitoring framework.<sup>23</sup>

In Germany, the Federal Ministry of Labour and Social Affairs has been named as the federal focal point, with focal points also established at the *Land* level. Germany, as a federal state, has chosen to create a particularly complex coordination mechanism. One goal for the coordination mechanism is to ensure the participation of civil society and people with disabilities in the implementation process.<sup>24</sup> To this end, the coordination mechanism contains an Advisory Council on Inclusion, which is responsible for liaising with broader society and representing the coordination mechanism. The Council also has oversight of four specialist committees, made up of various civil society groups who have a stake in the implementation process. Finally, the Council acts as a meeting place for

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<sup>19</sup>[http://www.ohchr.org/Documents/HRBodies/CRPD/Future/DefExMainstreamersGroup\\_UK\\_CRPDFuture.doc](http://www.ohchr.org/Documents/HRBodies/CRPD/Future/DefExMainstreamersGroup_UK_CRPDFuture.doc).

<sup>20</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Denmark*, ¶ 458, U.N.Doc. CRPD/C/DNK/1 (7 May 2013).

<sup>21</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Denmark*, supra note 20, at ¶ 458.

<sup>22</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Denmark*, supra note 20, at ¶ 458.

<sup>23</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Denmark*, supra note 20, at ¶ 458.

<sup>24</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Germany*, ¶ 284-290, U.N.Doc. CRPD/C/DEU/1 (7 May 2013).

civil society, the focal point, and the monitoring mechanism. Most of the members of the Advisory Council are people with disabilities, with most other members being representatives of focal points or other state bodies involved in implementation.<sup>25</sup> For its monitoring mechanism, Germany chose to appoint its NHRI, the German Institute for Human Rights. As a previously established NHRI, the Institute has the necessary independence to fulfil the requirements of Article 33.2.<sup>26</sup> On the website of the German Institute for Human Rights, more information on the monitoring mechanism is given. A National CRPD Monitoring Body has been created within the Institute, to monitor the Convention. This body is made up of 4 members, none of whom currently have a disability. The goal of the body is to gain a picture of the current situation for people with disability in Germany, as well as the on going implementation process. To the extent that its resources allow, the body also advises the government. The body also works on awareness raising and public outreach.<sup>27</sup> In order to work with civil society, the Monitoring Body holds three meetings a year to consult with various organisations.<sup>28</sup> The monitoring body is also responsible for preparing Germany's report to the UN Committee. It does not investigate individual complaints.<sup>29</sup>

Finally, In Azerbaijan, a Working Group was established within the Ministry of Labour and Social Protection of the Population. The Working Group is made up of members of government agencies as well as representatives of NGOs. The purpose of the Group is to coordinate the implementation of the Convention. The Commission for Human Rights of the Republic of Azerbaijan appears to be the monitoring mechanism.<sup>30</sup>

Some states in Europe follow this pattern despite the fact that their NHRI is not accredited by the ICC. In Lithuania, the Ministry of Social Security and Labour was appointed to coordinate the implementation of the CRPD, and seems to serve as both focal point and coordination mechanism. In addition, several other public bodies were designated as responsible for the implementation process within their competencies.<sup>31</sup> The Office of the Equal Opportunities Ombudsperson and the Council for the Affairs of the Disabled have been jointly appointed as the monitoring mechanism. Civil society is involved in the monitoring process through the Council for the Affairs of the Disabled: DPOs are actively involved in the Council, and people with disabilities, even operating

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<sup>25</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Germany, supra note 24, at ¶ 284-290.*

<sup>26</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Germany, supra note 24, at ¶ 284-290.*

<sup>27</sup> <http://www.institut-fuer-menschenrechte.de/en/monitoring-body/frequently-asked-questions.html>.

<sup>28</sup> <http://www.institut-fuer-menschenrechte.de/en/monitoring-body/frequently-asked-questions.html>.

<sup>29</sup> <http://www.institut-fuer-menschenrechte.de/en/monitoring-body.html>.

<sup>30</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Azerbaijan*, ¶ 337-342, U.N.Doc. CRPD/C/AZE/1 (7 February, 2013).

<sup>31</sup> [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fLTU%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fLTU%2f1&Lang=en).

without a DPO, are allowed to be included.<sup>32</sup> The Council submits recommendations to the Minister of Social Security and Labour. To facilitate information sharing between the two monitoring mechanism bodies, the Ombudsperson is an observer on the Council.<sup>33</sup>

Latvia has not yet submitted a state report, but the country did respond to a UN request for information on the CRPD in 2011. The Ministry of Welfare is the national focal point for the implementation process, as well as carrying out some monitoring duties, though it is not the independent mechanism.<sup>34</sup> The coordination mechanism is the National Council of Disability Affairs (NCDA), a government body located with the Ministry of Welfare. The NCDA is an advisory body that includes members of several government bodies, the Ombudsman, and representatives of NGOs.<sup>35</sup> Finally, the independent monitoring mechanism is the Ombudsman.<sup>36</sup>

States that ratify the CRPD and do not have a pre-established NHRI face a more difficult challenge. Unfortunately, many of these states fail to meet the independence requirements of Article 33.2. Nevertheless, the fact that these states attempt to create some kind of monitoring mechanism is still an important indicator of the uptake of Article 33. Hungary is one such state. It was the second European state to be examined by the Committee. In its report, Hungary named the General Department of Rehab and Disability Affairs, in the Ministry of National Resources, as the body that will coordinate implementation, although it is never explicitly named as either the focal point or coordination mechanism. The report notes as well that several departments and ministries also employ a person who is designated as an expert in disability affairs.<sup>37</sup> The National Disability Council (NDC) was also named as a body that will assist with implementation. The NDC is made up of 27 members, of which 14 come from civil society and 13 from government. The Council can offer opinions on proposed government actions, and is the main mechanism by which civil society and people with disabilities are involved with the implementation of the Convention.<sup>38</sup> The parliamentary commissioner of citizen rights and the Equal Treatment Authority are also named as “safeguarding” the Convention.<sup>39</sup> At the time the report was prepared, no organisation had been appointed as a monitoring

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<sup>32</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fLTU%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fLTU%2f1&Lang=en).

<sup>33</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fLTU%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fLTU%2f1&Lang=en).

<sup>34</sup> <http://www2.ohchr.org/english/issues/disability/docs/study/Latvia.doc>.

<sup>35</sup> <http://www2.ohchr.org/english/issues/disability/docs/study/Latvia.doc>.

<sup>36</sup> <http://www2.ohchr.org/english/issues/disability/docs/study/Latvia.doc>.

<sup>37</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Hungary*, ¶ 258-268, U.N.Doc. CRPD/C/HUN/1 (28 June, 2011).

<sup>38</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Hungary*, *supra* note 37, at ¶ 24.

<sup>39</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Hungary*, *supra* note 37, at ¶ 258-268.

mechanism, although Hungary notes that unofficial monitoring is being carried out by civil society groups that had prepared a shadow report.<sup>40</sup>

In its list of issues, the Committee requested information on progress made appointing a monitoring mechanism, as well as information about the participation of civil society in the preparation of the state report.<sup>41</sup> In its reply, Hungary stated that the NDC had been appointed as the independent mechanism. The non-governmental members of the NDC had issued an opinion on the state report, and revisions suggested by them and approved by the government of Hungary had been incorporated into the final draft.<sup>42</sup> The Concluding Observations issued by the Committee note that the NDC is not an independent body by the standards laid out in the Paris Principles, and hence not in compliance with Article 33. They call on Hungary to both set up a new monitoring mechanism in line with the Paris Principles, and do more to ensure the full involvement of civil society in the monitoring process and the implementation in general.<sup>43</sup> Hungary's shadow report was prepared by the Hungarian Disability Caucus, and it first notes the lack of civil society participation in the passing of laws related to people with disability. The report notes that large numbers of such laws were passed quickly, generally with only five to seven days in between the introduction of a bill and its adoption, with no consultation, and that the NDC, which is designed to be a consultative body, had, at the time the shadow report was prepared, met only once.<sup>44</sup> As far as the rest of the Article 33 framework is concerned, the report continues to be critical. It notes that the Ministry of National Resources was not formally named at the focal point in the report, and no government action has explicitly named it the focal point either. Furthermore, the shadow report, like the Committee, notes that the NDC, appointed as the monitoring mechanism, is not in compliance with the independence requirements of Article 33.<sup>45</sup>

Austria, recently examined by the Committee, presents another example. In its state report, Austria writes that the Federal Ministry of Labour, Social Affairs and Consumer Protection ("BMASK") has been named as the federal focal point, with the nine provincial branches of the Federal Social Office also serving as focal points. BMASK was also named as the coordination mechanism, along with the Federal

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<sup>40</sup>*Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Hungary, supra note 37, at ¶ 258-268.*

<sup>41</sup>Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, List of issues to be taken up in connection with the consideration of the initial report of Hungary (CRPD/C/HUN/1), concerning article 1 to 33 of the Convention on the Rights of Persons with Disabilities*, ¶ 31, U.N.Doc. CRPD/C/HUN/Q/1 (16 May, 2012).

<sup>42</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fAFR%2fHUN%2f16078&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fAFR%2fHUN%2f16078&Lang=en).

<sup>43</sup> Committee on the Rights of Persons with Disabilities, *Consideration of reports submitted by States parties under article 35 of the Convention, Concluding observations of the Committee on the Rights of Persons with Disabilities, Hungary*, U.N.Doc CRPD/C/HUN/CO/1 (22 October, 2012).

<sup>44</sup><http://www.mindbank.info/item/2860>.

<sup>45</sup> <http://www.mindbank.info/item/2860>.

Disability Advisory Board.<sup>46</sup> Austria does not have an accredited NHRI,<sup>47</sup> and therefore no body that is already in compliance with the Paris Principles. Therefore, a new body was created, and the state report names the Independent Monitoring Committee as the monitoring mechanism on the federal level. The Committee is funded by BMASK, and its members are appointed by the Minister of Labour, Social Affairs and Consumer Protection, after recommendations by the Umbrella Group of the Austrian Disability Association (“OEAR”). The committee members are 4 representatives of DPOs, a human rights NGO representative, a development NGO representative, and, in an advisory role, a representative of BMASK as well as a representative of the ministry or government body affected by a particular case.<sup>48</sup> The chair of the committee is an independent human rights consultant, nominated by DPOs in Austria. The committee is also obligated to hold public meetings, during which interested and affected people can communicate with the committee.<sup>49</sup> In addition to work at the federal level, many of the *Lander* have taken actions to establish monitoring committees at their own level. These committees vary in composition and function, with some *Lander* establishing new bodies, and others making use of existing anti-discrimination bodies.<sup>50</sup>

In their list of issues, the Committee noted that the Independent Monitoring Committee does not appear to meet the independence requirements of the Paris Principles, and is therefore not in compliance with Article 33. The Committee asks if Austria had any planned measures to bring the independent Monitoring Committee into compliance with Article 33. The Committee also requested more information on monitoring mechanisms in the *Lander*.<sup>51</sup>

Reports were also prepared by OEAR and the Independent Monitoring Committee itself. The Independent Monitoring Committee discusses its own creation in its report. The Monitoring Committee was established as part of the Federal Disability Act, specifically for the purpose of fulfilling the need for a monitoring mechanism under Article 33.2. In addition to information already provided in the state report, the Monitoring Committee report adds that members of the committee are not subject to any

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<sup>46</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Austria*, ¶ 357-366, U.N.Doc. CRPD/C/AUT/1 (10 October, 2011).

<sup>47</sup><http://nhri.ohchr.org/EN/Contact/NHRIs/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2828%20January%202014%29.pdf>.

<sup>48</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Austria*, supra note 46, at ¶ 357-366.

<sup>49</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Austria*, supra note 46, at ¶ 357-366.

<sup>50</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Austria*, supra note 46, at ¶ 357-366.

<sup>51</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, List of issues to be taken up in connection with the consideration of the initial report of Austria (CRPD/C/AUT/1), concerning article 1 to 33 of the Convention on the Rights of Persons with Disabilities*, U.N.Doc. CRPD/C/AUT/Q/1 (8 May, 2013).

instruction by the state government, and perform their work on a *pro bono* basis.<sup>52</sup> The Monitoring Committee also lacks a budget, when it was established, the government estimated that it would require a small sum to cover expenses such as travel arrangements, as well as one employee to perform day-to-day office work.<sup>53</sup> In its first statement, the Monitoring Committee drew attention to the fact that the Independent Monitoring Committee does not meet the independence requirements of a monitoring mechanism under Article 33.2. In particular, the Committee criticised the decision to locate the committee within a government ministry, as well as the lack of budget for the Monitoring Committee.<sup>54</sup> The Monitoring Committee noted that Austria already contained many bodies that partially fulfilled the requirements of a NHRI. Austria has a B status institution in the Austrian Ombudsman Board, in addition to several other specialised Ombudsman and Commissions.<sup>55</sup>

Due to its lack of a budget, the Monitoring Committee wrote that it is unable to be particularly effective. While the committee makes an effort to hear and resolve individual complaints, the lack of funds, combined with Austria's federal system, limits the Monitoring Committee's ability to operate effectively, and so the committee reports that only a very few cases could be resolved effectively.<sup>56</sup> The Monitoring Committee does write that the existence of the committee is fairly well-known to both political decision makers and the media, which the committee considers a small institutional victory. Additionally, many self-advocates have told the Monitoring Committee that they consider the public meetings important, as a way of improving the dialogue around disability rights.<sup>57</sup>

OEAR also prepared a shadow report. The authors of the report disapproved of the placement of the focal point. They wrote that the placement within BMASK did not show an embrace of the human rights model of disability, as disability rights are not only a social matter, but should be dealt with by all government bodies. Furthermore, BMASK

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<sup>52</sup> Independent Monitoring Committee for the Implementation of the UN Convention on the Rights of Persons with Disabilities, *Report of the Independent Monitoring Committee for the Implementation of the UN Convention on the Rights of Persons with Disabilities to the Committee on the Rights of Persons with Disabilities in Preparation of the dialogue with Austria in September 2013*, (on file with author).

<sup>53</sup> *Report of the Independent Monitoring Committee for the Implementation of the UN Convention on the Rights of Persons with Disabilities to the Committee on the Rights of Persons with Disabilities in Preparation of the dialogue with Austria in September 2013*, *supra* note 52.

<sup>54</sup> *Report of the Independent Monitoring Committee for the Implementation of the UN Convention on the Rights of Persons with Disabilities to the Committee on the Rights of Persons with Disabilities in Preparation of the dialogue with Austria in September 2013*, *supra* note 52.

<sup>55</sup> *Report of the Independent Monitoring Committee for the Implementation of the UN Convention on the Rights of Persons with Disabilities to the Committee on the Rights of Persons with Disabilities in Preparation of the dialogue with Austria in September 2013*, *supra* note 52.

<sup>56</sup> *Report of the Independent Monitoring Committee for the Implementation of the UN Convention on the Rights of Persons with Disabilities to the Committee on the Rights of Persons with Disabilities in Preparation of the dialogue with Austria in September 2013*, *supra* note 52.

<sup>57</sup> *Report of the Independent Monitoring Committee for the Implementation of the UN Convention on the Rights of Persons with Disabilities to the Committee on the Rights of Persons with Disabilities in Preparation of the dialogue with Austria in September 2013*, *supra* note 52.

does not have a higher position in the governmental hierarchy than any other ministry, and so cannot exercise authority over other ministries on the implementation of the Convention.<sup>58</sup> OEAR also drew attention to the fact that no coordination mechanism had been created to standardise compliance with the Convention across governmental bodies.<sup>59</sup>

Writing on the monitoring mechanism, the report notes that OEAR makes recommendations of members for the Independent Monitoring Committee. Like the report by the Monitoring Committee itself, the OEAR report states that the Monitoring Committee does not comply with Article 33.2, as it lacks the level of independence required in the Paris Principles.<sup>60</sup> The report cites four problems that need to be dealt with before the Independent Monitoring Committee would be in line with the Paris Principles: first, the committee must not be a part of BMASK. Second, the independence of the members of the committee must be guaranteed by law. Third, the committee needs to be established by a statute, and finally, requires an independent budget.<sup>61</sup> The OEAR report also addresses the regional monitoring bodies that have been created, noting that none of them are independent in the way required by the Convention, and most are governmental bodies largely concerned with non-discrimination.<sup>62</sup>

The final issue in Article 33 addressed by the OEAR report is the need to include civil society. The report criticised efforts to include civil society, stating that awareness of the Convention within Austria is limited, because of inadequate informational services at all levels of government. The report also states that this poor level of awareness raising hampers monitoring efforts.<sup>63</sup> While the Independent Monitoring Committee is largely made up of representatives of DPOs, and therefore does include civil society, the OEAR finds that the Austrian government has not made enough of an effort to systematically include people with disabilities in the implementation and monitoring

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<sup>58</sup> Austrian National Council of Persons with Disabilities (OEAR), *Alternative Report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Austria on the occasion of the first State Report Review before the UN Committee on the Rights of Persons with Disabilities*, (on file with author).

<sup>59</sup> *Alternative Report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Austria on the occasion of the first State Report Review before the UN Committee on the Rights of Persons with Disabilities*, *supra* note 58.

<sup>60</sup> *Alternative Report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Austria on the occasion of the first State Report Review before the UN Committee on the Rights of Persons with Disabilities*, *supra* note 58.

<sup>61</sup> *Alternative Report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Austria on the occasion of the first State Report Review before the UN Committee on the Rights of Persons with Disabilities*, *supra* note 58.

<sup>62</sup> *Alternative Report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Austria on the occasion of the first State Report Review before the UN Committee on the Rights of Persons with Disabilities*, *supra* note 58.

<sup>63</sup> *Alternative Report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Austria on the occasion of the first State Report Review before the UN Committee on the Rights of Persons with Disabilities*, *supra* note 58.

process. The activities of the Monitoring Committee cannot, the report argues, substitute for the comprehensive inclusion of civil society.<sup>64</sup>

In order to meet the requirements of 33.1, Italy has identified a National Contact Point in the Directorate General for Inclusion and Social Affairs of the Minister of Labour and Social Policies. This seems to be their focal point for implementation of the Convention.<sup>65</sup> Most of Italy's discussion of Article 33, however, focuses on the establishment of the National Observatory of the Status of Persons with Disabilities. The Observatory is based in the Ministry of Labour and Social Affairs, and chaired by the Minister of Labour and Social Affairs. The 40 members of the body are appointed by the Minister, and consist of a mix of government officials and representatives of DPOs.<sup>66</sup> The Observatory is considered an advisory body that provides knowledge and support for the creation of national disability policies. The body is also charged to prepare detailed reports, action programmes, and collect statistical data. The Observatory also appears to be the designated monitoring mechanism under Article 33.2.<sup>67</sup>

A few states, such as Bosnia and Herzegovina, attempted to combine the focal point and monitoring mechanism. The state names the Council of Persons with Disabilities of Bosnia and Herzegovina ("CPDBH") as both the focal points and monitoring mechanism in its state report. The CPDBH is responsible for both overseeing the passage of laws, as well as monitoring their progress. In addition, the CPDBH must prepare reports and recommendations on laws that are needed, and help prepare the state report.<sup>68</sup>

This is also the case in Cyprus. Here, in 2008, the government created a new department, the Department for the Social Inclusion of Persons with Disabilities, within the Ministry of Labour and Social Insurance. This department serves as the focal point for the implementation of the Convention. It also seems to serve as the monitoring mechanism.<sup>69</sup>

Other states in Europe have incomplete, or in some cases non-existent frameworks, making it difficult to assign them to a category. Still, it is notable that even in cases where a state has not finished a framework, they will emphasize progress in their self report. This could be taken as an indication that states consider it important to show that they want and plan to have an Article 33 framework. For instance, in the Czech

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<sup>64</sup> *Alternative Report on the implementation of the UN Convention on the Rights of Persons with Disabilities in Austria on the occasion of the first State Report Review before the UN Committee on the Rights of Persons with Disabilities*, supra note 58.

<sup>65</sup> [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fITA%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fITA%2f1&Lang=en).

<sup>66</sup> [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fITA%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fITA%2f1&Lang=en).

<sup>67</sup> [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fITA%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fITA%2f1&Lang=en).

<sup>68</sup> [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fBIH%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fBIH%2f1&Lang=en).

<sup>69</sup> [http://www2.ohchr.org/english/issues/disability/docs/Cyprus\\_270809.pdf](http://www2.ohchr.org/english/issues/disability/docs/Cyprus_270809.pdf).

Republic's report, the Ministry of Labour and Social Affairs is named as the focal point for implementation. The report states that the government has no plans to establish more than one focal point.<sup>70</sup> At the time the report was prepared, there was no firm consensus on the monitoring mechanism. The Czech Republic does not have a NHRI, just an Ombudsman whose main purpose is overseeing government administrative practices. The alternative to a NHRI that was discussed in the report is a Monitoring Committee. According to the report, the idea of Monitoring Committee is acceptable to civil society, and negotiations on the composition and form of such a committee were, at the time the report was prepared, on-going. The Czech government expected to have a final report on the form that the Article 33 framework should take approved by the first half of 2012.<sup>71</sup>

A shadow report was prepared by a group of NGOs in the Czech Republic. With regard to Article 33, the main focus of the report is the need for an independent monitoring mechanism in the Czech Republic. Although the state report stated that the plans for the Monitoring Committee were drawn up with consultation with civil society, the shadow report disputes this, claiming that the plan drawn up by the Ministry of Social Affairs was drafted without proper consultation. The plan was discussed with the Government's committee for persons with disabilities, which is an official government body. The National Disability Council, an umbrella group of DPOs, was also invited to the hearings, but they were closed to the public, so wider civil society could not participate.<sup>72</sup> The authors of the shadow report also objected to the first proposal that the Ministry of Social Affairs created. While this proposal was not publicly available, according to unofficial information the Monitoring Committee would consist partly of members of government bodies, as well as DPO representatives. The shadow report makes clear that this arrangement would not meet the independence requirements of Article 33.2, as it does not meet the standard set by the Paris Principles.<sup>73</sup> This first proposal has since been discarded, and a new proposal was being drafted at the time the shadow report was prepared, however once again the drafting process was not open to civil society.<sup>74</sup>

Ukraine's state report<sup>75</sup> names a focal point and coordination mechanism, but does not seem to have any mention of a monitoring mechanism. The Ministry of Social

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<sup>70</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Czech Republic*, ¶ 518-521 U.N.Doc CRPD/C/CZE/1 (27 June, 2013).

<sup>71</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Czech Republic*, supra note 72, at ¶ 518-521.

<sup>72</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2fCZE%2f15594&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2fCZE%2f15594&Lang=en).

<sup>73</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2fCZE%2f15594&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2fCZE%2f15594&Lang=en).

<sup>74</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2fCZE%2f15594&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2fCZE%2f15594&Lang=en).

<sup>75</sup> Currently available only in Russian, read via Google Translate.

Policy has been given the authority to ensure implementation of the Convention, a role that is consistent with that of the focal point in Article 33. Within the Ministry, the government has created the Council for Persons with Disabilities, to coordinate the activities of the various ministries and other executive government bodies. Coordination between executive and local bodies, as well as other institutions, has been assigned to the State Service for the Disabled and Veterans.<sup>76</sup> Ukraine has an A status NHRI, the Ukrainian Parliament Commissioner for Human Rights.<sup>77</sup> However, it did not appear that this body, or any other, was named as the monitoring mechanism.<sup>78</sup> A shadow report was prepared by a group of DPOs within the Ukraine, but it did not address Article 33 in any way.<sup>79</sup>

Armenia's state report names several government bodies, and what areas of disability policy they are responsible for, but does not name any body in particular as the focal point. The report does name a monitoring body, the Human Rights Defender of the Republic of Armenia.<sup>80</sup> The Human Rights Defender is an A status NHRI accredited by the ICC.<sup>81</sup>

In Croatia, no single focal point seems to exist, as the state report states that each administrative body is responsible for the implementation of the Convention within their own area of competence.<sup>82</sup> National Strategy of Equalisation of Opportunities for Persons with Disabilities 2007-2015 has the role of coordinating the implementation process, a responsibility shared with the Ministry of Family, Veterans' Affairs and Intergenerational Solidarity and the Committee for Persons with Disabilities of the Government of the Republic of Croatia ("CPDGRC"). The CPDGRC is an advisory body, consisting of 24 members, including representatives of state bodies, DPOs, scientific institutions, and people with disabilities.<sup>83</sup> As far as monitoring is concerned, Croatia possesses an A status NHRI, the Ombudsman. Rather than use this body, however, Croatia chose to create a new Ombudsman position, the Office of the Ombudsman for Persons with Disabilities ("OOPD"). The Ombudswoman in this position has the authority to access

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<sup>76</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fUKR%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fUKR%2f1&Lang=en).

<sup>77</sup><http://nhri.ohchr.org/EN/Contact/NHRIs/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2828%20January%202014%29.pdf>.

<sup>78</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fUKR%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fUKR%2f1&Lang=en).

<sup>79</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2fUKR%2f15595&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2fUKR%2f15595&Lang=en).

<sup>80</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fARM%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fARM%2f1&Lang=en).

<sup>81</sup><http://nhri.ohchr.org/EN/Contact/NHRIs/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2828%20January%202014%29.pdf>.

<sup>82</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Croatia*, ¶ 248-253 U.N.Doc CRPD/C/HRV/1 (7 May, 2013).

<sup>83</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Croatia*, *supra* note 82, at ¶ 248-253.

facilities that provide care or work to people with disabilities, an authority the regular Ombudsman does not have. The OOPD submits an annual report to Parliament.<sup>84</sup>

Moldova named the National Council for the Rights of Persons with Disabilities, a governmental advisory body, in conjunction with the Ministry of Labour, Social Protection and Family, as the focal points and coordinating bodies, under Article 33.1 of the Convention. The National Council also appears to have some monitoring duties, but is not considered the independent mechanism.<sup>85</sup> Moldova recognised that an independent body must be created, and in 2012 held several meetings to that end, but no official monitoring mechanism had been named at the time of the state's UN report.<sup>86</sup> In order to involve civil society, the Ministry of Labour, Social Protection and Family organised workshops with DPOs, and the opinions of DPOs were sought in the preparation of the report.<sup>87</sup> More recently, in 2013, a group of NGOs in Moldova have established their own mechanism, separate from the government, to monitor the Convention.<sup>88</sup>

In Portugal, the Directorate-General of Foreign Policy and the Office of Strategy and Planning have been appointed to fulfil the roles of the focal point and coordination mechanism. At the time the report was prepared, the independent monitoring mechanism had not been designated, and the state had not decided what form it would take.<sup>89</sup>

Serbia's state report names the Ministry of Human and Minority Rights, State Administration and Local Self-Government, Directorate of Human and Minority Rights as the bodies that are designated to prepare regulations and monitoring compliance. It does not make clear which part of the Article 33 framework the bodies are meant to fulfil, and in fact the framework is not mentioned in the report. The rest of the section on Article 33 deals with the preparation of the state report.<sup>90</sup>

The state report for Slovakia details some of the work the government has done, investigating which bodies and organisations should be used in the Article 33 framework, but as of the time the report was submitted, no part of the framework had been designated. The report does note that at that point, no independent mechanism existed within Slovakia to take on the duties of Article 33.<sup>91</sup>

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<sup>84</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Croatia, supra* note 82, at ¶ 248-253.

<sup>85</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fMDA%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fMDA%2f1&Lang=en).

<sup>86</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fMDA%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fMDA%2f1&Lang=en).

<sup>87</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fMDA%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fMDA%2f1&Lang=en).

<sup>88</sup> <http://www.mdac.info/en/21/03/2013/mdac-moldova>.

<sup>89</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fPRT%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fPRT%2f1&Lang=en).

<sup>90</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fSRB%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fSRB%2f1&Lang=en).

<sup>91</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fSVK%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fSVK%2f1&Lang=en).

Europe, possibly because it has been so well studied, appears to be the most diverse region in regards to Article 33. Still, many strong trends are evident. States for the most part continue to use as focal points the bodies that were in charge of disability issues prior to the CRPD. This could mean keeping disability issues in a medical or rehabilitation model, rather than taking a rights based approach. It almost certainly slows any progress on the ideas behind Article 33 spreading to other areas of human rights. It is, however, in line with the text of the Convention. On the monitoring mechanism, states that have an NHRI, even an unaccredited one, use it. States that do not have a pre-existing NHRI have difficulty meeting the independence standard, as all the non-NHRI monitoring mechanisms seem to be too strongly affiliated with government to meet the standards of the Paris Principles. There is also the matter of resources. Very few states address the fact that bodies given extra responsibilities under Article 33 will most likely need more resources. Austria's monitoring mechanism states that it is under-resourced. This lack of attention to resources is, unfortunately, also a common trend. Even with these problems, there are also significant positive patterns. First is the high uptake of Article 33. Most states that have ratified the CRPD have some form of framework in place. States that set up non-NHRI monitoring mechanisms often gave detailed descriptions, and tried to show how these bodies worked independently and involved civil society. Many states put work into designing and staffing new bodies to meet the requirements of Article 33. From this, it's clear that many states feel it is important to be seen as taking Article 33 seriously, even if they do not reach full compliance with the article.

### 6.3 The Americas

In both North and South America, as of April 2013, 10 states had submitted their initial report to the Committee on the Rights of Persons with Disabilities ("the Committee"). Of these 10, four had come up for review before the committee, with a fifth, Costa Rica, scheduled for examination at the next committee meeting. The four states that have so far been examined are Peru, Argentina, Paraguay, and El Salvador.<sup>92</sup> Costa Rica will come before the Committee in September, and Brazil, Chile, the Dominican Republic, Ecuador and Mexico had submitted reports and await future sessions.<sup>93</sup> With these reports, as well as the supplementary material submitted by various DPOs and other civil society groups, it is possible to get some idea of how Article 33 is being used by states within Latin America. Despite the fact that there are a large number of NHRIs in the Americas, many of them A accredited by the ICC, puzzlingly, most states in the region have chosen instead to appoint government bodies as their monitoring mechanism.

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<sup>92</sup> [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CRPD](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CRPD).

<sup>93</sup> [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CRPD](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CRPD).

For example, in Peru's initial report to the Committee, Peru stated that a multisectoral commission had been established to and would be responsible for follow-up on the Convention. Peru intends this multisectoral commission to serve as both focal point and monitoring mechanism, to this end, they plan for the commission to include "representatives of each type of disability".<sup>94</sup> This commission is also responsible for putting together the national report to the UN. Under Article 33.3, on the involvement of civil society, the government states that individuals are able to submit complaints to CONADIS when they feel a violation of the rights of people with disabilities has occurred.<sup>95</sup> Most of this is clearly in violation of Article 33 of the CRPD. While the multisectoral commission could fulfil the duties of a focal point or coordination mechanism, the focal point and monitoring mechanism must be different bodies. Furthermore, in the description of the commission in the report, there is no evidence that the body is independent, and it in fact seems to be a government body, thus violating Article 33.2 of the CRPD, which requires a body independent of government.<sup>96</sup> Finally, Article 33.3 states that civil society must participate fully in the monitoring process.<sup>97</sup> Having access to a complaint mechanism, while useful, does not qualify as full participation. Nor does appointing people with disabilities to the commission that oversees implementation, as while this guarantees the participation of those members, it does not ensure the participation of wider civil society.

In their list of issues, the Committee did not focus on the fact that the commission was serving as both a focal point and a monitoring mechanism, but rather on the more technical aspects of CONADIS and the commission, including how the commission was monitored by civil society, and how it ensures that its recommendations are heard and acted upon by the broader national government.<sup>98</sup> In their concluding observations, however, the Committee notes that the functions of the multisectoral committee are unclear, and that neither the committee nor CONADIS is in compliance with the Paris Principles. The Committee recommends appointing a specific monitoring mechanism that is independent under the terms of Article 33.2. It also notes that the participation of civil society should be made a priority.<sup>99</sup>

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<sup>94</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Peru*, ¶ 87 U.N.Doc CRPD/C/PER/1 (12 January 2011).

<sup>95</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Peru*, *supra* note 94 ¶ 87.

<sup>96</sup> United Nations Convention on the Rights of Persons with Disabilities, art. 33, 3 May 2008, 2515 U.N.T.S 3 (2008).

<sup>97</sup> United Nations Convention on the Rights of Persons with Disabilities, *supra* note 96, at art. 33.

<sup>98</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, List of issues to be taken up in connection with the consideration of the initial report of Peru (CRPD/C/PER/1), concerning article 1 to 33 of the Convention on the Rights of Persons with Disabilities*, ¶ 22-24, U.N.Doc. CRPD/C/PER/Q/1 (10 October 2011).

<sup>99</sup> Committee on the Rights of Persons with Disabilities, *Consideration of reports submitted by States parties under article 35 of the Convention, Concluding observations of the Committee on the Rights of Persons with Disabilities, Peru*, U.N.Doc CRPD/C/PER/CO/1 (22 October, 2012).

The shadow report, submitted by Peruvian National Confederation of Persons with Disabilities (“CONFENADIP”) backs up the idea that Peru has not met the requirements of Article 33.<sup>100</sup> According to the shadow report, the Permanent Multi-Sectorial Commission (“CMP”) is made up of representatives of both the executive branch and the Congress, with no members of DPOs on the commission.<sup>101</sup> Due to the failure to include people with disabilities in the decision making and monitoring process, CONFENADIP filed a legal action, and Peru’s Ombudsman (an A accredited NHRI),<sup>102</sup> filed a report with the UN Office of the High Commissioner for Human Rights.<sup>103</sup> In their report CONFENADIP recommends that the Peruvian government designate a new monitoring body, one that is set up with the participation of organisations and representative of people with disabilities in Peru, under the supervision of the Ombudsman, and supported by the Peruvian National Human Rights Coordinator (“CNDDHH”). CNDDHH is an umbrella group made up of various civil society organisations that work in Peru to promote human rights. The group has been operating since 1985, and has Special Consultative Status before ECOSOC, as well as being accredited to participate in the activities of the Organisation of American States.<sup>104</sup>

Argentina follows the same pattern. It named the National Advisory Commission on the Integration of Persons with Disabilities of the National Coordinating Council for Social Policy (“CONADIS”) as the focal point. The mission of CONADIS is to “coordinate, standardise, advise, promote and disseminate . . . any actions to contribute directly or indirectly to the integration of persons with disabilities”.<sup>105</sup> The state also proposed creating a National Disability Observatory to serve as the coordination mechanism, although judging from the state report it seems that this body would also be given monitoring powers. The purpose of the Observatory would be to organise and disseminate information gathered from both public and private sources, as well as monitoring the implementation of the Convention. Assuming the body is meant to serve as the Article 33.2 monitoring body, there is no indication of how its independence would be assured. On the involvement of civil society, the state report notes that CONADIS presides over the Federal Disability Council, the membership of which includes both government officials and representatives of NGOs.<sup>106</sup> Other than the mention of the monitoring duties of the National Disability Observatory, no mention of an independent monitoring mechanism is made.

<sup>100</sup> <http://www.mindbank.info/item/1374>.

<sup>101</sup> <http://www.mindbank.info/item/1374>.

<sup>102</sup> <http://nhri.ohchr.org/EN/Contact/NHRIs/Documents/Chart%20of%20the%20Status%20of%20NHRIs%200%2828%20January%202014%29.pdf>.

<sup>103</sup> <http://www.mindbank.info/item/1374>.

<sup>104</sup> <http://www.mindbank.info/item/1374>.

<sup>105</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Argentina*, ¶ 717-723 U.N.Doc CRPD/C/ARG/1 (28 June 2011).

<sup>106</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Argentina*, *supra* note 105, at ¶ 717-723.

The Committee's response to Argentina's state report highlights some of these problems. In the lists of issues the Committee requested more information on several points. First, the committee wished to know if CONADIS, as the focal point, was consulting with civil society as required by Article 4.3. Second, the Committee was unclear on whether the National Disability Observatory was intended to serve as the independent monitoring mechanism under Article 33.2, and if so, whether it was in compliance with the Paris Principles.<sup>107</sup> In their concluding observations, the Committee note that the framework described in Argentina's state report is not in compliance with Article 33. CONDAIS, appointed as the focal point, is not a powerful enough institution to effectively carry out its duties. Furthermore, the monitoring mechanism, the National Disability Observatory, is a subsidiary body of CONDAIS, and therefore not independent under the requirements of the Paris Principles.<sup>108</sup>

A shadow report prepared by several NGOs in Argentina confirms that the framework set up by the Argentine government does not meet the standards of Article 33. The reports repeats the problems noted by the Committee, that CONDAIS is not at the Ministerial level, and will therefore not be able to carry out the duties of a focal point effectively, and that the National Disability Observatory, as a government entity, is not in compliance with the Paris Principles.<sup>109</sup> Furthermore, the shadow report notes that Argentina does have an Ombudsman's Office that is in compliance,<sup>110</sup> and in fact, is an A accredited NHRI.<sup>111</sup> Finally, the shadow report criticises the framework for lacking the participation of people with disabilities and their organisations. It notes both the Advisory Council and Federal Council of CONDAIS are partially comprised of representatives from organisations for people with disabilities, but that this kind of political representation is not, under the Convention, a substitute for actual participation of people with disabilities.<sup>112</sup>

Paraguay's state report does not formally designate any part of the Article 33 framework. The National Institute for the Protection of Exceptional Persons ("INPRO"), had at the time the report was prepared submitted a proposal to establish a national secretariat for the human rights of people with disabilities ("SENADIS"). which would

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<sup>107</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, List of issues to be taken up in connection with the consideration of the initial report of Argentina (CRPD/C/ARG/1), concerning article 1 to 33 of the Convention on the Rights of Persons with Disabilities*, ¶ 30-31, U.N.Doc. CRPD/C/ARG/Q/1 (10 October 2011).

<sup>108</sup> Committee on the Rights of Persons with Disabilities, *Consideration of reports submitted by States parties under article 35 of the Convention, Concluding observations of the Committee on the Rights of Persons with Disabilities, Argentina*, U.N.Doc CRPD/C/ARG/CO/1 (8 October, 2012).

<sup>109</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2fARG%2f14809&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2fARG%2f14809&Lang=en).

<sup>110</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2fARG%2f14809&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2fARG%2f14809&Lang=en).

<sup>111</sup><http://nhri.ohchr.org/EN/Contact/NHRIs/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2828%20January%202014%29.pdf>.

<sup>112</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2fARG%2f14809&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2fARG%2f14809&Lang=en).

serve as a focal point. While the report discusses the need for a focal point, the independent monitoring mechanism is not mentioned.<sup>113</sup> As might be expected, the Committee's list of issues on Article 33 focused on the need for more information. The competency of INPRO, when the secretariat would be established, and how the government was consulting with civil society were all brought up as points needing clarification. Furthermore, the Committee wished to know what body Paraguay planned to use as a monitoring mechanism.<sup>114</sup> In the Committee's Concluding Observations,<sup>115</sup> The Committee noted the establishment of SENADIS to coordinate policy, but was concerned that this body had also been given monitoring powers, as it was not in compliance with the Paris Principles.<sup>116</sup>

Several civil society groups submitted reports on Paraguay. The report submitted by Paraguayan DPOs highlights many of the problems in the state report on Article 33. The report notes that SENADIS was created without consulting civil society groups, and that its functioning reflects a welfare approach to disability, rather than a mainstreaming approach.<sup>117</sup> Despite this, the DPOs in the report hope that SENADIS can be fully implemented throughout the country, as they see it as the best hope for changing the situation of people with disabilities outside of the capital city, as there is currently a large disparity in the situations of people with disabilities in and outside of the capital.<sup>118</sup> On the other parts of the framework, the DPOs note that Paraguay has not established a coordination mechanism, and that the report makes no mention of the need for an independent monitoring mechanism.<sup>119</sup> Like most Latin American countries, Paraguay does have an A accredited NHRI, the Public Defence Office.<sup>120</sup> However, the DPOs in the report do not suggest appointing the Public Defence Office as the monitoring mechanism, instead reporting that thus far, the Public Defence Office has not shown much interest in the rights of people with disabilities.<sup>121</sup>

A second report was prepared by Parlgual and Disability Council International. This report does not address Article 33 as closely as the one prepared by the DPOs, and

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<sup>113</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Paraguay*, ¶ 203-232, U.N.Doc CRPD/C/PRY/1 (28 June 2011).

<sup>114</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, List of issues to be taken up in connection with the consideration of the initial report of Paraguay (CRPD/C/PRY/1), concerning article 1 to 33 of the Convention on the Rights of Persons with Disabilities*, ¶ 35-37, U.N.Doc. CRPD/C/PRY/Q/1 (15 October 2012).

<sup>115</sup> Available only in Spanish, read via Google Translate

<sup>116</sup> Committee on the Rights of Persons with Disabilities, *Consideration of reports submitted by States parties under article 35 of the Convention, Concluding observations of the Committee on the Rights of Persons with Disabilities, Paraguay*, ¶ 75-78, U.N.Doc CRPD/C/PRY/CO/1 (15 May, 2013).

<sup>117</sup> <http://www.mindbank.info/item/2870>.

<sup>118</sup> <http://www.mindbank.info/item/2870>.

<sup>119</sup> <http://www.mindbank.info/item/2870>.

<sup>120</sup> <http://nhri.ohchr.org/EN/Contact/NHRIs/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2828%20January%202014%29.pdf>.

<sup>121</sup> <http://www.mindbank.info/item/2870>.

oddy, seems to take the position that SENADIS is an appropriate monitoring mechanism, despite the clear problems noted by both the committee and other civil society bodies. The report does note that INRPO has a history of taking a charitable perspective on disability that would not be appropriate in a monitoring body, and that monitoring must be done in cooperation with civil society.<sup>122</sup>

El Salvador is one of the few countries in this region to mention its NHRI in its state report, or give the body any role in monitoring. El Salvador is, at the time of this writing, the most recent country to report to the Committee, and as such there are no concluding observations at this point. In its state report, El Salvador reports naming CONDAIS as the body responsible for monitoring the Convention, stating that the competency of CONDAIS has been changed to take its new role into account. Furthermore, the state also names a second monitoring mechanism, the Standing Committee on Persons with Disabilities, which exists within the Office of the Human Rights Advocate, El Salvador's NHRI, and was, according to the report, set up in conjunction with civil society.<sup>123</sup> In the lists of issues prepared by the Committee<sup>124</sup>, the Committee notes that it is not clear which body, if any, El Salvador has appointed as the official monitoring mechanism. They also ask for more detail on how civil society has been involved in the process of setting up the Article 33 framework.<sup>125</sup>

The shadow report, prepared by DPOs within El Salvador,<sup>126</sup> repeats the confusion of the Committee over which body should be considered the monitoring mechanism. The DPOs note that CONDAIS is itself a government body, and therefore not in compliance with the Paris Principles. For this reason, it should not be appointed. They do, however, approve of the use of the Office of the Human Rights Advocate, as it is a fully independent NHRI. Furthermore, they note the lack of a focal point and coordination mechanism, both of which are required. The DPOs would like to see at least one person in each government institution responsible for issues relating to people with disabilities<sup>127</sup>.

Other state parties have submitted their reports, but not yet appeared before the Committee. These reports, even without shadow reports and comments from the Committee, can still give some idea of the trends in Latin America when it comes to

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<sup>122</sup><http://disabilitycouncilinternational.org/documents/DisabCouncilShadowReportParaguaycrpd1.pdf>.

<sup>123</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, El Salvador*, ¶ 272, U.N.Doc CRPD/C/SLV/1 (10 October 2011).

<sup>124</sup> Originally in Spanish, read via Google Translate.

<sup>125</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, List of issues to be taken up in connection with the consideration of the initial report of El Salvador (CRPD/C/SLV/1), concerning article 1 to 33 of the Convention on the Rights of Persons with Disabilities*, ¶ 40-41, U.N.Doc. CRPD/C/SLV/Q/1 (21 May 2013).

<sup>126</sup> Originally in Spanish, read via Google Translate.

<sup>127</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2fSLV%2f10%2f20812&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fNGO%2fSLV%2f10%2f20812&Lang=en)

erecting the Article 33 framework. In Chile,<sup>128</sup> SENADIS seems to have been appointed as the main monitoring body. In Chile, SENADIS is a government body within the Ministry of Social Development, tasked with promoting equal opportunities and accessibility for people with disabilities.<sup>129</sup> Within SENADIS there is also the Disability Advisory Council, which seems to be a body for consulting and interacting with civil society.<sup>130</sup>

Costa Rica's state report<sup>131</sup> names the Department of National Rehabilitation and Special Education ("CNREE") at the monitoring body, as well as the body in charge of preparing state reports. Most of the section on Article 33 focuses on past actions of CNREE, as well as the need to strengthen the body so that it can fulfil its new mandate. The state report also mentions at least some consultation of NGOs on the use of CNREE.<sup>132</sup>

The Dominican Republic's state report<sup>133</sup> states that CONADIS will be the body responsible, under Article 33.1, for implementing the Convention. The state report makes no mention of section 2 or 3 of Article 33.<sup>134</sup>

By contrast, Ecuador's state report<sup>135</sup> makes mention of all three sections of the Article, but is extremely vague on measures taken to address the need for a framework. The National Disability Council appears to be the focal point, although those words are not used. CONADIS is mentioned in the context of monitoring, but again it is not made clear what body, if any, will be the monitoring mechanism.<sup>136</sup>

Brazil's report names the National Human Rights Office, which exists under the President's Office, as the focal point. In addition, other government departments in Brazil have begun to alter their norms and practices to comply with the Convention. Brazil has allocated funds for this process.<sup>137</sup> For the monitoring mechanism, Brazil has currently appointed the National Council for the Protection of Rights of People with Disabilities ("CONADE"), although they acknowledge that, as CONADE includes government

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<sup>128</sup> Originally in Spanish, read via Google Translate.

<sup>129</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fCHL%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fCHL%2f1&Lang=en).

<sup>130</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fCHL%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fCHL%2f1&Lang=en).

<sup>131</sup> Originally in Spanish, read via Google Translate.

<sup>132</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Costa Rica*, ¶ 223-233, U.N.Doc CRPD/C/CRI/1 (18 February, 2013).

<sup>133</sup> Originally in Spanish, read via Google Translate.

<sup>134</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Dominican Republic*, ¶ 137-141, U.N.Doc CRPD/C/DOM/1 (4 July, 2013).

<sup>135</sup> Originally in Spanish, read via Google Translate.

<sup>136</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Ecuador*, ¶ 571-587, U.N.Doc CRPD/C/EQU/1 (5 June, 2013).

<sup>137</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fBRA%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fBRA%2f1&Lang=en).

representatives as well as members of civil society, it is not truly independent. The report states that this problem will be address, but while that work is on going, CONADE will fulfil the functions of a monitoring mechanism.<sup>138</sup>

The last Latin American country that has filed its initial report is Mexico.<sup>139</sup> Mexico has appointed CONADIS as it's focal point and coordination mechanism.<sup>140</sup> For it's monitoring mechanism, Mexico seems to have created a new body, although it's NHRI, the National Commission of Human Rights and Public Bodies, expressed a desire to be appointed, as monitoring compliance with the Convention was within their area of competency. It is not clear, at least from this translation of the report, what role, if any the NHRI was given.<sup>141</sup>

Other countries have yet to report to the UN, but have accomplished some work on their Article 33 framework. Canada appointed its Office of Disability Issues as the focal point for the Convention.<sup>142</sup> Canada did not appoint a monitoring mechanism at this time. At the time that Canada ratified the Convention, the state took a reservation to Article 33.2, stating that as a federal state, Canada will use a variety of mechanism at different levels of government to monitor the Convention.<sup>143</sup>

In Barbados, a National Advisory Committee on the Rights of Persons with Disabilities was established in 2005. This body is responsible for monitoring all government actions dealing with disability issues.<sup>144</sup>

Once, again, as in Europe, some kind of Article 33 framework has been set up by a large number of states, suggesting that states feel that it is important to be seen to be in compliance with Article 33. Unlike in Europe, there is a much larger proportion of states ignoring the independence requirements of Article 33.2, using a government body as the monitoring mechanism. This is especially noteworthy, as NHRIs are common in the Americas, and therefore it would be expected that more states would make use of them. Also once again, use of Article 33 is narrowly focused on the CRPD and disability issues, with no evidence that the article has an impact on broader human rights thinking in these states.

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<sup>138</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fBRA%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fBRA%2f1&Lang=en).

<sup>139</sup> Originally in Spanish, read via Google Translate.

<sup>140</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Mexico*, ¶ 240-242, U.N.Doc CRPD/C/MEX/1 (7 February, 2013).

<sup>141</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Mexico*, supra note at ¶ 240-242.

<sup>142</sup> <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2012-89-e.htm>.

<sup>143</sup> <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2012-89-e.htm>.

<sup>144</sup> Economic Commission for Latin America and the Caribbean, *A Situational Analysis of the Implementation of the Convention on the Rights of Persons with Disabilities in the Caribbean Subregion*, [http://www.eclac.cl/cgi-bin/getProd.asp?xml=/publicaciones/xml/4/42324/P42324.xml&xsl=/publicaciones/ficha-i.xsl&base=/publicaciones/top\\_publicaciones-i.xsl](http://www.eclac.cl/cgi-bin/getProd.asp?xml=/publicaciones/xml/4/42324/P42324.xml&xsl=/publicaciones/ficha-i.xsl&base=/publicaciones/top_publicaciones-i.xsl).

## 6.4 Africa

As of this writing, the only African country to be examined by the Committee is Tunisia. In its state report, Tunisia names the Higher Council for the Care of Persons with Disabilities as the coordinating body within government, and the Higher Committee on Human rights and Fundamental Freedoms (“Higher Committee”) as the independent monitoring mechanism.<sup>145</sup> The Higher Committee is a B status NHRI according to the ICC.<sup>146</sup> In the list of issues the Committee submitted to Tunisia, the focus for Article 33 is entirely on the monitoring mechanism. The Committee asked what steps were taken to ensure the Higher Committee’s independence, and also requested a report on the work of the Higher Committee.<sup>147</sup> According to Tunisia, the Higher Committee has been an independent body since 2009, when its organisation and operating rules were approved. The Tunisian delegation was able to provide a copy of the Higher Committee’s annual human rights report.<sup>148</sup>

One shadow report for Tunisia was prepared by the Atlas Council. The Atlas Council briefly addressed Article 33, approving of Tunisia’s designated framework, and stressing the need for the government to provide these bodies with the resources and responsibilities they need to successfully fulfil their role.<sup>149</sup> The International Disability Alliance (IDA) also provided a shadow report. They also address Article 33 briefly, focusing solely on the monitoring mechanism. The IDA notes that, at the time the state report was submitted, the Higher Council had no status with the ICC, and so could not be considered Paris Principles compliant. They also note that the report give no information into what additional resources the Higher Council will be given to address its new role.<sup>150</sup>

Tunisia’s framework is a typical framework that could be found anywhere in the world. The focal point is a government body designed specifically to address the rights of people with disabilities, and the monitoring mechanism is an existing NHRI. This pattern is repeated in South Africa. While the draft report from South Africa is still open to public comment, it places the national focal point in the Ministry of Women, Children and People with Disabilities. In addition, all government departments at all levels, down

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<sup>145</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Tunisia*, ¶ 571-587, U.N.Doc CRPD/C/TUN/1 (14 July, 2010).

<sup>146</sup> <http://nhri.ohchr.org/EN/Contact/NHRIs/Documents/Chart%20of%20the%20Status%20of%20NHRIs%200%2828%20January%202014%29.pdf>.

<sup>147</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, List of issues to be taken up in connection with the consideration of the initial report of Tunisia (CRPD/C/TUN/1), concerning article 1 to 33 of the Convention on the Rights of Persons with Disabilities*, U.N.Doc. CRPD/C/TUN/Q/1 (10 November 2010).

<sup>148</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Replies submitted by the Government of Tunisia to the list of issues (CRPD/C/TUN/1) to be taken up during the consideration of the initial report of Tunisia (CRPD/C/TUN/1)*, ¶226-231, U.N.Doc. CRPD/C/TUN/Q/1/Add. 1 (11 March 2011).

<sup>149</sup> <http://www.mindbank.info/item/1368>.

<sup>150</sup> <http://www.mindbank.info/item/1367>.

to the local, are required to have focal points of their own.<sup>151</sup> The South African Human Rights Commission will serve as the monitoring mechanism. The draft acknowledges, however, that the Commission does not currently have the capacity to fulfil this role.<sup>152</sup> Kenya also falls into this category, despite the fact that Kenya is, so far, the only state to submit a report to the Committee without mentioning Article 33.<sup>153</sup> According to other sources, monitoring has begun in the country, coordinated by the Kenya National Commission on Human Rights.<sup>154</sup> The National Commission on Human Rights is an A status NHRI.<sup>155</sup>

Seychelles and Nigeria are similar, except that both states chose to create multi-body monitoring frameworks, which include their NHRI. Although Seychelles has not submitted its initial report to the Committee, a draft of the report can be found online. According to this report, the Ministry for Social Affairs, Community Development and Sports, as the ministry responsible for disability issues, has taken on the role of the coordination mechanism. In addition, focal points are being established within all agencies concerned with the implementation effort. The role of these focal points will be to ensure that the various agencies take disability issues into account in the course of their normal work. For a monitoring mechanism, the Ministry of Foreign Affairs has begun to create a Human Rights Treaty Committee. This committee brings together representatives from different government departments with a stake in the implementation process.<sup>156</sup> This body will be one of the monitoring mechanisms. In addition, the Human Rights Commission, and the Office of the Ombudsmen appear to have received additional funding to allow them to monitor the Convention.<sup>157</sup> Neither of these bodies is accredited by the ICC.<sup>158</sup>

The Nigerian Human Rights Commission responded to a survey on the implementation of the Article 33 framework. According to their responses, the Department of Rehabilitation, in the Ministry of Women Affairs and Social Development, is in charge of disability issues. It's not clear if this body has also been specifically appointed as the focal point. After the Convention was adopted by Nigeria, a bill passed to, among other things, establish a National Commission for Persons with Disabilities. This body is made up of representatives from several government bodies, the

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<sup>151</sup> [www.gov.za/documents/download.php?f=179901](http://www.gov.za/documents/download.php?f=179901).

<sup>152</sup> [www.gov.za/documents/download.php?f=179901](http://www.gov.za/documents/download.php?f=179901).

<sup>153</sup> [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fKEN%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fKEN%2f1&Lang=en).

<sup>154</sup> <http://www.uspkenya.com/index.php/programs/what-we-do/legislation-and-policy-participation>.

<sup>155</sup> <http://nhri.ohchr.org/EN/Contact/NHRIs/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2828%20January%202014%29.pdf>.

<sup>156</sup> <http://www.socialdevelopment.gov.sc/files/CRPD-report.pdf>.

<sup>157</sup> <http://www.socialdevelopment.gov.sc/files/CRPD-report.pdf>.

<sup>158</sup> <http://nhri.ohchr.org/EN/Contact/NHRIs/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2828%20January%202014%29.pdf>.

Human Rights Commission, and people with disabilities. This body will be the main monitoring mechanism, with support from the Nigerian Human Rights Commission.<sup>159</sup> Other African states that have established monitoring mechanism has also used their NHRIs. Uganda appointed the National Council for Disability as its monitoring mechanism. The funding for the National Council was more than doubled to allow it to complete its new tasks.<sup>160</sup> The responsibility for monitoring is shared with the Human Rights Commission, which does not report any increase in funding.<sup>161</sup> Egypt and Senegal have also reported that their NHRI is at least part of their monitoring framework.<sup>162</sup>

Finally, Mauritius is the only African state which has established a focal point, but no monitoring mechanism. While Mauritius's state report does not yet appear on the Committee page, a copy can be found online. The government of Mauritius has established a National Committee on the Implementation and Monitoring of the Convention. The Committee is composed of a mix of government representatives as well as representatives from select NGOs and DPOs. The purpose of the committee is to promote collaboration and ensure representation.<sup>163</sup> The government also plans to create a Human Rights Monitoring Committee, which will be located in the office of the Prime Minister.<sup>164</sup>

The patterns in Africa are similar to those in the rest of the world. States are making an effort to establish Article 33 frameworks. The common trend to create or establish a very disability specific focal point is present, as is the use of NHRI, whether they are ICC accredited or not, as the monitoring mechanism. The vast majority of states do not appear to have increased funding for those bodies that have been given new responsibilities under Article 33, and South Africa's report is frank about the inability of the monitoring mechanism to perform its duties without further resources, but this problem is also common in other regions. In most respects, Africa continues the trends seen throughout the world as Article 33 is implemented.

## 6.5 Asia-Pacific

In the Asia-Pacific region, as in other areas of the globe, there are clear patterns in the establishment of Article 33. The use of a disability specific focal point and a pre-existing NHRI is one common pattern. Australia, the first example, is actually slightly unusual in the use of a non-disability specific body as one of its focal points, the

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<sup>159</sup> <http://www2.ohchr.org/english/issues/disability/docs/NigeriaHumanRightsCommission.doc>

<sup>160</sup> [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fUGA%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fUGA%2f1&Lang=en).

<sup>161</sup> <https://www.nuigalway.ie/cdlp/documents/publications/ICC%20SurveyReport33.2.pdf>.

<sup>162</sup> <https://www.nuigalway.ie/cdlp/documents/publications/ICC%20SurveyReport33.2.pdf>.

<sup>163</sup> [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fMUS%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fMUS%2f1&Lang=en).

<sup>164</sup> [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fMUS%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fMUS%2f1&Lang=en).

Attorney-General. Australia was the second Asia-Pacific country examined by the Committee, and the replies to issues and Concluding Observations have yet to be issued. In its state report, Australia names the Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs as joint focal points.<sup>165</sup> Unlike many other federal states, Australia did not appoint a coordination mechanism. The National Disability Strategy ("NDS") was given the responsibility of creating the Article 33.2 framework. As of the time the report was prepared, this framework remained undefined. In addition, a declaration was made to put the rights with the CRPD within the definition of human rights used by the Australian Human Rights Commission ("AHRC"). The effect of this was that, while the Commission is not the monitoring mechanism, it does have the same authority to use its functions in rights contained within the Convention as it does in other matters.<sup>166</sup> More recently, the AHRC was appointed as the sole monitoring mechanism for the CRPD.<sup>167</sup> On the involvement of civil society, Australia consulted with NGOs in the preparation of the state report, and supported the creation of the shadow report.<sup>168</sup> In addition to the standard Article 33 framework, Australia has reformed the way that human rights issues are addressed when new legislation is being considered, establishing a Parliamentary Joint Committee responsible for consider proposed bills in light of the CRPD, CEDAW and the CRC.<sup>169</sup>

In the Committee's list of issues, the focus was mainly on the involvement of civil society. The Committee asked the state to explain in detail what consultations were held with people with disabilities, in particular intellectual or psychosocial disabilities. The Committee also asked for details on the continuing cooperation between government and DPOs.<sup>170</sup>

Several NGOs and DPOs also submitted reports. The main shadow report, prepared by a number of civil society groups, expresses concerns with the way Article 33 has been implemented in Australia. The report notes that the effectiveness of the joint focal points is unclear, as there is no clear coordination strategy for these two agencies to work with the wider government. Furthermore, there was no, and has continued to be no, consultation with DPOs or civil society on the process of designating and organising

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<sup>165</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Australia*, ¶ 212-216, U.N.Doc CRPD/C/AUS/1 (7 June 2012).

<sup>166</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Australia*, supra note 165, at ¶ 212-216.

<sup>167</sup> <https://www.nuigalway.ie/cdlp/documents/publications/ICC%20SurveyReport33.2.pdf>.

<sup>168</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Australia*, supra note 165, at ¶ 212-216.

<sup>169</sup> Conference of State Parties to the Convention on the Rights of Persons with Disabilities, *Compilation of Legislative Measures Undertaken in the Implementation of the Convention on the Rights of Persons with Disabilities: 2012 Update*, U.N.Doc. CRPD/CSP/2012/CRP.2 (5 September 2012).

<sup>170</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, List of issues to be taken up in connection with the consideration of the initial report of Australia (CRPD/C/AUS/1), concerning article 1 to 33 of the Convention on the Rights of Persons with Disabilities*, U.N.Doc. CRPD/C/AUS/Q/1 (13 May 2013).

focal points.<sup>171</sup> The shadow report also expresses concerns with the way the Australian government has addressed Article 33.2. The use of the NDS as the monitoring mechanism is problematic, both because it does not meet the requirements of Article 33, and because while the NDS has a clear process for the involvement of civil society, actual involvement in the planning stages has been merely tokenistic.<sup>172</sup> The involvement of the AHRC also does not, in the view of the authors of the report, meet the requirements of Article 33, partly because the AHRC does not have the resources to act as an effective monitoring mechanism.<sup>173</sup>

The report by DisabCouncil is more positive, with its only critique of the main framework being that NGOs are not part of the official monitoring framework. They also note that the state report says nothing about additional resources for the AHRC.<sup>174</sup>

New Zealand stands out in the monitoring framework it has created, rather than the more usual single body model. According to the New Zealand state report, the Office for Disability Issues (“ODI”) is the designated focal point for the Convention. For a coordination mechanism, the ODI established the Ministerial Committee on Disability Issues. The membership of this Committee includes senior Ministers, and it is tasked with improving the implementation process.<sup>175</sup> The Human Rights Commission—an A-status NHRI<sup>176</sup>--and the Office of the Ombudsmen has both been appointed as part of the monitoring framework. Additional funding has been provided to allow them to take on new responsibilities. In addition, the implementation is monitored by the Convention Coalition, an umbrella group of DPOs, funded by the New Zealand government.<sup>177</sup>

South Korea, Thailand, and Jordan all use have a single focal point and a single body, their NHRI, for the monitoring mechanism. In South Korea, the designated focal point for the Convention is the Bureau of Policy for Persons with Disabilities at the Ministry of Health and Welfare. The monitoring mechanism is the National Human Rights Commission (NHRC).<sup>178</sup> The NHRC is an A status NHRI according to the ICC.<sup>179</sup>

In Thailand, NEP is the designated focal point for implementation of the CRPD, and the monitoring mechanism is the Office of the National Human Rights

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<sup>171</sup> <http://www.mindbank.info/item/3598>.

<sup>172</sup> <http://www.mindbank.info/item/3598>.

<sup>173</sup> <http://www.mindbank.info/item/3598>.

<sup>174</sup> <http://www.mindbank.info/item/3600>.

<sup>175</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, New Zealand*, ¶ 267-274, U.N.Doc CRPD/C/NZL/1 (1 October 2013).

<sup>176</sup> <http://nhri.ohchr.org/EN/Contact/NHRIs/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2828%20January%202014%29.pdf>.

<sup>177</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, New Zealand*, supra note 175 at ¶ 267-274.

<sup>178</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Republic of Korea*, ¶ 166-169, U.N.Doc CRPD/C/KOR/1 (27 February 2013).

<sup>179</sup> <http://nhri.ohchr.org/EN/Contact/NHRIs/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2828%20January%202014%29.pdf>.

Commission.<sup>180</sup> Thailand's Human Rights Commission is an A status NHRI.<sup>181</sup> On the involvement of civil society, Thailand has attempted to raise awareness of the Convention by producing a standard Thai language version as well as a cartoon version. The Committee on CRPD in Thailand, made up of Delegates from all ministries, DPOs, and other concerned parties, has also been formed.<sup>182</sup>

Jordan's state report<sup>183</sup> names the Higher Council for the Affairs of Persons with Disabilities as the focal point. The Higher Council appears to be a new body created specifically to serve as the focal point. While no figure is given, according to the report its budget will be provided by the state. The National Centre for Human Rights will serve as the monitoring mechanism.<sup>184</sup> The National Centre for Human Rights is an A status NHRI.<sup>185</sup>

Other states in the Asia-Pacific region are using government bodies, or committees partly staffed by members of government, as their monitoring mechanism, despite the fact that these bodies do not meet the independence requirement. Qatar's state report<sup>186</sup> names the Supreme Council for Family Affairs as the governmental focal point. According to the state report, Qatar does not yet have an independent body that could serve as a monitoring mechanism, and in the meantime the Supreme Council will also monitor the Convention.<sup>187</sup> In fact, Qatar does have an A status NHRI, the National Commission for Human Rights.<sup>188</sup> This body is mentioned as monitoring the human rights of people with disabilities, but is not named as the monitoring mechanism.<sup>189</sup>

Turkmenistan's state report<sup>190</sup> discusses an Inter-Ministerial Commission that appears to be serving the functions of both the focal point and the monitoring mechanism. The Commission includes representatives from several governmental bodies, as well as trade unions and a few NGOs.<sup>191</sup>

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<sup>180</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTHA%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTHA%2f1&Lang=en).

<sup>181</sup><http://nhri.ohchr.org/EN/Contact/NHRIs/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2828%20January%202014%29.pdf>.

<sup>182</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTHA%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fTHA%2f1&Lang=en).

<sup>183</sup> Currently available only in Arabic, read via Google Translate.

<sup>184</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fJOR%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fJOR%2f1&Lang=en)

<sup>185</sup><http://nhri.ohchr.org/EN/Contact/NHRIs/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2828%20January%202014%29.pdf>.

<sup>186</sup> Currently available only in Arabic, read via Google Translate.

<sup>187</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fQAT%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fQAT%2f1&Lang=en).

<sup>188</sup><http://nhri.ohchr.org/EN/Contact/NHRIs/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2828%20January%202014%29.pdf>.

<sup>189</sup>[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fQAT%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fQAT%2f1&Lang=en).

<sup>190</sup> Currently available only in Russian, read via Google Translate.

<sup>191</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Turkmenistan*, ¶ 267-274, U.N.Doc CRPD/C/TKM/1 (3 July 2013).

Bangladesh has not yet submitted its state report, but a version of it can be found online. According to this report, in establishing its Article 33 framework, the government has required all departments to establish focal points to deal with disability issues. To monitor the implementation process, the Ministry of Social Welfare has established an inter-ministerial National Monitoring Committee. The Committee does include representatives of DPOs in the country. It is responsible for preparing the state report.<sup>192</sup>

Finally, many states in the Asia-Pacific region still have incomplete frameworks. Most of these do not use a NHRI, and either lack a monitoring mechanism, or use a body with close ties to government. China was the first Asia-Pacific country examined by the Committee. China submitted 3 state reports, one covering mainland China, one for Hong Kong, and one for Macau. The state report for mainland China designates the State Council's Committee on the Work for Persons with Disabilities as the coordination mechanism. It also states that the Director of the Labour and Welfare Bureau of the Hong Kong Special Administrative Region, and the Social Welfare Bureau of the Macao Special Administrative Region, has also been selected as coordinating bodies.<sup>193</sup> The report also lists several government bodies that are responsible for ensuring compliance with the Convention, but does not name any of them as the monitoring mechanism. On the participation of civil society, the report notes the ability of citizens to lodge complaints and communicate with the government through designated channels.<sup>194</sup>

The Hong Kong report names the Commission for Rehabilitation as the focal point for the Convention. It does not repeat the statement made in the main China report, that the Labour and Welfare Bureau is serving as the coordination mechanism.<sup>195</sup> The Rehabilitation Advisory Committee ("RAC") is named as the monitoring body. RAC is the government's advisory body on matters relating to people with disability. It is chaired by a non-government official, and all members are appointed by the Chief Executive of Hong Kong. Members include people with disabilities, and representatives of NGOs and DPOs, as well as members of various governmental departments. The involvement of civil society in the monitoring process is also largely coordinated by RAC.

In the Macao report, the Social Welfare Bureau ("SWB") is named as the focal point. Once again, information about the coordination mechanism is not repeated.<sup>196</sup>

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<sup>192</sup> Ministry of Social Welfare, "Implementation of the Convention on the Rights of Persons with Disabilities in Bangladesh, May 2010 (on file with author).

<sup>193</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, China*, ¶ 150-153, U.N.Doc CRPD/C/CHN/1 (8 February 2011).

<sup>194</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, China*, supra note 193, at ¶ 150-153.

<sup>195</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Hong Kong, China*, ¶ 33.1-33.8, U.N.Doc CRPD/C/CHN-HKG/1 (11 February 2011).

<sup>196</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Macao, China*, ¶ 103-105, U.N.Doc CRPD/C/CHN-MAC/1 (8 February 2011).

Macao does not name a monitoring mechanism. Instead, the report notes that both courts and the Commission against Corruption--an Ombudsman-like body--exercise a monitoring function.<sup>197</sup>

The lists of issues from the Committee is also split into three parts. For China, the Committee requested more information on monitoring, wanted to know specifically which body had been appointed.<sup>198</sup> The Committee did not request any more information on Article 33 from Hong Kong. For Macao, the Committee again asked for clarification on the monitoring process.<sup>199</sup> On the issue of monitoring, China replied with a list of the organisations tasked with collecting statistical and qualitative information on the situation of people with disabilities.<sup>200</sup> For Macao, the replies detail how NGOs monitor the convention by working with government bodies such as the SWB. It also once again explains the functions of the Commission Against Corruption and the judiciary, though it seems that neither of these bodies had their mandate changed or expanded to cover the monitoring of the CRPD.<sup>201</sup>

The concluding observations continue to follow the trend of three parts. For China, the Committee noted both the lack of independent bodies involved in the monitoring process, as well as the lack of participation by DPOs and other civil society groups. As well, the Committee noted that it was still unclear if China had appointed an official monitoring mechanism under Article 33.2. The Committee recommended that the state address these areas of concern.<sup>202</sup> In Hong Kong, the Committee felt that the focal point was too low a rank to be effective, and was troubled by the lack of an independent monitoring mechanism. The concluding observations did not address the Article 33 framework in Macao.<sup>203</sup>

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<sup>197</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Macao, China, supra note 196, at ¶ 103-105.*

<sup>198</sup> *Committee on the Rights of Persons with Disabilities, Implementation of the Convention on the Rights of Persons with Disabilities, List of issues to be taken up in connection with the consideration of the initial report of China (CRPD/C/CHN/1), concerning article 1 to 33 of the Convention on the Rights of Persons with Disabilities, ¶ 60, U.N.Doc. CRPD/C/CHN/Q/1 (16 May 2012).*

<sup>199</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, List of issues to be taken up in connection with the consideration of the initial report of China (CRPD/C/CHN/1), concerning article 1 to 33 of the Convention on the Rights of Persons with Disabilities, supra note 198, at ¶ 60.*

<sup>200</sup> *Committee on the Rights of Persons with Disabilities, Implementation of the Convention on the Rights of Persons with Disabilities, Replies submitted by the Government of China to the list of issues (CRPD/C/CHN/1) to be taken up during the consideration of the initial report of China (CRPD/C/CHN/1), ¶ 95-96, U.N.Doc. CRPD/C/CHN/Q/1/Add. 1 (3 September, 2012).*

<sup>201</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Replies submitted by the Government of China to the list of issues (CRPD/C/CHN/1) to be taken up during the consideration of the initial report of China (CRPD/C/CHN/1), ¶ 95-96.*

<sup>202</sup> *Committee on the Rights of Persons with Disabilities, Consideration of reports submitted by States parties under article 35 of the Convention, Concluding observations of the Committee on the Rights of Persons with Disabilities, China, ¶ 75-78, U.N.Doc. CRPD/C/CHN/CO/1 (15 October, 2012).*

<sup>203</sup> *Consideration of reports submitted by States parties under article 35 of the Convention, Concluding observations of the Committee on the Rights of Persons with Disabilities, China, supra note 202, at ¶ 75-78.*

Several different civil society and other organisations submitted reports to the UN on China, but few of these address Article 33 in any detail. One that does is from the Hong Kong Committee on Promoting the UNCRPD, and it agrees with the concerns of the Committee on the framework in Hong Kong. The Promotion Committee report notes that the Commissioner for Rehabilitation, serving as the focal point, is too junior to require other departments to take any action, and so cannot be particularly effective. Further, the RAC, named as a monitoring body, is merely an advisory body, with no administrative powers. While people with disabilities are appointed to the RAC, those appointed to not—in the view of The Promotion Committee—represent civil society in the way the CRPD intends.<sup>204</sup>

In the Cook Islands, the Ministry of Internal Affairs has been appointed the focal point under Article 33.1. Within the Ministry of Internal Affairs, there is a Disability Officer, who works to implement the Convention, as well as liaising with DPOs. No coordinating body or monitoring mechanism is mentioned in the report.<sup>205</sup>

In the state report of the United Arab Emirates (UAE),<sup>206</sup> no body is named as part of the framework. Instead, the report details a plan to create a higher committee for disability that would act as a focal point, and another committee to act as the monitoring mechanism. The monitoring committee would include members of civil society, such as representatives from DPOs and other human rights organisations.<sup>207</sup>

Vanuatu appointed its National Disability Council as the Article 33 focal point. This council is made up of nine government representatives, and three DPO representatives, all appointed by the Prime Minister.<sup>208</sup> There are also plans to change the functioning of the Committee, bringing it in line with the Paris Principles, so that it can function as an independent monitoring mechanism.<sup>209</sup>

In the Philippines, the National Council on Disability Affairs (“NCDA”) has replaced the lower-profile National Council for the Welfare of the Disabled Persons. The NCDA is the monitoring mechanism for the Convention.<sup>210</sup> The independence of the NCDA is unclear.

Mongolia has established a coordination mechanism, the National Committee on the Promotion of Citizens with Disabilities.<sup>211</sup>

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<sup>204</sup> <http://www.mindbank.info/item/1400>.

<sup>205</sup> Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention, Cook Islands*, ¶ 33.1-33.8, U.N.Doc CRPD/C/COK/1 (28 June, 2013).

<sup>206</sup> Currently available only in Arabic, read via Google Translate.

<sup>207</sup> [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fARE%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fARE%2f1&Lang=en).

<sup>208</sup> [http://www.unescapsdd.org/files/documents/PUB\\_CRPD-Paper-XI-Vanuatu-20110121.pdf](http://www.unescapsdd.org/files/documents/PUB_CRPD-Paper-XI-Vanuatu-20110121.pdf).

<sup>209</sup> [http://www.unescapsdd.org/files/documents/PUB\\_CRPD-Paper-XI-Vanuatu-20110121.pdf](http://www.unescapsdd.org/files/documents/PUB_CRPD-Paper-XI-Vanuatu-20110121.pdf).

<sup>210</sup> *Compilation of Legislative Measures Undertaken in the Implementation of the Convention on the Rights of Persons with Disabilities: 2012 Update*, *supra* note 169.

<sup>211</sup> *Compilation of Legislative Measures Undertaken in the Implementation of the Convention on the Rights of Persons with Disabilities: 2012 Update*, *supra* note 169.

As in the other regions, patterns are clear. The chosen focal point is, in all cases except Australia, a disability focused body. Monitoring Mechanisms are either pre-existing NHRIs, or government or government affiliated bodies. A large number of states, even states considered fairly illiberal, have set up frameworks, once again suggesting that states see the existence of some kind of framework as an important signal. The frameworks are still narrowly focused, and states show no sign of changing the way they view their relationship to human rights treaties. The possible exception is Australia. In addition to using its Attorney General as one of its focal points, expanding the focal point outside of bodies that have specialised in disability issues, the state has set up a parliamentary committee to consider laws in light of human rights treaties. While this change is not explicitly linked to Article 33, the UN did record it as an Article 33 change, and it may represent a shift in how the government views its role in implementing human rights treaties.

## 6.7 Conclusion

At this point in time, states are showing clear patterns in their use of Article 33. While these patterns, and the implications they hold for the success of Article 33, will be discussed in more detail in the final chapter, some basic conclusions can be drawn here. First, the vast majority of focal points, are, in some way, disability related. There is a spectrum of reliance on the medical model versus the social model, but nearly all states have chosen to keep their focal point in a disability specific location, rather than a legal one. As discussed in the previous chapter, this is not best practice. The UN recommends that the Ministry of Justice, or an equivalent body, be the location for the focal point. This is consistent with ideas about mainstreaming and the social model from the disability rights movement. Looking ahead, if the idea of a focal point spreads beyond the CRPD, it is better to have expertise about the actions of a focal points concentrated in a part of the government that deals with legal issues, such as the Ministry of Justice or the Attorney General, so that new focal points can be added easily. If all expertise on the subject is located in a disability specific body, the addition of new focal points or new responsibilities will be more difficult.

It is harder to see a consistent pattern in the coordination mechanisms. As the coordination mechanism is voluntary, many states have simply chosen not to create one. When a coordination mechanism is created, however, they vary considerably, from a simple committee of ministry representatives, to the complex framework involving government, the monitoring mechanism, and civil society created by Germany. Furthermore, while the coordination mechanism might be seen as the least important part of the framework, given that it is optional, for many state this is the only part of the framework that has been created. There is little work done on best practices for a coordination mechanism, though the UN does recommend states establish one. It seems

that more research will be needed in this area, to establish a set of best practices and study exactly how states are using their widely varied mechanisms.

There is much less variation in the establishment of the monitoring mechanism, though there are some worrying patterns. In general, if a state has a NHRI, it will be used for at least part of the mechanism. States that create a multi-body mechanism—which are relatively rare—generally use their NHRI, then include NGOs or other civil society groups. The major exceptions to this are found in Latin America. In this region, NHRIs are common, but with only two exceptions, no state in this region chose to use their institution for the monitoring mechanism. It's unclear from this research why this has happened, but the use of government bodies for monitoring mechanisms that most Latin American states relied on is not in line with best practices. The other problem that has developed in this area is seen in states that do not have a NHRI. While these states have tried various solutions, none so far seem to have achieved the level of independence required by the Paris Principles. It's clear that further work is needed in this area, to find a suitable non-NHRI monitoring mechanism.

These are the patterns that have emerged so far in the implementation of Article 33. While the number of states that have established a framework is a hopeful sign, there is still much work to be done to bring states in line with best practices where such practices are established, and establish best practices in areas where they do not currently exist. The next chapter will look further into these trends, and their implication for the success of Article 33.

## **7. Conclusion**

### **7.1 Introduction**

The ultimate goal of Article 33 is to help change the way that states implement human rights treaties. More immediate goals are to improve the implementation of the CRPD in particular, and test to see if the framework laid out in Article 33 is effective in improving implementation. The article builds upon past solutions, such as the creation and spread of NHRIs, and the first domestic monitoring body built into a treaty, the NPM. It also relies upon past failures, such as the problems in the UN treaty body system, for its acceptance from states. In many ways, despite its precedents, Article 33 is unique. Decisions about how a treaty should be implemented are traditionally left to the state.<sup>1</sup> Even the NPM, which preceded Article 33, was only designed to monitor the results of implementation, not the implementation itself.<sup>2</sup> Article 33, however, tells states that they must pick a government body to oversee implementation, and must have an independent body to monitor that process. States must also allow civil society to participate in the implementation and monitoring process. This is the first time that any treaty has made these sorts of demands on states.

It is, therefore, remarkable that states did not object to Article 33. Instead, during the negotiations, states showed an understanding that some kind of change was necessary, particularly as the treaty body reform process had shown the flaws in the current system. At times, there was a question as to whether the CRPD would have its own treaty body, given the known problems with such a system. In the end, worries over the signals such a move might send, including the idea that the Convention would seem like a less important treaty without a treaty body, led to the creation of a standard treaty body system, with regular reports and a complaints mechanism. Despite agreeing to a fairly typical international monitoring body, states, NHRIs, and civil society were in agreement that new ideas were needed. Some form of Article 33 appears in every draft of the Convention, and while states had different ideas about the exact form it should take or the extent of its powers, no one at the drafting objected to the basic idea. Furthermore, no state has objected since, as only one state that has ratified the Convention has taken any kind of reservation in relation to Article 33, which addressed monitoring in a federal states, and most states appear to be taking some action to put together a framework, even if it does not fully comply with the article. The lack of state resistance, and the general feeling that new ideas are needed, have contributed to the rapid creation of Article 33 bodies.

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<sup>1</sup> ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 15 (1986).

<sup>2</sup> Frank Ledwidge, *The Optional Protocol to the Convention Against Torture (OPCAT): A Major Step Forward in the Global Prevention of Torture*, 17 *Helsinki Monitor* 73 (2006).

The problem of implementation has, of course, persisted throughout the history of human rights law, regardless of where one sets the origin of human rights. Human rights does not fit neatly into ordinary international law enforcement and implementation techniques, such as reciprocity.<sup>3</sup> States themselves were often reluctant to give international law power over their treatment of their citizens which, for instance, led to human rights being marginalised and barely mentioned in the original UN Charter.<sup>4</sup> It is only since the 1970s that the idea of human rights in international law has gained real traction.<sup>5</sup> Since that time, there has been a marked change in the attitudes of many states and other actors towards the idea of human rights. This was evident during the CRPD negotiations, where no state objected to the core idea of Article 33, despite the fact that it covers an area traditionally left to state discretion.

Article 33, then, is not only a unique article, and with the potential to improve the implementation of the CRPD. It could also be part of a larger change in the way that states handle human rights treaties. If Article 33 is successful at improving the implementation of the CRPD, then perhaps future treaties can use similar frameworks, refining the ideas behind Article 33 to be even more effective. This is why Article 33 is so important, not only for the Convention, but for international human rights law as a whole.

## 7.2 Article 33 and State Parties

As of this writing, enough states have set up Article 33 frameworks for several trends to have developed. While much of the progress made is positive, there are also areas of concern that need to be addressed now, in the fairly early stages, if the norms created around Article 33 are to reach their full potential to change human rights law. On the positive side, states have shown no resistance to the idea of Article 33. This is fairly remarkable, given that this article marks the first time states have received instruction on how to implement a treaty, an area traditionally reserved to states themselves. Despite this, there were no objections during the drafting, and no state has taken a complete reservation to this article. Additionally, all states that have reported to the UN have made some progress on the framework, as have many states that have yet to report. A wide variety of states have Article 33 frameworks, including states at all levels of development, in all geographical regions of the world, and with both more or less liberal governments. This is a positive trend, and extremely important for the future of Article 33. Without wide acceptance by states, Article 33 could not hope to succeed in its goals.

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<sup>3</sup> Andreas Paulus, *Whether Universal Values can Prevail over Bilateralism and Reciprocity*, in *REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW*, 92 (Antonio Cassese ed., 2012).

<sup>4</sup> Mark Mazower, *The Strange Triumph of Human Rights, 1933-1950*, 47 *The Historical Journal*, 2, 391 (2004).

<sup>5</sup> SAMUEL MOYN, *THE LAST UTOPIA*, (2010).

It is also encouraging to see the widespread use of NHRIs as monitoring mechanisms. A NHRI that is Paris Principles compliant has already met the independence requirements of Article 33.2, and for states that have an existing NHRI, it is much less of an administrative burden to use this body rather than create a new independent entity. The use of NHRIs as the monitoring mechanism also helps to cement their role as a body that can work with the government to create a bridge between international human rights law and domestic practices, and may help NHRIs that did not have monitoring powers previously to expand their duties. NHRIs are also wide-ranging, usually covering the entire spectrum of human rights. It is possible that they will be able to expand their role from monitoring one treaty to monitoring other treaties that the state has ratified.

Despite these positive trends, there are a number of troubling patterns emerging as well, that will have to be corrected if Article 33 is to be used to its full potential. First, the vast majority of states have chosen a very disability specific focal point. Either they have appointed a body created specially to deal with the rights of people with disabilities, such as the Office for Disability Issues in New Zealand, or as in many continental European countries, appointed the ministry, such as the Ministry for Social Affairs, that dealt with issues of disability rights prior to the ratification of the CRPD. This is a problem for two reasons. First, using disability specific bodies as the focal point continues to treat the issues surrounding the rights of people with disabilities as if they are in their own special category. This is counter-productive, and can serve to reinforce regressive ideas about disability and people with disabilities that the CRPD is meant to dispel. Secondly, placing the focal point in a disability focused area of government, rather than one focused on law or human rights, inhibits the ability of Article 33 to change the way that states relate to human rights treaty. If the focal point for Article 33 is treated as a body specific to the CRPD, then it may help to improve the implementation of this particular treaty, but will achieve no more than that. Article 33 was designed to improve the implementation process, and ideally change the way that states handle human rights treaties. It will have the greatest chance of success if states treat it as a human rights provision, rather than something that is disability specific. This tendency for states to use a disability specific focal point, despite recommendations from the UN that suggest bodies such as the Ministry of Justice, could be the result of several factors. States, rather than following guidelines, could be copying the behaviour of other states. States may have designated their focal point before the recommendations were released, or they may simply be unaware of the recommendations. In addition, most states have likely chosen the focal point that required the least amount of administrative change, since many states picked the body that was already responsible for disability issues as the CRPD focal point. Now that this trend is firmly established, it will likely be difficult to change. The only country that does not appear to have followed this trend is Australia, which appointed its Attorney General as the focal point, and even Australia used a dual focal point, with the second

focal point, the Department of Families, Housing, Community Service and Indigenous Affairs, being chosen apparently because of its disability specific focus.

Another problem is the lack of resources given to the various bodies designated in the Article 33 framework. In general, states using existing bodies did not increase the funding of these bodies to take into account their new duties. States that did create new bodies generally attempted to fund them as little as possible. An example of this would be Austria's Monitoring Committee, which provided no salaries for the committee members, and little in the way of administrative support. Obviously, if existing bodies are given new duties without an increase in funding, they will not be able to perform these duties as well as they otherwise could. Fortunately, increased funding for framework bodies is not quite as rare as non-disability specific focal points, so there are a handful of countries that can be used as role models on this issues, having provided increased funding to at least some of their framework bodies. These include Germany, Uganda, the United Kingdom, Seychelles, and New Zealand.

There are also serious problems in the monitoring mechanisms chosen by many states. The CRPD requires that monitoring mechanism be independent from government, and uses the same standard of independence used by NHRI, the Paris Principles. On the one hand, this gives states that have an accredited NHRI an easy way to comply with the article, by appointing their NHRI. On the other hand, states without a NHRI have struggled to create a monitoring mechanism that can meet the Paris Principles' standard for independence. As of this writing, it does not appear that any non-NHRI monitoring mechanisms are in full compliance with Article 33.2. This is particularly troubling because what seems to be the obvious solution: all states should establish a NHRI--is not as straightforward as it may appear. Establishing a NHRI can be a long and costly process, and the delay means that the Convention will go unmonitored in the meantime. Furthermore, as was discussed earlier in this thesis, the later effectiveness of a NHRI is partially dependant on the context of its establishment. It is possible that, if the public perception is that a NHRI was established solely to fulfil the requirements of the CRPD, its later effectiveness in areas outside of the rights of people with disabilities could be affected. Instead, for reasons of both efficiency and effectiveness, it would be best if a way to create an independent, non-NHRI monitoring mechanism could be found.

There is a second problem with monitoring mechanisms under the CRPD, and this is states which are apparently not trying to meet the independence requirement, and appoint government bodies as their monitoring mechanism. This is most common in states that lack a NHRI, but is not exclusive to these states. In Latin America, a common trend seems to have developed in which state use a government body for their monitoring mechanism, despite the existence of a well-established, accredited NHRI. It's difficult to know, without further research, why this trend has developed, but it must be addressed if Article 33 is to achieve its full potential. Possible reasons for this behaviour could be a lack of understanding of Article 33 on the part of the government, or a poor relationship

between government and its NHRI, which makes the government unwilling to assign new responsibilities to the NHRI. As mentioned, the problem is particularly acute in Latin America, where a large number of states are ignoring their NHRI in favour of government bodies for monitoring mechanisms. This regional trend could be a result other countries in the region copying each other, and coming to accept this as the norm.

Finally, there is the question of whether Article 33 is meeting its full potential. Ideally, this article, and the framework it creates, will help change the way that states handle the implementation of human rights treaties. If Article 33 is having this effect, then states should show some sign of treating international human rights law differently than they have in the past. So far, this does not seem to be happening. The sole exception is Australia, which has, as mentioned previously, created a human rights committee to ensure that all proposed legislation is in line with the human rights treaties that Australia has ratified. While this new committee is not directly related to Article 33 or the framework, it could signal a change in how Australia handles human rights. Furthermore, the committee does act to make human rights treaties a more commonplace part of domestic law, which is certainly in line with the goals of Article 33. Still, outside of Australia, there is little evidence that Article 33 is promoting states to think differently about human rights treaties. It is possible, however, that if the other weaknesses in the implementation of Article 33 are corrected, it will be easier for states to generalise the ideas of Article 33, from applying solely to the CRPD, to being a way to change the relationship between domestic law and international human rights law.

### 7.3 Policy Recommendations

With all of this in mind, it is possible to come up with a set of recommendations. These recommendations should encourage both the development of an Article 33 that works best for the CRPD, and encourage the use of the framework to change the way that states relate to human rights treaties. First, in states that have ratified the Convention, but not yet erected an Article 33 framework, civil society should encourage the government to consider broader human rights implications when choosing bodies for the framework. These states should be pushed to choose a broad focal point and truly independent monitoring mechanism. The creation of new, stronger frameworks may, by acting as models of effective practice, encourage states with existing frameworks to strengthen theirs,.

Meanwhile, states that have already established a framework should be encouraged to examine their focal point, and consider modifying or moving the focal point. As discussed, in the vast majority of cases, the chosen focal point is disability-specific, often either placed in a body created to serve the needs of people with disabilities, or placed in the ministry that was in charge of disability rights prior to the ratification of the Convention. This placement is, as explained, bad for both the rights of

people with disabilities and the future of Article 33. Civil society, both groups that work for the rights of people with disabilities and other human rights groups, should work to change the placement of the focal point in these governments, and to make governments realise the full potential of Article 33.

No matter how well chosen the different elements of the framework are, they will not be able to properly fulfil their roles without enough resources. So far, states have generally appointed existing bodies to fulfil framework roles without granted them additional funding, or created new bodies with minimal funding and administrative support. Instead, states should be encourage to increase funding to bodies given new duties, and properly fund and support newly created bodies. This will obviously be difficult in developing countries with few resources, but many of the states failing to properly support their framework are fully developed states that have the necessary resources. Civil society could encourage these states to provide the necessary resources to their own framework, and it is possible that support could be provided to poorer countries, to allow them to set up functional, well-resourced frameworks.

For obvious reasons, most of the civil society groups focused on the CRPD and Article 33 have been groups dedicated to the rights of people with disabilities. However, if Article 33 is to be used to bring about true change in the way that states implement human rights treaties, it will require the efforts of right and advocacy groups from all areas of human rights. For this reason, civil society groups outside of the disability rights movement should be encouraged to involve themselves in the negotiations around Article 33, as states set up and maintain these frameworks. If all advocacy and rights groups learn to think of the Article 33 framework as a tool they can use to promote their agendas, then there will be more pressure on states to extend the frameworks and use them to change the way that states handle all international human rights law. The bigger the audience to the state's use of Article 33, the more likely it is that it will be used correctly.

Finally, states need to be in complete compliance with Article 33. So far, the part of Article 33 that states seems least likely to comply with is the need for an independent monitoring mechanism. States that have used their NHRI, as long as the institution is accredited, are assumed to have met this requirement. States without established NHRIs, however, have struggled to create or appoint bodies that meet the independence requirements of the Paris Principles. A few states, most notably in Latin America, have even ignored accredited NHRIs in favour of far less independent government bodies. These problems must be addressed. States with established and accredited NHRIs should be encouraged to use them. It is more difficult to know what to do with states with no NHRI, as establishing such a body can be a long process, and needs to be seen as a process designed to benefit all parties in a state, rather a move to meet the requirements of a single treaty. States and civil society should continue to work to find some non-NHRI solution that properly fulfils the requirements of Article 33.2, as thus far no state has managed to create such a body.

## 7.4 Conclusion

If civil society and state parties can make full use of Article 33, then its impact should spread beyond the CRPD. While full implementation of the Convention in every state that has ratified it would be a notable achievement by itself, there is no reason for advocates and states using this article to stop with only that. The CRPD is the first convention to have a framework such as the one in Article 33, and therefore is where the ideas behind the article will be tested. If it is successful, then the same tools can be used in other areas of human rights. While Article 33 therefore has enormous potential to improve human rights around the globe, this also means the risks of failure are much higher. If no improvement is seen in the implementation of the Convention, then Article 33 could be seen as a failure, which could stifle innovation in human rights law in future treaties.

State parties must, therefore, make every effort to properly implement the Article 33 framework, including using appropriate focal points and monitoring mechanisms, and providing adequate funding to the bodies in the framework. Civil society must work to hold governments accountable, and to convince governments to make the correct choices with their Article 33 framework. At the moment, much of this work is being done by civil society groups that focus on the rights of people with disabilities, but this is an issue that extends beyond the CRPD, and has an impact on all areas of human rights. Awareness of Article 33 must therefore spread beyond the community working on the rights of persons with disabilities into all areas of civil society that work with human rights. The greater the number of civil society groups working on this issue, the more likely governments will have to take action.

In the best-case scenario, Article 33 could be a step toward fundamentally transforming the way states handle international human rights law. At the moment, however, states are not using Article 33 in a way that will easily lead to that best case. While the initial wide adoption of the Article 33 framework is a hopeful first step, and a sign that states are open to change, it is not enough. The frameworks set erect must be effective, with correctly chosen bodies and adequate funding, if all the goals of Article 33 are to be met. There are, therefore, two test that Article 33 must meet: the test of whether states will fully comply with the article and establish effective frameworks, and the test of how these frameworks will affect the future of human rights.

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