The Power of Engagement:

Assessing the Effectiveness of Cooperation between UN Human Rights Treaty Bodies and National Human Rights Institutions

Domenico Zipoli

Norwegian Centre for Human Rights, Faculty of Law, University of Oslo

Supervisors:

Prof. Malcolm Langford

Prof. Tom Pegram

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To my mother Gianna and my father Riccardo,

For their constant and loving support.[1]

[1] *Inter alia*, the PhD application was their idea (2014).

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Part A

Overview

Chapter 1. Introduction

This thesis explores the engagement between United Nations Human Rights Treaty Bodies (TBs or Committees) and National Human Rights Institutions (NHRIs) in the context of the State Reporting procedure. In doing so, it examines whether this dyadic relationship and cooperation is effective in facilitating the implementation of human rights treaties through a combination of goal-based and empirical approaches.

TBs are a central pillar of the international human rights protection system, essential to the independent, quasi-judicial monitoring of state parties' respect for and implementation of ratified UN human rights treaties. NHRIs are part of a state's administration but independent from it, defined as "a bridge between international norms and local implementation […], designed to ensure the state's compliance with its international legal obligations."[1] Since 1993, the UN has recognized NHRIs as crucial partners in monitoring States' compliance with international human rights treaty standards.[2] In doing so, the UN has gradually expanded engagement opportunities to NHRIs across the TB system's different procedures.[3] For TB-NHRI engagement, the heart of the process is the State Reporting procedure, which is why this project is limited to this aspect of the TB system. However, NHRIs may also cooperate with TBs under the individual communications and inquiry procedures as well as participate in the development and issuance of general comments and recommendations, but do so arguably to a much lesser extent.[4]

At the same time, the establishment of new UN human rights treaties and respective committees over the past 30 years has resulted in a more intricate framework for domestic stakeholder engagement in this international review process. Developments have occurred through committee-specific (and often committee-member-specific) initiatives, and not in a coherent or systemic fashion. A steadily stronger reliance on domestic stakeholder input has in fact coincided with the TB system's irregular expansion since the Vienna World Conference on Human Rights and the issuance of its Programme of Action.[5] The proliferation of both

[1] Ryan Goodman and Tom Pegram, *Human Rights, State Compliance and Social Change: Assessing National Human Rights Institutions* (Cambridge University Press 2012) 29.
[2] Principles Relating to the Status and Functioning of National Institutions for the Promotion and Protection of Human Rights, UN. GA. Ass., Res. 48/134, 20 Dec. 1993.
[3] OHCHR, Common approach to engagement with national human rights institutions, HRI/MC/2017/3 (9 June 2017) submitted to the attention of the Twenty-ninth meeting of Chairs of the human rights treaty bodies New York, 27–30 June 2017.
[4] Ibid. 15.
[5] Vienna Declaration and Programme of Action, Part II, paragraph 71.

committees and attendant domestic institutions might meet the same critiques that have greeted the rapid expansion of international courts:

> it was largely based on intuitive leaps of faith taken by international lawmakers without first undertaking any serious impact assessment. The negotiators who formulated their constitutive instruments […] seem to have acted pursuant to a belief that an increase in their number and power […] would strengthen international law and that a strengthened regime of international law would imply improvement in international relations.[6]

In parallel to TB expansion, the introduction of the Paris Principles Relating to the Status and Functioning of National Institutions for the Promotion and Protection of Human Rights[7] was followed by a five-fold increase of NHRIs worldwide during the 1990s and early 2000s, resulting in today's 123 accredited NHRIs.[8] Varying in institutional structure, NHRIs take the form of human rights commissions, ombudsmen, defensores del pueblo, procurators for human rights, national human rights institutes, and national advisory commissions on human rights with all their distinct structural and functional peculiarities. Regardless of these distinctions, all NHRIs may assist and advise both states and the TB system in monitoring the implementation of international human rights norms.

Almost 30 years later, however, this inter-institutional engagement is far from systematized. This concern was recently highlighted by the Office of the High Commissioner for Human Rights (OHCHR): "Committees vary not only in their practices regarding participation by NHRIs, but also in the choice of instrument through which they communicate these practices."[9] This lack of clarity is compounded by the necessarily varied nature of NHRI capacity to engage with the TB system, due to contextual variations among existing NHRIs. It is due to the current committee-specific approach that three consecutive Annual Meetings of Chairs of the Treaty Bodies have discussed ways to ensure the implementation of a common approach to NHRI

[6] Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press 2014) 3.
[7] Paris Principles (n 2).
[8] As of 6 November 2020, Chart of the Status of National Institutions, Global Alliance of National Human Rights Institutions, available at <http://nhri.ohchr.org/EN/Pages/default.aspx>.
[9] OHCHR, Identifying progress achieved in aligning the working methods and practices of the treaty bodies, HRI/MC/2018/3 (23 March 2018) 9.

engagement.[10] Such calls for streamlining and improvement increase the importance of normative and empirical evaluations on the effectiveness of current modalities for TB – NHRI engagement.

For the purposes of this thesis, I define "TB – NHRI engagement" as the dyadic space where the two organizations come in contact with each other[11], participate in each other's' processes[12], have the possibility to cooperate or conflict in shared spaces[13], or contribute to each other's' work[14]. It is an analytical category to define a complex phenomenon, highlighting how engagement is triggered, shaped and challenged due to the relative congruence of relevant institutional settings and the social influence of specific reference groups.[15] It also important to indicate what is not included within this definition of "TB-NHRI engagement", namely the quality of the rules of engagement and the mutual influence of TB and NHRI work, whether in relation to each other's activities or indeed on the domestic situation. These latter aspects are, instead, what this thesis wishes to assess, in light of current TB – NHRI engagement practices. By unpacking the black box of inter-institutional cooperation between the international and domestic mechanisms of human rights monitoring**,** this thesis takes a close and partly critical look at the available means for this cooperation and seeks to answer the following question:

> *To what extent is the engagement between TBs and NHRIs effective in facilitating the implementation of human rights treaties?*

[10] 28th meeting of Chairpersons (30 May–3 June 2016, New York), 29th meeting of Chairpersons (26–30 June 2017, New York), 30th meeting of Chairpersons (29 May–1 June 2018, New York). Information on all three meetings available at <www.ohchr.org/EN/HRBodies/AnnualMeeting/Pages/Meetingchairpersons.aspx>.
[11] E.g. The means available for NHRIs to attend and speak during TB sessions.
[12] E.g. The means available for NHRI alternative reporting and the means available for TB members to participate in NHRI domestic activities.
[13] E.g. The means available to cooperate or conflict during official UN side events, briefings and third party conferences.
[14] E.g. Submission of NHRI alternative reports (contributing to the goals of TBs), citation of TB recommendations in NHRl reports or organization of NHRI follow-up meetings to TB recommendations (contributing to the goals of TBs) or the issuance of TB recommendations on areas of NHRI concern (contributing to the goals of NHRIs).
[15] In sociology, a dyad (from the Greek: δυάς dyás, "pair") is a group of two people, the smallest possible social group. As an adjective, "dyadic" describes their interaction. For an application of this concept in different domains see e.g. Coleen M. Harmeling, Jordan W. Moffett, Mark J. Arnold, and Brad D. Carlson, Toward a theory of customer engagement marketing, 45(3) Journal of the Academy of Marketing Science, (2017), 312-335; Matthew Alexander M., Elina Jaakkola, Linda Hollebeek, Zooming out: Actor Engagement Beyond the Dyadic, 29(3) Journal of Service Management (2018) 1 -19.

To tackle this, the structure of the thesis has been informed by the understanding that TBs and NHRIs are similarly devised to monitor the implementation of international human rights treaties, albeit from different standpoints. In other words, "the design of international monitoring systems and the dynamics of their domestic equivalents—with the former impacting on the latter and vice versa—constitute two crucial factors influencing compliance processes and outcomes."[16] As such, the thesis is divided into an introductory part and two substantive parts, each of which answers a distinct set of sub-questions.

Part A presents the key conceptual and motivational factors that underscore the choice of research topic, together with the theoretical and methodological frameworks used to develop the study.

Part B unpacks the formal institutional framework available for TB-NHRI engagement at the *international level* and assesses its effectiveness through a goal-based approach (GBA). The sub-question that Part B tackles is:

(I) To what extent is the institutional framework for TB-NHRI engagement effective in facilitating domestic human rights treaty implementation?

Part C explores TB – NHRI engagement and its impact at the *domestic level* through an empirical case study of the Australian Human Rights Commission (AHRC). The sub-questions that Part C tackles are threefold, covering different layers of domestic impact:

(II) Are legal and policy frameworks in place domestically and do they allow for establishing and supporting effective engagement between the AHRC and the TB system? (Preconditions for impact)

(III) In what way have complementary AHRC and TB recommendations been referred to, used, and discussed at the domestic level? (Intermediate impact)

(IV) To what extent have complementary AHRC and TB recommendations had 'effects and influence' or 'repercussions' on domestic policy? (Policy impact)

In this introductory chapter, I provide an overview of the key conceptual and motivational factors that have helped shape the contours of the study. First of all, a transnational

[16] Baskali Cali and Anne Koch, 'Explaining Compliance: Lessons Learnt from Civil and Political Rights' in Malcolm Langford, Cesar Rodriguez-Garavito, and Julieta Rossi (eds), *Social Rights Judgements and Politics of Compliance* (Cambridge University Press 2017) 69.

understanding of TB – NHRI engagement, which permeates throughout the different parts of the study. Secondly, as motivation for the study, I include the equivocal nature of scholarly findings on the impact and effectiveness of both TBs and NHRIs and recent public policy reform processes. I conclude this chapter with an overview of the thesis structure and research design.

1. The Transnational Nature of Treaty Body - NHRI Engagement

The international human rights system has been expanding at a considerable pace in the last three decades, in relation to both new human rights treaties and domestic mechanisms established to monitor states' commitments to human rights promotion and protection. In this process of increasing legal and policy-related interconnectedness, global regulation has become ever more pluralist, with the inclusion of NHRIs, international and domestic civil society organizations, transnational corporations, and other non-state entities entering into agreements and shaping international law with their as yet growing involvement.

Such institutional expansion and interrelatedness in today's international human rights system need to be assessed, rationalized, and ultimately systemized. This necessity stems from the increasing requirements states are subject to, related to implementing treaty obligations, reporting to the international and regional human rights systems, and following up on the multitude of recommendations or decisions emanating from various human rights mechanisms. Effective implementation is consequently a growing challenge, even for the most willing and resourced state apparatus. To counter these challenges, it is important to ask ourselves whether the current international human rights system may benefit by improving coordination and leveraging synergies at the domestic level. Indeed, it is now recognized that the TB system's "report-and-review process seeps into domestic politics,"[17] as reflected in growing domestic institutionalization trends, with NHRI participation representing a key development in this regard. After all, "what is discussed in Geneva does not stay in Geneva. It spills over into domestic debates, adding fuel to mobilization and prompting demands for implementation."[18] This research project, dedicated to addressing specific institutional cooperation initiatives, attempts to address this very issue.

[17] Cosette Creamer and Beth Simmons, 'The Proof is in the Process: Self-Reporting Under International Human Rights Treaties' 114 American Journal of International Law 1 (2020) 1.
[18] Ibid.

In order to define TB-NHRI engagement, this thesis shifts attention from a dualist orientation toward international law and national law to a focus on how legal norms are developed, conveyed, and settled *transnationally*, integrating both bottom-up and top-down analyses. International law has long struggled with finding a legitimate solution to the ever-decreasing role of state sovereignty in instances of global regulation. This bureaucratization of the state and its transnational milieu has led to new challenges that in turn lead us to question "whether the theoretical categories that have dominated law, of rights and texts and procedures, are capable of addressing the experience confronting us on the front pages of our newspapers,"[19] which are much less defined in watertight discipline-specific clusters.

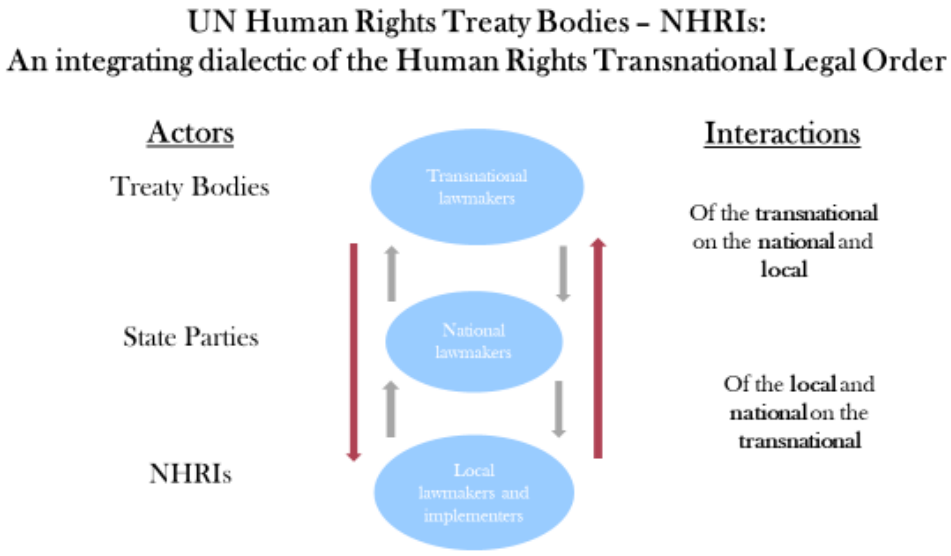
In response to these transformations, which have essentially deconstructed and segmented the Westphalian understanding of a state-centric legal order, scholars have introduced the concept of "transnational law"[20] to make sense of processes of legalization that venture into more diverse levels of social organization, from international and transnational to the national and local. For the purposes of this thesis, a transnational legal order (TLO) is "a collection of formalized legal norms and associated organizations and actors which authoritatively order the understanding and practice of law across national jurisdictions."[21] This study embeds TB-NHRI engagement within that transnational understanding. TLOs exist when the norms inherent in the system are produced by a legal organization or network that transcends or spans the nation-state. What this entails is not that legal norms are simply produced by international organizations for the states parties to accept and fulfill. Rather, these organizations are part of legal norms' more complex formation, conveyance, and institutionalization processes. They interpret, monitor, and enforce compliance to such norms, using mechanisms which may even be not purely adjudicatory, such as peer-review. Another characteristic of TLOs is that the resulting norms engage legal institutions within multiple nation-states—during adoption, recognition, monitoring, or enforcement—in direct or indirect, formal (hard law) or informal (soft law) ways. Within such networks, participants such as NHRIs act as intermediaries among local, national, and transnational arenas. In other words, TLOs are not independent from domestic structures, but jointly form a dynamic system of iterative legal interaction. This process is both top-down and bottom-up, involving the formation, conveyance, and practice of

[19] Victoria Nourse and Gregory Shaffer, 'Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory' 95(61) *Cornell Law Review* (2010).
[20] Terence C. Halliday and Gregory Shaffer, *Transnational Legal Orders* (Cambridge University Press 2015).
[21] Ibid. 5.

legal norms and recursive interaction between the various levels of social organization through which legal norms become institutionalized.

The inherent conundrum for such a pluralist legal order is how to assess a process in which *common problems* affect its participants—and the legal norms set to counter such problems are also shared—but the participants themselves are *deeply diverse due to the context*. TB-NHRI engagement must be understood within this optic, as an integrating dialectic of the wider human rights TLO (Figure 1.1).

Figure 1.1. TB – NHRI Engagement in the Human Rights TLO



Investigating TB-NHRI cooperation and the extent to which it facilitates human rights implementation requires identifying these institutions' commonalities within the transnational human rights arena. A desire to understand these commonalities has been a fundamental push behind choosing NHRI-TB engagement as topic of research, and they may be summarized as follows: both monitor states' implementation of international standards through soft monitoring and advisory mechanisms; both can be endowed, at most, with decision-making powers of a quasi-judicial nature;[22] both, ideally, act independently from states' interference.

A purely positivist interpretation of these characteristics would position this specific field of research outside of what is formally or conventionally understood as "legal." This is because

[22] Among NHRIs there are a few exceptions. E.g. the Ghanaian, Kenyan, Ugandan, and Sierra Leonean offices have been defined as judicial NHRIs, endowed with court-like powers.

the positivist understanding holds that law can only be defined as such when accompanied by authoritative interpretation and by enforcement.[23] While authoritative interpretation may indeed be a proprietary feature of TB procedure, enforcement is definitely not applicable to either TB or NHRI activity. In order to deflect such positivist criticism, it is best to highlight a fundamental tenet on which this research project relies.[24] Aside from the formal framework that regulates the possible avenues for cooperation between TBs and NHRIs, a variety of informal logics of influence exist, such as reputational effects, persuasion, and socialization,[25] that lead to compliance with international law despite the absence of authoritative interpretation and enforcement. Compliance understood simply as norm-adherence is too narrow a filter, and does not account for the wide range of effects that contemporary institutional synergies trigger in the transmission between the international and domestic levels of human rights protection. Established human rights norms are more complex:

> they may "guide" behavior, they may "inspire" behavior, they may "rationalize" or "justify" behavior, they may express "mutual expectations" about behavior, or they may be ignored. But they do not effect *cause* in the sense that a bullet through the heart causes death […]. The impact of norms within international regimes is not a passive process, which can be ascertained analogously to that of Newtonian laws governing the collision of two bodies. Communicative dynamics may tell us far more about how robust a regime is than overt behavior alone.[26]

Discussions on the effectiveness of TB-NHRI engagement must consider all available structures and processes, at both international and domestic levels, with a view to assessing strengths and weaknesses of the current transnational system. To that end, this thesis uses a multi-level, multi-method research design, to which I turn in the following chapters, to investigate the hypothesis that their interactive effect facilitates human rights implementation.

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[23] Hans J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (A.A. Knopf 1948).

[24] It is also useful to refer to the argument in R. Howse and R. Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters' 1(2) *Global Policy* (May 2010): "Why should international law have to defend itself before the bar of such a definition of law? Instead, might not the very proliferation of norms labeled international law in our own, very different era affect how we approach the meaning of legality?".

[25] G. W. Downs and M. Jones. 'Reputation, Compliance, and International Law' 31 *The Journal of Legal Studies* (2002) 95–114. Goodman and Pegram (n 1); R. Goodman and D. Jinks, *Socializing States* (Oxford University Press 2013).

[26] John G. Ruggie, 'Epistemology, ontology and the study of international regimes' in Ruggie, *Constructing the World Polity* (Routledge 1998) 97–98.

2. The Equivocal Nature of Treaty Body and NHRI Effectiveness Research

A study on the interaction between TBs and NHRIs essentially focuses on the persistent disjuncture between international human rights standards and the practice that exists in domestic jurisdictions—often referred to as the human rights "compliance gap."[27] The following two sections provide an overview of the existing, and somewhat conflicting, literature on the effectiveness of both TBs and NHRIs.

2.1. Conflicting Findings on the Effectiveness of the Treaty Body System

One of the most debated questions in human rights research has been whether ratification of human rights treaties has any effect on state behavior. In this regard, we can distinguish between two distinct sets of research, each characterized by notably different results. While some studies found that treaties have hardly any positive effect and sometimes even a negative effect, others found noticeable improvements.

Abundant literature is pessimistic about the ability of international law to influence human rights practices.[28] The legal scholar who is introduced to studies on human rights treaties thus risks falling into an overarching mistrust toward the international human rights system. As part of this first category, Hathaway discusses the apparent limits of treaties in reducing human rights violations, showing that "the poor reporting record merely reflects the main weakness of the treaty body regime—States lack incentives to police their compliance with TB procedure (reporting) and TB recommendations."[29] In relation to the absence of incentives to comply, Bayefski finds that "states may selectively provide requested information, present information in a way that obscures the situation on the ground, or ignore concerns or questions posed by the treaty body."[30] She also points to low levels of access, especially among those individuals and groups most affected by treaty violations, as TB processes are largely conducted far from domestic scrutiny. In his often-cited 2005 study on human rights treaty impact, Neumayer finds that treaty ratification can be associated with worsening personal integrity rights, negative impact on civil rights, and possible overall weakening of human rights in defined

[27] See e.g. Xinyuan Dai, "The 'Compliance Gap' and the Efficacy of International Human Rights Institutions" in Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds.), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press 2013).
[28] Samuel Moyn, *The Last Utopia* (Harvard University Press 2012) and Eric Posner, *The Twilight of International Human Rights Law* (Oxford University Press 2014).
[29] Oona A. Hathaway, 'Do Human Rights Treaties Make a Difference?' 111 *Yale Law Journal* (2002) 1935.
[30] A. F. Bayefski, *The Future of UN Treaty Monitoring* (Cambridge University Press 2001).

circumstances.[31] This is especially true within autocratic regimes, as Neumayer finds that strong civil society participation in a state enhances positively the effect of ratification.[32] Taking six of the major human rights conventions into focus, Hafner-Burton and Tsuitsui find that ratification is paradoxically associated with an increase in state repression.[33]

Such negative findings may also be found in more treaty-specific impact studies. As example, Keith empirically tested whether becoming a party to the International Covenant on Civil and Political Rights (ICCPR) and its optional protocol has an observable impact on a state party's actual behavior. Looking at 178 countries over an 18-year period (1976–93) across four different measures of state human rights behavior, she ultimately found no relationship between ICCPR ratification and improved human rights practices.[34] Similarly, Lupu finds no significant impact—negative or positive—of ICCPR ratification on physical integrity rights guarantees.[35] Cole's investigation led to similar findings: no significant aggregate between ICCPR ratification and physical integrity or empowerment rights was identified.[36] A negative relationship between ratification and rights performance was also found by Smith-Cannoy, whose analysis associates ratification of the ICCPR with worse human rights performance over time.[37] Similarly, Hill finds that ICCPR ratification is associated with a small but significant decrease in physical integrity protections. [38] From the above review, it is clear that TB performance evaluations have traditionally offered a rather bleak picture when using the act of formal ratification as yardstick for evaluating the effects of human rights treaties on domestic human rights implementation. What the above studies show is that ratification may not be sufficient to automatically constrain violations.

[31] Eric Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?' *Journal of Conflict Resolution* (2005).
[32] Ibid.
[33] Emilie Hafner Burton and Kiyoteru Tsuitsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises* (2005) 110 *American Journal of Sociology* 1373–1411.
[34] Linda Camp Keith, 'The United Nations International Covenant on Civil and Political Rights: Does it Make a Difference in Human Rights Behaviour?' 95 *Journal of Peace Research* (1999).
[35] Yonatan Lupu, 'Best Evidence: The Role of Information in Domestic Judicial Enforcement of International Human Rights Agreements' 67 *International Organizations* (2013).
[36] Wade Cole, 'Mind the Gap: State Capacity and the Implementation of Human Rights Treaties' 69 *International Organizations* (2015) 405–435.
[37] Heather Smith-Cannoy, *Insincere Commitments: Human Rights Treaties, Abusive States and Citizen Activism* (Georgetown University Press 2012).
[38] Daniel Hill, 'Estimating the Effects of Human Rights Treaties on State Behavior' 72 *Journal of Political Studies* (2010) 1161.

A second set of studies factors in such assumption, focusing on how treaty ratification is much more effective if assisted by downstream domestic effects. After all, human rights treaties and their dedicated monitoring mechanisms proliferate without a central system of international law-making, interpretation, and enforcement. While human rights norms are indeed directed at states in their capacity to respect, protect, and fulfill, the ultimate beneficiaries are not States themselves. To the contrary, states bind themselves to commit to the establishment of normative structures and institutions that are for the benefit of individuals within such states. In this optic, research has shown the positive effects of human rights treaties. Such effects have been qualified as diffuse, indirect, and often tied to certain underlying domestic circumstances.[39] In a notable example, Simmons finds that if human rights treaties influence governmental actions, it is because of their effect on domestic politics.[40] She contends that treaties are causally meaningful to the extent that "they *empower* individuals, groups or parts of the state with different rights preferences that were not empowered to the same extent in the absence of treaties."[41] In a similar vein, Dai reports positively on domestic effects, focusing on the informational role that independent civil society plays in the monitoring process.[42] In a specific study on the CEDAW Committee, Merry finds that civil society has successfully used recommendations to pressure governments to protect women from violence.[43] The seminal study by Heyns and Viljoen on the impact of the TB system on 20 countries lists numerous TB recommendations that have led to an effective change in government policy (although they also mention many others that have been flagrantly ignored).[44] Heyns and Viljoen conclude that "treaties need a strong domestic constituency to have local impact" and that "the absence of a domestic human rights culture is an obvious factor that limits the impact of the UN treaties in

[39] Kathryn Sikkink, *Evidence for Hope: Making Human Rights Work in the 21st Century* (Princeton University Press 2017); Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009); Christopher J. Fariss, 'The Changing Standard of Accountability and the Positive Relationship Between Human Rights Treaty Ratification and Compliance' 48 *British Journal of Political Science* (2018) 239; Kevin L. Cope and Cosette D. Creamer, 'Disaggregating the Human Rights Treaty Regime' 56 *Virginia Journal of International Law* (2016); Philip Alston, 'Beyond "Them" and "Us": Putting Treaty Body Reform into Perspective' in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000) 505–06; Andrew C. Byrnes and Marsha Freeman, 'The Impact of the CEDAW Convention: Paths to Equality' (UNSW Law Research Paper No. 2012-7, 2012) 51, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2011655##>.

[40] Simmons (n 39).

[41] Ibid 125.

[42] Xinyuan Dai, 'The Conditional Effects of International Human Rights Institutions' 36 *Human Rights Quarterly* (2014) 569.

[43] Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law Into Local Justice* (University of Chicago Press 2006) 87.

[44] Christof Heyns and Frans Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level' 23 *Human Rights Quarterly* (2001) 483.

many societies".[45] Furthermore, recent studies by Creamer and Simmons show that the more frequently states participate in the reporting process, the better they perform on relevant indicators of rights outcomes.[46] Moreover, having the institutional capacity or additional source of pressure from domestic actors such as NHRIs is associated with more consistent reporting on behalf of states.[47] Overall, these findings have shown that "treaty ratification sets in motion an institutional process that engages states constructively. None of this occurs in a political, social, or institutional vacuum."[48]

While I will delve deeper into the theoretical framework for this project in the following chapter, the intricate reasons why governments voluntarily hand over "figurative whips"[49] for such individuals to use against their own policies and practices are beyond the scope of this thesis. Instead of focusing on the crystallized point of ratification, this thesis looks at the effects that TB recommendations have on domestic human rights implementation through the vernacular value of the NHRI, a domestic actor which is part of the state administration but independent from it, "a bridge between international norms and local implementation […], designed to ensure the state's compliance with its international legal obligations."[50] In sum, the literature on TB effectiveness is contested. Evidence does indicate that under certain conditions, however, TB activity can indeed bring about positive change. This relates especially to the role of treaties as a leverage mechanism in domestic and international politics. It follows that examining the interaction between TBs and NHRIs in depth can be one means of investigating whether the ratification of UN human rights treaties produces these types of interactive effects. The underlying hope of this thesis is to contribute, albeit thematically, to these discussions.

2.2. A Multi-Dimensional Approach to the Study of NHRI Effectiveness

Turning to the second type of institution in focus here, research literature on NHRI effectiveness has also developed substantially of late. In a recent working paper titled *Lessons From Research on National Human Rights Institutions*, Jensen found that there are between 180 and 190

[45] Ibid. 518.
[46] Cosette D. Creamer and Beth A. Simmons (n 17); Cosette D. Creamer and Beth A. Simmons, 'The Dynamic Impact of Periodic Review on Women's Rights' 81 *Law and Contemporary Problems* (2018) 31.
[47] Cosette D. Creamer and Beth A. Simmons, Ratification, Reporting and Rights: Quality of Participation in the Convention against Torture, 37 Human Rights Quarterly (2015) 579 - 608
[48] Cosette D. Creamer and Beth A. Simmons (n 17).
[49] Simmons (n 39) 3–22.
[50] Goodman and Pegram (n 1) 29.

publications on NHRIs to date, with approximately six to 10 per year since 2007.[51] Effectiveness features prominently as a thematic focus of this burgeoning literature.[52]

In this overview, a somewhat less polarized opinion can be discerned than in TB literature. For the purposes of the brief review here, I identify three main points of departure. The first relies on analyses relating to internal NHRI characteristics, closely related to the structure and process specific to each institution's mandate.[53] The second, more quantitative category, approaches institutional effectiveness by capturing a long-time span of NHRI activity, in what Jensen defines as "longitudinal studies."[54] The third and last category, more qualitative and more attentive to factors external to NHRIs, evaluates performance of either specific institutions (generally[55] or thematically[56]), specific NHRI activities (such as independence, monitoring, protection, and education)[57] or specific elements of partnership between NHRIs and other national, regional, or international human rights mechanisms.[58]

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[51] L.B. Jensen, *Lessons from Research on National Human Rights Institutions* (Danish Institute for Human Rights 2018) 6.
[52] ibid 9.
[53] Katerina Linos and Tom Pegram, 'What Works in Human Rights Institutions' (2017) 112 (3) *American Journal of International Law*; International Council on Human Rights Policy and OHCHR, Assessing the Effectiveness of National Human Rights Institutions, Versoix, Switzerland (2005).
[54] Jensen (No 51) 11.
[55] Tom Pegram, 'Diffusion across Political Systems: The Global Spread of National Human Rights Institutions' (2010) 32(3) *Human Rights Quarterly* 729–760; Richard Carver, "A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law", (2010) 10(1) *Human Rights Law Review* 1–32; Goodman and Pegram (n 1) (13 articles); Julie A. Mertus, *Human Rights Matters: Local Politics and National Human Rights Institutions* (Stanford University Press 2009); Sonia Cardenas, *Chains of Justice: The Global Rise of State Institutions for Human Rights* (University of Pennsylvania Press 2014); Linos and Pegram (n 53).
[56] Tazreena Sajjad 'These Spaces in Between: The Afghanistan Independent Human Rights Commission and Its Role in Transitional Justice' 3(3) *International Journal of Transitional Justice* (2009) 424–444; Elina Steinerte and Rachel Murray, 'Same but Different. National Human Rights Commissions and Ombudsman Institutions as national preventive mechanisms under the Optional Protocol to the UN Convention Against Torture' 6 *Essex Human Rights Law Review* (2009) 54–72; Tom Pegram, 'Weak Institutions, Rights Claims and Pathways to Compliance: The Transformative Role of the Peruvian Human Rights Ombudsman' 39(2) *Oxford Development Studies* (2011) 229–250; Eva Brems, Gauthier de Beco, and Wouter Vandenhole (eds), *The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights* (Intersentia Publishing 2013) (9 articles); Andrew Byrnes, 'The Role of National Human Rights Institutions' in Maya Sabello and Marianne Schulze (eds), *Human Rights and Disability Advocacy* (University of Pennsylvania Press 2014) 222–239; Linda C. Reif, 'The Future of Thematic Children's Rights Institutions in a National Human Rights Institution World: The Paris Principles and the UN Committee on the Rights of the Child' 37(2) *Houston Journal of International Law* (2015) 433–490.
[57] 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(2) *Nordic Journal of International Law* (2011) 143–192; Meg Brodie, 'Pushing the Boundaries: The Role of National Human Rights Institutions in Operationalising the "Protect, Respect and Remedy" Framework' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff Publishers 2011) 245–272.
[58] Gauthier de Beco, 'Networks of European National Human Rights Institutions' (2008) 14(6) *European Law Journal* 860-877; Katrien Meuwissen and Jan Wouters (eds), *National Human Rights Institutions in Europe:*

Representing the first category, Linos and Pegram have recently developed a model of effectiveness analysis focused on formal design features because, as they argue, a large body of literature in administrative law points to the fact organizations with "formal safeguards are often more effective than agencies that lack them."[59] The model contains 18 "formal institutional safeguards" structured around four main categories: independence, investigatory, promotion and inclusiveness safeguards. Through extensive empirical analysis, Linos and Pegram show that formal institutional safeguards contribute greatly to NHRI efficacy. This framework of analysis is closely linked to practical experience, and indeed may be used as checklist for NHRIs to aspire to, with clear references to the Paris Principles and the GANHRI Sub-Committee on Accreditation processes. By focusing on formal design features, Linos and Pegram's model may have relevance in the broad array of contexts in which NHRIs operate. It has been defined as "the most elaborate updated attempt to conceptualize how effectiveness of NHRIs could be achieved."[60]

Studies pertaining to the longitudinal, quantitative category have analyzed NHRI effect over a 30- to 40-year timespan. Examples include Cole and Ramirez' global study *Conditional Decoupling: Assessing the Impact of National Human Rights Institutions, 1981 to 2004*,[61] Koo and Ramirez' *National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966–2004*,[62] and Moreno's *The Contributions of the Ombudsman to Human Rights in Latin America, 1982–2011*.[63] Although informative of historical developments, these studies are characterized by a high level of abstraction and lack important qualitative distinctions. As example, Cole and Ramirez conclude rather generally that "stronger human rights institutions are no more or less effective than their weaker counterparts" and that "the efficacy of NHRIs is shaped by the substance of different rights outcomes, not

Comparative, European and International Perspectives (Intersentia Publishing 2013) (15 articles); Tom Pegram, 'Global human rights governance and orchestration: National human rights institutions as intermediaries' 21(3) *European Journal of International Relations* (2015) 595–620; Katerina Linos and Tom Pegram, 'Architects of Their own Making: National Human Rights Institutions and the United Nations' 38(4) *Human Rights Quarterly* (2016) 1109–1134.

[59] Linos and Pegram (n 53).

[60] Jensen (n 51) 27.

[61] Wade Cole and Francisco O. Ramirez, 'Conditional Decoupling: Assessing the Impact of National Human Rights Institutions, 1981 to 2004' 78(4) *American Sociological Review* (2013).

[62] Jeong-Woo Koo and Francisco O. Ramirez 'National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966-2004' 87(3) *Social Forces* (2009) 1321–1353.

[63] Erika Moreno, 'The Contributions of the Ombudsman to Human Rights in Latin America, 1982–2011' 58(1) *Latin American Politics and Society* (2016).

organizational structures and powers".[64] The problem with such expansive global datasets is that they risk pushing the analysis to be so generic and abstract that it is actually disconnected from the object of study. The most relevant longitudinal study to the subject matter of the present thesis is that published in 2017 by Welch, focused on engagement between one specific UN human rights treaty—the Convention Against Torture (CAT)—and NHRIs.[65] Examining 153 countries from 1981 to 2007, Welch's data analysis concludes that "when states ratify the CAT and have an NHRI, state torture decreases" and that this relationship is causal: "NHRIs are responsible for making the CAT effective by increasing information."[66] This is a promising finding on which to build, and is evidence of the benefits longitudinal studies may bring to the discussion. As Cardenas argues, "assessing these institutions requires adopting a highly mediated and long-term view of human rights change and state compliance."[67] The lack of a more contextual, qualitative assessment of the factors that bring about change does, however, require some caution due to the particular nature of NHRIs. Cardenas provides an analytical distinction that becomes useful when assessing NHRI effectiveness:

> As "structures" they serve as spaces in which social interaction and communication occurs; as agents they "do things." The conceptual challenge is to assess an institution's influence in a way that captures its twofold nature, or its dual role as structure and agent.[68]

This brings us to what is perhaps the most developed category of NHRI effectiveness analysis, as researchers have produced "much more in-depth research with a finer granularity when it comes to understanding the work of NHRIs and the potential effectiveness of their work […] with much shorter time frames."[69] Common to most of these studies are discussions on the extent to which NHRIs are actually responsible for their own effectiveness. In the leading study pertaining to this category, Goodman and Pegram explain: "a lack of compliance with NHRI recommendations may reflect the failure of complementary actors to fulfill their democratic or accountability function rather than the failure of an NHRI".[70]After all, an NHRI is a national

[64] Cole and Ramirez (n 61) 703.
[65] Ryan M. Welch, 'National Human Rights Institutions: Domestic implementation of international human rights law' 16(1) *Journal of Human Rights* (2017).
[66] Ibid.106 and 108.
[67] Sonia Cardenas, 'National Human Rights Institutions and State Compliance' in Goodman and Pegram (n 1) 51.
[68] Ibid. 316.
[69] Jensen (n 51) 12.
[70] Ryan Goodman and Thomas Pegram, 'Introduction: National Human Rights Institutions, State Conformity, and Social Change' in Goodman and Pegram (n 1) 15.

entity "operating within a wider national human rights system that functions across a larger political set-up—a set-up that is often deeply constraining for national (and international) human rights actors."[71] Two underlying factors thus coexist when providing answers to the important question of NHRI effectiveness. First, the central role that the political context plays vis-à-vis NHRI activity in-country. As Jensen explains, "NHRIs that have been effective or have achieved important results in certain areas can sometimes easily be set back or undermined by political forces that feel challenged or threatened in the conduct of their power."[72] Second, any attempt at NHRI effectiveness research design cannot ignore the fact that the bond between internal and external factors may affect NHRI activity. Brodie has succinctly explained this:

> There is an inherent tension in the concept of an NHRI: states which establish an NHRI may not want to be held to account by an independent, powerful and well-resourced entity. […] As a result, NHRIs formal powers are often circumscribed, limited, or influenced by state actors, and this has led to criticisms that NHRIs are weak, or incapable of creating real change.[73]

I contend that each strand of NHRI effectiveness analysis research outlined above contains useful elements that cannot be discarded tout court. Accordingly, this thesis adopts elements from all three strands, as made clear in the research design sections below. The thesis will assess the extent to which TB-NHRI engagement is effective in facilitating human rights implementation by first looking at internal, formal design features and the actual extent of cooperation between a select number of TBs and NHRIs across time (Part B). To provide a full picture, it will then offer reflections on the crucial value of external, contextual factors (Part C), which I believe are necessary for an overall analysis of the mechanisms affecting TB-NHRI engagement.

3. Perennial Attempts at Treaty Body Reform and Harmonization of NHRI Engagement

One further motivating reason for this thesis lies in the repeated calls for reform that the TB system and NHRI engagement have been subjected to in the last four decades. It is 50 years

[71] Jensen (n 51) 14.
[72] Ibid. 15.
[73] Meg Brodie. 'Uncomfortable Truths: Protecting the Independence of National Human Rights Institutions to Inquire' 38(3) *University of New South Wales Law Journal* (2015) 1217–1218.

since the first UN human rights treaty entered into force.[74] The amount of TBs has now grown to a total of ten, with active discussions on expanding this number further.[75] Such growth has increased worldwide human rights monitoring capacity whilst causing the system's complexity to challenge its effectiveness. Of main concern is the *overburdening* of the system, as TBs have struggled to keep up with their workload.[76] Increasing demand has not been matched by a corresponding increase in *resources*, both in number and level of expertise of dedicated staff.[77] *Poor horizontal coordination* among TBs has increased the risk of substantive overlap and contradiction of ensuing TB recommendations.[78] The lack of *systemic coherence*, with each TB adopting their own working methods (WMs) and Rules of Procedures (RoPs), has raised unnecessary barriers for *stakeholder accessibility* to the system, which adds to the problem of *low visibility* compared to other international human rights mechanisms.[79] All these factors contribute to fueling the "ineffectiveness critique" toward the TB system,[80] as the burden of work is bound to increase as more states ratify more treaties and as the work and procedures of TBs become better known.

Since the late 1980s the former UN Human Rights Centre and the current OHCHR have launched several initiatives to address the TB system's constant expansion and ensuring challenges. TB reform initiatives have included reports on enhancing the long-term effectiveness of the UN human rights treaty system by independent expert Philip Alston (1988–

[74] The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) entered into force on 4 January 1969.

[75] For more information on the willingness to expand the TB system, see Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, *Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises* (zero draft, 16 July 2018), available at www.business-humanrights.org/sites/default/files/documents/DraftLBI.pdf; Geneva Academy of International Humanitarian Law and Human Rights, *Negotiation of a United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas Academy in-brief N.5* (January 2015) available at www.geneva-academy.ch/joomlatools-files/docman-files/InBrief5_rightsofpeasants.pdf.

[76] OHCHR, *Human Rights Appeal 2018*, available at <www.ohchr.org/Documents/AboutUs/HumanRightsAppeal2018.pdf>.

[77] "The funding and resourcing of the treaty bodies have not kept up with the fast growth in the number of ratifications, and the system now risks collapse" in Navi Pillay, 'The International Human Rights Treaty System: Impact at the Domestic and International Levels' 21(1) *Human Rights Brief* (2014) 32–34.

[78] Ibrahim Salama, *Strengthening the UN human rights Treaty Body System: Prospects of a work in progress* (2016), available at www.geneva-academy.ch/joomlatools-files/docman-files/Ibrahim%20Salama%20-%20Strenghtening%20the%20UN%20human%20rights%20TBs.pdf.

[79] Geneva Academy, Optimizing the UN Treaty Body System – the Academic Platform Report on the 2020 Review (May 2018) available at www.geneva-academy.ch/joomlatools-files/docman-files/Optimizing%20UN%20Treaty%20Bodies.pdf.

[80] James Crawford, 'The UN Human Rights Treaty System: A System in Crisis?' in Alston and Crawford (n 39) 1, 3; Moyn (n 28); Posner (n 28).

1996)[81] and a proposal by the UN secretary-general (2002–2006).[82] In 2006, then High Commissioner for Human Rights Louise Arbour proposed the creation of a unified standing TB.[83] This ambitious idea did not receive much political support and has not been revived.

The most recent initiative, the Treaty Body Strengthening Process (2009–2014) ('Strengthening Process'),[84] created a momentum that led to the adoption of GA Res 68/268 on *Strengthening and enhancing the effective functioning of the treaty body system*.[85] The ultimate objective of the process was "to improve the impact of treaty bodies on rights-holders and duty-bearers at the national level by strengthening the functioning of treaty bodies while fully respecting the independence of the latter."[86] Learning from past attempts at reform, the process rested on two tenets: "a bottom-up approach to ensure the buy-in *of all stakeholders*" and "incremental progress to achieve sustainable change through a transparent process that genuinely involves *all relevant stakeholders.*"[87] The growing relevance of domestic actors to TB reform initiatives was often reiterated in official statements and the Strengthening Process was embedded in the understanding that the TB system is inherently multi-stakeholder.[88] Thus, over 20 consultations on how to further strengthen the TB system allowed for the active participation of diverse categories of stakeholders, including NHRIs.[89] In 2014, former High Commissioner for Human Rights Navy Pillay further underlined the importance of connecting the international human rights monitoring system to its domestic counterparts: "even with a strengthened treaty body

[81] "Final report on enhancing the long-term effectiveness of the UN human rights treaty system" by Mr. Philip Alston (E/CN.4/1997/74); "Interim report on enhancing the long-term effectiveness of the UN human rights treaty system" by Mr. Philip Alston (A/CONF.157/pc/62/Add.1/Rev.1); and "Initial report on enhancing the long-term effectiveness of the UN human rights treaty system" by Mr. Philip Alston (A/44/668), for more information see reports by Independent Expert Philip Alston (1988–1996).

[82] "Strengthening the UN: an agenda for further change," UN Doc A/57/387/2002 (2002). For more information see The UN Secretary-General's proposal of a single report (2002 – 2006).

[83] UN Concept paper on the High Commissioner's Proposal for a Unified Standing Treaty Body, Report by the Secretariat, UN Doc HRI/MC/2006/2 (2006), for more information see the UN High Commissioner for Human Rights Arbour's proposal of a unified standing treaty body (2006).

[84] The Treaty Body Strengthening Process, initiated by the Report of the High Commissioner "Strengthening the UN Human Rights Treaty Body System, UN Doc A/66/860 (June, 2012), resulted in GA resolution 68/268 (2009–2014).

[85] GA Resolution 68/268, 'Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System', 9 April 2014, available at <www.ohchr.org/Documents/HRBodies/TB/HRTD/A-_RES-68-268_E.pdf>.

[86] UN High Commissioner for Human Rights Navenathem Pillay, in her statement to the Human Rights Council on 14 September 2009.

[87] Salama (n 78) 5.

[88] For a list of statements on TB strengthening, see <www.un.org/en/ga/president/66/statements/humanrights020412.shtml>.

[89] All documents related to the treaty body strengthening consultations are available at <www.ohchr.org/EN/HRBodies/HRTD/Pages/TBStrengthening.aspx>.

system, treaty implementation will only be as effective as the network of actors prepared to work together for the improvement human rights performance on the ground."[90]

Such an understanding has acted as incentive to focus my research efforts on how the interaction between TBs and NHRIs facilitates the implementation of human rights treaties. In much more direct terms than during past reform processes, the Strengthening Process spelt out that in order to increase its effectiveness and impact, the TB system needed to bolster its cooperation with key national actors. Due to this stronger focus on domestic implementation, GA Res. 68/268 encouraged the TBs to harmonize their working methods as a step toward a more consistent and predictable relationship with domestic counterparts.[91] However, due to the ad hoc and independent nature of the system, each committee enjoys exclusive competence to determine their working methods and rules of procedure. These are not only privileges but also requirements to ensure the objectivity and impartiality of TB members in fulfilling their quasi-judicial functions. Given that the TB system is currently composed of ten committees which collectively have 172 members, it is unsurprising that harmonization throughout the system remains a challenge.

Notwithstanding these difficulties, GA Res. 68/268 (and the Strengthening Process leading to it) constitutes the most recent unanimous political recognition by the community of states of the essential role that domestic actors have toward a stronger, more effective TB system. The 2014 Resolution established a six-year implementation process, the Treaty Body Review Process 2020, or so-called 2020 Review, mentioned above.[92] Notably, two aspects of GA Res. 68/268 ensure accountability in its implementation: two biennial reports of the secretary-general on the state of the TB system and the commitment expressed by states in the resolution to review the TB system in 2020 and consider further action in the 2020 Review.[93] In the final 2020 Report on the process of the consideration of the state of the UN human rights treaty body

[90] Report of the High Commissioner "Strengthening the UN Human Rights Treaty Body System (n 84) 32–34.
[91] "[T]o strengthen and enhance the effective functioning of the treaty body system, particularly in the area of the simplified reporting procedure, constructive dialogue, concluding observations, and the consultation process in the elaboration of general comments" in GA Resolution 68/268, "Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System."
[92] The UNGA resolution concludes, "Decides to consider the state of the human rights treaty body system no later than six years from the date of adoption of the present resolution, to review the effectiveness of the measures taken in order to ensure their sustainability, and, if appropriate, to decide on further action to strengthen and enhance the effective functioning of the human rights treaty body system," UN GA, Resolution 68/268, para. 41.
[93] UN General Assembly resolution A/RES/68/268, para. 41.

system, the co-facilitators have renewed the call for "an aligned model of interaction between treaty bodies […] and NHRIs" as a reform that would be "beneficial for all stakeholders".[94]

The process leading up to the 2020 Review has thus represented a historic opportunity to further reflect on engagement practices between TBs and NHRIs in order to inform innovative reform proposals for international human rights protection. Numerous moves have been taken to foster reflections on how to best seize the opportunity for more effective and systematized engagement between TBs and NHRIs. The following provides some key examples of the repeated efforts of the international community in this regard.

In 2006, a *Draft Harmonized Approach to National Human Rights Institutions Engagement with Treaty Body Processes* was adopted in Berlin, as annex to the conclusions of the International Roundtable on the Role of National Human Rights Institutions and Treaty Bodies.[95] Representing the position taken by the selected participants to the roundtable,[96] this initiative encouraged the TBs "to adopt a harmonised procedure ensuring formal interaction with NHRIs during the examination of the State party report"[97] as well as strengthen NHRI participation in the follow-up to TB recommendations. In 2010, the NHRI community endorsed the *Draft Harmonized Approach* adopted in Berlin: the *Marrakech Statement on Strengthening the Relationship between NHRIs and the Human Rights Treaty Bodies System*[98] specifically called for the reporting process "to be as much as possible aligned, through common rules of procedure and working methods, among treaty bodies in order to establish similar procedures for cooperation with NHRIs and other key national actors."[99]

In December 2015, the Third Committee of the UN General Assembly (UNGA), in the groundbreaking GA Res. 70/163,[100] called on all relevant UN processes and mechanisms to enhance the participation and contributions of Paris Principles-compliant NHRIs to their work.

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[94] UN General Assembly, Report of the co-facilitators on the process of the consideration of the state of the UN human rights treaty body system (14 September 2020), 14.
[95] German Institute for Human Rights, Conclusions of the International Roundtable on the Role of National Human Rights Institutions and Treaty Bodies (HRI/MC/2007/3), Annex I.
[96] More than 60 representatives from NHRIs, TBs, civil society, and the OHCHR. For more information see Amrei Müller and Frauke Seidensticker, *Handbook on The Role of National Human Rights Institutions in the United Nations Treaty Body Process* (German Institute for Human Rights 2007).
[97] Ibid.
[98] Marrakech Statement on Strengthening the Relationship between NHRIs and the Human Rights Treaty Bodies System (9–10 June 2010), available at <www2.ohchr.org/english/bodies/HRTD/docs/MarrakeshStatement_en.pdf>.
[99] Ibid., para. 23
[100] GA Res. 70/163 (Third Committee), National Institutions for the Promotion and Protection of Human Rights, A/RES/70/163 (17 December 2015).

Despite specific reference to increasing TB-NHRI interaction, the actual extent of NHRI influence and dynamics of such cooperation were not outlined.[101] The following year the Human Rights Council adopted Res. 33/15, which encouraged the human rights treaty bodies "to continue to consider a common treaty body approach to engaging national human rights institutions and to ensure the effective and enhanced participation by national human rights institutions compliant with the Paris Principles at all relevant stages of their work".[102]

In December 2017, the Third Committee adopted GA Resolution 72/181 on National Institutions for the Promotion and Protection of Human Rights[103] by consensus, without a vote, and 90 states from across all regions co-sponsored the resolution, thereby demonstrating their support of, and the value that they attach to, the work of NHRIs at national, regional, and global levels. In this instance, the UNGA welcomed "the continued contribution" of NHRIs to the work of the TBs, inviting the various Committees "to ensure the effective and enhanced participation" by NHRIs at all stages of TB work. In this instance, the UNGA also spurred the TB system to continue considering a common approach to NHRI engagement.[104] In its latest biannual resolution on NHRIs, in November 2019, the UNGA's Third Committee reiterated verbatim this evidence of support.[105]

The 2020 Review process has also benefited from sustained academic contributions. One major drive for the development of this PhD project has been my involvement with the Academic Platform on Treaty Body Review 2020.[106] In January 2015, Norway and Switzerland convened a meeting of states and independent experts, including TB members, to discuss the next steps in strengthening the UN human rights treaty monitoring system.[107] A major point that emerged was that, while Res. 68/268 was a significant achievement in addressing immediate challenges confronting the TB system, more ambitious and longer-term plans should be pursued for the

[101] Ibid., para 17.
[102] HRC Res. 33/15, Resolution on National Human Rights Institutions, A/HRC/RES/33/15 (7 October 2016), para.s 21-22.
[103] GA Res. 74/156, (Third Committee) National Institutions for the Promotion and Protection of Human Rights, A/RES/74/156 (23 January 2020).
[104] Ibid., Preamble.
[105] GA 74th session (Third Committee), National Institutions for the Promotion and Protection of Human Rights, A/C.3/74/L.44/Rev.1 (12 November 2019). For more information, see <https://undocs.org/A/C.3/74/L.44/Rev.1>.
[106] For more information on the Academic Platform on Treaty Body Review 2020, see <www.geneva-academy.ch/tb-review-2020>.
[107] Wilton Park, *Report, Strengthening the UN human rights treaty monitoring system: what are the next steps?*, Jan 2015, accessible at www.wiltonpark.org.uk/wp-content/uploads/WP1375-Report.

system's effective functioning.[108] One of the main recommendations the meeting put forward was to undertake an independent study, "using applied research and academic rigour" and looking at future options for the long-term sustainability of the TB system as stipulated in Res. 68/268.[109] The Geneva Academy of International Humanitarian Law and Human Rights has coordinated the academic input to the 2020 Review via the creation of an academic network of independent researchers, a call for papers, a series of regional consultations, annual conferences in Geneva, and ongoing interactions with key stakeholders.[110] In the words of former High Commissioner for Human Rights Zeid Ra'ad Al Hussein:

> In 2020, the General Assembly will review its 2014 resolution on strengthening the treaty body system. To prepare for that review, the Geneva Academy of International Humanitarian Law and Human Rights has launched an academic research project to look at options for reform and long-term sustainability of the treaty body system. The academic process is open to all relevant stakeholders, and I encourage all the academics to become involved. This is a key opportunity to help define the future of the Covenants and the treaty body system.[111]

Having personally spent more than one year as part of the team responsible for coordinating the Academic Platform and drafting the final report of the consultative process, this PhD project should be considered as a contribution to this explicit request for input.

4. Research Design and Structure of the Thesis

These introductory sections have outlined the main driving points behind the present study. This last section wishes to spell out how the study addresses TB-NHRI engagement. Overall, the main research question that this project wishes to address is the following:

> *To what extent is the engagement between TBs and NHRIs effective in facilitating human rights implementation?*

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[108] Ibid 3.
[109] Ibid.
[110] Geneva Academy, Optimizing the UN Treaty Body System, Academic Platform Report on the 2020 Review, May 2018 available at <www.geneva-academy.ch/joomlatools-files/docman-files/Optimizing%20UN%20Treaty%20Bodies.pdf>.
[111] Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights at the Future of the Human Rights Covenants, Berlin (6 October 2016), available at <www.ohchr.org/EN/newsEvents/Pages/DisplayNews.aspx?NewsID=20647&LangID=E>.

In doing so, **Part A** introduces the topic of research. As part of this introductory section, **Chapter 2** and **Chapter 3** outline the theoretical and methodological choices underpinning the study, an approach that fits within a growing trend of interdisciplinary and mixed-method scholarship.[112] As Langford argues, "human rights constitutes a natural field for interdisciplinary endeavor and methodological heterogeneity"[113] in that "many burning questions in human rights cannot be answered within the confines of a single tradition or method."[114] The benefits of a "mixed-method" research design are clear. TB-NHRI engagement is a complex interaction between two different sets of institutions that act within the "transmission belt" between the international and domestic levels of human rights protection. As such it requires an evaluative approach from both levels' perspectives, through "a combination of the normative and empirical" and "implicitly interdisciplinary since it involves methods to establish a norm, identify facts, and assess those facts against the norms."[115]

Having set the scene from a theoretical and methodological perspective, **Part B** unpacks the institutional framework available for TB-NHRI engagement at the international level and assesses its effectiveness. The sub-question that Part B tackles is:

> *(I) To what extent is the institutional framework for TB-NHRI engagement effective in facilitating domestic human rights implementation?*

For the purposes of this analysis, "institutional framework" is understood as the system of formal rules specific to NHRI engagement with the State Reporting procedure. Although an exploration of the effectiveness of public organizations generating hard-to-quantify public goods might encounter difficulties, Part B proposes this evaluation against the backdrop of an adaptation of a goal-based approach (GBA) to organizational effectiveness.[116] As the name suggests, a GBA model adopts a definition originating from the rational-system school: "an organisation is effective if it accomplishes its specific objective aims."[117] Accordingly, **Chapter 4** provides an outline of the goal-setters and the ultimate goals that TB-NHRI

[112] Malcolm Langford, 'Interdisciplinarity and Multimethod Research' in Bård A. Andreassen, Hans-Otto Sano, and Siobhán McInerney-Lankford, *Research Methods in Human Rights: A Handbook* (Edward Elgar Publishing 2017) 161.
[113] ibid 190.
[114] ibid 164.
[115] ibid 173.
[116] Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-based Approach' 106 *American Journal of International Law* (2012) 225; Shany (n 6).
[117] Chester I. Barnard, *The Function of the Executive* (Harvard University Press 1968) 20.

engagement entails. Focusing on organizational goals requires the application of an institution-by-institution analysis of effectiveness, thus helping to identify the roles each institution could and should play within their respective fields of competence. This exercise is important not only because of its practical implications, typical of the rational school of thought, of outlining those goals against which an evaluation of effectiveness develops. In and of itself, goal identification also clarifies the roles NHRIs could and should play when acting under TB procedures. However, identifying the goals of the institutional framework for TB-NHRI engagement is only one step in evaluating its effectiveness.

The challenge for the current project is to test the framework of the GBA in light of the specific dynamics of engagement between two different sets of institutions. The systematic approach through which TB-NHRI effectiveness is evaluated applies the concept of "reverse engineering": assessing the likelihood that outcomes be generated as a result of the process employed by TB-NHRI engagement utilizing its available structural assets.[118] In other words, a GBA allows an investigation of whether the *structure*[119] of the institutional framework for TB-NHRI engagement and the *process* this framework entails can realistically lead to goal attainment. As such, **Chapter 5** seeks to identify and analyze structural and procedural indicators in order to evaluate whether the institutional framework can realistically attain the goals set for it. In focusing on the State Reporting procedure only, it is important to identify and analyze the distinct modalities through which NHRIs are able to interact with the different TBs' cycles of reviews. Each committee has in fact developed its own institutional framework for NHRI engagement during various stages of the State Reporting procedure, leading to a somewhat confused panoply of engagement practices. Such an overview of specific structural and procedural indicators of TB - NHRI engagement is an important toolkit for this study. It defines and explores the subject of the investigation and, at the same time, feeds detail to the effectiveness analysis that follows.

To complement the analysis of both structural and procedural indicators, **Chapter 6** offers quantitative data on the actual engagement of a select number of NHRIs within the latest reporting cycle of a select number of TBs. As part of the wider question of effectiveness, it is

[118] Shany (n 6) 62.
[119] *Structure* is understood as the material and non-material resources employed toward the operations of the framework. *Process* is understood as the different stages of the TB State Reporting Procedure in which NHRIs may participate.

in fact useful to undertake a document content analysis of NHRI parallel reports and ensuing TB recommendations.[120] In such way, it will be possible to add a more precise indication of the extent to which TBs take into consideration what is submitted to them by different NHRIs. More specifically, this chapter estimates:

- the amount of TB outputs, both as List of Issues (LOIs) and Concluding Observations (COBs), that contain issues highlighted in NHRI submissions (also known as "parallel reports"); and
- the extent of NHRI recommendations, out of the total amount contained in NHRI submissions, integrated by the TBs in ensuing LOIs and COBs.

With all these elements in place, **Chapter 7** concludes Part B, assessing whether the *structure* and the *process* of the institutional framework for TB - NHRI engagement, taken together with the quantitative document content analysis, is likely to lead to the attainment of the previously identified goals. In sum, the adapted GBA may facilitate the development of an analytical tool for understanding and systematizing the interaction between TBs and NHRIs. This is especially valuable in view of a possible harmonization of procedures following the 2020 Treaty Body Review process.

However, the varying degrees of effectiveness found through an analysis of the formal institutional framework constitutes only one, albeit crucial, dimension of TB-NHRI engagement processes. International efforts aimed at increasing the effectiveness of such inter-institutional engagement require adequate institutional frameworks at the *domestic* level, a definitional corollary and integral part of the TLO structure described above. The underlying assumption of this domestic perspective is that without an adequate and receptive domestic human rights dimension, UN-level initiatives may face structural and procedural complications that might undermine efforts toward a more inter-connected and effective system of human rights monitoring. In other words, proposals for increased connectivity among UN human rights mechanisms cannot be assessed in a vacuum. As such, Part B is followed by a more context-specific analysis of TB-NHRI engagement. In this way, I contest the value of strict textualism and steer toward a consideration of particular factual, social, and historical contexts as catalysts for different legal outcomes.

[120] NHRIs produce reports (also known as "parallel reports" or simply "submissions") to inform the various TBs of human rights developments in the states-parties under consideration.

Part C therefore aims to contribute to those investigative efforts to assess TB recommendations' domestic impact, narrowing down our approach to only those changes brought about through the intermediary role of NHRIs. In a predominantly qualitative study such as this, a direct causal link between the UN human rights treaty system and legislative, legal, and policy reforms at the domestic level might be difficult to establish conclusively. As such, **Chapter 8** places TB-NHRI engagement within a novel analytical framework to explain domestic human rights dynamics: the national human rights system (NHRS) framework.[121] The main hypothesis behind the conceptualization of a NHRS is that "when all actors, frameworks and procedures are in place at domestic level, the state will be in a better position to comply with all its human rights obligations."[122] This approach falls well within the realm of New Legal Realism scholarship, which looks into how law works in practice and through the institutions and processes it puts in place.[123]

Chapter 9 applies this more context-driven approach by focusing on the Australian NHRS as a "most likely case" of TB-NHRI impact, where theory and previous empirical studies suggest that outcome is more likely to occur. This methodological choice is important, in that a finding of ineffectiveness would, for example, raise more serious concerns on the work of both institutions rather than on the contextual factors potentially hampering their work. The case study analysis focuses on the impact of TB-NHRI engagement in Australia, by dissecting the role that engagement between the Australian Human Rights Commission (AHRC) and the TB system plays in facilitating human rights implementation.[124] I divide the case study along three investigative lines, namely *preconditions for impact*, *intermediate impact* and *policy impact.* The sub-questions that this chapter tackles are thus threefold:

(I) *Are legal and policy frameworks in place domestically and do they allow for establishing and supporting effective engagement between the AHRC and the TB system?*

[121] Stéphanie Lagoutte, 'The Role of State Actors Within the National Human Rights System' 37 *Nordic Journal of Human Rights* (2019) 177–194.
[122] Ibid.
[123] Nourse and Shaffer (n 19) 62; Thomas J. Miles and Cass R. Sunstein, 'The New Legal Realism' 75 *University of Chicago Law Review* (2008) 831; Howard Erlanger et al, 'Is It Time for a New Legal Realism?' *Wisconsin Law Review* (2005) 335–363. And more recently: Elizabeth Mertz, Stewart Macaulay, and Thomas W Mitchell, *The New Legal Realism: Translating Law-and-Society for Today's Legal Practice,* Volume 1 (American Bar Foundation Research Paper No. 5–17 206) and Heinz Klug and Sally Engle Merry, *The New Legal Realism: Studying Law Globally, Volume 2* (Cambridge University Press 2016).
[124] My case study selection and methodological design will be developed in detail in Chapter 3.

(II) *In what way have complementary AHRC and TB recommendations been referred to, used, and discussed at the domestic level?*

(III) *To what extent have complementary AHRC and TB recommendations had 'effects and influence' or 'repercussions' on domestic policy?*

Finally, in **Chapter 10**, the thesis draws overall conclusions based on analyses of both substantive Parts. In sum, I argue that the formalist approach typical of the GBA model may be strengthened by a more contextualized understanding of the intricate dynamics of TB-NHRI engagement within the NHRS under analysis. The thesis contends that TB-NHRI cooperation is an essential element of a functioning NHRS. There is a clear link between the level of use and awareness of complementary TB-NHRI recommendations and their impact in contextualizing TB recommendations in-country. This is not enough, however, as formal interactions between the various domestic actors and the frameworks that link these to the international monitoring system require concerted efforts by multiple stakeholders. The NHRS framework may help in identifying further details about the process of implementation and compliance by the state, which can in turn assist in determining the effectiveness of any follow-up and monitoring mechanism employed by both TBs and NHRIs.

With all the above in mind, this thesis aims to assess the available means of TB-NHRI cooperation and pose fundamental questions about the unity and utility of such cooperation: Is the current framework effective in facilitating human rights implementation? Does it fulfill the expectations that have led to its creation and empowerment? What changes would be conducive to a more effective institutional framework for TB-NHRI engagement? And, finally, what are the domestic factors that may impede or facilitate human rights implementation through the combined efforts of these two institutions.

Chapter 2. Theoretical Framework

The engagement between TBs and NHRIs is a complex interaction between two different sets of institutions that act within the "transmission belt" between the international and domestic levels of human rights protection. We have defined this space as an integrating dialectic of the wider Human Rights TLO, jointly forming a dynamic system of iterative legal interaction. This process is by definition both top-down and bottom-up, as the formation, conveyance and implementation of human rights recommendations engage different institutions between the international and domestic levels. This understanding requires a reflection on the theoretical approaches chosen to tackle TB-NHRI engagement and its effectiveness in facilitating human rights implementation.

Two underlying questions set the scene for the theoretical underpinnings of this project. First of all, why would we expect TB – NHRI engagement to have positive effects towards the implementation of human rights treaties? This represents the potential underlying causality that both motivates the thesis and that will be the subject of analysis. Directly linked to this first conjecture, it is also important to ask ourselves a second question, namely what is "effectiveness" in this specific context and how do we measure it?

These questions are all the more important due to the growing complexity of the institutional framework for TB-NHRI engagement and the inherent difficulty of identifying causality between such engagement and effective human rights implementation. They are tackled through two main segments that make up this chapter. The first segment offers a *general theoretical framework* that aims at situating TB-NHRI engagement within human rights-relevant compliance theories. The second segment sets out the *operative theoretical framework* that will be deployed to examine specifically the effectiveness and impact of TB-NHRI engagement, thus informing the methodology of this thesis.

By locating the cooperation between TBs and NHRIs within established human rights compliance theories, the *general theoretical framework* is designed to generate a list of factors that may contribute to the effectiveness of TB-NHRI engagement in facilitating implementation measures. As will be discussed, one specific strand of human rights compliance theory considers domestic mobilization as central for enabling human rights treaties to affect domestic

law and policy.[1] Another strand links compliance to the persuasive effect of norms, as institutions with high levels of authority and legitimacy can help persuade state parties to comply with non-binding human rights monitoring processes.[2] Linked to this, a managerial approach to compliance values the concept of "capacity" as the key driver behind compliance efforts, connecting ambiguous and indeterminate treaty provisions,[3] limited capacity for dedicated bureaucratic expertise and resources,[4] and complicated processes of legal and policy reform at the domestic level[5] to instances of noncompliance. By embedding the project in a broader discourse about the mechanisms through which international institutions affect states' behavior, the general theoretical framework provides insights into the contribution that cooperation between TBs and NHRIs may make to human rights implementation.

The second segment sets out the *operative theoretical framework* that will be deployed to examine specifically the effectiveness and impact of TB-NHRI engagement. Three main factors have helped shape the structure of this project's operative theoretical framework: the prevailing unclear understanding of what is considered "effective" cooperation between TBs and NHRIs, the practical difficulties in measuring such criteria, and a constantly developing institutional framework for TB-NHRI engagement.

Firstly, the effectiveness of the TB system and of NHRIs has been discussed in recent literature, but seldom jointly.[6] It is often the case that engagement with domestic institutions is just one element used to assess the effectiveness of the TB system[7]; similarly, cooperation with the international human rights system is often used as one among many indicators of NHRI effectiveness.[8] This project takes a departure point in inter-institutional engagement as a single

[1] Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009); Xinyuan Dai, *International Institutions and National Policies* (Cambridge University Press 2007); Peggy Levitt and Sally E. Merry, 'Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States' 9 *Global Networks* (2009) 441–461.
[2] Jose Alvarez, 'Book Review Essay: The Quest for Legitimacy: An Examination of the Power of Legitimacy among Nations by Thomas M. Franck' 24 *International Law and Politics* (1991) 206.
[3] Gerda Falkner et al, *Complying with Europe: EU Harmonisation and Soft Law in the Member States, Themes in European Governance* (Cambridge University Press 2005) 286.
[4] ibid. and Tanja A. Börzel and Thomas Risse, 'From Europeanisation to Diffusion: Introduction' 35(1) *West European Politics* (2012) 11.
[5] Abram Chayes and Antonia Handler Chayes, 'On Compliance' 47 *International Organization* (1993) 188, 204.
[6] On the specific effects of TB-NHRI engagement, see also Ryan M. Welch, 'National Human Rights Institutions: Domestic implementation of international human rights law' 16 *Journal of Human Rights* (2017) 96–116.
[7] E.g. Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009) 3–22.
[8] E.g. Ryan Goodman and Thomas Pegram, *Human Rights, State Compliance and Social Change: Assessing National Human Rights Institutions* (Cambridge University Press 2012); Richard Carver, *Measuring the impact*

phenomenon, a stand-alone subject of analysis.[9] Secondly, one salient problem in the existing literature assessing the effectiveness of both TBs and NHRIs is that it does not provide clear measurement parameters. For instance, a number of studies on the effectiveness of human rights treaties rely on the effects of ratification as sole benchmark, adopting a before-and-after model of measurement.[10] Yet, other studies focus on domestic institutions and their mobilization as key factor for human rights treaty effectiveness.[11] Within NHRI effectiveness studies, measurement parameters also vary, reflecting either "external" or "internal" elements of the institution in focus. On the one hand, "there is a solid awareness among scholars that NHRIs operate within a larger political context—often a very complicated one—and these external factors must be considered when trying to analyze and understand the success or failures by NHRIs in becoming effective institutions."[12] On the other hand, recent efforts to develop a theoretical model on NHRI effectiveness focus on formal design features because, as they argue, a large body of literature in administrative law points to the fact that organizations with "formal safeguards are often more effective than agencies that lack them."[13] Thirdly, assumptions about the role of TB-NHRI engagement have shifted in the last decade.[14] Some TBs now seem better equipped at managing their cooperation with domestic stakeholders, while the importance of these domestic institutions has gradually increased within state parties' reporting cycles.

and development effectiveness of national human rights institutions: a proposed framework for evaluation (United Nations Development Programme 2014).

[9] See Welch (n 6).

[10] Emilie M. Hafner-Burton and Kiyoteru Tsuitsui, Human Rights in a Globalizing World: The Paradox of Empty Promises 110 'American Journal of Sociology' (2005) 1373–1411; Oona A. Hathaway, 'Do Human Rights Treaties Make a Difference?' 111 *Yale Law Journal* (2002) 1935; Eric Neumayer, Do International Human Rights Treaties Improve Respect for Human Rights' *Journal of Conflict Resolution* (2005); Linda Camp Keith, 'The United Nations International Covenant on Civil and Political Rights: Does it Make a Difference in Human Rights Behaviour?' 95 *Journal of Peace Research* (1999); Wade M. Cole, 'Mind the Gap: State Capacity and the Implementation of Human Rights Treaties' 69 *International Organizations* (2015) 405–435; Daniel W. Hill Jr., 'Estimating the Effects of Human Rights Treaties on State Behavior' 72 *Journal of Political Studies* (2010) 1161.

[11] Simmons (n 1); Hathaway (n 10); Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (Oxford University Press 2013); Xinyuan Dai (n 1); Xinyuan Dai, 'The Compliance Gap and the Efficacy of International Human Rights Institutions' in Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance;* C.H. Heyns and Frans Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level' 23 *Human Rights Quarterly* (2001) 483.

[12] Steven L. B. Jensen, *Lessons from Research on National Human Rights Institutions* (Danish Institute for Human Rights 2018).

[13] Katerina Linos and Tom Pegram, 'What Works in Human Rights Institutions?' 112(3) *American Journal of International Law* (2017) 3.

[14] See Chapter 4.

The operative theoretical framework proposed for this thesis adopts a multidisciplinary approach precisely as a response to this combination of factors.

1. Treaty Body - NHRI Engagement in Human Rights Compliance Theory

> *[C]ompliance is one of the most central questions in international law. Without a theory of compliance, we cannot examine the role of treaties, customary international law, or other agreements. Nor can we consider how to improve the functioning of the international legal system, or develop a workable theory of international legal and regulatory cooperation.*
>
> —A. Guzman[15]

1.1. The Importance of Domestic Institutions and their Mobilization

According to a domestic-centric thread of compliance theory, international norms are complied with as the result of domestic politics and institutions.[16] At its simplest, this means international institutions are able to change the behavior of a state through its domestic institutions, such as NHRIs, as well as by mobilizing domestic advocacy and political groups. While international pressure is indeed necessary, it is with domestic support that legal and policy change may actually come about. Helfer and Slaughter concur on the essential role of coopted domestic actors in pressurizing governments to comply with international human rights norms.[17] By taking up such perspective, this thesis abandons the realist concept of states as unitary actors, arguing instead that states are made up of a large number of actors with diverse interests, which is why domestic politics matter. International human rights regimes can be effective if domestic groups—NHRIs but also nongovernmental organizations, protest movements, political parties, or any other group—can use them to pressure their domestic government into increased respect for human rights.

Three leading and somewhat overlapping theories on domestic mobilization are particularly relevant for this study: Xinyuan Dai's *theory on domestic constituencies*, Beth Simmons's

[15] Andrew T. Guzman, 'A Compliance-Based Theory of International Law' 90(6) *California Law Review* (2002) 2.
[16] Simmons (n 1); Hathaway (n 10); Goodman and Jinks (n 10).
[17] Laurence Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' 107 *Yale Law Journal* (1997) 278.

domestic politics theory on compliance with human rights treaties and Sally Engle Merry's *vernacularization theory*.

Dai's *theory on domestic constituencies* relates to the power of weak international institutions to indirectly influence a government's compliance decisions through empowering domestic non-state actors.[18] With a focus on the local, this theory represents a useful frame for a study on TB – NHRI engagement, by locating the analysis within the sub-national dimension. In Dai's own words, "if international institutions can work effectively through domestic compliance mechanisms, even weak international institutions may have powerful effects on states' behavior."[19] An institution's weakness is typically evinced by limits in both monitoring and enforcement capacities, and the UN human rights treaty mechanism has famously been branded as an evident example of weak institutional capacity.[20] According to Dai, the best way for such institutions to rein in governments' self-interests is by altering the strategic environment at home. It is possible to do this in two ways. International institutions can increase the political leverage of domestic actors and improve their informational status.[21]

The combination of both elements may help empower domestic actors and raise the salience of the issue at hand. This is particularly relevant for international human rights treaties, as domestic non-state interests and efforts towards compliance appear stronger when domestic stakeholders are the primary beneficiaries of international norms. Ratifying states may not have any intrinsic interest in complying and thus only provide lip service or window dressing, or lack the overall capacity to comply. If so, "whether or not monitoring materializes will depend on whether non-state interests can fill the vacuum".[22] Independent NHRIs can, in this perspective, play a fundamental role in monitoring, detecting, and bringing to light instances of non-compliance, whether due to a state's lack of interest or its lack of capacity. By empowering NHRIs, international institutions are thus able to boost independent expertise as a check on governments' efforts to comply with international human rights norms.

[18] Dai (n 1); Xinyuan Dai, 'The Compliance Gap and the Efficacy of International Human Rights Institutions' in Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press 2013).
[19] Dai (n 1).
[20] Ibid.
[21] Ibid.
[22] Ibid 46.

Simmons' *domestic politics theory on compliance with human rights treaties* also puts emphasis on the local.[23] Starting from the premise that international human rights agreements are essentially not self-enforcing, together with the fact that full compliance is hardly an achievable aim, the attention should thus be directed towards the *influence* that treaties have *within* states. Human rights treaties are part of an inherently peculiar treaty system: negotiated internationally, they create stakeholders almost exclusively at the domestic level. The rights enshrined in human rights treaties are largely to be guaranteed and respected by governments, so their impact must be analyzed in the conceptual space between citizens and their government. The correct dialogue resulting from this logic is one between the state and society, not one exclusively between states. Accordingly, if such treaties influence governmental actions, it is because of their effect on domestic politics. It follows that treaties are causally meaningful to the extent that "they *empower* individuals, groups or parts of the state with different rights preferences that were not empowered to the same extent in the absence of treaties."[24] Three domestic processes are highlighted in this regard:

1) Treaties have *influence on domestic agenda-setting*, both at executive and legislative level. It is in fact through internationally negotiated agreements that certain policies may legitimately be placed higher both on a government's agenda and in the legislative discourse. Once a particular right has been made salient by an international agreement, a government's silence in that regard can easily be interpreted as opposition to that right. NHRIs, in their function as bridge between the national and international, can thus play an important advisory and monitoring role within this first domestic process.

2) Treaties can *create possibilities for litigation*, as they give rise to domestically enforceable legal obligations. Within this second domestic process of influence, a government's calculation with respect to compliance is influenced by the possibility of litigation: "interfering with or ignoring a ruling of a duly constituted national tribunal greatly raises political costs of non-compliance."[25] This is of course dependent on two major factors: the judiciary's independence and its interpretative capacity; and the citizenry's legal literacy. NHRIs may play a role in both counts. They may challenge potential judicial biases through amicus curiae submissions and aid the judiciary's

[23] Simmons (n 1)
[24] Simmons (n 13) 125.
[25] Ibid 130.

interpretative capacity, by making the TB system and its recommendations known and available in the local language and within domestic human rights legal discourse. NHRIs may also foster the local population's legal literacy, by promoting international human rights recommendations and domestic human rights procedures among them. Most importantly, however, NHRIs may themselves provide quasi-judicial mechanisms to act upon conventional obligations, depending on the powers conferred to them in their respective mandates.

3) Lastly, treaties offer "*a strategic tool to support political mobilization.*" Like Dai's argument, this third mechanism for domestic influence relies on two basic assessments for successful mobilization: the value that domestic constituencies place on the rights in question and the probability that mobilized domestic constituencies can succeed in getting their demands met. Human rights treaties are useful in both aspects of the success of mobilization: they introduce rights claims to potential victims and increase the likelihood of a movement's eventual success in realizing those claims. Once the act of invoking a new right has been facilitated by the ratified treaty instrument, the "transformative potential of externally negotiated law depends on the success of translating external norms for local audiences."[26] NHRIs may play an important role in this "translation."

The final domestic mobilization theory that is relevant for a study on TB-NHRI engagement is Merry's *vernacularization theory.* In a nutshell, Merry underlines the critical role of "local individuals deeply rooted in a particular local social and political context but with extensive connections to international and transnational communities in translating rights from the universal to the local vernacular […] bringing transnational cultural understanding to local settings."[27] Envisioning NHRI representatives within such a definition is not difficult. Unlike Simmons, Dai, and Merry, who rest the onus of analysis solely on civil society actors, this thesis highlights the vernacular value of NHRIs, applying the focus which Merry directs at individuals to a specific institutional actor which is part of state administration yet independent of it. NHRIs have been defined as "a bridge between international norms and local implementation […] designed to ensure the state's compliance with its international legal obligations."[28] While the

[26] Ibid 140.
[27] Levitt and Merry (n 1) 441–461.
[28] Goodman and Pegram (n 8) 29.

specificities of NHRIs' roles in human rights treaty compliance will be dealt with in later chapters, here I will briefly highlight the importance of these institutions in favoring a similar mobilization to the "social" kind enunciated by Merry.

Through their classic functions, such as inquiring about human rights abuses, monitoring a state's compliance with its international obligations, training civil servants, and raising human rights awareness in civil society, NHRIs facilitate a more "formal" kind of mobilization. As governments claim their legitimacy as being grounded in law, local constituencies can also expect their human rights to be upheld by basing their own claims on legal rights. NHRIs, situated both locally and internationally, may translate external norms for local audiences, acting as auxiliaries to human rights treaties and empowering civil society by both introducing human rights to potential claimants and increasing their prospects of success in claiming them. At the same time, by empowering and legitimizing NHRIs, human rights treaties increase the size of the coalition and the range of strategies employable to realize its demands. Treaties can thus also provide an additional focal point for domestic constituencies of right-holders, as NHRIs find themselves in an optimal institutional space for policy examination, between civil society demands and government actions.

From a more practical perspective, the success of such mobilization depends on both tangible resources, such as money, facilities, and means of communication, and intangible resources, ranging from legitimizing factors to experience and human capital. NHRIs can have an impact on the availability of both levels of resources. By adding a layer to the national infrastructure of human rights promotion and protection, they broaden the list of domestic actors involved, act as catalyst for their claims, and alleviate their tangible resource needs. Depending on the independence and capacity of an NHRI, it can also add a legitimating layer to a national constituency's claims. The relation between NHRIs and their state's government/legislature may have a resonating effect on policy-making which would not otherwise happen, given the often antagonistic relationship between civil society and the state.

The above theoretical overview is relevant for the purposes of this thesis due to its strong focus on domestic stakeholder engagement as key element towards implementation of international human rights norms. By unpacking the state and dissecting its relevant components, liberal democratic theories are suitable for a study on TB - NHRI engagement, its effectiveness and the role of domestic stakeholder mobilization towards human rights implementation. The importance of domestic mobilization theory is especially relevant to the question of impact, as

I define it in relation to TB-NHRI engagement as the extent to which domestic actors have used complementary TB and NHRI outputs toward human rights implementation as well as what effects such use has had on domestic human rights policy.[29] This understanding has also influenced the selection of Australia as case study, as most liberal theorists consider established democracies as more likely to comply precisely because of a framework of robust and independent domestic actors.[30]

1.2. The Importance of Norms: Persuasion and Legitimacy

Beyond the perspective of domestic actor mobilization, another relevant thread of compliance theories focuses on the persuasive and transformative power and appeal of international norms themselves. Persuasion and legitimacy play a crucial role in the causal mechanisms concerning TB effectiveness. Accordingly, compliance takes place from a normative belief that a norm ought to be obeyed, with socialization as a leading phenomenon which leads states into following norms as a sense of obligation and responsibility to meet social expectations.

One useful theoretical framework for a study of TB-NHRI engagement is Chayes and Chayes' *managerial model of compliance theory*. According to this model, dealing with factors behind noncompliance requires a shift away from formal enforcement and coercive sanctions toward non-coercive tools such as reporting, verification, monitoring, technical-financial assistance, and capacity building. This depends on cooperative, interactive, and iterative processes of persuasive discourse among the state parties and the treaty organization. Persuasion is understood as "an activity or process in which a communicator attempts to induce change in the belief, attitude, or behavior of another person […] through the transmission of a message in a context in which the persuadee has some degree of free choice."[31] Without coercive measures ensuring human rights treaty compliance or clear benefits resulting from it, states' decisions are linked to mechanisms based on the persuasive and transformative power and appeal of international norms.

Within this logic, the role of domestic actors is once again of fundamental importance. As they were writing in 1995, it was probably too early for Chayes and Chayes to consider NHRIs as

[29] This definition of impact is expanded in Chapter 3, in which the methodological framework for this thesis is outlined.
[30] Kal Raustiala, 'Compliance & Effectiveness in International Regulatory Cooperation' 32 *Case Western Reserve Journal of International Law* (2000) 387, 388, 391–392; Hathaway (n 10); Neumayer (n 10).
[31] Richard M. Perloff, *The Dynamics of Persuasion: Communication and Attitudes in the 21st Century* (2nd ed., Lawrence Erlbaum Associates 2003).

part of their list of domestic actors. Their general analysis, however, indicates that NHRIs now fit within the managerial model of compliance theory. Managerialism suggests that global problems can be solved by experts resorting to the specific knowledge and instruments within their sphere of expertise: "When a legal problem arises, an expert—a lawyer—is called to fix it as a plumber would be to fix a leaking tap."[32] NHRIs may aid TBs in "persuading" a government into compliant behavior by molding domestic decision makers' perception that certain human rights norms are appropriate. Through NHRIs' annual reports to national parliaments, their human rights training capacity, and domestic human rights monitoring, they can provide assistance and capacity building to states which, in turn, help the TBs, through their monitoring capacities, push for the highest level of compliance possible. NHRIs can thus facilitate a state's normative belief that human rights treaty norms ought to be obeyed.

Moreover, elevating the role of norms and consequently of norm-creating institutions, a second set of theoretical approaches focuses on the extent of these institutions' legitimacy to explain various degrees of compliance. Legitimacy based-explanations are consistent with a constructivist approach to the value of persuasion,[33] which focus on the subjective perceptions of domestic decision makers. One such approach useful for a study on the transmission belt between the international and domestic levels of human rights protection can be found in recent literature on "socialization" as a logic of compliance. According to Checkel, persuasion is "an activity or process in which a communicator attempts to induce a change in the belief, attitude or behavior of another person […] through the transmission of a message in a context in which the persuadee has some degree of free choice."[34] A number of Checkel's scope conditions on when persuasion is more likely to influence compliance can be applied to TB-NHRI engagement. Persuasion is more likely to occur when the persuader is seen as authoritative (the *legitimacy-persuasiveness* link), when it does not "lecture or demand" but relies on deliberative argumentation (in this case constructive dialogue with an NHRI advisory role), when the interaction occurs in a less politicized environment (meaning here TB and NHRI independence), and finally when there is a high degree of interaction between persuader and

[32] Martti Koskenniemi and Palvi Leino, 'Fragmentation of International Law? Postmodern Anxieties' 15 *Leiden Journal of International Law* (2002) 578.
[33] Kal Raustiala and Anne-Marie Slaughter, 'International Law, International Relations and Compliance' in Walter Carlsnaes, Thomas Risse and Beth Simmons (eds), *The Handbook of International Relations* (Sage Publications 2002) 541; Jutta Brunnée and Stephen Toope, 'Constructivism and international law' in J. L. Dunoff and M. A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2013) 131.
[34] Jeffrey T Checkel, '"Going Native" In Europe? Theorizing Social Interaction in European Institutions,' 36(1-2) *Comparative Political Studies* (2003) 212

persuadee.[35] Because we are dealing with institutions that lack coercive force when tackling TB-NHRI engagement, legitimacy can be considered "the missing link in solving the mystery of how the international system obliges without a coercive means."[36] Compliance with judgements has been seen as resulting from the attitudes and perceptions of domestic decision makers and stakeholders in various judicial contexts,[37] and a similar logic can be folded into the contours of the present study.

To conclude this section, I argue that both domestic mobilization and socialization theories provide useful interpretations of the underlying causality that both motivates the thesis and that will be subject to analysis. According to this understanding, the expectation that TB – NHRI engagement may facilitate the implementation of human rights treaties rests on whether NHRIs are adequately mobilized to "persuade" their governments into increased respect for human rights. Compliance, which refers to "a state of conformity or identity between an actor's behavior and a specified rule,"[38] is however not a concept that can fully account for the specific role and relative weight of TB-NHRI engagement in facilitating human rights implementation. Firstly, full compliance is very difficult to achieve, even when dedicated state actors do take steps to address any given TB recommendation. As Langford et al explain in the context of social and economic rights adjudication, "The meaning of a judicial remedy may be highly contested, the order may be complex or multi- level, or intervening events may confound the scope or sequencing of compliance steps."[39] Secondly, there are inherent difficulties in both quantifying public goods that result from TB-NHRI engagement, and isolating the effects that external factors might have in the process. Adding to the above complexity is, in fact, the multiple nature of possible "compliance partners" or government responses to recommended action. The role that a country's NHRI may have in facilitating implementation of TB recommendations rests on such variety of intervening factors. As Hillebrecht laments, "The domestic politics of compliance can be murky and difficult to navigate, and almost always contentious."[40] It follows that "measuring compliance is as much an exercise in interpretation

[35] Jeffrey T Checkel, 'International Institutions and Socialization in Europe: Introduction and Framework' 59(4) *International Organization* (2005) 818.
[36] Jose Alvarez, 'Book Review Essay: The Quest for Legitimacy: An Examination of the Power of Legitimacy among Nations by Thomas M. Franck' 24 *International Law and Politics* (1991) 206.
[37] Başak Çalı, Anne Koch, and Nicola Bruch, *Report, "The Legitimacy of the European Court of Human Rights: The View from the Ground"* (Department of Political Science, University College London (2011).
[38] Kal Raustiala, (n 30) 391–392
[39] Malcolm Langford, Cesar A. Rodriguez Garavito, and Julieta Rossi (eds), *Social Rights Judgements and the Politics of Compliance: Making It Stick* (Cambridge University Press 2017) 7.
[40] Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge University Press 2014) 11.

as one in data gathering."[41] Thirdly, institutional practices vary greatly, both among the various TBs and among the over 100 NHRIs that exist. TB recommendations may relate to actions that require concerted efforts by multiple actors within a state, such as devising national human rights action plans, or more focused activities, implementable by individual ministries, such as providing specific sets of data. The nature of NHRI activity is just as varied, ranging from targeted promotional activities to full-fledged, multi-stakeholder national inquiries. An analysis focused solely on logics of compliance (the "compliance pull") is thus not sufficient when examining the extent to which TB-NHRI engagement facilitates human rights implementation. This focused approach would

> ignore the role of law in managing the relations "between diverse norms and regimes," setting "benchmarks" for decision making, bargaining and institutional access for actors, transforming perceptions of political conflicts and problems and catalysing ultra-compliance by producing "normative effects that are greater or more powerful or different" than intended or envisaged.[42]

In response to this combination of factors, the operative theoretical framework adopts a two-step approach, as outlined in the following section.

2. The Effectiveness of Treaty Body - NHRI Engagement: An Operative Theoretical Framework

> *Treaties, like all regulatory institutions, are purposive. Their primary aim is to produce effects on behavior that would not otherwise have occurred. What causes some treaties to achieve their purposes while others do not is a central question—perhaps the central question—in international cooperation today, for without an understanding of effectiveness we cannot design useful, productive institutions.*
>
> K. Raustiala[43]

[41] Langford et al (n 39) 7.
[42] Ibid.
[43] Raustiala (n 30) 387.

2.1. A Goal-Based Approach to Organizational Effectiveness

Without a solid understanding of the formal design of institutions, there cannot be any informed analysis of what works and what requires adjustment. A large literature in administrative law underlines the importance of formal institutional features, suggesting that agencies with formal safeguards are often more effective than agencies that lack them.[44] Administrative law scholarship suggests that politically independent bodies can potentially facilitate expert and nonpartisan decision-making, stabilize policymaking against electoral cycle volatility, and protect politically disadvantaged minorities.[45] An examination of the formal infrastructure regulating NHRI engagement with the TB system should thus be the starting point for any effectiveness-related analysis in this field. In order to do this, the project uses a conceptual framework originally introduced in social science literature dedicated to assessing the effectiveness of public or governmental organizations. "Intellectually borrowing" from organizational and public administration studies provides frames of reference and indicators that can be usefully applied to more "normative" fields of research. Organizational effectiveness theory provides a wider set of tools than that found in existing international law/international relations literature, and at the same time enables a systematic unpacking and analysis of the institutional frameworks that regulate the activity of public organizations such as TBs and NHRIs.

Organizational effectiveness is one of the basic tenets in management and organizational theory.[46] Identifying what features are determinative for an effective and ineffective organization is the major challenge for organizational evaluation and the issue is as old as organizational research itself.[47] In fact, there is no universally acceptable definition of organizational effectiveness. The concept of organizational effectiveness is most often expressed in terms of the criteria that are believed to be most related to an effective institution.

[44] For a thorough analysis of such body of literature, see Katerina Linos and Thomas Pegram, 'What Works in Human Rights Institutions' 111 *American Journal of International Law* (2017) 628.
[45] Ibid.
[46] Yehuda Baruh and Nelson Ramalho, 'Communalities and Distinctions in the Measurement of Organizational Performance and Effectiveness Across For-Profit and Nonprofit Sectors' 35 Nonprofit and Voluntary Sector Quarterly (2006), 39-65; Peter Goodmann and Helena Pennings, Critical issues in assessing organizational effectiveness, in E. E. Lawler III, D. A. Nadler & C. Camman (Eds.), Organizational Assessment (Wiley, 1980).
[47] Kim Cameron, 'Critical questions in assessing organizational effectiveness' , 4(2) *Organizational dynamics*, (1980), 66-80; David Shilbury and Kenneth Moore, 'A study of organizational effectiveness for National Olympic Sporting Organizations', 35(1) *Nonprofit and Voluntary Sector Quarterly* (2006), 5- 38.

One oft-cited quote explains this subjectivity rather well: "Organizational effectiveness depends upon whom we ask to define the concept. This is equivalent perhaps to arguing that the state of an organization's 'effectiveness' is largely dependent upon individual perceptions and judgements".[48] This difficulty in finding a consensual definition of the concept of organizational effectiveness manifests itself in the different models and theoretical approaches that have been developed to assess it. Herman and Renz stated that there are as many effectiveness models as there are models of organizations.[49] Different models with their relating criteria reflect different values and preferences of schools of thought concerning effectiveness.[50] The best known models are the goal model[51], the system resource model[52], the internal process approach[53] and the multiple constituency model.[54]

The oldest and most applied approach to the study of organizational effectiveness is the goal model. There are several variations of the goal model but most researchers accept Etzioni's definition of effectiveness as the degree to which an organization realizes its goals.[55] This "rational model" approach places great attention on the planned, rational and mechanical aspects of organization functioning, with one basic tenet: the closer the outputs are to meeting the goals of the organization, the more effective the organisation is.[56] This understanding of effectiveness is based on the somewhat problematic assumptions that organizations have clear, identifiable goals and that goals are stable over time and measurable.[57] For example, the yardstick for measuring an organization's effectiveness may be according to the goals an

[48] Paul Leitch, 'A Study of Judgments of Organizational Effectiveness' in Proceedings of the Executive Study Conferences (Princeton, N.J.: Educational Testing Service, 1968).
[49] Robert D.Herman, and David O. Renz, 'Multiple Constituencies and the Social Construction of Nonprofit Organization Effectiveness', 26 Nonprofit and Voluntary Sector Quarterly (1997), 185-206; Robert D.Herman, and David O. Renz, 'Theses on nonprofit organizational effectiveness', 28(2) Nonprofit and Voluntary Sector Quarterly (1999), 107-126
[50] Eric J. Walton and Simon Dawson, 'Managers' perceptions of criteria of organizational effectiveness', 38(2) Journal of Management Studies (2001), 173-199.
[51] Amitai Etzioni, 'Two approaches to organizational analysis: A critique and a suggestion' 5(2) Administrative Science Quarterl (1960), 257-278; W.R. Scott, W. R. Effectiveness of organizational effectiveness studies in P.S. Goodmann, J.M. Pennings & Associates, New perspectives on organizational effectiveness (Francisco: Jossey-Bass, 1990).
[52] Ephraim Yuchtman and Stanley Seashore, A system resource approach to organizational effectiveness, 32 *American Sociological Review* (1967), 891-903
[53] Jefrrey Pfeffer, Usefulness of the concept in P. S. Goodmann & J. M. Pennings (Eds.), New perspectives on organizational effectiveness (1977), 132-143.
[54] Anne Tsui, A multiple constituency model of effectiveness: An empirical examination at the Human Resource subunit level, 35 Administrative Science Quarterly (1990), 458-483; T. Connolly, E.J., Conlon and S. J. Deutsch, Organizational effectiveness: a multipleconstituency approach, 5 Academy of Management Review (1980), 211-217.
[55] Etzioni (n 51).
[56] Cameron (n 47).
[57] Ibid. and Herman and Renz, 1997 (n 49)

organization claims to be following (public or official goals) or according to the goals the organization is actually following (private or operative goals). The public or official goals may fail to be realized, not because of poor planning or any of the other relevant factor, but because they are not meant to be fully realized. Also, a strict interpretation of the goal model seems inattentive to both external and internal characteristics of the organization of which it purports to assess the effectiveness.

In order to overcome these limitations, organizational effectiveness scholars introduced other models. The *(open) system resource approach* views the organization as a functionally differentiated sub-system of a larger social system and defines effectiveness as the organization's ability to exploit its environment in the acquisition of scarce and valued resources to sustain its functioning. [58] In other words, according to a system resource approach, organizations are effective when they succeed in acquiring the needed resources from their external environment. This approach is much more concerned with the external environment in which the organization operates, and may be useful when there is a clear connection between the resources and the outputs of the organization.[59] Another alternative effectiveness approach is the *internal organizational processes model*. Advocates of this model argue that it is essential for organizational effectiveness to look within the organization's structure and process, thus highlighting the determinants of organizational health and success.[60] The processes by which organizations articulate preferences, perceive demands and make decisions are seen as the criteria of effectiveness.[61] Organizational effectiveness is thus associated with the internal characteristics of the organization such as internal functioning, information flow, trust, integrated systems and smooth functioning.[62] Yet another model is the *(strategic) multiple constituencies approach*, introduced as response to the use of a single set of evaluative criteria and the insufficient attention given by previous models to stakeholders that are not part of the organization under analysis.[63] The multiple constituency model conceives effectiveness not as a single statement but it recognizes that organizations have multiple constituents or stakeholders

[58] Yuchtman and Seashore (n 52),
[59] Cameron (no 47)
[60] Pfeiffer (no 53).
[61] Ibid.
[62] Cameron (no 47); Shilbury and Moore (no 47).
[63] Connelly et al (n 54)

who evaluate effectiveness in different ways. The various constituents define the criteria to evaluate effectiveness.

Each model outlined contains a specific focus and theoretical advantages over the others. However, it is widely agreed today that any such unilateral view ignores the complexity of organizational effectiveness and that effectiveness models should capture multiple dimensions.[64] Each model identifies a particular set of characteristics as main indicators for organizational effectiveness analysis. In acknowledging the relevance of each specific model, I propose, as first step for assessing the effectiveness of the institutional framework that regulates TB-NHRI, to adopt a goal-based approach (GBA) to organizational effectiveness. Whilst being primarily based on the goals model, this choice permits to integrate the broader array of dimensions typical of both the internal organizational processes and multiple constituencies models outlined above.

A GBA to institutional effectiveness has first been conceived by Yuval Shany in relation to international courts,[65] as part of a growing range of legal literature around judicial effectiveness.[66] In his words, the GBA model "compares actual impacts with desired outcomes, or performance with expectations, and provides us with a multidimensional framework for assessing the effectiveness of international courts in the eyes of multiple constituencies. At the heart of the goal-based approach is the proposition that effective international courts are courts that attain […] the goals set for them by their relevant constituencies."[67]

With a more comprehensive and policy-driven focus than other available theories on organizational effectiveness,[68] a GBA simultaneously proposes a rational system understanding and the use of operational categories as proxies for organizational effectiveness: structure,

[64] Shilbury and Morre (no 47) and J. E. Sowa, S. C Selden, & J.R. Sandfort, No Longer Unmeasurable? A Multidimensional Integrated Model of Nonprofit Organizational Effectiveness, 33(4) Nonprofit and Voluntary Sector Quarterly (2004), 711-728.

[65] Yuval Shany, "Assessing the Effectiveness of International Courts: A Goal-based Approach" 106 *American Journal of International Law* (2012) 225; Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press, 2014).

[66] E.g. Helfer and Slaughter (n 31) 273; Eric A. Posner and John C. Yoo, 'Judicial Independence in International Tribunals' 93 *California Law Review* (2005) 1, 7; Laurence R, Helfer and Anne Marie Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' 93 *California Law Review* (2005) 899, 906; Oran Young, 'The Effectiveness of International Institutions: Hard Cases and Critical Variables' in Czempiel et al (eds), *Governance without Government: Order and Change in World Politics* (Cambridge University Press 1992); Robert D. Herman and David O. Renz, 'Advancing nonprofit organizational effectiveness research and theory: Nine theses' 18 *Nonprofit Management and Leadership* (2008) 399.

[67] Y. Shany, 2014 (n 65) 6.

[68] The rational goal perspective, the natural systems perspective, and the open systems perspective are just three of the most representative organizational theories.

process, and outcomes.[69] Key to a GBA is the definition of what an *effective* organization is, which, as said, presents several variants.[70] Borrowing from the rational system approach, it offers a convenient and straightforward definition: "an organization is effective if it accomplishes its specific objective aims."[71] In doing so, it also sets up a clear and systematic methodology to assess the constitutive, operational, and procedural configuration specific to the organization(s) in question, which is crucial for any legal/policy reform initiative. Furthermore, the complexity inherent in identifying exact chains of causation and measuring actual outcomes generated by public organizations may be offset by increasing the importance of *structural* and *process indicators*—what analysts refer to as "relative rather than absolute performance standards."[72] As Shany explains,

> a better understanding of [organizational] structure and process can help us, by way of *reverse engineering*, to assess the feasibility of some effective outcomes. Where past experience or simple common sense suggests that certain structures and procedures are unlikely to generate certain outcomes, we may substitute outcome assessment with evaluation of structural and procedural adequacy (as proxies for outcome).[73]

"Reverse engineering" is crucial to any GBA to effectiveness analysis, and in the present case it entails *assessing the likelihood that outcomes be generated as a result of the process employed by the institutional framework for TB-NHRI engagement utilizing its available structural assets.* In essence, a GBA clarifies whether the current institutional framework available for NHRIs to engage with the TB system is effectively designed to facilitate domestic implementation efforts.

Applying Shany's logic to the current project, the point of departure must be that the institutional framework for TB-NHRI engagement is effective only if that framework's goals are met. Identifying these *goals* is only the first, albeit fundamental, task of a GBA to

[69] See P. S. Tolbert and R. H. Hall, *Organizations: Structures, Processes and Outcomes* (10th edn, Pearson Prentice Hall 2009) 17.
[70] Herman and Renz, 1999 (n 49), 109.
[71] Chester I. Barnard, *The Function of the Executive* (Harvard University Press 1968) 20; see also Amitai Etzioni, *Modern Organizations* (Prentice Hall 1964) 8; Jeffrey Pfeffer, *Organizations and Organization Theory* (Pitman 1982) 41; J. L. Price, 'The Study of Organizational Effectiveness' 13(3) *The Sociological Quarterly* (1972) 3–7.
[72] See R. W. Scott, *Organizations: Rational, Natural and Open Systems* (5th edn, Pearson Prentice Hall 2002) 364.
[73] Yuval Shany, 2014 (no 65), 50.

effectiveness analysis. The next step is to assess whether the *outcomes* of the institutional framework for TB-NHRI engagement—that is, changes in the state of the world caused by the outputs generated by the engagement[74]—meet the goals set for both TBs and NHRIs when acting jointly. As with any other public organization, measuring outcomes can be an extremely difficult task, especially considering the broadness of the goals implied, the challenge of quantifying public goods resulting from their activity, and the dependence of their performance on the external environment. *Outcomes* generated by TB-NHRI engagement may generally be understood as intangible public goods, such as the normative impact on state parties' internal laws and policies or actual impact on increasing compliance with international human rights law standards. For this reason, measurement of efficiency and causality is particularly problematic, and in such cases public administration scholars attempt to unravel satisfactory cause-and-effect analyses through empirical studies based on process tracing.[75] I propose that organizational effectiveness theory can be a first, useful point of departure for any such studies. By adopting a GBA to organizational effectiveness, it is in fact possible to identify whether the *structure* of the institutional framework for TB-NHRI engagement—the material and non-material resources employed towards its operations—and the *process* this engagement entails can realistically lead to goal attainment. If the analysis shows that such improvement cannot be clearly foreseen, it follows that both structural and procedural reforms should be considered.

However, reliance on such a top-down, formalistic approach is easily subject to criticism. A GBA does not take into account the context in which law is made, operates, and inflects, disregarding the philosophically pragmatist insight that one cannot posit the "ends" of law without understanding fully its "means."[76] Thus, the second plank in this project both tests and complements the more formalistic GBA to effectiveness analysis with a more contextual, bottom-up, and participatory form of empiricism that is typical of the new legal realist tradition. New legal realists argue that scholarship "must avoid temptations of top-down prescription without grounding in the bottom-up appreciation of individuals, social contexts and the dynamics of institutional processes."[77] In other words, "a bottom-up approach requires that assertions about the impact of law be supported by research at the 'ground' level. This in turn

[74] Ibid.
[75] For a discussion of process tracing, see Alexander L. George and Andrew Bennet, *Case Studies and Theory Development in the Social Sciences* (MIT Press 2005), 205.
[76] Victoria Nourse and Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory* 95 *Cornell Law Review* (2010) 61.
[77] Ibid, 114.

requires that we rely on (or actually undertake ourselves) empirical research rather than using projections based simply on our theories or individual experiences."[78]

2.2. New Legal Realism

Crucial for new legal realists is the study of the context in which law is made, operates, and has effects. The second part of the thesis acknowledges the importance of such understanding towards a more complete assessment of the effects that TB – NHRI engagement has domestically. This is achieved by placing emphasis on the importance of empirical analysis in seeking to understand of the environment in which law operates, distinguishing "paper rules" from "real rules," and focusing attention on the behavioral aspects of law on human actors and social consequences.

A scholarly reaction to classic, formalist, and positivist legal theory and practice, New Legal Realism (NLR) studies, evaluates, and theorizes how law works over time—dynamically. Whereas the original legal realists of the 1920s generally sought to explain legal outcomes in terms of political, economic, and personal factors as opposed to formal doctrinal constraints,[79] new legal realists tend to explore the *interconnection* of formality and doctrine with other factors as different aspects of legal decision making.[80] The original articulation of legal realism blossomed in the 1960s as industrialization, labor violence, human suffering on a grand scale, and government repression indicted a legal doctrine that put contracts and property over human rights and welfare.[81] In similar fashion, NLR is also a reaction to real-life phenomena that characterized the turn of the century. The new challenges thrown up by the bureaucratization of the state and its transnational milieu prompt us to confront "whether the theoretical categories that have dominated law, of markets and efficiency, of rights and texts and procedures, are capable of addressing the experience confronting us on the front pages of our newspapers."[82] New legal realists find such experience increasingly impossible to define through watertight discipline-specific clusters.

[78] Howard Erlanger et al, 'Foreword: Is It Time for a New Legal Realism?' *Wisconsin Law Review* (2005) 339.
[79] E.g. Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921) 128; Max Radin, 'Legal Realism' *Columbia Law Review* (1931) 824.
[80] Victoria Nourse and Gregory Shaffer, 'Empiricism, Experimentalism and Conditional Theory' 67 *SMU L. Rev.* (2014) 141.
[81] Nourse and Shaffer (n 76) 61.
[82] Ibid.

An essential feature of NLR is the theorization of how law's formal aspects interact with diverse political, economic, social, and psychological contexts. The "growing disjunction between social sciences and law, to the detriment of scholarly and practical understanding between law and social change"[83] is a serious concern for new legal realists, so much so that the challenge of bridging the chasm has been pinpointed as a "core task of new legal realist translations."[84]

A useful contribution to understanding the context in which NLR is framed comes from Allen:

> new realists do not, or anyway should not, "simply reject law's formal qualities as meaningless." […] Methodologically, an emphasis on law's social context, the use of empirical information about "ground level" legal administration, and the attempt to explore "the often-messy reality of law as it actually works" are all common features of the new legal realist project.[85]

Like classic legal realism, NLR "rejects formalism and finds that rationalism is not enough; theories are necessary, but insufficient, to explain law's reach and aspirations."[86] In this context, both formalist and positivist tenets are subject to criticism, namely:

- a descriptive, and prescriptive theory of law based on a complex of rationally organized principles that can and should be deductively applied to any set of facts; and
- a view of law as rule-bound, under which judges apply rules to facts as part of a rule-of-law system regardless of consequences in particular cases.[87]

What the "new" in NLR signifies in comparison to classic legal realism is also twofold. Firstly, NLR escapes the reductivist trends which lead to an outright skepticism about law. In this sense, it is significant that one of the great classic realists, Max Radin, has turned into a champion of contemporary formalists.[88] Secondly, NLR holds against the dominance of other academic disciplines over law, a scholarly practice defined as "subsumption," which can be summed up

[83] Mitu Gulati and Laura B. Nielsen, 'Introduction: A New Legal Realist Perspective on Employment Discrimination' 31 *Law and Social Inquiry* (2006) 797.
[84] Joel Handler et al, 'A Roundtable on New Legal Realism, Microanalysis of Institutions and the New Governance: Exploring Convergences and Differences'*Wisconsin Law Review* (2005) 479.
[85] Jessie Allen, 'Documentary Disenfranchisement' 86 *Tulane Law Rev*iew (2011) 389, 398 as quoted in Nourse and Shaffer (n 76).
[86] Stewart Macaulay, 'The New Versus the Old Realism: "Things Ain't What They Used to Be"' *Wisconsin Law Review* (2005) 392.
[87] Brian Z. Tamanaha, *Balanced Realism on Judging: Beyond the Formalist-Realist Divide* (Princeton University Press 2009) quoted in Nourse and Shaffer (n 76).
[88] Max Radin, 'Legal Realism' *Columbia Law Review* (1931) 824.

as "the law and" movement. This antagonism implies that law may not be explained simply by law, as scholars pertaining to other fields are bound to use disciplinary tropes which are substantially different from legal ones. The law-social sciences chasm, which still must be bridged, is dealt with by NLR through a "sophisticated conversation about the process of translation itself."[89]

NLR can be divided into three main strands, each positing a different "external" factor as a driving force behind legal discourse and decision-making.

a) *Behavioralism*, which borrows from disciplines such as behavioral economics and political science, contends that legal reasoning is always molded by ideological variables and political affiliations.[90] For example, in the international law context, the so-called attitudinal model, through which biases play a central role in judicial decisions, has been used to empirically assess the voting patterns of judges at the International Court of Justice, calling into question its legitimacy.[91]

b) *Contextualism* within NLR lends itself rather well to accounts of international standards compliance within domestic systems. This strand consists of empirical work, often involving bottom-up and participatory forms of empiricism, also referred to as "law-in-action" studies.[92] This approach utilizes anthropological and sociological methods, applying them to legal analysis to uncover how law works in practice. Institutions play a key role in the contextualist strand of NLR: scholars "enter the institutions of the world and observe, systematically interview and survey individuals within them."[93] The theoretical grounding of contextualism derives from the Deweyan pragmatist insights that theory must come from the world, that only theory that works has established its truth and that it is impossible to divorce theory from fact. [94] Also topical among adherents to this variety of NLR is the combination of empirical engagement with *recursivity*: "Scholars study a real problem in the world (they do not start with a theory or a normative agenda), and as they encounter the problem, scholars emerge with different ideas and new strategies, learning from those who must deal with the problem

[89] Elizabeth Mertz, 'Translating Science into Family Law: An Overview' 56 *Depaul Law Review* (2007) 799, 801.
[90] Frank B. Cross, 'Political Science and New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance' 92 *Northwestern University Law Review* (1997); Thomas Miles and Cass R. Sunstein, 'The New Legal Realism' 75 *University of Chicago Law Review* (2008)831.
[91] Eric C. Posner and Miguel de Figuereido, 'Is the ICJ Biased?' 34 *Journal of Legal Studies* (2005) 599.
[92] Macaulay (n 86).
[93] Nourse and Shaffer (n 76).
[94] The concept of "end-in-view."

(the legal subjects)."[95] It is thus not prediction and verification which contextualists regard as the measure of their success, but rather that of discovery: "leaving one's office and venturing into the field transforms one's core assumptions regarding one's subject of study."[96] This methodology has been defined as "emergent analytics"[97] and has been key to the idealization and operationalization of the case study analysis that complements the GBA analysis in this thesis.

c) *Institutionalism,* as the name suggests, claims that NLR should focus on how institutions constrain, shape, and determine individual behavior. Leading institutionalist Komesar shows that the "choice of social goals or values is insufficient to tell us anything about law and public policy"[98] because the pursuit of all goals will be shaped and determined by institutional processes. In a similar vein, Rubin has theorized in favor of a microanalysis of institutions, recognizing that a solution for a unified methodology of legal scholarship based on institutional analysis would deal with "how politics interacts with law at both the descriptive and normative levels."[99] Linked to this institutionalist variety, "new governance" theory focuses on efforts to move beyond a court-centric and rights-focused basis of law and toward a new form of problem solving, involving institutional experimentation in a pragmatist sense.[100] These new forms involve "collaborative, multiparty, multilevel, adaptive, problem-solving methods" for law creation and implementation "that to varying extents supplements or supplant traditional regulation."[101] New governance theory does not limit its focus to particular disciplines, or discipline-specific institutions and methods, but refers "to a wide range of processes and practices that have a norm-setting or regulatory dimension but do not operate primarily or at all through the conventional mechanisms of command-and-control-type legal institutions."[102] This is relevant here, of course, because of the soft-law nature of decisions taken by both TBs and NHRIs. Instead of emphasizing "top-down, fixed-rule

[95] Nourse and Shaffer (n 80) 85.
[96] Gregory Shaffer, *A Call for a New Legal Realism in International Law: The Need for Method* (2009) Melvin C. Steen Appointment Lecture, Forthcoming; Minnesota Legal Studies Research Paper No. 09-02.
[97] Nourse and Shaffer (n 80) 101–142.
[98] Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press 1996).
[99] Edward L. Rubin, 'The New Legal process, the Synthesis of Discourse and the Microanalysis of Institutions' 109 *Harvard Law Review* (1996) 1393.
[100] Grainne de Burca, Robert O. Keohane, and Charles F. Sabel, 'Global Experimentalist Governance' *British Journal of Political Science* (2014).
[101] Michael Waterstone, 'A New Vision of Public Enforcement' 92 *Minnesota Law Review* (2007) 434 at 480.
[102] William H. Simon, 'Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes' in Grainne de Burca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006) 37.

> regimes [new governance theory] favours ongoing stakeholder negotiation, continuously revised performance measures, and transparency."[103]

All three varieties of NLR have common points which have shaped the second part of this research project. First of all, behaviorists, institutionalists, and contextualists all move beyond the courts, studying the reciprocal interaction between law and society. This means they look at how organizations and institutions receive law and go about affecting its meaning through practice, and recognize that public law dynamically interacts with a wide range of national actors. New legal realists also commonly contest the value of strict textualism as being a challenge to law's effectiveness, due to both the expanding involvement of non-legal actors/practices in legal disputes and the situated nature of decision makers within said disputes: particular factual, social, and historical contexts are always to be considered as catalysts for different legal outcomes. These two points lead to a general NLR opposition to a formalist conception of law and judging that is blind to real-life behavior and the institutional implications of judicial decision-making.

A second common trait of NLR is how the individual is understood. Unlike formalist notions of individual autonomy, individuals are viewed as adaptive to surrounding social, political, and cultural environments. Both contextualists and institutionalists "urge that it is essential to investigate particular situations and institutional processes to explain variation."[104] In this vein, "the state" is regarded as contextually skewed, especially by comparative institutionalists. The choice to include as part of this project one specific case study derives from the new legal realist understanding that it is crucial to focus on the relative advantages of different forms of state in different contexts. As Nourse and Shaffer explain

> The "state," in this sense, is emergent; it emerges from the interaction of legal subjects and of different institutions. In a world of globalization, the state is constantly reshaped by its need to respond to global processes and new publicly and privately made transnational legal orders. The "state" is not imposed from on high, either by governors or by legal theories. It emerges from real-world interaction.[105]

[103] Charles F. Sabel and William H. Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' 117 *Harvard Law Review* (2004) 1094.
[104] Nourse and Shaffer (n 76), 110.
[105] Ibid.

Thirdly, another generally accepted new legal realist characteristic which has shaped the second part of this thesis is the importance given to empirical engagement. This will be made clear in chapter 3, where I discuss the adopted methodological approach for the case study analysis. New legal realists argue that scholarship "must avoid temptations of top-down prescription without grounding in the bottom-up appreciation of individuals, social contexts and the dynamics of institutional processes."[106] In other words "a bottom-up approach requires that assertions about the impact of law be supported by research at the 'ground' level. This in turn requires that we rely on (or actually undertake ourselves) empirical research rather than using projections based simply on our theories or individual experiences."[107] Likewise, new legal realists hold the view that institutions and institutional analysis are central in skewing results. Because all institutions are imperfect and all policy choices comparative, it is a necessity to engage these imperfections, suggesting comparative and/or empirical analysis with a view to the introduction of new institutional "architectures."

Finally, NLR assumes that law and politics are inextricably linked and the case study analysis in this thesis will highlight numerous examples that confirm such assumption. NLR believes that a truly positive analytic approach can explain variation, which is in turn dependent on contextual elements. Different contexts and related disciplines imply different research methodologies. In lieu of totalizing theories (that "only law" or "only politics" count) new legal realists work with "mediating theory" (how law and politics interact). Accepting the simultaneity of law and politics means agreeing that jurisprudence is not only context-dependent but context-productive. Yet law's formal qualities should not be underestimated: "Law structures politics to constrain arbitrary decision making and demand reasoned justification."[108] As Shaffer notes:

> the problem with formalism is when it becomes automatic and blind to the politics and institutional biases that drive it and the status-quo biases that it can legitimate. When formalism is used simply to limit the administrative state and allocate authority to private ordering and the market, then it is problematic. Seeing law in terms of rules and doctrine may be insufficient, but recognizing that different forms of institutions produce

[106] Ibid., 114.
[107] Erlanger et al (n 78) 339
[108] Nourse and Shaffer (n 80) 125.

different forms of discourse as forms of power is central to understanding, evaluating, and critiquing law and its place.[109]

In sum, four elements of NLR are useful for a study of TB-NHRI engagement:

- **recursivity**: the view that legal reform efforts are dynamic and involve constantly cycling interaction between law and society[110];
- **emergent analytics**: the idea that legal concepts emerge from factual analysis;
- **contextualization**: an aspiration to understand the ways in which law's purposes are thwarted once translated into the world; and
- **simultaneity of law and politics**: the necessity of mediating theory.

NLR differs from classic legal realism as it is concerned with developing "positive theory about law's operation in the world, based on facts about the world."[111]This theoretical approach entails a recursive understanding of law, as both responding to and shaping individual and political behaviors, and as reciprocally interacting with social and institutional structures. As will be made clear through the case study analysis, a study on the interaction between TBs and NHRIs is strengthened by considerations about the context in which these institutions operate. Inter-institutional engagement cannot be assessed in a vacuum as each institution is more or less effective depending on its surrounding environment. And the only way to seriously engage with relevant contextual nuances is through empirical analysis.

3. Conclusion

I have started this chapter by posing two questions that are consequential for the chosen theoretical framework of this thesis.

The first question wished to clarify why we would expect TB – NHRI engagement to have positive effects towards the implementation of human rights treaties. I have chosen to address this question by situating the discussion within compliance theories that focus on domestic stakeholder mobilization and socialization as leading phenomena toward compliance.

According to mobilization theories, the TB system can be effective if it manages to increase the political leverage of domestic stakeholders, including NHRIs, to pressure their domestic

[109] Ibid.
[110] Terence C. Halliday, 'The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes' 112 *American Journal of Sociology* (2007) 1135.
[111] Ibid.

government into increased respect for human rights. At the same time, the TB system may increase its effectiveness by improving the informational status of such domestic actors. According to this logic, the establishment of adequate channels of cooperation between TBs and NHRIs may have powerful effects on state behavior. By translating what may be perceived as external norms to local rights holders, NHRIs may act as auxiliaries to the different TBs and at the same time increase the prospects of wider civil society mobilization. By empowering NHRIs, the TB system may also benefit from domestic independent expertise as an additional check on governments' efforts to comply with international human rights norms.

In addition to this, we have seen that without coercive measures that ensure human rights treaty compliance, states' decisions are linked to mechanisms based on the persuasive and transformative power and appeal of international human rights norms. NHRIs may once again play a crucial part in such socialization processes. NHRIs may aid TBs in "persuading" a government into compliant behaviour by moulding domestic decision makers' perceptions that certain human rights norms are appropriate. This elevates the importance of cooperative, interactive, and iterative processes typical of TB – NHRI engagement. Through functions such as reporting, monitoring and following up on a government's implementation record, as well as through technical assistance and capacity building activities, NHRIs may ultimately facilitate a state's normative belief that human rights treaty norms ought to be obeyed.

In essence, the expectation that TB – NHRI engagement may facilitate the implementation of human rights treaties rests on whether NHRIs are adequately mobilized to "persuade" their governments into increased respect for human rights. It is for this reason that attention needs to be given to both the institutional framework that guides TB – NHRI engagement and the context in which this engagement takes place.

This leads us to the second question posed at the outset of the chapter, namely what is "effectiveness" in this specific context and how do we measure it. I have expressly chosen to engage with two approaches to effectiveness analysis, namely the GBA model and New Legal Realism. These two approaches, although divergent in many respects, do complement each other in one fundamental aspect. The comparative analytic framework offered by the GBA model, although based on a rational understanding of effectiveness and focusing on formal design features, calls for an institution-specific understanding and microanalysis of institutional structures and processes. This approach is shared by NLR as a recent expansion in legal scholarship stemming from the law and society tradition. NLR adherents strongly believe in the necessity of assessing how law operates in the world, deploying both qualitative and

quantitative empirical methods. The interaction of formal law with other, often extra-legal factors in particular contexts is central to NLR thought.

Both the GBA and NLR are purposeful theories to inform a study on the interaction between TBs and NHRIs. A study of the complex matrix formed by such interaction must consider both the formal design features specific to the two actors and the specific contexts in which TB-NHRI engagement operates. A policy-relevant analysis of law rests therefore on these assumptions:

> that comparative institutional analysis is empty without a new legal realist assessment of how real-life institutions operate in particular contexts, and that new legal realism is of no practical use without an analytic framework in which to translate and organize its findings for purposes of real-life decision making.[112]

[112] Gregory Shaffer, 'Comparative Institutional Analysis and a New Legal Realism' 2 *Wisconsin Law Review* (2013) 12.

Chapter 3. Methodological Framework

This chapter presents the methodological framework adopted to assess the effectiveness of TB-NHRI engagement in facilitating human rights implementation. The methodological choices mirror the multidisciplinary nature of the operative theoretical framework. According to this logic, the chosen methodology is one that implements and complements the goal-based approach (GBA) to effectiveness analysis with two further compensatory methods. What results is an 'adapted' methodology in response to the limitations that an effectiveness analysis purely based on the GBA model would entail.

In this chapter I firstly describe and apply Shany's goal-based methodology to assess the effectiveness of the institutional framework for TB-NHRI engagement.[1] Thereafter, due to inherent limitations of an analysis based solely on a strict interpretation of the GBA model, I devise two additional compensatory methods to strengthen the analysis with examples from actual NHRI interaction in recent TB reporting cycles: a comparative document content analysis of selected direct outputs of the institutional framework for TB – NHRI engagement[2]; and an impact assessment of TB-NHRI engagement towards human rights implementation applied to a specific case study, the Australian National Human Rights Systems.[3] Lastly, I explain the methodology used to strengthen the findings of this thesis through elite interviews. Each of the methodological steps will be explained in detail throughout the following sections.

1. A Goal-Based Method to Evaluating the Effectiveness of Treaty Body – NHRI Engagement

Part B of this thesis features an adapted goal-based method to evaluating the effectiveness of the institutional framework for TB-NHRI engagement. In doing so, I wish to tackle the following sub-question:

> *To what extent is the institutional framework for TB-NHRI engagement effective in facilitating domestic human rights implementation?*

[1] Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press 2014).
[2] As will be discussed, this exercise consists in identifying the amount of TB outputs that contain issues highlighted and suggested by NHRIs in their parallel reports; and the extent of NHRI recommendations contained in parallel reports that have been integrated in TB outputs.
[3] As will be discussed, this assessment distinguishes between three types of impact: pre-conditions for impact, intermediate impact and policy impact of TB – NHRI engagement in the Australian context.

Firstly, due to the prominence of goals under the rational system approach, it is crucial to understand the types of organizational goals that may act as relevant yardsticks for the effectiveness analysis that follows. Organizational goals may vary depending on whether we perceive institutions as unitary entities, serving as focal points for the various expectations of their sub-units, or as conglomerates of the individuals collectively forming them, each with their own specific goal conception.[4] In the case of the institutional framework for TB-NHRI engagement, a number of sub-units contribute to its overarching activity: States parties to UN human rights treaties, individual TB members, OHCHR representatives and NHRI leaders/staff among others. Highlighting each of these players' distinct expectations of TB-NHRI engagement should produce a more accurate picture of the social forces that shape organizational preferences, an analytical choice often referred to as 'piercing the institutional veil'. While the expectations of these different players will be scrutinized, for the purpose of this project the analysis will rest on the sociological assumption that organizations serve as focal points for the distinct expectations of their sub-units and entities.[5] Indeed, a key point for organizational effectiveness analysis is that an organization's success in attaining its goals largely depends on its ability to generate a unity of purpose (or coalition of interests) that transcends the idiosyncratic interests and goals of its constitutive sub-groups and the individuals comprising them.[6]

Mapping the goals to be pursued represents only one stage in establishing benchmarks for assessing effectiveness. According to GBA theory, the following key stage for effectiveness analysis is evaluating whether the framework's outcomes attain those goals. In other words, to assess whether an organization functions "effectively", it is necessary to consider the following question:

- Are the direct products of the organization and their resulting social effects (i.e. the outcome) consistent with the organization's goals?

Exact chains of causation between TB-NHRI engagement operations and outcomes are almost impossible to measure, however, due to their intangible nature and the myriad of external factors that apply to the operations of public institutions acting in complex social, political, and

[4] Manuel Delanda, *Assamblage Theory*, Edinburgh University Press (2016).
[5] See Stephen D. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' 36 *International Organization* (1982) 186 (defining regimes as "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relation").
[6] Larry L. Cummings, 'Emergence of the Instrumental Organization' in Paul S. Goodman and Johannes M. Pennings (eds), *New Perspectives On Organizational Effectiveness* (Jossey-Bass 1977) 60.

legal environments. It is thus necessary to develop a methodology to go around these implicit complications and identify suitable qualitative and quantitative outcome indicators and appropriate methods to identify their correlative and causal relationships. Identifying suitable outcome indicators is not a simple endeavor and organizational effectiveness studies specific to public institutions have identified an exorbitant number of possibilities. Studies developed more specifically in relation to the effectiveness of judicial institutions restrict the scope of useful indicators, such as court management and leadership; court policies; human, material, and financial resources; court proceedings; client needs and satisfaction; affordable and accessible court services; and public trust and confidence.[7] Related studies also place an emphasis on the career, competence, and professional skills of judges, prosecutors, and lawyers.[8] Different authors have also used more qualitative methods for such assessments, such as surveys, interviews, observation and archival approaches using historical sources[9] or through legal analyses of how human rights are implemented through legislation and administrative regulations in different contexts.[10]

As a first step for this thesis, and inspired by the methodology utilized in Shany's *Assessing the Effectiveness of International Courts*[11], the chosen straightforward taxonomy involves the utilization of operational categories to describe two broader aspects of the institutional framework for TB – NHRI engagement and its activities: its *structure* and *process*. According to rational choice theory, organizational design is in fact crucial for understanding how effectiveness is impacted, in that it affects the likelihood of reaching certain outcomes.[12] According to this logic, it is useful to substitute outcome assessment with proxies/indicators through the evaluation of structural and procedural adequacy, a methodological process known

[7] The International Framework for Court Excellence (2009). For more information, see www.courtexcellence.com/Implementation/Implementing-the-Framework.aspx.
[8] The European Commission for the Efficiency of Justice (CEPEJ), Working Group on Quality of Justice Evaluation Scheme (December 7, 2007) Council of Europe Doc CEPEJ (2007)15, 10.
[9] Bård A. Andreassen, Hans-Otto Sano, and Siobhán McInerney-Lankford, *Research Methods in Human Rights: A Handbook* (Edward Elgar Publishing 2017); Mark Goodale and Sally Engle Merry, *The Practice of Human Rights: Tracking Law between the Global and the Local* (Cambridge University Press 2007).
[10] Christof Heyns and Frans Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level' 23 *Human Rights Quarterly* (2001) 483–535.
[11] Yuval Shany (n 1) 50. See also Pamela S Tolbert and Richard H Hall, *Organizations: Structures, Processes and Outcomes* (10th edn, Pearson Prentice Hall, Upper Saddle River NJ 2009) 17; Patricia Ingraham and Amy Kneedler Donahue, 'Dissecting the Black Box Revisited: Characterizing Government Management Capacity' in Caroline J Heinrich and Laurence E Lynn, Jr (eds), *Governance And Performance: New Perspectives* (Georgetown University Press 2000) 293–303.
[12] Andrew Guzman, "International Tribunals: A Rational Choice Analysis" (2008) 157 University of Pennsylvania L Rev 171.

as "reverse engineering."[13] In such way, it will be possible to identify how the framework in question can be expected to perform, considering that "to improve outcomes, organizations need to understand how their structures and processes enable or hinder those outcomes".[14] As such, a goal-based method also demands the answer to the following two questions:

- Do the tangible and intangible resources or assets available to the organization (i.e. the structure) actually enable it to meet its objectives?

- Do the organizational processes (i.e. the process) facilitate the aim of the organization?

The goal-based method, in this sense, serves more than one purpose for this project. Even if the research does not lead to definitive conclusions on whether the institutional framework for TB-NHRI engagement attains its ultimate goals, "it will focus attention on the structural and procedural conditions that are conducive to goal attainment, and will encourage a critical evaluation of the [framework's] output on the basis of whatever outcome indicators are available."[15] Furthermore, reliance on structural and procedural indicators may yield information on the general building blocks of TB-NHRI engagement and its effectiveness. By identifying relevant structural and procedural indicators, the analysis also helps unpack the various elements that characterize cooperation between international and domestic human rights monitoring bodies, and to see which elements deserve strengthening and/or harmonization.

Before delving deeper into an assessment of the sources for goal identification as well as identified structural and procedural indicators in **section 1.1**., **section 1.2,** and **section 1.3** respectively, there is a need for a definitional clarification. The concepts of *outputs* and *outcomes* are of crucial importance and this distinction needs to be clarified at the outset.

On the one hand, *outputs* are the direct products of an organization's operations, such as decisions, recommendations, authoritative interpretations etc. As this research is only concerned with the Treaty Body State Reporting procedure, I identify as *outputs* the treaty bodies' List of Issues (LOIs), List of Issues Prior to Reporting (LOiPR) and Concluding

[13] Ibid, 203: "[t]ribunal design can influence outcomes".
[14] See Jessica E. Sowa, Sally C. Selden & Jodi R. Sandfort, No Longer Unmeasurable?A Multidimensional Integrated Model of Nonprofit Organizational Effectiveness, 33 Nonprofit & Voluntary Sector Quarterly 711 (2004) 715.
[15] Shany (n 1) 54.

Observations (COBs) influenced by NHRI submissions. On the other hand, *outcomes* are "not what the programme or organization itself did, but the consequences of what the programme or organization did."[16] In other words, outcomes are the effects of outputs on the external state of the world such as events, occurrences, or changes in conditions, behaviour or attitudes. For the purposes of this project, an obvious example of a relevant outcome would be a legal/policy reform adopted by a state party following a TB recommendation which was found to be influenced by NHRI submissions. Another example would be a legal/policy reform introduced following NHRI follow-up to a TB recommendation. If one goal of TB-NHRI engagement is monitoring the implementation of UN human rights treaties, the goal-based method should identify structural and procedural indicators that reflect the extent that facilitates such monitoring activity. Similarly, if another goal of the framework is regime support, it should investigate structural and procedural indicators reflecting the extent to which such framework facilitates the comprehensive operation of a transnational human rights regime, including a wider set of human rights monitoring actors than just TBs and NHRIs. Lastly, if the goal under assessment is that of legitimization, it should look into structural and procedural indicators that reflect the extent to which TB-NHRI engagement increases the legitimacy of both institutions' operations.

A strict interpretation of the goal-based method requires the juxtaposition of goals (or desired ends) with outcomes (actual ends), rather than outputs. As Shany explains, "measuring outputs may assist us in evaluating outcomes […] Under the goal-based approach, however, they do not represent objects of study in themselves".[17] It is in relation to this aspect that the "adapted" goal-based method applied here differs from Shany's approach. The added value of including output assessment[18] is all the more relevant in light of the limitations inherent to a strict application of the goal-based approach adopted by Shany, which will be further developed in section 1.4.

As part of this introduction to the adapted GBA model, it is at this point useful to outline a number of generally applicable categorizations that will inform the analysis in Part B.

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[16] Geert Bouckaert and Wouter van Dooren, 'Performance Measurement and Management in Public Sector Organizations' in Tony Bovaird and Elke Löffler (eds), *Public Management And Governance* (2nd edn, Routledge 2009).

[17] Shany (n.1), p. 54

[18] Chapter 7 presents a quantification of the actual engagement of a select number of NHRIs within the latest reporting cycle of a select number of TBs, carrying out a comparative document content analysis of NHRI parallel reports and ensuing TB recommendations.

1.1. Sources for Goal Identification

According to organizational effectiveness theory, some goals of public organizations are set by external constituencies, while others are internal, established by actors belonging to the organization in question.[19] With regards to the institutional framework for TB-NHRI engagement, this distinction has both definitional and normative significance. The TBs are obliged, as a matter of law, "to comply with the goals set out in their constitutive instruments formulated by an external community of States—the mandate providers [… yet their] internal goals are typically non-binding or, alternatively, are subject to change"[20] by the TBs themselves. Although external goals may have a stronger legal foundation, it is a combination of external and internal goals that form the basis of organizational goal-setting.

One other aspect to keep in mind at the outset of selecting goals pertaining to TB-NHRI engagement is that organizational goals in general are not static in time but shift throughout an organization's existence. This can be due to several reasons, such as in response to actual performance—thus raising or lowering constituents' expectations—or due to changes in the external environment—such as when available resources vary or competing organizations appear in the picture—or simply due to changes in the nature and/or preferences of goal-setting actors.[21] The adoption of the Paris Principles by the General Assembly in 1993 can be considered one such goal-shifting event, impacting goal-setting standards and hence crucial for a goal-based approach to assessing the effectiveness of TB-NHRI engagement. This temporal aspect adds a layer of difficulty to identifying the moment in time when new goals were added to the organization in focus.

What follows is an analysis of both external and internal sources for goal identification. This informs the methodology used to identify those goals specific to the institutional framework for TBs -NHRI engagement.

External goals are relatively straightforward to identify and depict, as they are usually found in the organizations' constitutive instruments. As is the case for any public organization, external constituencies set the ultimate goals of both the treaty bodies and NHRIs. States formally create the treaty bodies by negotiating the relevant articles of each convention in question and may

[19] Charles Perrow, *Organizational Analysis: A Sociological View* (Tavistock Publications 1970), 134.
[20] Y. Shany (n 1) 18.
[21] Ibid, 23.

change their legal powers by way of amending the convention, introducing new protocols, and entering into unilateral declarations. States may also exert some degree of control through nomination and election of TB members.[22] Of major relevance is the fact that state parties are the main duty-bearers under the various covenants and as such may be considered as having an obligation to support and strengthen the system of protection that the covenants have established,[23] including that system's relationship with key domestic stakeholders such as NHRIs.[24] The same logic applies to NHRI goals, as the establishment of an NHRI, whether through constitutional, executive or legislative provisions, is the prerogative of the relevant state of belonging and the vast majority of NHRIs are accountable to national parliaments or to the executive branch of government.[25]

From a TB perspective, external goals particular to NHRI cooperation may be evinced from the object and purpose of the treaty as a whole (that is, the preamble), conventional provisions relating to states' obligations, implementation measures, the right to remedies and to its structural and procedural provisions. Further indications emerge by leaving the four corners of the convention to analyze, for example, the travaux préparatoires and official statements held by mandate providers after the entry into force of each convention. These provisions are intimately tied to the broader goals of the treaty in question, and need to be scrutinized for explicit and implicit links to NHRI engagement. External goal-setters represent, after all, some of the mandate providers' essential expectations concerning the institutions that they ultimately oversee.[26] As such, we can surmise that conventions negotiated and drafted before and after the

[22] Jeffrey Dunoff & Marck Pollack, The Judicial Trilemma. *American Journal of International Law, 111*(2) (2017) 25-276.

[23] Office of the United Nations High Commissioner for Human Rights, Report of the Third Consultation with State Parties (New York, April 2012), para 13: "Some States noted that as creators of the system, States have an obligation to work to strengthen the human rights treaty body system, while others underscored that the ultimate purpose of the treaty body strengthening process should be the universal respect for and observance of human rights."

[24] For example, the German reply to the OHCHR request for comments by states on the implementation of GA Res. 68/268 towards the Second biennial report by the Secretary General on the Status of the Human Rights Treaty Body System (2018) includes the following: "Germany advocates for a stronger involvement of National Human Rights Institutions in the work of relevant UN processes and fora, including human rights treaty bodies. To this end, we successfully introduced General Assembly resolution 70/163, which invites the human rights treaty bodies, within their respective mandates and in accordance with the treaties establishing these mechanisms, to provide for ways to ensure the effective and enhanced participation by national human rights institutions compliant with the Paris Principles at all relevant stages of their work."

[25] The Danish Institute for Human Rights, NHRIs Independence and Accountability Report (2013), available at https://www.humanrights.dk/publications/nhris-independence-accountability.

[26] Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-based Approach' 106 *American Journal of International Law* (2012) 243

adoption of the Paris Principles by the General Assembly in 1993[27], will diverge in explicit reference to NHRI scope of action (for example, the 1979 Convention on the Elimination of Discrimination Against Women as compared to the 2006 Convention on the Rights of Persons with Disabilities[28]). Furthermore, UN resolutions (both in terms of negotiations towards adoption and adopted resolutions) may provide insights into what TB mandate providers consider expected outcomes of TB-NHRI engagement. The latest resolutions specific to NHRIs and their role within the UN human rights framework are General Assembly Resolution 74/156 (23 January 2020)[29] and Human Rights Council resolution 45/20 (30 September 2020).[30] An especially useful and up-to-date source for goal identification is the collection of States' submissions to the Treaty Body Review 2020 process, which include improved domestic stakeholder engagement as a fundamental tenet for a stronger UN human rights treaty system.[31]

From a NHRI perspective, external goals may be found in each mandate of the over 120 NHRIs established worldwide, whether it be in the form of a constitutional, executive or legislative provision. A comparative analysis of every NHRI's mandate and its relevant provisions on engagement with international human rights monitoring bodies, although useful, was considered superfluous. Each NHRI, by its very nature, is required to meet the criteria enshrined in the Paris Principles, which provide the international benchmarks against which NHRIs can be accredited as such by the Global Alliance of National Human Rights Institutions (GANHRI) Sub-Committee on Accreditation (SCA). As such external goals may be evinced from the Paris Principles themselves, as adopted by General Assembly resolution 48/134, which contain provisions related to NHRI responsibilities vis-à-vis international human rights instruments.[32]

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[27] The Paris Principles were adopted by the United Nations Human Rights Commission by Resolution 1992/54 of 1992, and by the UN General Assembly in its Resolution 48/134 of 1993.

[28] Domenico Zipoli, NHRI Engagement with UN Human Rights Treaty Bodies: A Goal-based Approach, 37 Nordic Journal of Human Rights 3 (2019) 259-280.

[29] GA Res. 74/156, (Third Committee) National Institutions for the Promotion and Protection of Human Rights, A/RES/74/156 (23 January 2020).

[30] HRC Res. 45/20, Resolution on National Human Rights Institutions, A/HRC/RES/45/20 (30 September 2020).

[31] Geneva Human Rights Platform, An overview of positions toward the 2020 Treaty Body Review by States (2020), on file with author.

[32] Useful for goal-identification is paragraph 3 of the Principles: "3. A national institution shall, inter alia, have the following responsibilities: (b) To promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation; (c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation; d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence; (e) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights."

Besides mandate holders, it is also useful to consider the needs of internal referents that maintain the operation of the institutional framework for TB-NHRI engagement.[33] The expectations of internal goal-setters are especially relevant when dealing with domestic stakeholder engagement, not least because these officials "may react quicker than mandate providers to changing circumstances as the mandate providers presumably formulated their expectations before [TBs] began to operate, when the actual challenges to be encountered remained uncertain and hypothetical."[34] In a way, the identification of internal goals represent a window into the future, as "mandate providers may choose to respond to runaway [TBs] by embracing or accepting, whether explicitly or tacitly, the new missions that such [TBs] have set for themselves."[35]

Such "new" goals are arguably more problematic to identify. As Shany describes it, organizations

> develop their own conception of goals and strategies independently of the states or international organizations that created them. Such new goals sometimes result from personal initiatives of the organizations' officials who act as norm-entrepreneurs and on other occasions are the outcomes of collective decision making.[36]

In other words, the difficulty of getting the mandate providers to approve new goals might push institutions to take matters into their own hands when faced with new conditions or opportunities. The "bottom-up" nature of this process of goal shifting is facilitated, to a large extent, by the slow and cumbersome process of reformulating international organizations' external goals, especially through the explicit amendment of their constitutive instruments. As such, the role of internal goals is key to the study of TB-NHRI effectiveness, not least due to the relatively late arrival of NHRIs within UN-endorsed human rights institutional frameworks. Internal goals, aside from their taxonomical difference, hold a different normative value to external goals in that the former are usually not legally binding and are subject to change by the institution itself. Time is also of essence for this category of goals, as

[33] Charles Perrow, *Organizational Analysis: A Sociological View* (Wadsworth Publishers, 1970) 134; E. Gross, 'The Definition of Organizational Goals' 20 *British Journal of Sociology* (1969) 277, 282.
[34] Shany (n 26) 243.
[35] Ibid.
[36] Shany (n 1) 23.

"mandate providers may 'catch up' and explicitly reject or endorse the organizations' self-identified goals as their own; or, alternatively, they may accept the new goals as fait accompli by way of acquiescence."[37]

For the purposes of this thesis, *internal goals* may be identified within instruments issued by committee members themselves (such as General Comments, Statements, Rules of Procedure, Working Methods, and so on) as well as official documentation published by the OHCHR Secretariat and the UN more generally. Moreover, NHRIs also express their position on the aims that their engagement with the TB system entail. This comes either from individual NHRIs or their international (GANHRI) and regional coordinating bodies.[38]

1.2. Structural Indicators as Proxies for Outcome Assessment

From a GBA perspective, the understanding that "institution design can influence outcomes"[39] is key to assessing the reasons behind apparent discrepancies between outcomes and goals, as well as to identifying performance expectations. The identification of structural indicators must be specific to each committee under assessment. As we are dealing with multiple frameworks pertaining to one overarching system (the TB system), however, we can classify a set of generally applicable structural indicators, replicable under each TB framework for NHRI engagement. It is through this identification that we may attempt "to understand the perceived discrepancies between the framework's outcomes and goals [as well as explain] how the framework can be expected to perform."[40] While every organization is characterized by its own, distinct set of structural indicators, we can identify some indicators that are common to all or almost all TBs and NHRIs. Adopting Shany's categorization[41], I identify a number of determinants that can be used as structural indicators of the institutional framework for TB-NHRI engagement. Before listing the main identified categories, it is crucial to underline that the very capacity of the TB system to harness domestic institutions to promote its objectives and facilitate the implementation of its outputs may be considered a structural factor useful to assess the TB system's overall effectiveness. The primary determinants for each of these indicators are given below by way of illustration and are summarized in Table 3.1.

[37] Ibid. 25.
[38] Regional NHRI coordination bodies include the European Network of National Human Rights Institutions (ENNHRI), the Asia Pacific Forum (APF), the Network of African National Human Rights Institutions (NANHRI), and the Federacion Iberoamericana de los Ombusman (FIO).
[39] Guzman (n 12) 203.
[40] Shany (n 1) 58.
[41] Ibid.

- *Structural embeddedness* refers to formal design features that are provided by both the TB system and NHRIs on how the two institutions may interact with each other. In essence, this indicator determines the rules of engagement, through formal instruments of a differing nature, regulating the extent that the two bodies are permitted to mutually engage. This represents one set of key indicators useful to assess the feasibility of goal-attainment, as it is on the basis of these instruments that interaction between TBs and NHRIs is facilitated. I focus on formal design because literature in administrative law suggests that agencies with formal safeguards are often more effective than agencies that lack them.[42] Formal design can in fact protect institutions such as TBs and NHRIs from efforts to change its membership, leadership or structure, as well as from allegations that it exceeded its mandate.[43] Today, the UN human rights apparatus suffers from the obstructive behavior of a number of member states, scarce resources and enjoys few effective policy tools to directly enforce human rights protections.[44] Persistent violating behavior by "false positives," states that commit to UN treaties with no intention of complying, threaten to bring the entire system into disrepute.[45] In response, the United Nations has sought to strengthen a diverse body of global administrative human rights law, exemplified by more intrusive norm frameworks, enhanced access to UN procedures, and the formal coordination of dedicated institutional mechanisms at the national level.[46] NHRI promotion and strengthening forms a key plank of an ambitious UN strategy of compliance via orchestration.[47] Whereas governments can often resist TB and NHRI activity by pulling on other levers, notably by manipulating personnel appointments and cutting budgets, they find it harder to change formal design features, especially if they are out their control. In light of this,

[42] Katerina Linos and Tom Pegram, 'Architects of Their own Making: National Human Rights Institutions and the United Nations' 38(4) *Human Rights Quarterly* (2016) 1109–1134; Katerina Linos and Tom Pegram, 'What Works in Human Rights Institutions?' *The American Journal of International Law*, vol. 112, no. 3 (2017) 1-61; Matthew McCubbins, Roger G. Noll and Barry R. Weingast, Structure and Process, Politics and Policy: Administrative Arrangement and the Political Control of Agencies, 75 *VA. L. REV*. 4 (1989) 31; David A. Hyman & William E. Kovacic, Why Who What Matters: Governmental Design and Agency Performance, 82 *Washington Law Review* (2014)1446;

[43] This is why Linos and Pegram term these features "safeguards", in Katerina Linos and Tom Pegram, 'What Works in Human Rights Institutions?' (n 42).

[44] Emilie Hafner Burton, Trading Human Rights: How Preferential Trade Agreements Influence Government Repression, 59 *International Organizations* (2005) 593;

[45] Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009).

[46] See Benedict Kingsbury, Nico Krisch and Richard B. Stewart, The Emergence of Global Administrative Law, 68 *Law and Contemporary Problems* 1(2005) 5-61).

[47] See Tom Pegram, Global Human Rights Governance and Orchestration: National Human Rights Institutions as Intermediaries, 21 *European Journal of International Relations* (2015) 595;

it is important to look at the extent, precision and uniformity of available instruments on TB – NHRI engagement.[48] Firstly, it is useful to identify all available guidance on NHRI engagement featured in the different UN Human Rights Treaties and TB-issued instruments such as General Comments, Rules of Procedure, Working Methods, Statements, Guidelines, Papers and session-specific Information Notes. It is through such analysis that it will be possible to assess the embeddedness of NHRIs within the TB framework. As we are dealing with institutional interaction, it is also important to identify the other side of the coin, namely available guidance on TB engagement featured within the Paris Principles as well as GANHRI SCA General Observations. In such way, it will also be possible to assess the embeddedness of TBs within the NHRI framework.

- *Legal powers* are traditionally determined by the breadth of jurisdiction, the extent of the binding effect of TB and NHRI outputs, scope and nature of applicable law and eventual enforcement machinery.[49]The ability of TBs and NHRIs to attain the goals prescribed by their external and internal goal-setters is decisively influenced by such characteristics. This is because the ability of quasi-judicial bodies to fulfill their various functions depends on the nature of the outputs they can expect to attract or generate. Although important from a formalist perspective, to merely rely on legal powers when assessing institutional effectiveness might not be enough when considering the iterative and participatory nature of the TB State Reporting procedure. According to experimentalist human rights theorists De Burca, Keohane and Sabel, the complexity of the human rights regime is a constructive and institutionalized development, "establishing relationships of legitimate authority by keeping the circle of decision making open to new participants […] and generating possibilities for effective and satisfactory problem solving in a non-hierarchical fashion."[50] Knowledge of local conditions is considered a fundamental pivot for a functioning system, thanks to which a stream of continuous feedback flows from the local to the transnational context, aiding the reporting and monitoring necessary for a "most-effective" implementation of the

[48] Martin Gramatikov, Maurits Barendrecht, and Jin Ho Verdonschot, "Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology" 3 Hague Journal on the Rule of Law (2011) 349

[49] Cf Kal Raustiala and Anne-Marie Slaughter, "International Law, International Relations and Compliance" in Walter Carlsnaes, Thomas Risse, and Beth A Simmons (eds), Handbook of International Relations (Sage, Los Angele 2002) 539, 546 (discussing the relationship between the solution structure and norm qualities, on the one hand, and compliance, on the other).

[50] G. de Búrca, R. O. Keohane, & C. Sabel, *New Modes of Pluralist Global Governance*, New York University Journal of International Law and Politics, Vol. 45, No. 1 (2013), 5

accepted framework norms.[51] The role of NHRIs as participants to the human rights treaty regime is convincingly interpreted by such experimentalist understanding. The essential underpinning of human rights experimentalism is that regardless of legal status, implementation may be guaranteed by a system of recurrent non-hierarchical review mechanisms, with a prominent role given to stakeholder participation. It follows that the scope and effectiveness of TB and NHRI activity may be delimited by two related factors: the jurisdictional provisions found in both institutions' constitutive instruments (i.e. UN human rights treaties, the Paris Principles, specific NHRI mandates, etc.) as well as the moral and legal authority which governments and other members of the international community attach to their outputs.[52] In essence, the effectiveness of the outputs stemming from TB-NHRI engagement and the "shadow" that these outputs cast on international law and international relations[53] are largely determined by both institutions' jurisdictional provisions as well as the respect accorded, by states in particular, but also by other stakeholders. Hence, any study of the effectiveness of quasi-judicial bodies must consider this broader configuration of their legal powers.[54]

- *Independence and pluralism* pertain to the manner in which available legal powers should be exercised, and influence the manner in which such powers are actually exercised. This is unlike the abovementioned rules on jurisdiction, which delineate the legal powers that TB and NHRI outputs can exercise. Conflicting findings emerge from existing literature on international courts and the potential linear relation between judicial effectiveness and judicial independence. On the one hand, Eric Posner and John Yoo suggested that independent courts could be less effective than their dependent counterpart as "independent tribunals pose a danger to international cooperation because they can render decisions that conflict with the interests of state parties. Indeed, states will be reluctant to use international tribunals unless they have control over the judges".[55] Shortly thereafter, Laurence Helfer and Anne-Marie Slaughter published a

[51] Ibid.
[52] Maxime E. Tardu, 'Protocol to the UN Covenant on Civil and Political Rights and the Inter-American System: A Study of Coexisting Procedures' 70(4) *American Journal of International Law* (1976) 778, at 784.
[53] For a classic exposition on the "shadow effect" of legal institutions, see Robert H Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" 88 *Yale Law Journal* 950 (1979) 968.
[54] Shany (No.1) 67
[55] Eric A Posner and John C Yoo, "Judicial Independence in International Tribunals" 93 *California Law Review* 1 (2005) 72.

response in which they challenged the conclusions adopted by Posner and Yoo.[56] In fact, Helfer and Slaughter postulated that independent courts are the most effective international judicial bodies, since "agreeing to an independent tribunal signals the depth of a state's commitment to a particular international regime in a way that makes it more likely that it will secure the benefits of that regime."[57] It is not the intention of this thesis to make sweeping assertions as to whether higher degrees of independence promote or hinder the effectiveness of TB – NHRI engagement. For one, the whole methodological framework of this thesis is designed against this. Since TB – NHRI engagement operates in unique institutional and political settings, the need and degree of independence may vary for the same TB across different domestic contexts. Nonetheless, it is possible to identify generally applicable categories for both TBs and NHRIs which determine the conditions in place to ensure that members of both TBs and NHRIs, as well as the staff servicing these institutions, are free of influence from other actors. This is all the more relevant for institutions that do not have a binding force of law, such as TBs and NHRIs. I identify four different categories, namely legal and operational independence, financial independence, appointment, composition and pluralism measures and accountability measures.[58] For TBs, the determinants for these indicators stem from an analysis of conventional provisions, TB rules of procedure, specific guidelines on the independence of treaty body members and previous academic studies on the nature of TB membership and accountability. For NHRIs, the determinants are to be found in the Paris Principles, GANHRI SCA General Observations and relevant NHRI literature.

- *Resources and personnel capacities* are also important structural indicators, determined by short- and long-term budgets, facilities, and other tangible resources such as the number of TB experts and NHRI commissioners, number of other employees, legal-assistance procedures, and actual and perceived quality of personnel (qualifications, experience, and professional background). This represents an overlap between the rational system (or goal-based) and system resource approaches: an organization's survival and its empowerment (even self-aggrandizement), which are the measures of effectiveness under the latter approach, may improve its prospects for goal attainment,

[56] Laurence R Helfer and Anne-Marie Slaughter, "Why States Create International Tribunals: A Response to Professors Posner and Yoo" (2005) 93 Cal L Rev 899.
[57] Ibid, 955.
[58] See Chapter 5.

which is the measure of effectiveness under the former approach. Put differently, increasing the material capabilities available to the institutional framework for TB – NHRI engagement may be one useful step in order to attain the ultimate ends for which it was created. A focus on "capacity" and "resources" as key drivers for institutional effectiveness is furthermore in line with managerial models of compliance theory, as discussed in the previous chapter. [59]

- *Political support* is determined by and is reflected in the capacity to harness different Members States to support and promote the objectives of the institutional framework for TB – NHRI engagement and to implement its outputs. The lack of political support has the potential to seriously undermine any attempt at an effective cooperation between TBs and NHRIs. In this respect, it is thus important to assess relevant Human Rights Council and UN General Assembly resolutions, together with relevant consultation processes with different Members States, in search for possible statements of political support. One latest example of multilateral exercise that has included discussions relevant to TB – NHRI engagement is the Treaty Body Review 2020 process.[60]

Table 3.1. Structural Indicators for the Institutional Framework for TB-NHRI Engagement

Structural Indicators	Determinants
Structural embeddedness (of NHRIs in TB instruments)	UN Human Rights Treaties, General Comments, Rules of Procedure, Working Methods, Statements, Guidelines, Papers and Info Notes featuring guidance on NHRI engagement.
Structural embeddedness (of TBs in NHRI instruments)	Paris Principles and GANHRI SCA General Observations featuring guidance on TB engagement.
Legal powers	The legal status of TB and NHRI recommendations when acting under the State Reporting procedure.
Structural independence	The conditions in place to ensure that members of both TBs and NHRIs, as well as the staff servicing these institutions, are free of influence from other actors.

[59] Abram Chayes and Antonia Handler Chayes, 'On Compliance' 47 *International Organization* 188 (1993) 204.
[60] For more information on the Treaty Body Review 2020 process, see https://www.ohchr.org/en/hrbodies/hrtd/pages/tbstrengthening.aspx.

Resources and personnel capacity	The operations budgets, facilities, and other material capabilities specific to TB – NHRI engagement.
Political support	The extent of support from states parties for further strengthening NHRI engagement with the TB system.

This thesis will further develop the application of these determinants as proxies for outcome assessment.

1.3. Procedural Indicators as Proxies for Outcome Assessment

Like structural indicators, the processes employed by the institutional framework for TB - NHRI engagement may shed light on both the effectiveness and ineffectiveness of the current state of affairs. The efforts invested in operating NHRI engagement with the TB system are an essential analytical tool for predicting the degrees to which certain identified goals will be met, as per the GBA model.

For TB-NHRI engagement, the heart of the process is the State Reporting procedure, which is why this project limits its reach to this aspect of TB procedures. NHRIs also cooperate with TBs under the Individual Communications procedure, the Inquiry procedure, and towards the issuance of General Comments, but arguably to a much lesser extent.[61]

Each TB has developed its own set of rules concerning its engagement with NHRIs (both in writing and orally), and as such it is important to underline these procedural nuances. This is particularly interesting considering the ongoing efforts to harmonize the manner in which NHRIs can interact with the TBs, in their State Reporting functions.[62] As mentioned in Chapter 1, the Report by the High Commissioner for Human Rights on Strengthening the UN human rights treaty body system (the so-called "Pillay Report"[63]) highlighted several procedural shortcomings. These weaknesses may seriously affect TB-NHRI effectiveness through failure

[61] For more on this aspect, see Geneva Academy, "Optimizing the UN Treaty Body System - the Academic Platform Report on the 2020 Review (May 2018) available at <https://www.geneva-academy.ch/joomlatools-files/docman-files/Optimizing%20UN%20Treaty%20Bodies.pdf.> Accessed 20th December 2019

[62] See Treaty Body Chairpersons Position Paper on the future of the treaty body system, 31st meeting of Chairpersons (24–28 June 2019) available at <www.ohchr.org/Documents/HRBodies/TB/AnnualMeeting/31Meeting/ChairpersonsPositionPaper_July2019.docx>.

[63] Report of the High Commissioner "Strengthening the UN Human Rights Treaty Body System, UN Doc A/66/860 (June, 2012).

to meet the framework's goals. The current analysis will offer an assessment of the extent to which these weaknesses have been addressed to date. Some of the relevant social science literature mentions two main categories for evaluating the quality of the judicial process: procedural justice and informational justice.[64]. As such, I identify the following two procedural indicators as proxies for outcome assessment: accessibility and usage rate/periodicity indicators.

- *Accessibility rules* define the circumstances under which NHRIs can or should engage with TBs during the different stages of the State Reporting procedure. Unlike jurisdictional provisions that operate, by and large, in a manner predetermined by the mandate providers, rules of accessibility are determined at the discretion of the TBs according to their internal preferences and in response to external expectations. Thus, rules on accessibility provide the institutional framework for TB – NHRI engagement with important policy tools that regulate the manner in which NHRIs are allowed to participate throughout each cycle of review. The determinants used to assess this procedural indicator may be found in General Comments, Rules of Procedure, Working Methods, Papers and the Session-Specific Information Notes on Participation by NHRIs. Useful information may also be found both in the Paris Principles and in the GANHRI SCA General Observations. Lastly, the OHCHR Secretariat has also been involved in regulating the different opportunities for NHRI participation in the State Reporting procedure.
- *Usage rate and periodicity* refer to the pace at which the State Reporting procedure takes place and the frequency that NHRIs may provide their input throughout the different state review cycles. Actual usage rates, participation of all the relevant stakeholders in the process and duration of the proceedings have already been adopted to evaluate courts' performance. [65] Even though they have been referred to as 'procedural justice criteria'[66], thus not focusing on effectiveness, they may also be useful for understanding how procedures can affect goal attainment. This last set of indicators may partly predict the ability of the institutional framework for TB – NHRI

[64] Shany (n. 1), p. 62
[65] Laura Klaming and Ivo Giesen, "Access to Justice: The Quality of the Procedure" (2008) TISCO Working Paper Series on Civil Law and Conflict Resolution Systems No 002/2008 available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091105 >.
[66] Ibid.

engagement to produce certain outcomes within a specific timeframe and thus attain its goals, in light of the process the framework prescribes.

The primary determinants for both identified procedural indicators are summarized in Table 3.2. below.

Table 3.2. Procedural Indicators for the Institutional Framework for TB-NHRI Engagement

Procedural Indicators	Determinants
Accessibility rules	Available TB-specific NHRI "entry points" throughout the stages of the State Reporting procedure (RoPs, WMs, Statements, Guidelines, Papers and Info Notes)
Usage rate and periodicity	The duration of TB reporting cycles and the frequency of NHRI input therein.

In sum, Part B of this thesis investigates whether the structure of the institutional framework for TB-NHRI engagement and the processes it employs within the State Reporting procedure are geared toward contributing to the attainment of its overarching goals.

1.4. Limitations of the Goal-Based Approach to Effectiveness Analysis

From a methodological perspective, the GBA has similar limitations to what have been defined as *mandate-based* approaches to effectiveness analysis.[67] It is thus important to acknowledge the inherent limitations of an effectiveness analysis based solely on a GBA approach. Three main criticisms concern the formalistic nature of mandate-based evaluations. First, the assumption that performance is tied to the quality of the initial structure and mandate of the assessed institutions. Second, the subjectivity implied by the GBA method, which in turn affects the identification of institutional goals and relevant structural and procedural indicators. Third, the risk that a sole focus on mandates renders the analysis oblivious to factors of a contextual nature.

[67] Julie Mertus, 'Evaluating NHRIs – Considering Structure, Mandate and Impact' in Thomas Pegram and Ryan Goodman, *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (Cambridge University Press 2012). For more information on NHRI effectiveness studies, see Steven L. B. Jensen, 'Lessons from Research on National Human Rights Institutions' (Danish Institute for Human Rights 2018).

To the first criticism, the adapted GBA model actually provides a partial answer, due to the evolutive understanding of goal-achievement, which implies an evolutive understanding of organizational effectiveness. The analysis thus far has in fact rested on this crucial element:

> [that] organizational goals are not necessarily static in time. To the contrary, goals often shift throughout the life of an assessed organization, possibly in response to actual performance, changes in the external environment and due to changes in the identity and the preferences of the goal-setting actors.[68]

Through such an understanding of goal-setting, context is partially taken into consideration. Furthermore, formal institutional design acts as key influence on human rights outcomes, "in part because formal institutional design remains relatively stable over time". [69] Whereas governments can often resist both TB and NHRI activity by pulling on other levers, for instance by manipulating personnel appointments and cutting budgets, it is harder to change formal design features. As stated by Linos and Pegram, "Formal rules both constrain and enable independent agencies: they work both as a limit on permissible activities, and as a basis for justification of independent action."[70] This is especially true in the human rights field. Human rights violations are often perpetrated by the government itself, and are often authorized by top leaders in the state's most powerful branches, including the executive, the police, and the military. In our scenario, international human rights treaties often oppose the interests of the authorizing principal (individual states and their officials) against the regulator (the NHRI). The risk of regulatory capture is thus particularly acute in the human rights field, due to the risk that the regulated executive and legislative branches might capture the regulator. A focus on formal design features is thus crucial to counter such risk.

Let us now focus on the question of subjectivity characterizing the identification of both goals and structural/procedural indicators. Some will doubtless dispute the goals and indicators identified under a GBA model at any one time and I acknowledge that they are likely to be contested by different constituencies, with differing expectations. This difficulty is inherent in determining an organisation's goal from the perspective of its constituencies and it is well

[68] Richard W. Scott, *Organizations: Rational, Natural and Open Systems* (5th edn, Prentice Hall 2002) and Shany (n 1).
[69] Katerina Linos and Tom Pegram, 'What Works in Human Rights Institutions?' 112(3) *American Journal of International Law* (2017) 680.
[70] Ibid.

recognised by organisational effectiveness scholars.[71] Shany addresses this challenge by singling out one set of constituencies—the 'mandate providers'—from which his four 'ultimate' goals emanate.[72] He acknowledges that his model is based on the expectation of one external constituency, and advocates that scholars examine effectiveness from the perspective of other stakeholders. I answer Shany's call by envisaging a broader array of goal-setters, including both external and internal actors, in a wish to mitigate a narrow mandate-providers approach. Regardless of this, subjectivity as a limitation still stands, which may eventually result in an extensive range of conflicting effectiveness models for TB – NHRI engagement, as varying goals will arise depending on the constituency chosen as the point of departure for analysis. We must also remember that an examination of *structure* and *process* is a suboptimal proxy for outcome indicators. The reason for this shortcoming is that such an examination might reflect the same incorrect assumptions about the relationship between structure, process and outcomes that are employed by the TBs and NHRIs themselves, for example, that more recommendations lead to greater deterrence or that a harmonized methodology of engagement leads to fewer, not more, limits to the system's accessibility. Although the precise measurement of outcomes is difficult, I suggest that applying the rational system (or goal-based) approach can significantly improve our understanding of public organizations' performance, along with their promise and their limits. Such improved understanding may also be facilitated by an increased awareness by TBs, NHRIs, stakeholders, and academic critics of the need to engage in discussions about their ultimate goals and the likelihood of attaining them.[73] And while every TB and NHRI is characterized by its own, distinct set of structural and procedural indicators, it is possible to identify and classify some broad categories of indicators that are common to all or almost all such bodies based on analysis of theory, practice and stakeholder perceptions. Such structural and procedural attributes may explain, in part, why certain actors choose or not choose TBs and NHRIs as the vehicle for achieving their aims and may also explain why certain actors choose to structure TB – NHRI engagement as they do.[74] Ultimately, it is through such

[71] KS Cameron and DA Whetten, 'Organizational Effectiveness and Quality: The Second Generation' in John C Smart (ed), *Higher Education: Handbook of Theory and Research XI* (Agathon Press 1996).
[72] Shany (n 1), chapter 3.
[73] See Richard W Scott, Organizations: Rational, Natural and Open Systems (5th edn, Pearson Prentice Hall, Upper Saddle River 2002) 364 ("The problem of inadequate knowledge of cause-effect relations can be handled by the use of relative rather than absolute performance standards . . .") and 350 ("The topic of organizational effectiveness is eschewed by some analysts on the ground that it necessarily deals with values and preferences that cannot be determined objectively. Such criticisms, however, apply not to the general topic, but only to certain formulations of it").
[74] See eg. Neil K Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy (University of Chicago Press, Chicago 1997) 49

analysis that it is possible to unpack the general building blocks of TB-NHRI engagement in a methodologically consistent manner, with a view to making improvements.

I will now turn to the third criticism in more detail. Commentators have often underlined the impact context has on shaping institutional effects,[75] arguing that scholarship "must avoid temptations of top-down prescription without grounding in the bottom-up appreciation of individuals, social contexts and the dynamics of institutional processes."[76] Studies on the effectiveness of international institutions do in fact distinguish between factors of influence, discerning between factors of an endogenous and exogenous nature.[77] The former category essentially refers to factors internal to the organization in question, such as its structure and the process through which it operates. The latter category refers to the legal, institutional, political, economic, ideological, and cultural environments in which particular institutions operate, "as it appears that their de jure and de facto powers derive largely from these background circumstances."[78] Whereas the original GBA method is only concerned with an assessment of effectiveness based on endogenous factors, I call for an additional focus on exogenous factors complementing the more formalistic GBA method with a more contextual, bottom-up, and participatory form of empiricism typical of the New Legal Realist (NLR) tradition. Adherents to that tradition argue that "a bottom-up approach requires that assertions about the impact of law be supported by research at the 'ground' level. This in turn requires that we rely on (or actually undertake ourselves) empirical research rather than using projections based simply on our theories or individual experiences."[79] This is due to the understanding that "changes in the state of the world" brought about by TB-NHRI engagement (in other words its effectiveness) "are influenced by States parties' capacity to govern, the distribution of power among them and their interdependence."[80]

As such, the chosen methodology adopted for this thesis departs from the original GBA approach devised by Shany, proposing two complementary methods for assessing organizational effectiveness: an additional performance indicator added to the GBA model,

[75] Victoria Nourse and Greogory Shaffer, 'Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory' (2010) 95 *Cornell Law Review* 113.
[76] Ibid. 114.
[77] See e.g., Oran R. Young, 'The Effectiveness of International Institutions: Hard Cases and Critical Variables' in James N. Rosenau and Ernst-Otto Czempiel (eds), *Governance without Government: Order and Change in World Politics* (Cambridge University Press 1992) 176.
[78] Ibid.
[79] Howard Erlanger et al, 'Foreword: Is It Time for a New Legal Realism?' (2005) *Wisconsin Law Review* 339.
[80] See Lawrence R Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' 107 *Yale Law Journal* (1997) 273, 298, 367.

utilized as proxy for outcome assessment, focusing on selected *direct outputs* of the institutional framework for TB – NHRI engagement (chapter 7) and a *context-based* analyses of the National Human Rights System concept (Chapter 8) applied to one NHRI, the Australian Human Rights Commission, and its engagement with the TB system (Chapter 9). The following sections introduce this more context-specific analysis of TB-NHRI engagement, effectively placing the discussion firmly within the contextualist strand of NLR. In such way, I question the value of formalism, which has been a common thread of the methodological analysis thus far, by steering toward a consideration of particular factual, social, and historical contexts as catalysts for different legal outcomes. By looking at the actual extent of selected instances of TB-NHRI engagement and the domestic implications of one specific national context, the discussion also feeds on the comparative institutionalist understanding that "the state" is to be regarded as contextually skewed, focusing on the relative advantages of different forms of state institutions in different contexts.[81] Lastly, a more context-specific analysis underlines the relevance of yet another founding element of NLR theory, that is the simultaneity of law and politics. Placing TB-NHRI engagement within a form of "mediating theory," in other words understanding how law and politics interact, might bring us closer to understanding the intricate mechanisms involved in human rights inter-institutional cooperation.

2. A Document Content Analysis of the Direct Outputs of the Institutional Framework for Treaty Body – NHRI Engagement

As the adapted GBA to effectiveness analysis postulates, it is the combination of structure and process that results in the outputs of the institutional framework for TB-NHRI engagement. In order to address concerns over the over formalistic nature of the goal-based approach, it is important to bring into the methodology an additional set of indicators, more context-specific and closer to the actual day-to-day interaction between the TBs and NHRIs. Aside from structural and procedural indicators, I add a third set to the adapted goal-based method specific to the direct outputs of the institutional framework for TB – NHRI engagement. As such, the goal-based method is strengthened by an additional step that may summarized by the following question:

[81] Francis Nourse and Gregory Shaffer, 'Empiricism, Experimentalism and Conditional Theory' (2014) 67 *Southern Methodist University Law Review* 110.

- Are the direct outputs facilitating the attainment of the organization's goals (i.e. the outcome)?

The standard way for NHRIs to engage with the State Reporting procedure is in fact by providing written information in the form of a report, sometimes called "alternative" or "parallel" report, at various stages of the reporting cycle. To complete the picture on the effectiveness of TB-NHRI engagement within the State Reporting procedure, it is thus fundamental to estimate the amount of TB outputs that contain issues highlighted in NHRI parallel reports.[82]At the same time, it is also important to consider the extent of recommendations found in NHRI parallel reports that are included within the official outputs that TBs issue to State Parties. This phase of the assessment quantifies the actual engagement of a select number of NHRIs within the latest reporting cycle of a select number of TBs, carrying out a comparative document content analysis of NHRI parallel reports and ensuing TB outputs.

By comparing recommendations proposed by NHRI parallel reports and outputs issued by the various TBs, the consistency (or lack of it) between the two sets of recommendations will become visible. If recommendations found in NHRI parallel reports feature within the list of outputs adopted by the TBs, the institutional framework available is at least likely to facilitate an effective engagement between NHRIs and the TB State Reporting procedure. In light of the *output* findings, the final step of the adapted GBA to effectiveness analysis is to return to what were found to be the ultimate goals of the institutional framework for TB-NHRI engagement and see whether the *structure* and the *process* of this framework can realistically lead to goal attainment.

The aim of this exercise is linked to the broader GBA evaluation, focused on *the likelihood that outcomes be generated as a result of the process employed by the institutional framework for TB - NHRI engagement, utilizing its available structural assets*. Using a *medium-N comparative content analysis*, the exercise consists of a document content analysis of both TB recommendations and NHRI parallel reports submitted throughout the last reporting cycle of 10 selected state party examinations.

[82] For the purposes of this project, I consider as TB outputs the LOIs/LOIPRs and COBs influenced by NHRI submissions. The TB system has witnessed uneven development in the issuance of Follow-up recommendations over the past decade, and meager NHRI submissions specifically directed at influencing them. Accordingly, this study does not consider follow-up recommendations and related NHRI recommendations.

Ten countries have been selected by identifying a representative group from each of the five UN regions, in which NHRIs exist and regularly submit reports to the TB system. Two other selection criteria were the ratification status of each country (six or more UN human rights treaties ratified) and NHRI accreditation (only A-status NHRIs). Although limited in scope, the selected NHRIs cover the full geographical spectrum of international NHRI coordinating bodies,[83] thus giving a global dimension to the findings. By comparing recommendations found in each NHRI submission to committees' LOIs/LOIPRs and COBs, this exercise shows the relative extent of NHRI influence on the committees' work. As mentioned, it is nearly impossible to isolate the influence of NHRI engagement from that of other stakeholders, such as UN agencies and civil-society organizations (CSOs), which is beyond the scope of this research. The findings offered through this methodology, however, can be analogized to the GBA model's reverse engineering formula, "substituting outcome assessment with evaluation of structural and procedural adequacy."[84] In other words, conclusions on the (in)adequacy of the institutional framework for TB - NHRI engagement will be informed by how many NHRI recommendations are present in TB outputs.

[83] The Asia Pacific Forum, the European Network of NHRIs, the Network of African NHRIs, and the Federacion Iberoamericana del Ombudsman.
[84] Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-based Approach' 106(2) *American Journal of International Law* (2012).

According to the abovementioned method of selection, the ten countries in focus, are: Australia,[85] Canada,[86] Costa Rica,[87] Colombia,[88] Denmark,[89] Germany,[90] Indonesia,[91] Kenya[92], Morocco,[93] and South Africa.[94] The focus is on the following six TBs, selected due to

[85] CCPR, Sixth reporting cycle of Australia (2017); CEDAW, Eighth reporting cycle of Australia (2018); CERD, Combined eighteenth to twentieth reporting cycles of Australia (2017); CESCR, Fifth reporting cycle of Australia (2017); CRC, Combined fifth and sixth reporting cycles of Australia (2019); CRPD, Combined second and third reporting cycles of Australia (2019). For more information, see https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=AUS&Lang=EN.

[86] CCPR, Sixth reporting cycle of Canada (2015); CEDAW, Combined Eighth and Ninth reporting cycles of Canada (2016); CERD, Combined twenty-first to twenty-third reporting cycles of Canada (2017); CESCR, Sixth reporting cycle of Canada (2016); CRC, Combined third and fourth reporting cycles of Canada (2012); CRPD, Initial reporting cycle of Canada (2017). For more information, see https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=CAN&Lang=EN.

[87] CCPR, Sixth reporting cycle of Costa Rica (2016); CEDAW, Seventh reporting cycle (2017); CERD, Combined nineteenth to twenty-second reporting cycles of Costa Rica (2015); CECSR, Fifth reporting cycle of Costa Rica (2016); CRC, fourth reporting cycle of Costa Rica (2011); CRPD, Combined second and third reporting cycles of Costa Rica (2018). For more information, see https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=CRI&Lang=EN.

[88] CCPR, Seventh reporting cycle of Colombia (2016); CEDAW, Combined seventh and eighth reporting cycles of Colombia (2019); CERD, Combined fifteenth and seventeenth reporting cycles of Colombia (2015); CECSR, Sixth reporting cycle of Colombia (2017); CRC, Combined fourth and fifth reporting cycles of Colombia (2015); CRPD, Initial reporting cycle of Colombia (2016). For more information, see https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=COL&Lang=EN

[89] CCPR, Sixth reporting cycle of Denmark (2016); CEDAW, Eighth reporting cycle of Denmark (2015); CERD, Combined twentieth and twenty-first reporting cycle of Denmark (2015); CESCR, Sixth reporting cycle of Denmark (2019); CRC, Fifth reporting cycle of Denmark (2017); CRPD, Initial reporting cycle of Denmark (2014). For more information, see https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=DNK&Lang=EN.

[90] CCPR, Seventh reporting cycle of Germany (2018); CEDAW, Combined seventh and eighth reporting cycles of Germany (2017); CERD, Combined nineteenth to twenty-second reporting cycles of Germany (2015); CESCR, Sixth reporting cycle of Germany (2018); CRC; Combined third and fourth reporting cycles (2014); CRPD, initial reporting cycle of Germany 2015). For more information, see https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=DEU&Lang=EN.

[91] CCPR, Initial reporting cycle of Indonesia (2013); CEDAW, Combined sixth and seventh reporting cycles of Indonesia (2012); CERD, Combined initial to third reporting cycles of Indonesia (2007); CESCR, Initial reporting cycle of Indonesia (2014); CRC, Combined third and fourth reporting cycles of Indonesia (2014). For more information, see https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=IDN&Lang=EN.

[92] CCPR, Third reporting cycle of Kenya (2012); CEDAW, Eighth reporting cycle of Kenya (2017); CERD, Combined fifth to seventh reporting cycles of Kenya (2017); CESCR, Combined second to fifth reporting cycle of Kenya (2016); CRC, Combined third to fifth reporting cycles of Kenya (2016); CRPD, Initial reporting cycle of Kenya (2015). For more information, see https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=KEN&Lang=EN.

[93] CCPR, Sixth reporting cycle of Morocco (2016); CEDAW, Combined third and fourth reporting cycle (2008); CERD, Combined seventeenth and eighteenth reporting cycles of Morocco (2010); CESCR, Fourth reporting cycle of Morocco (2015); CRC, Combined third and fourth reporting cycles of Morocco (2014); CRPD, Initial reporting cycle of Morocco (2017). For more information, see https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=MAR&Lang=EN.

[94] CCPR, Initial reporting cycle of South Africa (2016); CEDAW, Combined second to fourth reporting cycles of South Africa (2011); CERD, Combined fourth to eighth reporting cycles of South Africa (2016); CESCR, Initial reporting cycle of South Africa (2018); CRC, Second reporting cycle of South Africa (2016); CRPD, Initial reporting cycle of South Africa (2018). Available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=ZAF&Lang=EN.

ratification by all ten selected countries and because all ten countries submitted a State Report for each in the past decade (2007–2020):

- the Committee on the Elimination of Racial Discrimination (CERD),
- the Human Rights Committee (HRCtee),
- the Committee on Economic, Social and Cultural Rights (CESCR),
- the Committee on the Elimination of Discrimination against Women (CEDAW),
- the Committee on the Rights of the Child (CRC), and
- the Committee on the Rights of Persons with Disabilities (CRPD).

Depending on availability, the analysis distinguishes between two phases, relating to the first two stages of the State Reporting procedure:

- towards the adoption of LOIs/LOIPR (stage 1)
- and towards the adoption of COBs (stage 2).

The pool of ten A-status NHRIs amount to 13% of the 79 A-status accredited NHRIs as of November 2020, and feature a representative set of NHRI institutional models. They are:

- the Australian Human Rights Commission,
- the Canadian Human Rights Commission,
- the Defensoria de los Habitantes de la Republica de Costa Rica,
- the Defensoria del Pueblo de Colombia,
- the Danish Institute for Human Rights,
- the German Institute for Human Rights,
- the Human Rights Commission of Indonesia (KOMNAS HAM),
- the Kenyan Human Rights Commission,
- the National Human Rights Council of Morocco, and
- the South African Human Rights Commission.

By comparing recommendations proposed by NHRI parallel reports and LOIs/PR and COBs issued by the various TBs, the consistency (or lack of it) between the two sets of recommendations may become visible. If recommendations found in NHRI parallel reports feature within the list of outputs adopted by the TBs, the institutional framework available is at least likely to facilitate an effective engagement between NHRIs and the TB State Reporting procedure.

In practice, the exercise consists of evaluating two integrated aspects of TB-NHRI engagement during the TB reporting cycle:

1. the amount of TB outputs that contain issues highlighted and suggested by NHRIs in their parallel reports; and
2. the extent of NHRI recommendations contained in parallel reports that have been integrated in TB outputs.

Both aspects represent important indicators for assessing the (in)adequacy of the institutional framework for TB - NHRI engagement in attaining its goals.

The methodology in relation to the first aspect is relatively straight forward. A comparative document content analysis of TB outputs (LOIs/PR and COBs) on the one hand and related NHRI parallel reports on the other, allows to identify the amount of TB outputs that share the same issues raised as recommendations in each NHRI parallel reports.

With regard the second aspect, the analysis is focused on the recommendations found in each NHRI's parallel report and wishes to identify how much is ultimately taken on board by each TB. It utilizes a grading of likeliness as 0, 1, or 2, where 0 is the absence of similar recommendation, 1 is a proxy partial similarity (i.e. similar content but with a slightly different focus or wording), and 2 is a proxy perfect or quasi perfect resemblance (i.e. quasi-identical content and wording). This ranking helps to design a more representative picture of the NHRI's influence on specific LOIs and COBs.

Overall, considering the irregular patterns of NHRI submissions for both LOIs/LOIPRs and COBs, 72 comparative content analyses were performed across the six TBs for the 10 countries in focus, with 28 analyses performed on issued LOIs/LOIPRs and related NHRI submissions and 44 analyses performed on issued COBs and related NHRI submissions. Out of the pool of selected NHRIs, in 32 instances no NHRI parallel report was submitted toward Pre-sessional Working Groups (LOIs/LOIPRs), while in 16 instances no NHRI parallel report was submitted toward TB sessions (COBs). In this way the medium-N analysis provides "a universe of cases large enough to look for patterns […], but small enough to present some context and detail."[95] For the purposes of this exercise, medium-N qualitative research relates to research that is epistemologically and ontologically rooted in qualitative social science traditions, but that examines a larger-than-usual number of cases.[96]

[95] Thomas M. Keck, 'Medium- and Large-N Qualitative Methods in Constitutional Law' in Malcolm Langford and David Law (eds), *Handbook on Research Methods in Constitutional Law* (Edward Elgar, forthcoming).
[96] Ibid, 6.

Before turning to the limitations pertaining to this exercise, it is important to highlight one important specification. Due to the irregular issuance of Follow-up recommendations by TBs vis-à-vis the selected states parties, as well as the low level of NHRIs' recommendations specifically directed toward FU recommendations, this analysis focuses only on the first two stages the State Reporting procedure, that is, on LOIs/LOIPRs and COBs. The Treaty Chairpersons meeting has recently called for further harmonization of the FU procedure,[97] and so it is arguably a matter of time until irregularity in this strategically relevant facet of the reporting cycle will cease.

2.1. Limitations of the Document Content Analysis

While the selected methodology is appropriate to extract the information needed, that is, to capture the influence of NHRI engagement with the TB State Reporting procedure, it suffers from certain limitations and the results ought to be interpreted with caution.

First, although the *content analysis* compares 1/8 of the world's A-status NHRIs in their reporting capacity to six TBs, engagement processes vary significantly across all NHRIs. Therefore we must be cautious in generalizing findings across all NHRIs, although patterns have been identified and presented below.

Second, because TBs also rely on parallel reports from other stakeholders (CSOs, for example), it is difficult to pinpoint the specific influence NHRI reports have on ensuing TB recommendations. While a grade of 2 is meant to better capture "direct" NHRI influence on specific LOIs and COBs, it is also possible that a separate CSO submission suggests the same recommendation, thus weakening the assessment of "NHRI-only" influence.

Third, the quantity and quality of NHRI recommendations differ significantly throughout the selected pool. Not every NHRI systematically submits to both Pre-sessional Working Groups (LOIs/LOIPRs) and to the Session (COBs). When they do, it may happen that a submission to that session builds on the content of that same NHRI's submission to the Pre-sessional Working Group. While on average the ten NHRIs in focus have submitted an overall total of 28 submissions towards Pre-sessional Working Group, and a total of 44 submissions towards TB Sessions, the volume varies from as few as three NHRI recommendations (submitted by the Defensoria del Pueblo de Colombia to CRPD's PSWG) to as high as 78 NHRI recommendations (submitted by the Defensoria del Pueblo de Colombia to the HRCtee PSWG).

[97] OHCHR, Position paper of the Chairs of the human rights treaty bodies on the future of the treaty body system, 31st meeting of Chairpersons (24–28 June 2019, New York), A/72/256, in Annex III, 2.

Although it may seem inevitable that the number of NHRI recommendations vary (because some countries may have more pressing issues than others concerning a particular TB reporting framework), it may also weaken the assessment of influence. On the one hand, NHRI parallel reports that contain fewer recommendations are more likely to be integrated in their entirety within TB outputs, thus scoring higher on influence levels. On the other hand, those that contain a long list of recommendations are more likely to have higher numbers of recommendations disregarded by TB members in their drafting of COBs and/or LOIs. In order to counter this weakness, the analysis also looks at the ratio of NHRI-influenced TB outputs to the total number of TB outputs.

Concerning quality and content of NHRI recommendations, several NHRI parallel reports do not feature recommendations per se, but rather describe relevant governmental activity and related NHRI actions.[98] Thus they refrain from suggesting actual recommendations, leaving that task to TB members. In such cases, influence can only be inferred indirectly. In other instances, NHRI parallel reports alternate descriptive paragraphs with highlighted recommendations.[99] It is often the case that a compilation of all recommendations is featured at the end of the report, allowing for a much more direct assessment of NHRI influence.[100] It is also interesting to note variance among NHRI parallel reports in terms of the language used. While many NHRIs utilize strong and direct formulations in criticizing government actions,[101] others seem more complacent[102] and some adopt neutral terms.[103] This may suggest disparate dynamics of self-awareness about what their role is both domestically and internationally. Other clear distinctions appear among the selected pool of NHRI parallel reports in terms of format and content. This reflects the internal structures of NHRIs, with specific commissioners and/or units working on specific sets of rights. In cases where NHRI reports are similarly formatted throughout the institution, influence-assessment criteria present fewer difficulties.[104]

[98] This has often been the case with submissions from the Defensoria de los Habitantes de la Republica de Costa Rica and the Defensoria del Pueblo de Colombia.
[99] This has often been the case with submissions from the Australian Human Rights Commission and the Danish Institute for Human Rights.
[100] Idem.
[101] This has often been the case with submissions from the Kenyan Human Rights Commission.
[102] This was the case in one submission from the South African Human Rights Commission.
[103] This was the case in most NHRI submissions under analysis.
[104] This has often been the case with submissions from the Australian Human Rights Commission and the Danish Institute for Human Rights.

Lastly, lack of uniformity has also afflicted LOIs/LOIPRs and COBs. In terms of quantity, certain TBs issue significantly more recommendations than others. As an example, the total of CERD outputs (LOIs and COBs) for the 10 selected states parties is 545, while the equivalent total of CRC outputs is 1472. TB recommendation paragraphs are drafted either as "blocks," in which several recommendations are made as short, distinctive, and numbered recommendations, or characterized by the use of separate numbering. Hence, in calculating the number of recommendations issued, the analysis could suffer from instances of double counting during the comparative exercise. To counter this weakness, a re-clustering of similar NHRI recommendations and LOIs/COBs has sometimes been performed in order to render the analysis a comparable one.

While these limitations do suggest that the results of the analysis should be taken with caution, it reinforces the argument put forward that a lack of uniformity and mainstreaming renders TB-NHRI engagement more difficult. The same lack of uniformity also hampers the evaluation of NHRI's influence on TB outputs.

3. An Impact Assessment of Treaty Body – NHRI Engagement toward Human Rights Implementation

3.1. A Single Country Case Study

In addition to output analysis, the second, more context specific step for an all-round assessment of organizational effectiveness, complementing the more formalist methodology typical of the GBA model, takes the form of a single country case study. Part C will seek to answer the following three research questions:

- *Are legal and policy frameworks in place domestically and do they allow for the establishment of and support for effective engagement between the NHRI and the TB system?* (preconditions for impact)
- *How and in what way have complementary NHRI and TB recommendations been referred to, used, and discussed at the domestic level?* (intermediate impact)
- *To what extent have complementary NHRI-TB recommendations had 'effects and influence' or 'repercussions' on domestic policy?* (policy impact)

By answering the above three interrelated questions, Part C develops an impact assessment of TB-NHRI engagement towards human rights implementation applied to a single country case study. The choice to adopt a single case study methodology allows a greater level of detail and understanding, similar to the ethnographer Clifford Geertz's notion of "thick description,"[105] the thorough analysis of the complex and particularistic nature of distinct phenomena. It is however important to distinguish, within case study methodology, between a 'holistic' case design, with a single unit of analysis, and an 'embedded' case design with multiple units of analysis. This case study falls in the latter category, and the last part of the thesis dissects the various units that shape the effects of TB-NHRI engagement in the selected country and analyses specific examples of such engagement. As Bennett and Checkel observe, this carries the advantage of offering a methodologically rigorous "analysis of evidence on processes, sequences, and conjunctures of events within a case, for the purposes of either developing or testing hypotheses about causal mechanisms that might causally explain the case."[106]

Single case analysis can therefore be valuable for the testing of hypothetical propositions. As expanded below, the selection of a "most-likely case" allows focusing on a country in which TB-NHRI engagement potentially "works" instead of countries in which one would expect hardly any result from the outset. In such way, it is possible to identity mechanisms and conditions under which TB-NHRI engagement facilitates human rights implementation. This case study attempts to enable readers to identify trends, strengths and weaknesses of a specific NHRI's engagement with the TB system. It may furthermore help shape the future and encourage reform after the 2020 TB review landmark. Strengths and weaknesses found in a "most - likely" scenario for the impact of TB-NHRI engagement can inform policy considerations, regardless of the context that shapes human rights implementation in the selected case study. Lastly, a "most-likely" case study can also inform the underlying hypothesis of the overall thesis, namely that in order to alleviate its current implementation gap, the TB system can benefit from improved coordination and the leveraging of synergies at the domestic level.

3.2. Country Selection – Australia as "Crucial Case Study"

A number of parameters were set for the case-study selection. The first prerequisite was that the selected country should have ratified at least six UN human rights conventions, so as to

[105] Clifford Gaertz, *The Interpretation of Cultures: Selected Essays* (Basic Books 1973).
[106] Andrew Bennett and Jeffrey T. Checkel, *Process Tracing* (Cambridge University Press 2014).

determine variance in its activity throughout the TB system. The second requirement was that the country should have participated regularly in the process of state reporting in at least three cycles of reporting. This permits to obtain a reliable picture of developments over time. A third necessary precondition was the presence of a well-regarded and well-funded A-status NHRI, which regularly submits parallel reports to the TB system. Within these parameters, the decision was made to focus on "most likely cases," where theory and previous empirical studies suggest that outcome is meant to occur, in other words where TB-NHRI engagement in facilitating human rights implementation could be expected. This particular choice of case study design falls under what Eckstein defines as crucial case studies, within which he includes both the idea of "most-likely" and "least-likely" cases. Whereas the former relates those instances in which it is likely that a hypothesis is affirmed, if it is to have any validity at all, the latter concern "tough tests" in which the posited hypothesis is unlikely to be confirmed. Levy neatly refers to the inferential logic of the least-likely case as the "Sinatra inference"—if a theory can make it here, it can make it anywhere. Conversely, if a theory cannot pass a most-likely case, it is seriously impugned.[107]

Accordingly, two aspects of a most-likely case scenario drove case selection. First, commitment to the rule of law and democracy may be considered a precondition for impact and effectiveness of TB-NHRI engagement. Lacking enforcement mechanisms, the TB system strongly relies on mechanisms of persuasion and these can be presumed to be most effective in stable democracies, where human rights are by and large considered essential elements of a functioning state.[108] A stable democratic system as most-likely case for effective TB-NHRI engagement is also presumed by liberal theories of compliance, which highlight domestic mobilization as key to compliance with international human rights standards.[109] It is in stable democracies that international organizations find the best ground to "recruit" domestic interest groups or compliance partners or allies, such as NHRIs.[110] Scholars have argued that democracies, by design, foster dialogue, internal political contests, and accountability, all of

[107] Jack S. Levy, 'Case Studies: Types, Designs and Logics of Inference' 25 *Conflict Management and Peace Science* (2008) 1–18.
[108] Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press 2013); Emilie Hafner-Burton, *Making Human Rights a Reality* (Princeton University Press 2013).
[109] Laurence Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' 107 *Yale Law Journal* (1997).
[110] Ibid, 331–335.

which are essential for human rights treaties to have effect.[111] Yet counter to these claims, recent empirical findings show that civil and political rights have had the most evident effects in transitioning countries.[112] This was found to be due to higher domestic mobilization levels in such countries, coupled with the "redundancy" of TB recommendations in consolidated Western democracies. The current project will not focus on these middle-ground countries for two reasons. Firstly, specific empirical studies on the impact of TB reporting processes hint at higher levels of compliance in liberal democracies. Heyns and Viljoen find that countries endowed with a domestic human rights culture and active "domestic constituencies," an independent judiciary, and free press lead to an "enabling domestic environment."[113] Similarly, Tomuschat finds that rule of law-abiding countries evaluate and address TB recommendations more thoroughly.[114] Due to the prominent role this study gives to structural and procedural indicators of TB-NHRI engagement, case study selection rested on the understanding that "formal institutional design is most likely to translate directly to improved outcomes in stable democracies that follow the rule of law."[115]

A second precondition for impact and effectiveness is a serious commitment on the part of the state to fulfill its treaty obligations throughout its TB engagement.[116] Indications include consistent adherence to TB reporting requirements and a propensity to report on time; correlations between TB effectiveness and the extent to which states take their reporting obligations seriously have been outlined by prominent scholars.[117] Timeliness of reporting is also seen as dependent on adequate bureaucratic and financial capacity, including a thorough knowledge of the TB processes.[118] This expectation is corroborated by the managerial model of compliance, which associates TB effectiveness with sufficient state capacity and

[111] Hafner-Burton (n 108) 64–71.
[112] Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009).
[113] Viljoen F, "The African Human Rights System and Domestic Enforcement" in Malcolm Langford, César Rodríguez-Garavito and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance: Making it Stick* (Cambridge University Press 2017) and Heyns and Viljoen (n 10).
[114] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press 2008), 13.
[115] Katerina Linos and Thomas Pegram, 'What Works in Human Rights Institutions' 112(3) *American Journal of International Law* (2017), 5.
[116] Heyns and Viljoen (n 10); Jasper Krommendijk, *The domestic impact and effectiveness of the process of state reporting under UN human rights treaties in the Netherlands, New Zealand and Finland: Paper-pushing or policy prompting?* (Intersentia 2014).
[117] Cosette Creamer and Beth Simmons, "The Proof Is in the Process: Self-Reporting Under International Human Rights Treaties" (2020) 114 American Journal of International Law 1; Philip Alston, *Final report on enhancing the long-term effectiveness of the United Nations human rights treaty system* (1989).
[118] Ibid.

resources/expertise while attributing non-compliance to limited state capacity. According to Chayes and Chayes, the causes of noncompliance call for a managerial model of compliance, including non-coercive tools such as reporting, verifying, monitoring, technical and financial assistance, and capacity building.[119] These considerations meant the case selection for this project was limited to industrialized countries, which tend to benefit from the greatest capacity and most developed domestic systems for human rights monitoring (NHRS), and have been found to comply more thoroughly with reporting obligations.

The choice of Australia allows for the analysis to be grounded in an environment of democratic stability and freedom, respect for rule of law, and human rights awareness, with the state actively involved in advancing human rights at the multilateral level. It features at the top of the Freedom House Index (98/100),[120] scoring its highest points in civil and political rights. Australia is characterized by a "strong record of advancing and protecting political rights and civil liberties," although, "challenges to these freedoms include the threat of foreign political influence, harsh policies toward asylum seekers, and ongoing difficulties ensuring the equal rights of indigenous Australians."[121]

In Australia, periodic engagement has occurred under the State Reporting procedure with the following six TBs:

- the Human Rights Committee (HRCtee),
- the Committee on Economic, Social and Cultural Rights (CESCR),
- the Committee on the Elimination of Racial Discrimination (CERD),
- the Committee on the Elimination of Discrimination Against Women (CEDAW),
- the Committee on the Rights of the Child (CRC), and
- the Committee on the Rights of Persons with Disabilities (CRPD).

It follows that Australia has regularly participated in these six TBs' State Reporting procedure. Crucially, Australia has established an A-status NHRI, the AHRC, whose model was highly influential in shaping the Paris Principles themselves.[122] The AHRC has regularly submitted

[119] Abram Chayes and Antonia Handler Chayes, 'On Compliance' 47 *International Organization* (1993).
[120] Freedom House, 'Freedom in the World 2018 – Australia Profile' available at https://freedomhouse.org/report/freedom-world/2018/australia.
[121] ibid

[122] Tom Pegram, The Untold Story of the Paris Principles (blogpost, June 19 2019) available at http://tompegram.com/2019/06/untold-story-paris-principles/.

parallel reports and briefed the above-mentioned TBs during its reporting cycles. From a practical perspective, this implies that sufficient information is available for analysis in the form of state reports, summary records, NHRI parallel reports, civil society submissions, and domestic mechanisms for follow-up to TB recommendations (parliamentary records, ministerial briefs, judgements, media coverage, and so on).

3.3. The Impact of AHRC – TB Engagement on Domestic Human Rights Implementation

Domestic contexts are central to the implementation of human rights law. By addressing three interrelated questions, I wish to provide a methodology that comprehensively covers three identified types of impact: preconditions for impact, intermediate impact and policy impact. A wide variety of approaches can be used to survey and observe how state actors work (or do not work) and how they interact to implement political and legal decisions. A qualitative analysis of the role and functioning of NHRI engagement with the TB system can draw on previous legal analyses of how human rights are implemented through legislation and administrative regulations in given contexts,[123] ethnographic studies of how institutions work,[124] and more socio-legal approaches to how human rights actors function.[125] Many authors have previously used qualitative methods (survey, interviews, and observation) for such an assessment.[126] The approach applied here is mixed-method, as it focuses not only on more qualitative methods but precedes this assessment with an analysis of the mandate and role of the various components of Australia's National Human Rights System (NHRS). By following this approach, I investigate how the NHRI works in practice when engaging with TB recommendations, which processes it actually puts in place or participates in, and how it interacts with other actors, whether they be governmental state actors, independent state actors and non-state actors. Using a mixed-method approach assists in analyzing the successes and shortfalls of inter-institutional

[123] Christof Heyns and Frans Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level' 23 *Human Rights Quarterly* (2001) 483–535.
[124] Thomas Max Martin, 'The local importation of human rights in Ugandan prisons' 212 *Prison Service Journal* (2014) 45–51; Thomas Bierschenk and Jean Pierre Olivier de Sardan (eds), *States at Work: The Dynamics of African Bureaucracies* (Brill, 2014).
[125] Ryan Goodman and Thomas Pegram (eds), *Human Rights, State Compliance and Social Change: Assessing National Human Rights Institutions* (Cambridge University Press 2012); Luka Glušac, 'Local public libraries as human rights intermediaries' 36(2) *Netherlands Quarterly of Human Rights* (2018) 133–151; Hans Otto Sano and Thomas Max Martin, 'Inside the Organization. Methods of Researching Human Rights and Organizational Dynamics' in Bård A. Andreassen, Hans Otto Sano, and Siobhan McInerney-Lankford, *Research Methods in Human Rights: A Handbook* (Edward Elgar 2017) 273–281.
[126] Mark Goodale and Sally Engle Merry, *The Practice of Human Rights: Tracking Law between the Global and the Local* (Cambridge University Press 2007).

engagement as well as understanding the reasons why certain components of the NHRS fulfill their roles or not, whether due to lack of resources and capacity, lack of domestic political will, local cultural resistance (that generates political resistance) or other reasons. For the purposes of Part C, the assessment of TB-NHRI engagement will thus feature a qualitative research design combining several methodological strategies.[127] Table 3.3 helps to visualize the devised three-legged approach to impact assessment.

Table 3.3. Types of Impact of AHRC-TB Engagement

Preconditions for Impact	Analysis of the Australian NHRS: actors, interactions and frameworks *RQ: Are legal and policy frameworks in place domestically and do they allow for establishing and supporting effective engagement between the AHRC and the TB system?*
Intermediate Impact	The Use of complementary TB and AHRC recommendations by NHRS actors *RQ: In what way have complementary AHRC and TB recommendations been referred to, used, and discussed at the domestic level?*
Policy Impacts	The extent to which complementary AHRC and TB recommendations have had effects, influence or repercussions on domestic policy *RQ: To what extent have complementary AHRC-TB recommendations had 'effects and influence' or 'repercussions' on domestic policy?*

My intention with this part of the thesis is twofold. Firstly, I wish to systematize (as much as it is possible) the intricacies of the current human rights protection system in Australia and the roles of both the TB system and AHRC therein. This will be done by positioning AHRC-TB engagement within the NHRS model, in what I categorize as *preconditions for impact.* Concentrating on the formal infrastructure available for AHRC-TB engagement, essentially placing this engagement within the Australian NHRS, is a first step which must precede a more qualitative assessment of how such engagement works at the national and local levels. The main idea behind the conceptualization of a NHRS is that, when all actors, interactions, and frameworks are in place at domestic level, the state is in a better position to comply with all its human rights obligations. This approach falls well within the realm of New Legal Realism scholarship that looks into how law works in practice and through the institutions and processes it puts in place.

[127] Jonathan Zeitlin, 'The open method of coordination and reform of national social and employment policies: influences, mechanisms, effects,' in Martin Heidenreich and Jonathan Zeitlin, *Changing Employment Welfare Regimes: The Influence of the Open Method of Coordination on National Reforms* (Routledge 2009) 214–45.

Also pertaining to a new legal realist approach, my second intention in the chapter is to assess the *intermediate impact* and *policy impact* of AHRC-TB engagement. In order to tackle these latter types of impact, I have selected two specific instances of AHRC-TB engagement, the first concerning the issue of *inequality in health standards of Aboriginal and Torres Strait Islanders* and the second concerning *children in immigration detention*. A focus on *intermediate impact*, understood as the "use" made of complementary AHRC-TB recommendations by different domestic stakeholders, allows categorization to take place depending on the extent of references made by other domestic actors in their own work. A focus on *policy impact*, however, goes beyond assessing whether various actors recognize the authority of such engagement through a more or less extensive use of complementary AHRC-TB recommendations in their activities. It is also important that recognition is met with meaningful action by these actors to give full effect to ensuing recommendations.[128] For this reason, this analysis also looks at whether both selected examples of AHRC-TB engagement have led, through time, to legal and/or policy changes in either field of focus.

Combining these three approaches (preconditions for impact, intermediate impact, and policy impact), the chapter strives to tackle the current intricacy of the Australian patchwork of human rights protection vis-à-vis the TB system and assess the AHRC's role therein. It also challenges the binary claim that effective implementation efforts reside either at the international or the national level to show that they benefit from a transnational, iterative continuum exemplified by the TLO concept. Adapting Alter's words to the specifics of TB-NHRI engagement, the proposed framework suggests

> a strategy through which [TBs and NHRIs] can become politically influential institutions. [TB members and NHRI representatives] should look outside their engagement to build support among future compliance partners and the larger legal field. This further implies that it is not enough for [TBs and NHRIs] to focus on delivering high-quality recommendations and advice. Nor should they be satisfied once a recommendation garners compliance. Building and maintaining authority remains a collective and fragile enterprise, one that is shaped by a range of contextual factors and requires the ongoing care and attention of a wide range of actors.[129]

[128] Karen J. Alter et al., 'How Context Shapes the Authority of International Courts' 79 *Law and Contemporary Problems* (2016).
[129] Ibid.

The following sections explain the rationale behind the types of impact and the methodology chosen for their assessment.

Preconditions for Impact – the National Human Rights System

The Australian Human Rights Commission has been collaborating with the TB system for some decades with, on paper at least, a relatively strong mandate for monitoring the implementation of UN human rights conventions. Even then, there might appear discrepancies between formal structure/process and its actual operation. In other words, its effectiveness on translating TB recommendations into domestic human rights policy reform could amount to mere "paper-pushing."

The first challenge, then, concerns how to define and measure impact and how to establish in what ways NHRIs can be held accountable for their effectiveness in their different contexts. NHRIs are "national entities operating within a wider national human rights system that functions across a larger political set-up—a set-up that is often deeply constraining for national (and international) human rights actors."[130] In the words of Carver and Korotaev:

> the efficiency of the NHRI's activities depends significantly on the level of development of democratic institutions and judicial system in the country. A NHRI cannot usually be much better than the general level of institutional development and effectiveness in the country. They have to develop and improve together. But there is a complex two-way relationship: active, consistent and efficient NHRIs can greatly contribute to the democratic development of their country.[131]

In a predominantly qualitative study such as this, a direct causal link between TB recommendations, related NHRI activity and legislative/legal/policy reforms at the domestic level might be difficult to establish conclusively. This more context-specific assessment of TB-NHRI engagement adopts a novel analytical framework, the national human rights system

[130] Jensen (n 67).
[131] Richard Carver and Alexey Korotaev, *Assessing the Effectiveness of National Human Rights Institutions*. Consultancy Report on the behalf of the UNDP Regional Centre in Bratislava (2007) 5.

(NHRS) framework.[132] The main idea behind the conceptualization of a NHRS is that, "when all actors, frameworks and procedures are in place at domestic level, the state will be in a better position to comply with all its human rights obligations."[133] This approach falls well within the realm of new legal realist scholarship looking into how law works in practice and through the institutions and processes it puts in place.[134] Concentrating on the formal infrastructure available for TB-AHRC engagement is thus a first step that must precede a qualitative assessment of how specific instances of engagement work at the national and local levels. When investigating how TB-NHRI engagement works in context, it is essential to document and analyze whether the main components of the system are in place and work in practice. That first step determines whether the institutional basis for actual human rights implementation and meaningful dialogue between domestic and supranational levels is in place. This reasoning focuses on formal design features because, as Linos and Pegram argue, a large body of literature in administrative law points to the fact that organizations with "formal safeguards are often more effective than agencies that lack them."[135]

Analyzing initiatives at the domestic level that can facilitate the receptiveness of human rights recommendations is at the core of human rights implementation efforts. After all, the primary responsibility for preventing human rights violations lies with the national protection system of each state. It is for the government to ensure to all individuals within its territory, and subject to its jurisdiction, the rights recognized in any ratified human rights convention. The state is furthermore responsible to take the necessary steps, in accordance with its constitutional processes and the provisions of ratified international human rights treaties, to develop specific activities (legislative, administrative, or other) that enable the enjoyment of recognized rights. Lastly, it is obliged to guarantee an effective remedy to any person whose recognized rights have been violated.

These three obligations, which taken as whole constitute the tripartite responsibility to respect, protect, and fulfill, are the founding pillars of "one of the most strategic concepts for the universal realization of human rights,"[136] that is, a functioning and effective NHRS. The

[132] Stéphanie Lagoutte, 'The Role of State Actors Within the National Human Rights System' 37 *Nordic Journal of Human Rights* (2019) 177–194.
[133] Ibid.
[134] Nourse and Shaffer (n 75) 62.
[135] Linos and Pegram (n 69) 4.
[136] Bertrand G. Ramcharan, 'National Responsibility to Protect Human Rights' 39(2) *Hong Kong Law Journal* (2009).

common denominator for the overall NHRS concept is that when frameworks, actors, and interactions are purposefully set up to integrate and monitor human rights in a country, the state will be better equipped to abide by its international human rights commitments. Dissecting this three-part definition, most of these frameworks, actors, and interactions are state-driven, some both state-driven and independent (such as the work of courts or indeed NHRIs), and others are driven by purely non-state actors.

The methodological framework utilized in order to identify whether *legal and policy frameworks are in place domestically and whether these allow for an effective TB-NHRI* engagement will include an analysis of the following elements:

- the actors of the NHRS
    - governmental state actors
    - independent state actors
    - non-state actors
- interactions between NHRS actors
    - coordination structures, processes, and dialogues
    - joint MoUs between state actors
    - platforms for engagement between state and non-state actors
- frameworks between NHRS actors and UN human rights mechanisms
    - National Human Rights Action Plans
    - Inter-Ministerial Committees on Human Rights
    - National Mechanisms for Reporting and Follow-up

The underlying assumption of this approach is that without an adequate and receptive domestic human rights dimension, UN-level initiatives risk facing structural and procedural complications that might undermine efforts towards a more interconnected system of human rights monitoring. The outcome of a NHRS analysis will lead to the identification of institutional trends and models within the Australian context. In turn, the strengths and weaknesses stemming from the NHRS model can inform other domestic institutionalization initiatives as well as boost efforts toward increased connectivity among UN human rights mechanisms.

Intermediate and Policy Impact of Selected Instances of AHRC – TB Engagement

Aside from analyzing the NHRS in which TB-NHRI engagement operates, it is also useful to select and dig deeper into specific cases that attest to the impact of such inter-institutional

engagement domestically. I have selected two specific fields in which AHRC – TB engagement has taken place, namely the issue of *inequality in health standards of Aboriginal and Torres Strait Islanders* and issue of *children in immigration detention*.

The selection process took into consideration TB recommendations that reflect AHRC submissions found in parallel reports, on the assumption that due to prior work towards its own submission, it is more likely that the AHRC will dedicate more efforts toward related policy/legislative change. Secondly, case selection stems from a collation of views from interviewed stakeholders who qualified both selected fields as typical and accessible scenarios of recent AHRC-TB engagement.[137] Lastly, it was considered important to guarantee variance in terms of TB of reference as well as NHRI functions. With regards to issue of *inequality in health standards of Aboriginal and Torres Strait Islanders,* the analysis relies on Concluding Observations from the latest three review cycles of Australia by the CERD Committee and three distinct AHRC functions: parallel reporting to the CERD Committee, annual reporting by the Aboriginal and Torres Strait Islander Social Justice Commissioner and thematic reporting in response to government action (the AHRC Close the Gap Reports). With regards to the issue of *children in immigration detention,* the analysis relies on Concluding Observations from the two latest review cycles of Australia by the CRC Committee and three distinct AHRC functions: parallel reporting to the CRC Committee, annual reporting by the Children's Commissioner and the National Inquiry into children in immigration detention (the "Forgotten Children Inquiry"). In essence, I trace the impact and effects of two typical instances of AHRC-TB engagement involving disparate NHRI functions and TB review cycles. The analysis thus offers a generalizable set of factors useful for identifying the strengths and weaknesses of AHRC-TB engagement.

For both selected instances of AHRC – TB engagement, the study is based on a document content analysis of the above TB and NHRI outputs, as well as ministerial and parliamentary papers and reports, Federal Court judgements, as well as NGO reports and media statements for the period 2005–2019. Academic literature complements the document content analysis as well as opinions from 25 interviews with elite domestic actors.[138] In more detail, the following

[137] For the precise methodology applied for the interviews see section 4 of this chapter. For a list of interviewees, see Annex.
[138] The precise methodology applied for the interviews is developed in section 4 of this chapter.

types of documentation have been used as tools for impact assessment for both selected instances of AHRC-TB engagement:

- 3 sets of Concluding Observations from the latest examinations of State Reports of Australia by the CERD Committee[139];
- 2 sets of Concluding Observations from the latest examinations of State Reports of Australia by the CRC Committee[140];
- 4 AHRC parallel reports (3 submitted to the CERD Committee[141] and 1 submitted to the CRC Committee[142]), 14 AHRC Annual Reports[143], 7 AHRC Annual Commissioners and thematic reports[144] and 1 AHRC National Inquiry Report[145];
- 3 Combined Periodic Reports of Australia to the CERD Committee[146];
- 2 Periodic Reports of Australia to the CRC Committee[147];
- 10 Australian Government reports, policy papers and communiques[148];

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[139] CERD Committee, Concluding Observations, CERD/C/AUS/CO/14 (14 April 2005); Concluding Observations, CERD/C/AUS/CO/15-17 (13 September 2010); Concluding Observations, CERD/C/AUS/CO/18-20 (26 December 2017).

[140] CRC Committee, Concluding Observations, CRC/C/15/Add.268 (20 October 2005) and Concluding Observations, CRC/C/AUS/CO/4 (28 August 2012).

[141] Australian Human Rights Commission, Information concerning Australia's compliance with the International Convention on the Elimination of All Forms of Racial Discrimination (13 February 2005, 8 July 2010 and 30 October 2017).

[142] Australian Human Rights Commission, Information relating to Australia's joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol on the sale of children, child prostitution and child pornography, and second report on the Optional Protocol on the involvement of children in armed conflict (1 November 2018)

[143] Australian Human Rights Commission, Annual Reports (2005 – 2019), available at https://humanrights.gov.au/our-work/commission-general/publications/annual-reports-index.

[144] Australian Human Rights Commission, Social Justice Report (2005),available at https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-report-5; Close the Gap Reports (2016 – 2020) available at https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications; Children Rights Reports (2018 – 2019), available at https://humanrights.gov.au/our-work/childrens-rights/projects/childrens-rights-reports;

[145] Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention Report* (2014).

[146] Commonwealth of Australia, *Thirteenth and Fourteenth Periodic Reports of Australia to CERD*, *CERD/C/428/Add.2* (2005); *Fifteenth to Seventeenth Combined Periodic Reports of Australia to CERD*, CERD/C/AUS/15-17 (2010) and *Eighteenth to Twentieth Combined Periodic Reports of Australia to CERD*, CERD/C/AUS/18-20 (2016).

[147] Commonwealth of Australia, *Fourth Periodic Report of Australia to CRC*, CRC/C/AUS/4 (2009), *Fifth and Sixth Periodic Reports of Australia to the CRC*, CRC/C/AUS/5-6 (2018).

[148] Commonwealth of Australia, Department of the Prime Minister and Cabinet (2007), 'Closing the Gap Prime Minister's Report 2017,' available at <http://closingthegap.pmc.gov.au/sites/default/files/ctg-report-2017.pdf>: Department of Health, Implementation Plan for the National Aboriginal and Torres Strait Islander Health Plan 2013–2023; Department of Prime Minister and Cabinet, Closing the Gap: Prime Ministers Report 2017; Australian Government, Department of Prime Minister and Cabinet, Closing the Gap Report 2019, available at <https://ctgreport.niaa.gov.au/sites/default/files/ctg-report-20193872.pdf?a=1>; Australian Government, Department of Home Affairs, Response to the Australian Human Rights Commission Report on 'The Forgotten Children: National Inquiry into Children in Immigration Detention 2014' (10 November 2014)

- 28 Australian and International NGO parallel reports submitted to the CERD and CRC Committees.[149]
- 4 Mission Reports of Special Rapporteurs[150]
- 6 Parliamentary Joint Committee on Human Rights Reports and 5 Senate Standing Committee on Legal and Constitutional Affairs Reports[151];

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available at <www.homeaffairs.gov.au/reports-and-pubs/files/department-response-ahrc-inquiry.pdf>; Philip Moss, *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru* (Department of Immigration and Border Protection, 6 February 2015) www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-conditions circumstances-nauru.pdf;

[149] NGO Submission to the UN Committee on the Elimination of Racial Discrimination, 'Freedom Respect Equality Dignity: Action (June 2010) available at <https://tbinternet.ohchr.org/Treaties/CERD/Shared%20 Documents/AUS/INT_CERD_NGO_AUS_77_8046_E.pdf>; Amnesty International, Submission to the United Nations Committee on the Elimination of Racial Discrimination (2017), available at <https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/ AUS/INT_CERD_NGO_AUS_29290_E.pdf>: National Congress of Australia's First Peoples, Aboriginal Peak and Torres Strait Islander Organisations Unite — The Redfern Statement (2016); Chris Johnson, AMA Demands Urgent Fix to Humanitarian Emergency on Nauru (20 September 2018) Australian Medical Association, available at <https://ama.com.au/ausmed/ama-demands-urgent-fix-humanitarian-emergency-nauru>; Médecins Sans Frontières, *MSF Calls for the Immediate Evacuation of All Asylum Seekers and Refugees from Nauru* (11 October 2018;

[150] Anand Grover, *United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Preliminary Observations and Recommendations* (4 December 2009); Anand Grover, *United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Addendum: Mission to Australia, UN Doc A/HRC/14/20/ADD.4* (3 June 2010); Victoria Tauli Corpuz, UN Human Rights Council, Report of the Special Rapporteur on the rights on indigenous peoples on her visit to Australia, UN Doc A/HRC/36/46/Add.2 (8 August 2017), 4746-47 available at <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/36/46/Add.2>; François Crépeau, Report of the Special Rapporteur on the Human Rights of Migrants on His Mission to Australia and the Regional Processing Centres in Nauru, UN Doc A/HRC/35/25/Add.3 (24 April 2017);

[151] Parliament of Australia, "Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru, Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru," 31 August 2015 available at <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processin g_Nauru/Final_Report; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of the Migration (Regional Processing) package of legislation* (19 June 2013) <www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Committee_Inquiries/mig ration/index>; Select Committee on the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru, Parliament of Australia, *Taking responsibility: Conditions and circumstances at Australia's Regional Processing Centre in Nauru* (August 2015) 59–86 <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processin g_Nauru/~/media/Committees/nauru_ctte/Final_Report/report.pdf>; Senate Standing Committee on Legal and Constitutional Affairs, *Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre* (2017) <www.aph.gov.au/Parl iamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/NauruandManusRPCs/Report; Senate Standing Committee on Legal and Constitutional Affairs, *Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre* (2017) 165 <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional _Affairs/NauruandManusRPCs/Report>; Evidence to Senate Standing Legal and Constitutional Affairs, Budget Estimates, Answer to Question taken On Notice BE18/243, Canberra, 12 June 2018 (provided 5 July 2018) <www.aph.gov.au/Parliamentary_Business/Senate_Estimates/legcon>.

- 6 cases from the Federal Court of Australia[152].

Let us now turn to the specific methodology adopted to assess the remaining two types of impact identified.

This study defines "intermediate impact" as the manner in which NHRS actors have used and discussed *complementary AHRC and TB recommendations* at the domestic level. This definition fits within theoretical frameworks that focus on levels of domestic and transnational mobilization, by associating the extent of domestic actors' use of *complementary AHRC and TB recommendations* to their impact (or lack thereof). The crucial point for this part of the analysis is that in order for the institutional framework for TB - NHRI engagement to have some sort of impact domestically, it cannot solely rely on the (in)adequacy of the NHRS in which it operates. It is also necessary that other domestic actors recognize both TB and NHRI output as authoritative. Alter, Helfer, and Madsen, in a recent study on how context shapes the authority of international courts, highlight the importance of such recognition by key audiences:

> We are interested in the statements and conduct of these audiences. In particular, we ask whether one or more audiences recognize, by their words, actions, or both, that international courts rulings are legally binding and engage in actions that push toward giving full effect to those rulings.[153]

According to Alter et al, *recognition* of an obligation to comply is a necessary factor for international court effectiveness.[154] Due to the non-binding nature of both TB and NHRI recommendations, recognition of authority plays an even larger role for both TBs and NHRIs than for international courts. As such, it seems "more conclusive and determinative of implementation and compliance" to look at "the respect which the body is accorded, by States in particular, but also by other stakeholders."[155] For TBs, *recognition* can be either an express statement on the government's intent to comply, or the implied acceptance that accompanies a government's decision to implement or give effect to issued recommendations. TB recognition by independent actors such as NHRIs, or non-state actors such as civil society groups, occurs

[152] *FRM17 v Minister for Immigration and Border Protection* (2018) FCA 63; *AYX18 v Minister for Home Affairs* (2018) FCA 283; *BAG18 v Minister for Home Affairs* (2018) FCA 1060; *DIZ18 v Minister for Home Affairs* (2018) FCA 1050; *DWD18 v Minister for Home Affairs* (2018) FCA 1121.
[153] Karen J Alter, Laurence R. Helfer, and Mikael Rask Madsen, 'How Context Shapes the Authority of International Courts' 79 *Law and Contemporary Problems* (2016) 6.
[154] Ibid 7.
[155] Rachel Murray and Debra Long, *Soft/Hard, Binding/Non-Binding: A Useful Distinction? The Implementation of the Findings of the African Commission on Human and Peoples' Rights* (Cambridge University Press 2015) 24.

when they refer to TB recommendations when pushing states to conform to their international human rights obligations. For NHRIs, *recognition* may also come in diverse forms and is strongly dependent on the specific mandate in question. Generally speaking NHRI recognition may take place expressly, with the government stating intent to comply with a recommendation, as well as implicitly, through the government's decision to give effect to NHRI advice. As for TB authority, NHRIs also require recognition from other domestic stakeholders, through references to their reports, inquiries, and recommendations by domestic courts, other independent state institutions, civil society organizations, the media, and the general public.

In sum, the identification of intermediate impact for the purposes of this project relies on the following assumption: the higher the use of *complementary AHRC and TB recommendations* by other domestic actors in the outputs they issue, the more likely they are to use these recommendations in their subsequent work. This is because of the higher recognition of authority that the different domestic actors accord to both the AHRC and TBs.

The discussion about intermediate impact deals with modalities through which domestic actors have used and referred to AHRC parallel reports, annual reports, and policy papers, and generally understood advocacy efforts toward the implementation of TB recommendations. Examples of domestic actors in focus here include the government (different ministries for different TBs), parliament, the courts system, other independent human rights institutions, civil society, and the media.

In order to assess *how and in what way complementary AHRC and TB recommendations have been referred to, used, and discussed at the domestic level,* I identify three degrees of intermediate impact (Table 3.4). These can be useful in categorizing NHRI activity when engaging with TB recommendations in the national context; the table below offers such a categorization, including indicators for each type of impact outlined.

Table 3.4. Types of TB-NHRI Intermediate Impact[156]

Types of Intermediate Impact	Indicators	Determinants
	No identifiable "use" of complementary TB and NHRI	No evidence of complementary TB-NHRI recommendations

[156] The categorization in Table 3.4 adapts the five types of "Authority in Fact" identified in Alter et al. (n 153) 1–36.

No Intermediate Impact	recommendations by actors in the National Human Rights System under scrutiny	outside of the formal State Reporting cycle.
Narrow Intermediate Impact	Identifiable "use" of complementary TB and NHRI recommendations by "compliance actors" in the National Human Rights System under scrutiny. This includes government officials, administrative agency officials, judges and other policy makers, including lawyers.	Knowledge and use of complementary TB-NHRI recommendations by domestic actors who have the power to decide whether to comply with international law as interpreted by the TB and monitored by the NHRI.
Extensive Intermediate Impact	Identifiable "use" of complementary TB and NHRI recommendations by a wider audience. This includes civil society groups, other independent state bodies, academia and the media.	Widespread knowledge and use of complementary TB-NHRI recommendations throughout the wider public.

I apply the three types of intermediate impact to joint TB-NHRI efforts to tackle Aboriginal and Torres Strait Islander equality of health and children in immigration detention. Generally speaking, it can be difficult to set selected instances of TB-NHRI engagement precisely within one or the other category of intermediate impact. The categorization is useful to identify movement across types, however, and variation across the TB system and NHRI focus areas. For example, certain complementary TB and NHRI recommendations may either be generally disregarded (no intermediate impact) or indeed be considered useful guidance for domestic policy reform, such as when NHRI domestic activity broadens the scope of TB influence to "compliance partners" (narrow intermediate impact). A clear communications strategy developed by the NHRI could bring increased attention to certain issues raised by TBs, thus increasing knowledge among civil society organizations and the wider public (extensive intermediate impact).

This intermediate step, based on the "use" of complementary AHRC and TB recommendations by other domestic actors, leads to the final methodological aspect of Part C, that is *policy change*

affected by TB-NHRI engagement. In relation to the two selected instances of AHRC-TB engagement, it is in fact also important to assess whether such engagement has effectively led to change. "Policy impact" is defined as the 'effects and influence' or 'repercussions' of *complementary AHRC and TB recommendations* on domestic policy.[157] This does not only mean adoptions of novel measures on behalf of the state but might also entail, for example, preventing adoptions of potentially violating measures or the commissioning of related inquiries/evaluation reports. Such understanding of policy impact falls under what what Rodrıguez-Garavito calls a neorealist approach: an intervention is effective when it produces an "observable change" in the conduct of those it targets.[158] Simmons makes the same observation on previous research on the effects of international treaties.[159]

The most challenging aspect of such an understanding of impact analysis is perhaps that of causation.[160] Methodologically, it is difficult to establish an exact causal relation between complementary AHRC and TB recommendations, on the one hand, and policy/legislative change, on the other. As such, a definition of impact as 'effects', 'influence' and 'repercussions', is helpful in that it denotes some form of link between complementary AHRC and TB recommendations and domestic policy without necessarily amounting to an established link of cause and effect. This last step of the case study analysis thus wishes to identify, to the extent possible, correlation between complementary AHRC and TB recommendations and domestic policy. It is therefore a methodology that applies process tracing in order to identify instances where NHRI – TB engagement contributed to change/domestic effects, which requires multiple observation points and a careful triangulation of data.[161]

The formal architecture within the Australian NHRS that is available to the AHRC in translating TB recommendations into potentially effective recommendations will be assessed in light of actual specific changes in the country's policy and legislative framework. The qualitative aspect of the research plays a crucial role in assessing effectiveness, and the Australian NHRS is the

[157] Christof Heyns, Frans Viljoen and Rachel Murray, Background Information to Country Researchers, Study on the Impact of the United Nations Human Rights Treaties on the Domestic Level (11 March 2020) available at http://www.icla.up.ac.za/guidance-for-contributors-to-the-study/contributors-to-the-book/background-information-for-country-researchers#_ftnref2

[158] Cesar Rodrıguez-Garavito, 'Beyond the courtroom: The impact of judicial activism on socioeconomic rights in Latin America', 89 Texas Law Review (2011) pp. 1669–1698.

[159] Beth Simmons, Mobilizing for human rights: International law in domestic politics (2009, New York: Cambridge University Press).

[160] David Dessler, 'Beyond correlations: Toward a causal theory of war', 35 International Studies Quarterly 3 (1991), 337–55.

[161] Bennett and Checkel (n 106).

starting point for a qualitative assessment of the correlation between TB recommendations and policy/legal reform through the intermediary role of AHRC activity. An analysis of the correlation between the selected instances of AHRC-TB engagement will be made, scoping out explicit/implicit references in bills, policy documents, and reports. Thus "chains of events" will be examined in chronological sequence, to determine which factors have contributed to the decision underlying the policy or legislative reform. In other words, this last section will trace progress of observable change in domestic policy from the array of documentation outlined above. In this way we can challenge the binary claim that authority resides at either the international or national level. By design, TBs exercise their legal authority in tandem with domestic actors, whether in a complementary or a contested fashion. As Alter explains, "Domestic actors who recognize an obligation to comply with TB recommendations and engage in meaningful practices toward that end affirm TB authority without necessarily diminishing their own authority".[162]

As mentioned, this review will be complemented with data gathered though elite interviews.

4. Interviews

To inform the findings, I have conducted 50 semi-structured interviews with both UN and domestic stakeholders directly involved in the cooperation between TBs and NHRIs during the process of state reporting. This involvement could consist of drafting or contributing to TB recommendations, State reports or NHRI reports. It could also consist of attendance at the dialogue with the committees or use of TB and NHRI recommendations in their domestic work. These interviews took place between the months of October and December 2017 (as part of a visiting fellowship at the Geneva Academy of International Humanitarian Law and Human Rights) and February and March 2019 (as part of visiting research stay at the Australian Centre for Human Rights of University of New South Wales, Sydney).

With regards to UN stakeholders, I firstly selected relevant OHCHR staff from the Human Rights Treaties Branch, including all ten UN human rights committee Secretaries and Chiefs of Section. To focus on mid-to-high range officials allowed the interviews to benefit from these official's practical experience and broader understanding of the different committees' reliance on NHRI input. In order to arrive at a comprehensive understanding of NHRI-specific policy vis-à-vis the TB system, I also selected relevant OHCHR staff from the National Institutions

[162] Alter et al (n 153), 36.

and Regional Mechanisms Section as well as GANHRI representatives. In addition, the approach of chain-referral sampling was used by asking interview respondents for recommendations of other relevant stakeholders, such as current and former TB members with direct experience on cooperation with NHRIs.

With regards to domestic stakeholders, I selected according to the NHRS categorization of actors, that is governmental, independent state and non-state actors. In order to gain a full picture of the impact of AHRC-TB engagement, a comprehensive array of stakeholders has been selected according to the following categories:

- High-ranking government officials who are directly responsible for or involved in preparing reports, representing the government at TB sessions in Geneva, interacting with the AHRC and NGOs on TB-related issues (report preparation and implementation issues), and implementing recommendations and decisions.
- AHRC staff who are directly responsible for or involved in preparing reports, interacting with the government on TB-related issues, and implementing recommendations and decisions.
- Staff and elected representatives of the country's parliament or other legislative body who are directly involved in drafting domestic legislation in response to TBs' decisions and recommendations.
- Staff at TB-related NGOs who are directly involved in completing complimentary reports, interacting with government and the AHRC with regard to report preparation, and implementing recommendations and decisions.
- Leading academics in the fields of public international law, international human rights law, political science, and international relations.
- Journalists and editors of traditional print, online, radio, and television news resources who have reported on TBs' decisions and recommendations.
- Australian members of TBs.

Government officials have been identified by consulting the lists of delegation who participated in the constructive dialogue of the last two periodic reviews of Australia under the six treaties. I also selected former and current Australian TB members, as well as AHRC officials who have actively participated in the parallel reporting to the different committees. Starting from these categories, I have used chain-referral sampling throughout the interviews in order to identify other relevant actors to interview. Although a number of interviews were recorded, the majority

were not, upon explicit request of the interviewees. In both instances extensive written notes were taken during interviews. I provided an interview checklist for the semi-structured interviews prior to each interview, so as to ensure that the same questions were asked to all. The checklist included questions on both the impact of NHRI engagement on issued TB recommendations as well as impact of TB-NHRI engagement on domestic human rights implementation. In addition, the checklist included more general questions on the background, past and current functions related to TB-NHRI engagement. For interviewees in Australia, further specific questions were provided on the role of the AHCR and TBs in domestic human rights implementation. I attach a copy of the interview checklist and a list of interviewees in annexes 1 and 2.[163]

5. Conclusion

In sum, the goal-based method adapted here to assess the effectiveness of the institutional framework for TB-NHRI engagement proposes the following two parts.

Firstly, an effectiveness analysis based on an adapted goal-based method, inclusive of a document content analysis of selected outputs from the institutional framework for TB-NHRI engagement. This consists of the following four steps:

1. Selecting the relevant goal-setters for TB-NHRI engagement among its various constituencies and identifying the specific goals expected of such engagement (Chapter 4);
2. Analyzing the structure and process specific to the institutional framework available for TB-NHRI engagement, which determines its performance potential (Chapter 5);
3. Quantifying a selection of the framework's direct outputs, the products of TB – NHRI engagement. More specifically, identifying:
    a. the amount of TB outputs that contain issues highlighted and suggested by NHRIs in their parallel reports; and
    b. the extent of NHRI recommendations contained in parallel reports that have been integrated in TB outputs (Chapter 6);

[163] The candidate has registered the questionnaire used for the interviews with the Norwegian Data Protection Ombudsman, the NSD, under project number 51620.

4. Using the combination of structure, process, and selected outputs of the institutional framework for TB – NHRI engagement to indicate the likelihood of goal-attainment (Chapter 7).

The resulting findings will provide a first assessment of *whether the institutional framework for TB-NHRI engagement is effective, by being adequately set for goal-attainment.*

Secondly, and cognizant of the impact context has on shaping institutional effects, a more complete understanding of TB – NHRI interaction and effectiveness requires a more specific country-level focus. Afterall, countries have an uneven record when it comes to the impact of the TB system. In their much-quoted study on the Impact of the UN Human Rights Treaties, Heyns and Viljoen list a number of factors limiting and enhancing TB impact.[164] Their in-depth qualitative study underlines that "in order for international human rights treaties to have an impact, an enabling domestic environment is required".[165] Also in terms of NHRI impact, context is key. Although it is "the responsibility of a NHRI itself as to how it chooses to prioritise and organise its work, a considerable impact on its effectiveness falls outside of its control."[166] On a similar note, NHRI effectiveness studies have shown that whilst "it is certain that many NHRIs do not perform effectively, […] this is more symptomatic of state failure to meet human rights obligations than an inherent problem with NHRIs".[167] For this reason, following an adapted goal-based method to effectiveness analysis of the broader institutional framework for TB-NHRI engagement, this project adds a second complementary method.

This consists in an impact assessment of TB-NHRI engagement toward human rights implementation applied to a specific case study, the Australian National Human Rights Systems.[168] Part B consists of the following two steps:

5. Identifying the role of TB-NHRI Engagement in the National Human Rights Systems framework (Chapter 8);

[164] Christof Heyns and Frans Viljoen, 'The Impact of the United Nations Human Rights Treaties on the Domestic Level' 23 *Human Rights Quarterly* (2001) 483–535.
[165] Ibid. 518.
[166] Rachel Murray, 'National Human Rights Institutions: Criteria and Factors for Assessing Their Effectiveness' 25(2) *Netherlands Quarterly of Human Rights* (2007) 220.
[167] Richard Carver, 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law' 10(1) *Human Rights Law Review* (2010) 31.
[168] As will be discussed, this assessment distinguishes between three types of impact: pre-conditions for impact, intermediate impact and policy impact.

6. Analyzing the impact of TB – NHRI engagement applied to a specific case study, the Australian Human Rights Commission engagement with the TB system (Chapters 9).

The thesis will then provide some overall conclusions and recommendations on both the effectiveness of the institutional framework for TB – NHRI engagement and the impact of TB – NHRI engagement in facilitating human rights implementation in the Australian context (Chapter 10).

Part B

Assessing the Effectiveness of Treaty Body – NHRI Engagement through the Adapted Goal-Based Approach

Chapter 4. The Goal-Setting Actors and Goals

A crucial step in evaluating effectiveness under a goal-based approach is to ascertain the goals of the institution in question, that is the ends its principal constituencies expect it to attain. Therefore, before any attempt at identifying institutional goals is possible, it is necessary to first determine the goal-setters whose choice and expectations should inform the analysis.[1] For the purposes of this analysis, I distinguish between two types of goal-setting actors, namely external and internal actors to the institutional framework for TB-NHRI engagement. The second necessary step is then to identify the different goals of the framework, taking into consideration the multiple sources from which generic goals specific to TB-NHRI engagement may be identified. While the most recent human rights conventions feature explicit references to their aims and purpose, the majority do not. For this reason, goals are often implicit, and must be surmised from a combination of provisions issued by different sets of goal-setters. As mentioned, some goals of public organizations are set by external constituencies, while others are internal, established by actors belonging to the institution in question.[2] With regards to the institutional framework for TB - NHRI engagement, this distinction has both definitional and normative significance. The TBs are obliged, as a matter of law, "to comply with the goals set out in their constitutive instruments formulated by an external community of States—the mandate providers [… yet their] internal goals are typically non-binding or, alternatively, are subject to change"[3] by the TBs themselves and influenced by other stakeholders, such as the OHCHR Secretariat and NHRIs. Although external goals may have a stronger legal foundation, internal goal-setters may react and adapt faster to changing circumstances than the burdensome processes employed by the diplomatic community. Internal actors may also benefit from more immediate knowledge of the practical, day-to-day functioning of the organizations they belong to. As such, it is a combination of external and internal goals that form the basis of organizational goal-setting. The remainder of this chapter outlines what I consider the goal-setting actors and the common generic goals of the institutional framework for TB – NHRI engagement.

[1] Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press 2014) 33.
[2] Charles Perrow, *Organizational Analysis: A Sociological View* (Tavistock Publications 1970) 134.
[3] Shany (n 1) 18.

1. The Goal-Setting Actors

1.1. External Goal Setters

A key constituency of any public institution are its mandate providers, collectively responsible for the creation and modification of its mandate. Goals set by mandate providers are undoubtedly a strong point of reference, and deviation from them may even lead, in extreme instances, to the termination of the institutions' existence.[4] Apart from such draconian measures, deviation from goals set by mandate-providers, a process known as "agency slack"[5], may lead to impairing actions such as budget limitations, alteration of legal powers, and changes in membership/leadership, all intended to diminish the institution's reach. It is due to this situation, for instance, that Helfer and Slaughter have described international courts as operating within a context of "constrained independence."[6]

As such, the first identified category of goal-setting actors of the institutional framework for TB – NHRI engagement relate to those responsible for the establishment, mandate formulation and support of both TBs and NHRIs. Such responsibility falls either through collective efforts by states party to the various human rights conventions or through the action of any state in which NHRIs operate. A focus on State Parties/mandate providers works from a normative perspective. Despite the decreasing relevance of a strictly "principal-agent" narrative in favor of logics of "trusteeship,"[7] state-negotiated mandates should continue to be faithfully executed. State Parties incorporate within each UN human rights treaty and NHRI mandates, albeit often not explicitly, what they expect as ultimate institutional goals. In turn, this adds an obligation that TBs and NHRIs exercise their legal powers in pursuit of these goals. Moreover, a goal-setting process led by mandate-providers usually features a degree of transparency that might not pertain to other goal-setters. The fact that mandate-providers' choices must go through a deliberative process of public justification means that a focus on mandate-providers grounds the analysis on more public and less opaque goal-setting processes.

[4] Ibid.
[5] Karen J. Alter, 'Agents or Trustees? International Courts in their Political Context' 14 *European Journal of International Relations* (2008) 35.
[6] Laurence R Helfer and Anne-Marie Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' 93 *California Law Rev* (2005) 899–955.
[7] Kenneth Abbot and Duncan Snidal, 'International Regulation without International Government: Improving IO Performance through Orchestration' 42(2) *Venderbilt Journal of International Law* (2009); Thomas Pegram, 'Global Human Rights Governance and Orchestration: National Human Rights Institutions as Intermediaries' 21(3) *European Journal of International Relations* (2015).

In sum, it is important to conform effectiveness studies to expectations set by State Parties/mandate-providers, relying on the aims and expectations of the direct creators, primary funders, and main backers of both TB and NHRI activity, consequently affecting the aims of their mutual engagement.

1.2. Internal Goal-Setting Actors

A focus on mandate-providers as only goal-setters requires essentially employing traditional tools of international governance. Such limited focus would make the analysis rest on state consent, apply to states, and rely on state implementation and compliance, while looking at the actions of international organizations in isolation, even when they are ultimately intended to coordinate transnational regulation of independent state actors. Abbot and Snidal have called this reliance on traditional state-based mechanisms "international old governance."[8] By this standard, international organizations' performance is frequently unsatisfactory.[9] There is another way to understand their performance, however: by considering the full range of ways in which international organizations can (and do) operate, especially through engagement with independent state actors and institutions.

A useful concept in making visible these actors and thus "piercing the institutional veil" of the UN human rights treaty regime, is that of *orchestration*. In brief, this recent conceptualization of governance arrangements reveals how international governmental organizations enlist and support intermediary actors to address target actors in pursuit of its governance goals. Orchestration occurs when: "(1) the orchestrator seeks to influence the behaviour of the target via intermediaries; and (2) the orchestrator lacks authoritative control over the intermediaries, which, in turn, lack the ability to compel compliance of the target." [10]

The approach works aptly with the NHRI-infused configurations in the UN human rights machinery.[11] If we are to apply this structure to the TB system's governance in relation to NHRIs, the model can be adjusted accordingly: together with the OHCHR Secretariat, TB

[8] Kenneth Abbott and Duncan Snidal, *The governance triangle: Regulatory standards institutions and the shadow of the state, in The Politics of Global Regulation* (Princeton University Press 2009).
[9] Yuval Shany, 'The Effectiveness of the Human Rights Committee and the Treaty Body Reform' in Marten Breuer et al (eds), *Der Staat im Recht. Festschrift für Eckart Klein Zum 70. Geburtstag* (Duncker and Humblot 2013).
[10] Kenneth Abbott and Duncan Snidal, 'Strengthening international regulation through transnational new governance: Overcoming the orchestration deficit' 42(2) *Vanderbilt Journal of International Law* (2009) 501–578; Kenneth Abbott et al (eds), *Orchestration: Global Governance through Intermediaries* (Cambridge University Press 2014).
[11] Pegram (n 7).

members act as *orchestrators* seeking to influence the behavior of the *target*, the State Parties to the different UN human rights conventions. In between this bilateral dialectic, the *intermediary*, in our case UN-affiliated NHRIs and their collective representative body, the Global Alliance of National Human Rights Institutions (GANHRI), are enlisted to facilitate and support the influence that TB members seek vis-à-vis states parties. One core assumption of *orchestration* is key to an analysis of TB-NHRI engagement, in that "orchestrator and intermediary are mutually dependent, each unable to achieve its goals without the other."[12] With their context-specific knowledge of and independence from the state, NHRIs may provide a functional gateway for the TB system to inform, and strive to bridge, the increasing gap in compliance.

This three-legged institutional environment (orchestrator, intermediary, target) is particularly suited to the legal nature of the international human rights treaty system, based on both hard law (treaties, conventions, and protocols) and soft law (recommendations, declarations, principles, and guidelines) instruments. Among this varied mix of legal standings, NHRIs have gradually been vested with increased margins of independent action outside of the state's authority, thus breaking the traditional (and much criticized) two-agent system (state party - UN). Accepting the possibility for institutional insulation from political control allows this analysis to cover a wider potential for influence than that stemming from mandate providers only. As said, TB-NHRI engagement is rooted in structural and procedural features which often do not fall within the contours of state-negotiated human rights treaties. The wider architecture that supports the activity of both TBs and NHRIs is of crucial importance for goal-setting purposes. For the above reasons I identify, in addition to mandate providers, three internal actors to TB-NHRI engagement that act as goal-setters: NHRIs, treaty body experts and the OHCHR Secretariat.

National Human Rights Institutions

Similar to the case with TBs, it is up to the state to establish its NHRI, usually under the national constitution or through a domestic legislative process. A country that decides to establish a NHRI is also ultimately responsible for delineating its overall mandate. State preferences are bypassed somewhat in the context of TB-NHRI engagement, however, because only Paris Principles-compliant (A-status) NHRIs may fully access UN human rights mechanisms and be

[12] Abbott et al (n 10) 12.

granted speaking rights during official sessions.[13] The Paris Principles represent a unique example of bypassing state preferences, in that their non-binding standards are the result of deliberations by NHRIs themselves as opposed to UN member states, emerging out of a workshop on national institutions organized by the UN Commission on Human Rights in 1991.[14] NHRI representatives, together with sympathetic government delegations, then included this set of principles in the 1993 Vienna World Conference Declaration, which paved the way to their endorsement in an Annex by the UNGA in its Resolution 48/134 of 1993.[15] This peculiar feature of institutional establishment has led scholars in the field to define NHRIs as "architects of their own making."[16] It follows that NHRIs have a role to play in setting their own goals with respect to engagement with the TB system.

Treaty Body Experts

The basic tenet of the TB system's operational powers, which also includes its relation to domestic stakeholders, is the notion of delegated power. Each UN human rights convention establishes a committee of independent human rights experts, each prescribing its own rules for the election of its members.[17] By way of example, I will use two specific TB frameworks, cognizant of the fact that similar reasoning may be applied to the wider TB context. CEDAW Article 17[18] and CRPD Article 34(2)[19] spell out the characteristics of their dedicated committee. The authority to supervise states' compliance with their obligations under the core treaties is formally delegated to each committee of experts by each state's act of ratification. As this process constitutes an example of *delegative human rights governance*,[20] the current GBA model to effectiveness analysis will consider TB members as vested goal-setters.

[13] E.g. UNGA, Resolution 70/163, 'National Institutions for the Promotion and Protection of Human Rights' (17 December 2015), UN Document A/RES/70/163 para. 17.
[14] UNCHR, 'National institutions for the promotion and protection of human rights' (7 March 1990) UN Document E/CN.4/RES/1990/73, para. 3.
[15] UNGA, Resolution 48/134 'National institutions for the promotion and protection of human rights, 85th plenary meeting' (20 December 1993), UN Doc A/RES/48/134 Annex.
[16] Katerina Linos and Tom Pegram, 'Architects of Their own Making: National Human Rights Institutions and the United Nations' 38(4) *Human Rights Quarterly* (2016) 1109–1134.
[17] The Committee on Economic, Social and Cultural Rights is the exception, as the conditions of election to this TB are established by the Economic and Social Council (ECOSOC), Resolution 1985/17, 'Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights' 22nd plenary meeting, (28 May 1985), UN Document E/1985/85.
[18] Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (adopted by the General Assembly, 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 Art 17(1).
[19] Convention on the Rights of Persons with Disabilities (CRPD) (adopted by the General Assembly, 24 January 2007, entered into force 3 May 2008) 2515 UNTS 3 Art 34(2).
[20] Pegram (n 7).

One further element in favor of adding this "internal" set of actors to the grid is provided by the conventional articles related to each TB's Rules of Procedure. It is in fact up to the TBs themselves to set the concrete terms of engagement with their domestic stakeholders. For example, CEDAW Article 19(1) and CRPD Article 34(10) both state that it is the Committee's role 'to adopt its own rules of procedure'. The very concept of "accredited" NHRIs (after 1991) was introduced following the 1979 adoption of CEDAW. It is therefore not surprising that for all pre-1991 conventions, regulations dealing with how to engage with NHRIs had to be developed outside of the contours of state-led treaty negotiations, through the issuance of General Comments, Statements, within Rules of Procedure and Working Methods. What all these instruments have in common is that their introduction and amendment are primarily set by TB members' internal decision-making powers. This does not fully apply to the CRPD, however, as NHRIs were involved from the early negotiation stages that led to its adoption in 2006.[21] While this aspect will be analyzed in more detail below, it is nonetheless relevant that CRPD members adopt their own rules of procedure and working methods. It is in fact the Committee itself that adopted its *Guidelines on independent monitoring frameworks and their participation in the work of the Committee*,[22] which include specific reference to CRPD-NHRI engagement. For the above reasons, I also conceive TB members as goal-setters of TB-NHRI engagement.

OHCHR Secretariat

One of the most important functions of the OHCHR Secretariat is the rendering of services to its various bodies of independent experts. Since the pursuit of virtually any human rights objective has political implications, the Secretariat must also act, whether publicly or privately, in close consultation and cooperation with the competent organs.[23] Aside from administrative tasks, the OHCHR clearly plays an important auxiliary role to the TBs in monitoring and engagement with domestic stakeholders.

[21] Theresia Degener, 'From Invisible Citizens to Agents of Change' in Valentina Della Fina, Rachele Cera, and Giuseppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (Springer 2017) 37.
[22] CRPD, 'Guidelines on independent monitoring frameworks and their participation in the work of the Committee on the Rights of Persons with Disabilities' (October 2016), UN Document CRPD/C/1/Rev.1.
[23] Theo Van Boven, 'The Role of the United Nations Secretariat in the Area of Human Rights' 24 *New York University Journal of International Law & Politics* (1991) 69.

Inspired by Weber's theory of bureaucracy,[24] Barnett and Finnemore foreground bureaucratic behavior in international relations discourse, adopting a particularly constructivist approach to inter-governmental organizations by highlighting their autonomous influence within the bureaucratic apparatus.[25] Developing these insights, Xu and Weller highlight the role of international civil servants in global governance but also the conditions. Through empirical research they found that civil servants' policy influence depends on organizational structure, organizational competences, control of information, permanence of office, technical expertise, and bureaucratic leadership.[26] In their study of international secretariats in environmental policy-making, Biermann and Siebenhüner emphasize organizational competences and, even more so, administrative resources and intra-organizational structures as crucial determinants of international secretariats' policy influence.[27]

This short literary review essentially describes the concept of "bureaucratic autonomy," as relating to the formal executive characteristics, administrative resources, and organizational competences empowering international bureaucracies.[28] The concept is rooted in the structural features and formal relationships of and within public organizations' secretariats, which aid in developing a full understanding of the dynamics of TB-NHRI engagement. The TB regime is codified in a dense array of treaties, institutions, networks, and standards that have shaped the operative ecology of its stakeholders. The open-ended nature of the treaty mandates, the part-time tenure of TB membership and the proliferation of dedicated institutional mechanisms at all levels of the implementation chain, has enhanced both access to and potential influence by servicing secretariats in their engagement with external stakeholders such as NHRIs.

As such, the OHCHR Secretariat is crucially involved in shaping the engagement between TBs, which they service through their operations, and NHRIs. Many instances of Secretariat support for NHRI interaction can be found both in the work of its dedicated National Institutions and Regional Mechanisms Section[29] as well as in the opening statements of each TB session. A

[24] Max Weber, *Economy and Society* (University of California Press 1978).
[25] Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press 2004).
[26] Yi-Chong Xu and Patrick Weller, '"To be, but not to be seen": exploring the impact of international civil servants' 86(1) *Public Administration* (2008) 35–51.
[27] Frank Biermann and Bernd Siebenhüner (eds), *Managers of Global Change: The Influence of International Environmental Bureaucracies* (MIT Press 2009).
[28] Michael W. Bauer and Jörn Ege, 'Bureaucratic autonomy of international organizations' secretariats' 23(7) *Journal of European Public Policy* (2016) 1019–1037.
[29] For more information, see OHCHR, "OHCHR and NHRIs" available at <www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx> accessed 23 December 2019.

survey of these statements shows ample attention to encouraging NHRI access to the TB monitoring system.[30] Significantly, the Secretariat recently issued a paper on a "Common approach to engagement with national human rights institutions," stating that:

> Cooperation between the human rights treaty bodies and national human rights institutions is critical and has been long standing. There are many avenues for various types of cooperation, some of which have been formalized in official treaty body documentation. National human rights institutions have a unique role to play in promoting the recommendations made by treaty bodies […] They also have an important role to play in promoting national consultations prior to reporting and in the implementation and follow-up of recommendations.[31]

Accordingly, we may expand the list of key constituencies with influence over TB engagement with NHRIs to the OHCHR, which services the committees through its secretariat,[32] funds their operations through its regular budget, and supports the establishment and strengthening of NHRIs through its National Institutions and Regional Mechanisms Section.[33]

2. The Goals

As indicated, different goals apply depending on which constituencies are considered as goal-setters. Having identified the sources for goal identification, it important to first gauge into the question of goal temporality and the choice of focusing on common generic goals.

The purposes specific to the State Reporting procedure have in fact noticeably changed over time. For instance, the CCPR introduces its State Reporting procedure in Article 40 and the only mention of the Committee's purpose in this regard is that it "shall study the reports submitted by the States Parties" and that it "shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties".[34] The HRCtee's first Reporting Guidelines, adopted in 1977, stressed the need for "constructive dialogue" explicitly stating that the Committee's aim was "to contribute to the friendly relationship between States in

[30] On file with author.
[31] OHCHR, 'Common approach to engagement with national human rights institutions', Note by the Secretariat (9 June 2017), UN Document HRI/MC/2017/3 paras. 13-14. The consultation on a common approach to engagement with national human rights institutions was held in Geneva on 9 and 10 March 2017. Representatives of all TBs, 11 NHRIs, the Global Alliance and the Geneva Academy, as well as relevant OHCHR staff participated.
[32] CEDAW Art 17(9) and CRPD Art 34(11).
[33] For more information, see OHCHR, "OHCHR and NHRIs" available at <www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx> accessed 23 December 2019.
[34] CCPR, Article 40 para. 4.

accordance with the Charter of the United Nations."[35] At that time, HRCtee members "did not consider that it was the Committee's function to monitor compliance of states parties with their Covenant obligations."[36] The concept of Concluding Observations was introduced only after the end of the Cold War, to provide a general evaluation of the State report and of the dialogue with the delegation.[37] While focused on the evaluation of the report and dialogue rather than on the situation of the country concerned, this represented a definite shift of attention toward human rights monitoring. The current HRCtee Rules of Procedure expresses the TB members' opinion that the key purpose of the State Reporting procedure is to examine "the measures [states parties] have adopted which give effect to the rights recognized in the Covenant and on the progress made in the enjoyment of those rights."[38] Although it is specific to the HRCtee, this provision has been replicated, mutatis mutandis, in other committees' Rules of Procedure and as such maybe considered of systemic value. Therefore, it can be assumed that the current TB system's reporting procedure has become, in its essence, a mechanism aimed at monitoring compliance by states parties with their obligations under the substantive provisions of each UN human rights treaty - that is, to respect, protect and fulfil the human rights guarantees contained therein.[39]

Also from an NHRI perspective, the aims of their activity vis-à-vis the human rights treaty body system changed with time. The Paris Principles, negotiated by NHRI representatives in 1991 and later adopted by the community of States through General Assembly Res. 48/134 in 1993, call for NHRIs "to contribute to the reports which States are required to submit to United Nations bodies and committees […] pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence".[40] This provision has since been interpreted by the GANHRI SCA, which is composed exclusively of NHRI representatives. The current General Observation 1.4. of the SCA explains that NHRIs are encouraged "to monitor the states' reporting obligations under […] international treaty bodies, including through dialogue with the relevant treaty body committees. […]".[41] However, it

[35] See David Kretzmer, *The UN Human Rights Committee and International Human Rights Monitoring* (paper presented at the IIJL International Legal Theory Colloquium, New York University School of Law, Straus Institute for the Advanced Study of Law and Justice, Spring 2010) 20.
[36] Ibid, 20.
[37] Ibid.
[38] HRCtee, 'Rules of Procedure of the Human Rights Committee' (9 January 2019), UN Document CCPR/C/3/Rev.11* Rule 66(1).
[39] Walter Kalin, 'Examination of state reports' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 37.
[40] Paris Principles, para. 3(d) (1993)
[41] GANHRI, SCA General Observation 1.4. (2020)

further clarifies that NHRIs must maintain their independence when doing so: "while it is appropriate for governments to consult with NHRIs in the preparation of a state's reports to human rights mechanisms, NHRIs should neither prepare the country report nor should they report on behalf of the government."[42] According to the GANHRI, the current aim for NHRI contribution to the reporting process is to monitor the implementation of UN human rights treaties, through the submission of stakeholder or shadow reports and drawing attention to "problems, issues and challenges that may have been omitted or dealt with inadequately in the state report".[43]

Across time, the expectations around TB – NHRI engagement has considerably changed, above all due to the activity of internal actors such as TB members and NHRI representatives. In a way, internal actors have sought to update the general understanding of what is expected of TBs and NHRIs cooperation in the State Reporting procedure from its original mandate. States have since caught up with the new understanding, inasmuch that the most recently negotiated UN human rights treaties, such as the CRPD and the Optional Protocol to the Convention Against Torture (OPCAT), explicitly consider Paris Principles-compliant institutions as necessary partners for monitoring and prevention of human rights violations.[44]

Before delving into the actual identification of the goals of the institutional framework for TB – NHRI engagement, it is also important to clarify the choice of focusing on common generic goals rather than specific goals for each TB and each NHRI framework available. Although each UN human rights convention does, per definition, relate to distinct set of rights and rights-holders,[45] the TB system as whole represents a semi-congruous family of quasi-judicial bodies established by similarly situated mandate providers, all characterized by common preconceptions about their structure, procedures, and functions.[46] Furthermore, as is the case for international adjudication more generally, the TB system has developed and expanded through a process of replication and adaptation that scholars have labelled as an example of path dependence in institutional design.[47] The 1966 adoption of the two Human Rights Covenants gave precise shape to the rights contained in the Universal Declaration of Human

[42] Ibid.
[43] Ibid.
[44] CRPD, Art 33 and OPCAT Art. 19.
[45] That is, generally applicable treaties versus specifically applicable treaties.
[46] According to such understanding, the forthcoming analysis on goal-selection does not systematically cover all specific TB frameworks for NHRI engagement.
[47] E.M. Hafner-Burton, D.G. Victor, and J. Lupu, Political Science Research on International Law: The State of the Field, 106(1) American Journal of International Law (2012), 47 – 97.

Rights (UDHR), put them in the form of treaties, and provided for measures of implementation. Since then, it has become clear that the examination of reports by an independent body of experts represents an effective instrument for monitoring domestic implementation measures of all UN human rights conventions, both general and specialized.[48] Moreover, the same processes have characterized the concomitant global expansion of NHRIs, which, although featuring distinct institutional models, all have common structural, procedural, and functional roots, exemplified within the Paris Principles and through General Observations of GANHRI's Sub-Committee on Accreditation. The existence of common generic goals for the institutional framework for TB - NHRI engagement is not surprising, albeit with the unavoidable nuances related to the different sets of rights that each TB regime has been designed to tackle.

Today, three common generic goals can be surmised by interpreting the various sets of documents stemming from the identified goal-setters of the institutional framework for TB-NHRI engagement:

- **Goal 1**: to monitor the implementation of UN Human Rights Conventions[49];
- **Goal 2**: to support a transnational human rights regime dedicated to the implementation of UN Human Rights Conventions;
- **Goal 3**: to legitimize the institutional framework necessary to support such a regime.

This represents a slight departure from what Shany considers as ultimate goals in his application of the GBA to the workings of the HRCtee.[50] Whilst confirming the relevance of implementation monitoring, Shany downplays the existence of regime support by suggesting that 'proposals to centralize the UN human rights system by way of creating one unified treaty body, which could have resulted in improved levels of systemic coordination, have been strongly resisted by many States'.[51] For this reason, he argues, 'the HRCTee's systematizing role cannot not be said to constitute part of its original mandate, and there is little evidence that that mandate providers have intended to add it on, subsequently, as a prominant goal'.[52] Shany does also not consider legitimization as a valid goal, which he defines as the 'HRCtee's ability

[48] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, Engel 2005) in Introduction, XXI.
[49] The OHCHR describes it as the "active collection, verification and use of information to address human rights problems" in OHCHR, 'Manual on human rights monitoring' (2011) UN Document HR/P/PT/7/Rev.1 III.
[50] Shany (n 1)
[51] Ibid, 10.
[52] Ibid.

to confer legitimacy upon certain legal constructions of their ICCPR obligations'.[53] It is important to state at the outset that the focus of Shany's article is on one TB, the HRCTee, and considers mandate providers as sole goal setters. This analysis deals with the institutional framework for TB - NHRI engagement and considers internal actors to the framework as goal-setters, such as NHRIs, TB members and the OHCHR Secretariat, with evidence from statements that embed TB - NHRI within the broader transnational human rights regime. The typical imagery of NHRIs acting as a 'bridge' between international and national human rights systems extends beyond simple TB- NHRI engagement, and through their mutual cooperation, there seems to be the basis for the identification of regime support as one ultimate goal. In relation to the third identified goal, this analysis differs from Shany in that it deals with 'self-legitimation', that is how TB - NHRI engagement serves the purpose of legitimating both TB and NHRI activity at both the international and domestic level.

The following analysis provides explicit or implicit evidence of the three ultimate goals from the range of goal-setters previously identified. The interpretation of relevant provisions for such an analysis is of course a subjective exercise, and views on what is appropriate may reasonably diverge. It is clear, however, that in recent decades TBs have increasingly supported the role of NHRIs as monitoring partners of UN human rights treaties. Through an evolutive and dynamic interpretation, this chapter seeks to fill the "blind spots" left by drafters and locate the role and functions of NHRIs therein. This exercise, an integral part of a GBA to effectiveness analysis, also serves to highlight the underlying systemic coherence of TB-NHRI engagement. In other words, this chapter wishes to underline how NHRI engagement already benefits from a certain degree of harmonization vis-à-vis the TB system.

2.1. Goal 1: To Monitor the Implementation of UN Human Rights Conventions

When analyzing the role of NHRI activity in the work of the TB system, we are above all dealing with matters of domestic implementation. NHRIs, when established in accordance with the independence paradigm found in the Paris Principles, act in order to assist and monitor the domestic implementation of ratified human rights conventions. However, the text of most UN human rights treaties do not expressly envisage a role for NHRIs in the State Reporting procedure and the debate about permissible 'alternative' sources continued intermittently for decades.[54] The question of temporality plays a strong role in goal identification, and I divide

[53] Ibid.
[54] UNGA, Report of the Committee on the Elimination of Racial Discrimination. 27th session, (1972) UN Document A/8718, para. 27.

the following analysis around the watershed moment in which the General Assembly first encouraged all member states to set up NHRIs by adopting Resolution 48/134. This discussion highlights the importance of internal actors in shaping and updating the common generic goals of TB – NHRI engagement for those frameworks preceding 1993 and the growing recognition of this shift by external actors/mandate-holders in more recent introductions to the TB system, such as in relation to the CRPD and the OPCAT.

Evidence of Goal 1 from pre – 1993 Conventions and Treaty Body instruments

As indication of the gradually increasing involvement of NHRIs in the work of the committees, we can learn from the CERD experience, which "by 1980 […] was prevented from taking advantage of information supplied by non-governmental organisations."[55] This interpretation became obsolete in the early 90s, when the Committee decided that as well as information from state reports, members "must have access, as independent experts, to all other available sources of information, governmental and non-governmental."[56] The *Establishment and reinforcement of independent specialized national institutions* featured as stand-alone recommendation in the 2001 Durban Declaration and Programme of Action[57] and the CERD Committee expanded on NHRI engagement in subsequent General Recommendations.[58] Since then, the Committee's work has been characterized by wide stakeholder participation, with NHRI contributions explicitly recognized through recommendations on NHRI establishment and through the development of modalities for their accommodation in reporting and other procedures.[59] As follow-up to the 2009 Durban Review Conference, the Committee reiterated the value of NHRI engagement by recommending that states parties to "engage with national human rights institutions and civil society, in a spirit of cooperation and respect, while preparing their

[55] Ibid.
[56] UNGA, Report of the Committee on the Elimination of Racial Discrimination, 46th session (27 February 1992) UN Document A/46/18, Annex VII B.
[57] R Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, (31 August to 8 September 2001), UN Document A/CONF.189/12, para. 90
[58] CERD, General Recommendation no. 28, (Follow-up on the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance), para. 9: 'The Committee invites NHRIs to assist their respective States to comply with their reporting obligations and closely monitor the follow up to the concluding observations and recommendation'.
[59] International Human Rights Instruments, Note by the Secretariat: 'Report on the working methods of the Human Rights Treaty Bodies relating to the state party reporting Process' (17 May 2006) UN Document HRI/MC/2006/4, para. 94: "CERD provided NHRIs… present with the opportunity to make an oral presentation in the plenary on the second day of the consideration of the State party's report. NHRI representatives were seated separately from representatives of NGOs, with a sign clearly identifying them."

periodic reports and with regard to follow-up."[60] As such, it is now confirmed that ICERD, with its purposefully vague wording, does "strongly suggest" that state reports submitted to the Committee pursuant to Article 9(1) "should be tested against external reference points, otherwise the examination would be drained of significance."[61]

The gradual recognition of a range of stakeholders beyond the state, including NHRIs, is not a phenomenon circumscribed to the CERD Committee and has characterized the history of most Committees throughout the 1990s, mitigating the "statist" culture that permeated the early years of the TB system's existence.[62] The 1990s signified a major shift for the international community, from an ' ... era of declaration ... to an era of implementation', which led to new forms of domestic institutionalization.[63] The 1993 Vienna World Conference on Human Rights "marked a turning point for this process as it […] represented an institutional shift taken by the international human rights regime that began to prescribe for states more specific organisational structures and processes in the domestic setting.'[64] It follows that most treaties lack express provisions on NHRI engagement, as their drafting preceded the introduction of the Paris Principles, the Vienna World Conference and the domestic institutionalization trends of that decade. In such cases, evidence of Goal 1 may be found through the Committees' subsequent interpretation of the conventions' general measures of implementation.

As example, ICCPR Article 2 gives expression to the principle that the implementation of human rights under international law is primarily a domestic matter. Its provisions are of an accessory character, not establishing standalone and subjective rights but rather duties of states parties based "on the rights recognized in the present Covenant." Also known as an "umbrella clause," Article 2 (as all other related articles in UN human rights conventions[65]) plays a

[60]CERD, *General Recommendation no. 33, Follow-up to the Durban Review Conference*, 29 September 2009, CERD/C/GC/33, 1(g).
[61] Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford University Press 2016), 52.
[62] For instance, it is agreed that also 'CEDAW has placed increasing emphasis on the role that independent national human rights institutions can play in the implementation of the Convention' in Marsha Freeman, Christine Chinkin, and Beate Rudolf, *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford University Press 2012), 545.
[63] Secretary-General's Address to the UN Commission on Human Rights, Geneva, 7 April 2005.
[64] Steven LB Jensen, Stéphanie Lagoutte & Sébastien Lorion, 37 The Domestic Institutionalisation of Human Rights: An Introduction, Nordic Journal of Human Rights3 (2019)167.
[65] CCPR Art. 2; International Covenant on Economic, Social and Cultural Rights (CESCR) (adopted by the General Assembly, 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 Art.2; International Convention on the Elimination of All Forms of Racial Discrimination (CERD), (adopted by the General Assembly, 21 December 1965, entered into force 4 January 1969) 660 UNTS 195. Art. 2; CEDAW (No 17) Art.2; International Convention on the Rights of the Child (CRC), (adopted by the General Assembly, 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 art.4; CRPD (No 18) Arts. 1 and 4.

fundamental role in the systematic interpretation of the Covenant and its engagement with domestic stakeholders, including NHRIs. Its purpose of obliging states to ensure effective national implementation, including appropriate remedies, implies the utility of and need for domestic counterparts to facilitate the monitoring of implementation measures. More specifically, Article 2(2) contains several provisions that help identify the aims shared by the body established to monitor the implementation of the Covenant, the HRCtee, and NHRIs. The provisions relate to the obligation to ensure Covenant rights (paragraph 1); the obligation to take legislative and other measures of implementation (paragraph 2); the right to an effective remedy for violations of the Covenant and states parties' duty to provide actual relief in the event of a violation (paragraph 3). Within each specific facet of the state parties' obligations, NHRIs can play an important role in monitoring the implementation of ICCPR provisions. Already hinting at the role that NHRIs can play vis-à-vis the Covenant, Art. 2 "gives expression to the principle that international implementation is limited to the supervision of domestic measures by political, *quasi-judicial* or judicial organs."[66] As NHRI institutionalization had not taken place at the time of drafting, a dynamic interpretation of the Convention, in light of 'relevant societal developments' wording is thus required.[67] The Committee first expressed a mutuality of purpose between its activity and that of NHRIs in General Comment 31, for which "administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. NHRIs, endowed with appropriate powers, can contribute to this end."[68] A more direct and broader indication of implementation monitoring as a common generic goal of TB – NHRI engagement comes from the 2012 *Paper on the relationship of the Human Rights Committee with national human rights institutions*.[69] Through this Paper, the Committee made clear it foresees specific roles for NHRIs in monitoring the implementation of the Covenant, recognizing that "close cooperation between the Committee and national human rights institutions is important for the promotion and implementation of the International Covenant on Civil and Political Rights and its Optional Protocols at the domestic level."[70]At domestic level 'NHRIs may promote human rights education, awareness of the Covenant rights, the communications procedure and the Committee's work; and monitor, and advise the State on,

[66] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, Engel 2005), 28.
[67]Roger Judge v. Canada (2003) Communication No. 829/1998, U.N. Doc CCPR/C/78/D/829/1998, para. 10.3.
[68] HRCtee, General Comment no. 31 para 15.
[69] UN HRCtee, 'Paper on the relationship of the Human Rights Committee with national human rights institutions, adopted by the Committee at its 106th session' (13 November 2012), UN Document CCPR/C/106/3.
[70] Ibid para 1.

legislative and policy compliance with the Covenant provisions'.[71] At the international level NHRIs may partner with the Committee acting under CCPR Art. 40 towards implementation monitoring. In this sense,

> 'NHRIs encourage and assist the State party to meet its reporting obligations; provide the Committee with independent information on the national implementation of the Covenant; and work on follow-up to, and monitor implementation of, the Committee's concluding observations, Views and other decisions […].[72]

Turning to the ICESCR, Article 2(1) spells out the general obligation applicable to all substantive rights it protects.[73] The most direct implication of NHRIs and their mutuality of purpose with the CESCR Committee is found in General Comment No. 10 on *The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights.*[74] Here, the Committee states that Article 2 (1) of the Covenant obligates each State party "to take steps [...] with a view to achieving progressively the full realization of the [Covenant] rights [...] by all appropriate means" and notes that 'one such means, through which important steps can be taken, is the work of national institutions for the promotion and protection of human rights.'[75] The explicit inclusion of NHRI activity within the "appropriate means" through which ICESCR implementation may be fostered, coupled with the "programmatic" nature of the Covenant's language, indicate the common goal of the CESCR Committee and NHRIs to monitor the progressive achievement of states parties' full realization of the Covenant rights. Furthermore, CESCR General Comment No. 1 on Reporting by States Parties[76] is particularly useful in tracing the overarching goals of the TB system's State Reporting procedure, in that it enunciates a comprehensive list of key objectives.[77]

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[71] Ibid.
[72] ibid
[73] Each State party undertakes *to take steps*, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures
[74] General Comment No. 10 (1998), The role of national human rights institutions in the protection of economic, social and cultural rights, E/C.12/1998/25.
[75] Ibid. para.1.
[76] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 1: 'Reporting by States Parties Adopted at the Thirteenth Session of the Committee on Economic, Social and Cultural Rights' (27 July 198) UN Document E/1989/22.
[77] ibid, paras. 1–9.

Yet another example comes from the CRC Committee. According to Art. 4 CRC, States Parties 'shall undertake all appropriate legislative, administrative, and other measures for the implementation" of the rights recognized in the Convention'.[78] The Committee, in General Comment No.5, has subsequently placed NHRI activity within the purview of Art. 4. In this sense, "an effective review process requires a form of independent scrutiny which can be provided by, for example, […] national human rights institutions."[79] In fact, even though it is for the government to self-monitor and evaluate, the Committee has stressed that states must "facilitate independent monitoring mechanisms such as parliamentary committees, NGOs, academic institutions, professional associations, youth groups and *independent human rights institutions.*"[80] The CRC Committee's General Comment No. 2 is specifically dedicated to *The role of independent national human rights institutions in the promotion and protection of the rights of the child*.[81] A whole section clarifies what is expected by NHRIs when cooperating with the State Reporting procedure, which includes 'to contribute independently to the reporting process under the Convention' and 'to monitor the integrity of government reports to international treaty bodies with respect to children's rights, including through dialogue with the Committee.[82]

In addition to the above instances, the report of the Secretariat at the third inter-committee meeting introducing the draft Harmonized Guidelines[83] lists four main purposes of reporting:

1. To give a holistic perspective of human rights established by the Universal Declaration of Human Rights and reaffirmed in the human rights treaties.
2. To reaffirm a commitment to treaties, under which the Secretariat noted that the reporting process constitutes a reaffirmation by the State party of its continuing commitment to respect and ensure observance of the rights set out in the treaties to which it is a party.

[78] CRC, Art 4.
[79] CRC, General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5, para. 18.
[80] See UNGA, 'Interim report of the Special Rapporteur of the Commission on Human Rights on the right of everyone to enjoy the highest attainable standard of physical and mental health, Mr. Paul Hunt' (10 October 2003) UN Document A/58/427 paras. 5–37.
[81] CRC, General Comment No. 2 (2002): 'The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child,' (15 November 2002), UN Doc CRC/GC/2002/2.
[82] Ibit., para. 20.
[83] International Human Rights Instruments, Third Inter-Committee Meeting, 'Guidelines on an expanded core document and treaty-specific targeted reports and harmonized guidelines on reporting under the international human rights treaties' (9 June 2004) UN Document HRI/MC/2004/3.

3. To review of the implementation of human rights at the national level: the reporting process should encourage and facilitate, at the national level, popular participation, public scrutiny of government policies and constructive engagement with civil society conducted in a spirit of cooperation and mutual respect, with the aim of advancing the enjoyment by all of the rights protected by the relevant convention.
4. To serve as a basis for constructive dialogue at the international level between states and the treaty bodies.[84]

The above discussion underlines the role that internal actors play in updating and contextualizing mandates, whether it is through subsequent interpretation by TB members or professional input by the OHCHR Secretariat. Whilst such exercises of interpretation and revision take place under most UN human rights conventions, the strongest evidence for Goal 1 can be found in two of the most recent introductions to the TB system, the OPCAT and the CRPD, which deserve a more detailed account. As will be assessed below, both set up a system of coordination between international and national independent bodies for implementation monitoring. The centrality of both treaties to the institutional framework for TB – NHRI engagement lies in the specific reference of, and conferment of legal value to, the Paris Principles. States parties to OPCAT and to the CRPD are to respectively 'give due consideration to'[85] and 'take into account'[86] the Paris Principles when selecting and/or establishing the national bodies that are to have a role in implementation monitoring.

Evidence of Goal 1 from CAT and SPT-NHRI Engagement

This section will consider the link between NHRIs and NPMs, as well as the role NPMs can play in the State Reporting procedure under CAT. And while this project is only concerned with NHRI engagement with the State Reporting procedure, it is nonetheless important to bring OPCAT within the analysis. As former UN Special Rapporteur on Torture Manfred Nowak specifies, 'ratification of the OP by States parties to the CAT and the creation of independent national visiting bodies can be considered as one of the most effective legislative measures to prevent torture in the sense of Article 2(1) CAT'.[87] The travaux preparatoires are a useful point

[84] Ibid., para. 7- 11.
[85] Article 18 (4) of the OPCAT
[86] Article 33 (2) of the CRPD.
[87] Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford University Press 2008)115.

of departure for identifying the commonality of purpose between the CAT, the SPT and independent national institutions.

In 1977, the UNGA requested that the Commission on Human Rights draft the text of a binding Convention against Torture.[88] An inter-sessional Working Group of the Commission was entrusted to discuss and develop this task and the Convention against Torture was unanimously adopted by the UNGA on December 10, 1984.[89] Since the prohibition of torture and cruel, inhuman, or degrading treatment or punishment had already been recognized, inter alia, in CCPR Article 7 as a non-derogable human right, the Convention does not simply reiterate that principle. Instead, the drafters intended "to make more effective the struggle against torture and cruel, inhuman or degrading treatment or punishment throughout the world."[90]

Supported by the International Commission of Jurists and the Swiss Committee against Torture, Costa Rica proposed a draft for an Optional Protocol to the draft Convention in 1980, aimed at introducing a system of preventive unannounced visits to places of detention.[91] The idea did not initially receive ample support, for the majority of states considered the competence of an international monitoring body to carry out such unannounced visits as undue interference in state sovereignty. Sovereignty-based debates created an impasse that was resolved only about 20 years later; OPCAT was adopted on December 18, 2002.[92] Indeed, only after Mexico had introduced the idea of establishing domestic visiting commissions, or so-called national preventive mechanisms (NPMs) in addition to the international monitoring body (the UN Subcommittee on Prevention of Torture), could a broad majority be formed to adopt the OP.[93]

As a result of the timely intervention of NHRI representatives and the receptiveness of the Costa Rican chair who oversaw the finalisation of the draft Optional Protocol text[94], the obligation to establish NPMs now requires State Parties to 'take into consideration the Principles relating to the status of national institutions for the promotion and protection of human rights'.[95]

[88] CHR Res. 18 (XXXIV) of 7 March 1978.
[89] UNGA Resolution 39/46 (10 December 1984) UN Document A/RES/39/46.
[90] CAT, Preamble.
[91] See Draft Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submittet by Costa Rica (6 March 1980) UN Document E7CN.4/1409.
[92] GA. Res. 57/1999 of December 2002.
[93] Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford University Press 2008) 7.
[94]Tom Pegram, The Untold Story of the Paris Principles (blogpost, June 19 2019) available at http://tompegram.com/2019/06/untold-story-paris-principles/#more-2175
[95] OPCAT Article 18(4)

The travaux préparatoires thus show that hesitation among the various sets of state representatives eventually led to agreement on a two-pillar system, combining an international visiting mechanism and national mechanisms to be established in each ratifying state. OPCAT's innovation, crucial for our purposes of goal identification, consists in just that: the creation of a double-tier system through the introduction of a preventive obligation to establish independent national mechanisms. It is the first UN human rights treaty that proposes a concrete implementation mechanism as opposed to requesting to take 'measures which give effect' to the rights recognized in the treaty thus leaving the choice of exact measures up to the State Party.[96] NPMs, as 'on the spot' visiting bodies, may frequently visit places of deprivation of liberty; they have the opportunity to engage with legislative and institutional frameworks; and they have the contextual knowledge and understanding of local socio and geopolitical realities, thereby making a meaningful contribution to the strengthening of national preventive systems. It is therefore not at all surprising that a large part of the SPT's mandate is about ensuring that NPMs operate as they ought to in each State Party.[97] In this sense, preventive visits to places of detention have a double purpose. The very fact that national or international experts have the power to inspect every place of detention at any time without prior announcement has a strong deterrent effect. At the same time, such visits create the opportunity for independent experts to monitor the implementation of the OPCAT and all other human rights conventions which deal with instances of deprivation of liberty. NPMs are not to be equated with NHRIs, of course. NHRIs, per definition, have the broadest possible mandate, and this clashes with the obvious specificity of NPMs. Yet NPMs often find their institutional home within pre-established NHRIs, to the extent that the Subcommittee on the Prevention of Torture (SPT) has issued a paper on "Organizational issues regarding national preventive mechanisms that form part of a national human rights institution."[98] It is for these reasons that my analysis will now briefly consider both CAT and OPCAT provisions that relate to NPMs and their nature. Furthermore, due to the relatively modern drafting exercise that preceded the adoption of OPCAT, what follows is arguably of significance, mutatis mutandis, for the whole TB system's current approach to independent domestic institutions like NHRIs and NPMs.

[96] For example, as in case of the ICCPR (Art. 40) or CAT (Art.19)

[97] Elina Steinerte, The Changing Nature of the Relationship between the United Nations Subcommittee on Prevention of Torture and National Preventive Mechanisms: in Search for Equilibrium, 31 *Netherlands Quarterly of Human Rights* 2 (2013), 129–155.

[98] OPCAT CAT, Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (22 March 2016) UN Document CAT/C/57/4 Annex, III paras. 11–23.

In order to further clarify the first overarching goal of the institutional framework for TB - NHRI engagement, it is useful to turn to CAT Article 2(1), the umbrella obligation clause in respect of torture as defined in Article 1: 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'.[99] Drafted very similarly to CCPR Article 2(2), CAT Article 2(1) puts emphasis on the positive obligation of states parties to fulfil, focusing this obligation on effective measures to prevent acts of torture. The mechanisms by which states carry out their obligation to prevent torture are *permissive*, allowing measures other than legislative, administrative, or judicial. While the Committee has not explicitly outlined an exhaustive list of measures, authoritative commentators have opined that 'one of the most effective measures to prevent torture is to create independent national commissions with the power to carry out *unannounced visits to all places of detention'*.[100]

Turning to the OPCAT, Article 3 contains the "national counterpart" to its treaty body, the SPT, and the obligation to establish the NPM:

> Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism).

The wording of OPCAT Article 3 denotes a high degree of flexibility, leaving the option open for states parties to either establish a new NPM or indeed to designate or maintain existing bodies, provided they meet the requirements of independence, impartiality, and efficiency. OPCAT Article 18 lays out these requirements and represents the link between the newly conceived national mechanisms for torture prevention and NHRIs:

> 1. The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.
>
> 2. The States Parties shall take the necessary measures to ensure that the experts of the national preventive mechanism have the required capabilities and professional knowledge. They shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country.

[99] CAT, Art 2(1).
[100] Nowak and McArthur (n 93), 115.

> 3. The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms.
>
> 4. When establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights.

As said, Article 18(4) explicitly refers to the Paris Principles and obliges states parties to consider them when establishing NPMs under OPCAT. Remarks made during the tenth session of the drafting Working Group on the value existing NHRIs may have when conceiving NPMs are pertinent. A considerable number of state representatives emphasized that NPMs should be established on the basis of the Paris Principles, and be independent from any other national authority, able to issue recommendations to the concerned authorities, and receive adequate funding.[101] The idea that the establishment and maintenance of NPMs must be based on the Paris Principles was reiterated in the final proposal presented by the chairperson-rapporteur.[102] Moreover, the wording of OPCAT Article 18 itself mirrors some key facets of the Paris Principles, such as functional and financial independence, pluralism of composition, and institutional efficiency, achieved through members' and staff's high level of capabilities and professional knowledge. Also, the mandate and power of NPMs as described in OPCAT Article 19 contain elements particular to NHRIs. While 19(a) and (b) relate to NPMs' role in visiting places of detention and reporting on such visits, Article 19(c) empowers NPMs to submit proposals and observations concerning existing draft legislation. Of a more general character than the previous two paragraphs, such a consulting function is typical of NHRIs according to the Paris Principles.

Lastly, a combination of other OPCAT obligations are useful for identifying the ultimate goals of the institutional framework for TB - NHRI engagement. The wording chosen for OPCAT Article 20, which spells out the obligations of states parties to facilitate visits by NPMs, mirrors that of Article 14, where almost identical obligations of states parties are laid down in respect of the SPT. This has been found to reflect "the clear desire of most delegations to grant the NPM a mandate as broad as that of the Subcommittee."[103] NPM-SPT engagement is specifically spelled out in Article 20(f), which grants the NPM "the right to have contacts with the

[101] ECOSOC, Report of the working group on a draft optional protocol to the Convention against Torture, (20 February 2002) UN Document E/CN.4/2002/78, para. 37.
[102] ibid para. 50.
[103] Nowak and McArthur (n 93) 1084.

Subcommittee on prevention, to send it information and to meet with it." The corresponding obligation of the SPT "to maintain direct, and if necessary confidential, contact with the national preventive mechanisms and offer them training and technical assistance with a view to strengthening their capacities" is enshrined in OPCAT Article 11(b) (ii)–(iii). In addition, Article 12(c) introduces the obligation for states parties "to encourage and facilitate contacts between the SPT and the national preventive mechanisms" and Article 16(1) requires the SPT to "communicate its recommendations and observations confidentially to the State Party and, if relevant, to the national preventive mechanism." While recommendations of both NPMs and the SPT are not binding on states parties,[104] "it follows from the objective and purpose of the OP and the general principle of cooperation that States shall take the recommendations of both sides seriously and make bona fide attempts to implement them."[105] The effects of the cooperation principle do not end there, for if a state party refuses to engage with the SPT and act upon its recommendations, this violation of the principle of cooperation may lead to sanctions, namely a public statement by the Committee against Torture or a decision to publish the entire SPT mission report.[106] Provisions on states' non-cooperation with NPMs is not contained in the OP, however, as all NPM documentation are of public nature in the first place.

The combination of provisions just outlined are of central importance for the purposes of goal-identification. Aware of the complexity that a mandate derived from an international human rights treaty can pose to national bodies, the drafters of OPCAT put in place a special relationship between NPMs and the SPT. This relationship has led the SPT to describe itself as 'a new generation of United Nations treaty body with a unique mandate.'[107] The resulting 'complex' of obligations constitutes the first conventional provisions within the TB system which require independent domestic human rights bodies and a TB to closely cooperate, meet, and exchange information. It is crucial for the success of OPCAT's preventive system that the SPT be able to rely on domestic counterparts in each State Party. For one, "even with ample funding the SPT will be unable to match the frequency of visits that NPMs as national bodies could potentially ensure".[108] Coordination between the two institutions has to be maintained, as NPMs need to be established with requisite powers and adequate funding. At the same time,

[104] Both Art 12(d) and Art 22 OPCAT require States parties only "to examine" recommendations of the Subcommittee and NPM, accordingly.
[105] Nowak and McArthur (n 93) 1097.
[106] OPCAT (n 40) Art 16(4).
[107] Subcommittee on Prevention of Torture, First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. CAT/C/40/2 (2008), at para. 5.
[108] Steinerte (n 97), 136.

this requires the continuous support by the SPT in order to ensure the continued cooperation between the international and national mechanisms for torture prevention. As stated by the SPT Chairperson, 'the establishment of independent, fully functioning and properly resourced NPMs in accordance with the OPCAT criteria is the most significant single thing which a State can do to prevent torture and ill-treatment occurring over time'.[109] In other words, the SPT must have reliable associates on the ground in each State Party and, to this end, strong and effective NPMs are natural partners to the treaty body. OPCAT Articles 18 and 20, read in conjunction with OPCAT Article 11(b) (ii)-(iii), Article 12(c) and Article 16(1) represent the clearest indication that one ultimate goal of the institutional framework for TB - NHRI engagement is "to make more effective the struggle against torture"[110] through implementation monitoring at both national and international levels.

Evidence of Goal 1 from CRPD - NHRI Engagement

Also useful for the identification of the first ultimate goal of TB – NHRI engagement, this section will consider the link between NHRIs and National Monitoring Mechanisms (NMMs) under the CRPD Committee's State Reporting procedure. As with the CAT/SPT section above, it is interesting to go back to the travaux preparatoires to seek for relevant information.

The CRPD, adopted on December 13, 2006, is one of the most innovative human rights conventions to date. The Convention was, after all, the first human rights treaty to be negotiated following the 1993 Vienna Declaration and Programme of Action, a watershed for the increasing role domestic actors can play in supporting the efforts of the international human rights system. The CRPD drafting period coincided with the initial stages of the UN reform of treaty bodies, which acknowledged the growing complexity of the human rights machinery and the corresponding burden of reporting obligations straining the resources of both Member States and the Secretariat.[111] A common understanding that the treaty body system was not enough on its own affected the discussion, eventually leading to a push for innovation at the national level.[112] Fundamental to TB-NHRI engagement is the novel fact that, after intense

[109] Statement by Mr Malcolm Evans, Chairperson of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment during the 66th session of the General Assembly, Third Committee, Item 69(a); 18 October 2011, New York. Available at: www2. ohchr.org/english/bodies/cat/opcat/docs/statements/StatementSPT_Chair_to_UNGA67.docx.
[110] CAT, Preamble.
[111] UN Secretary-General, Strengthening the United Nations: An Agenda for Further Change, A/57/387, 9 September 2002, para 52.
[112] Meredith Raley, 'The Drafting of Article 33 of the Convention on the Rights of Persons with Disabilities: The Creation of a Novel Mechanism' (2016) 20(1) *IJHR* 149.

lobbying at the first drafting session, it was decided that both NHRIs and CSOs could participate in future Ad Hoc Committee sessions,[113] thus breaking with the tradition by which negotiations took place only among state representatives. Also due to this participatory process, the CRPD 'put forward one of the most creative proposals for a comprehensive scheme for implementation and monitoring anchored to the domestic level, which boasted highly institutional features'[114], thus further underscoring the value of TB – NHRI engagement and its ultimate goal of implementation monitoring.

The identification of the CRPD Committee's ultimate goal when engaging with NHRIs is somewhat less complex than doing so for earlier TBs. During negotiations, a proposal immediately emerged that led to the inclusion of a specific article on the *purpose* of the CRPD, making it the only core UN human rights convention to have such a separate article.[115] Article 1, titled "Purpose," appeared in the draft articles elaborated by the Working Group in 2004,[116] which included civil society and indeed, for the very first time, NHRIs.[117] Easier for an effectiveness assessment through the GBA model, Article 1 states:

> The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

The very *raison d'être* of the CRPD, then, is ensuring that people with disabilities enjoy the fundamental rights set out in the existing international human rights treaties like everyone else.

Despite the direct formulation of CRPD's goal pursuant to Article 1, it is also useful to briefly expand on the Convention's General Obligations set forth in Article 4, which differs from similar provisions in other human rights treaties. Like other such provisions, Article 4 is of a cross-cutting nature and encourages national legal and policy reform guiding domestic

[113] UNGA, 'Report of the First Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities' (27 August 2002) UN Document A/57/357.
[114] Sébastien Lorion, A Model for National Human Rights Systems? New Governance and the Convention on the Rights of Persons with Disabilities, 37 *Nordic Journal of Human Rights* 3 (2019), 237.
[115] CRPD drafters took inspiration from such practice in treaty drafting in the field of international environmental law. See Della Fina, Cera, and Palmisano (n 21) 89.
[116] See UNGA, 'Report of the Working Group to the Ad Hoc Committee: Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities' (27 January 2004) UN Document A/AC.265/2004/WG/1, Annex I.
[117] Marianne Schultze, 'Monitoring the Convention's implementation' in Maya Sabatello and Marianne Schultze, *Human Rights and Disability Advocacy* (University of Pennsylvania Press 2014) 209.

implementation of the Convention. Uniquely to CRPD, it enumerates both general and specific obligations, including the obligation to universally design structures, making Article 4 "a guide […] on the nature and implementation of States' legal obligations."[118] The programmatic nature of this article is perhaps due to the Ad Hoc Committee's decision to include both NHRIs and "national disability institutions" in its call for contributions to the deliberations on a new convention from its first session.[119] After all, it is these institutions which have a closer affinity with the complex dynamics of implementation at the national level. The final draft of the article presents provisions which may provide information on the ultimate goals of CRPD-NHRI engagement. CRPD Article 4 paragraphs 1 (a)–(b) state that:

> 1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:
>
> (a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;
>
> (b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;

Firstly, by undertaking to "ensure and promote"[120] the full realization of the rights of persons with disabilities under the Convention, states parties have vowed to adopt several concrete positive measures to safeguard its full spectrum of rights. The obligation to "ensure" contained in CRPD Article 4(1) corresponds broadly to the final level of the tripartite typology of human rights obligations—the duty to fulfil. Borrowing from the interpretative efforts of CESCR Committee, the duty to "fulfil" has been broken down into the obligations to facilitate, to provide, and to promote, requiring states "to take positive measures that enable and assist individuals and communities to enjoy" a particular right "when an individual or group is unable,

[118] See the comments of Canada, Ad Hoc Committee, Daily Summary of discussions at the seventh session of UNCRPD (30 January 2006).
[119] UNGA, Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities UN Document A/57/357 para. 11.
[120] It was the Federation of and for People with Disabilities in Kenya, an NGO, that proposed adding "and to promote" after "ensure" in the first line of Article 4(1), believing that states "cannot ensure the full realization of the rights of persons with disabilities in all instances but they can always promote them" in Ad Hoc Committee, Daily Summary of discussions at the seventh session of UN Convention on the Rights of Persons with Disabilities (31 January 2006).

for reasons beyond their control, to realize the right themselves by the means at their disposal."[121] The duty to "promote" the full realization of rights for persons with disabilities ties in with CRPD Article 8 on awareness raising, which implies training and education activities that foster respect for the rights and dignity of persons with disabilities.[122] Moving on, the value of Article 4(1)(a) is the same as when applied to other conventions and the same logic applies to states parties' obligations under the CRPD: "while the adoption of legislative measures is indispensable, obligations under article 4(1)(a) encompass a panoply of duties that is much broader than the mere adoption of legislation."[123] Also similar to other conventional provisions[124], the obligation contained in Article 4(1)(b) of the Convention requires states parties to modify or abolish existing laws, regulations, customs, and practices that constitute discrimination. Positive measures that states are required to adopt in order to bring their domestic laws, policies, and practices in line with the Convention may vary.[125] For the purposes of goal identification, however, the main contribution that CRPD has made to TB – NHRI engagement is in fact the conferment of legal value to the Paris Principles. Emblematic of a shift toward increased domestic stakeholder engagement, CRPD Article 33 articulates the procedures for monitoring its implementation through the introduction of two different yet related positive obligations. Firstly, Article 33(1) requires member states to designate one or more focal points within their governments for matters relating to the implementation of the Convention. Secondly, and crucial to this analysis, Article 33(2) instructs establishing or designating a national coordination mechanism in order to facilitate the adoption of measures for implementation, also known as National Monitoring Mechanisms (NMMs). In doing this, "States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights."[126] By virtue of Article 33, the CRPD introduces an obligation to establish within state parties a national monitoring mechanism, taking into account the Principles relating to the Status of National Institutions

[121] CESCR, "General Comment No 13 on the right to education" (8 December 1999) UN Doc E/C12/1999/10 para. 47.
[122] CRPD Art 8(a)–(c).
[123] Andrea Broderik, "Art 4 General Obligations" in Ilias Bantekas, Michael Ashley Stein, and Dimitris Anastasiou, *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press 2018) 119.
[124] ICERD Article 2 and ICEDAW Article 2.
[125] See the views of Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia 2005).
[126] CRPD, Article 33(2).

adopted by the UNGA in 1993.[127] It further states that such mechanisms are created "to promote, to protect and monitor the implementation of [...] the Convention,"[128] thus establishing an explicit linkage between CRPD's 'Purpose' and NHRIs.

This explicit reference to the Paris Principles may be traced back, significantly, to a comprehensive proposal prepared by NHRIs and submitted to the sixth Ad Hoc Committee, including a separate article on the "Establishment of a National Monitoring Body."[129] The powers of that body were specified as, at minimum, monitoring national compliance with the Convention, making proposals on existing and draft legislation, initiating and supporting complaints at the national level, making recommendations to authorities, getting involved in awareness raising and serving as liaison to organizations representing persons with disabilities as well as international stakeholders.[130] After further negotiations, Article 33(2) was agreed as follows:

> 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.[131]

In essence, Article 33 places the onus on domestic monitoring, with international monitoring taking a secondary role. Article 33(2) clearly draws on the 2002 OPCAT, both deploying a two-tier system of international and national independent bodies as well as conferring legal value to the Paris Principles. As was the case for NPMs, 'NHRIs should not blindly be designated as the independent mechanism'[132], although NMMs are often set up within existing NHRIs. Afterall,

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[127] UNGA, Resolution 48/134 (No 12). A number of records—drafting proposals as well as records of oral contributions made during the years in which the CRPD was under negotiation—seem to leave "no doubt" as to which international standard was meant. See Asia Pacific Forum of National Human Rights Institutions, *Human Rights and Disability: A Manual for National Human Rights Institutions* (Asia Pacific Forum of National Human Rights Institutions, December 2018) 49.
[128] CRPD, Art 33(2).
[129] HRI Monitoring proposal, 'Draft Text on Monitoring Presented by National Human Rights Institutions' (10 August 2005), available at <http://www.un.org/esa/socdev/enable/rights/ahc6contngos.htm>.
[130] CRPD, Art. 27 ('Establishment of a National Monitoring Body').
[131] CRPD Art. 33(2).
[132] Gauthier de Beco, 'Article 33(2) of the UN Convention on the Rights of Persons with Disabilities: Another Role for National Human Rights Institutions?' (2011) 29(1) NQHR 84 106

the Paris Principles specifically refer to NHRIs and can already count with mandates for human rights promotion, protection and monitoring, as well as pre-established links with disability organizations.

As Lorion explains when referring to the CRPD Committee's recent jurisprudence on Article 33(2) 'The Committee has consistently struck down any 'complex' monitoring framework if there was any suspicion that one of its components might be connected to the executive in any way but accepted a monitoring framework composed solely of an NHRI'.[133] As such, 'not only NHRIs shall always be part of the framework, but all the mechanisms in the framework shall be 'functionally' and 'substantively' independent'.[134] NHRIs unique position, as part of the administration yet independent, are the perfect fit for the CRPD's ambition to foster domestic coordination and strengthen implementation monitoring

NHRIs had a major impact on the form and content of this article and of the Convention as a whole, and they will continue to do so through stimulating further NHRI engagement in implementing and monitoring the human rights of persons with disabilities. Since the Convention entered into force, 'NHRIs have continued to leverage the conventional recognition of the Paris Principles by Article 33 to underpin the diffusion of NHRIs at large, and at least to be part of the Article 33(2) monitoring framework'.[135] By stating that the mechanism was created in order "to promote, to protect and monitor the implementation of [...] the Convention," Article 33(2) establishes an explicit linkage between the core goal of the Convention, the CRPD Committee, and NHRIs.

A common ultimate goal of monitoring the implementation of UN human rights conventions

From the above analysis, two specific aspects appear to characterize the evolving nature of TB – NHRI engagement. Firstly, the increasing efforts made by TBs to develop guidance aimed at supporting human rights mainstreaming and action by NHRIs. In addition to that, international human rights law has increasingly been prescribing the structures and processes that States should set up domestically in order to monitor the implementation of treaties.[136]

[133] Lorion (n 114), 255.
[134] Ibid.
[135] Ibid, 253
[136] Domenico Zipoli NHRI Engagement with UN Human Rights Treaty Bodies: A Goal-based Approach, 37(3) *Nordic Journal of Human Rights* (2019), 260.

With the adoption of the Paris Principles by the General Assembly in 1993, the treaty body system began to prescribe more specific organizational structures and processes at the domestic level. This is reflected in the clear distinctions between pre- and post-1993 human rights treaties, with NHRI engagement included in conventional provisions only within more recent conventions, the OPCAT and the CRPD. For earlier conventions, the task of prescribing a role for NHRIs has necessarily happened through subsequent TB interpretation, whether through the issuance of General Comments or NHRI-specific Committee instruments. As such UN human rights treaties have required each respective Committee to develop an interpretative methodology that is sensitive to 'new' institutionalization trends - especially considering the "effectiveness gaps" that might materialize in the course of a treaty's existence. These gaps include what Dixon labels "blind spots": deficiencies, occurring for various reasons, which lead to weaknesses in the legislation that require a response to remedy.[137] The role of NHRIs in helping the Committees monitor implementation in each State party was "overlooked or unanticipated in the drafting process" but "remain essential to the effective operation of the relevant provision and thus require the development of an appropriate interpretative response."[138] Unless addressed through subsequent interpretation, these gaps may undermine the effective implementation of a treaty because "'it is reasonable to expect that circumstances should arise […] in which it is necessary to imply a condition in order to give effect to this intention."[139] It follows that since the Paris Principles' adoption by the General Assembly, a process of *contextualization* has led the TB system to acknowledge the growing institutionalization of NHRIs and their role in monitoring the implementation all UN human rights treaties.

Furthermore, it is arguably the case that granting legal recognition to the Paris Principles, as well as to their respective TBs' engagement with NHRIs, has since had effects beyond the OPCAT and CRPD frameworks. That is because interpretation of human rights conventions requires *pursuing coherence with the whole TB system* to enhance its persuasiveness. More broadly, "coherence in the legal system focuses on fitting a decision into the legal system and on the fitting together of all components of the legal system"[140] as there is strong presumption

[137] Rosalind Dixon, 'Creating Dialogue about Socioeconomic Rights: Strong-fAorm Versus Weak-form Judicial Review Revisited' 5 *International Journal of Constitutional Law* (2007) 391.
[138] John Tobin, *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press 2018) 18.
[139] Arnold Duncan McNair, *The Law of Treaties* (Clarendon Press 1961) 436.
[140] Leonor Moral Soriano, *A Modest Notion of Coherence in Legal Reasoning: A Model for the European Court of Justice* (2003)16 Ratio Juris 296.

against normative conflict.[141] The application of this presumption supports a preference for harmonization or systemic integration and "unless there is evidence in the drafting history to suggest that an alternative meaning was intended, the interpretation of similar provisions in different human rights treaties should pursue harmonization."[142] As no such evidence can be produced, the principles of contextualization and systemic coherence also suggest that one common ultimate goal of the wider institutional framework for TB – NHRI engagement is that of implementation monitoring.

2.2. Goal 2: To Support a Transnational Human Rights Regime Dedicated to the Implementation of UN Human Rights Conventions

A second goal of the institutional framework for TB-NHRI engagement may be deduced from the above discussion: *regime support*. Both institutions operate within the framework of a specific legal regime, characterized by a set of norms and iterative monitoring procedures around which expectations by its different actors converge. While a precise definition is debated, Krasner suggested that a *regime* is made of 'principles, norms, rules and decision-making procedures around which actors' expectations converge.[143] Aiming to stabilize and guide international behaviour, regimes are conceptualized as enabling mechanisms that create convergence and expectations, while seeking to establish standards of behaviour and cultivate a general sense of obligation.[144] Relevant to our analysis, regimes are to be considered as institutions involving States and increasingly non-State actors, who seek to realize their long-term objectives and structures […]."[145] In this sense, TBs and NHRIs are 'regime institutions', expected to contribute to and support the functioning of its overarching regime. In Chapter 1, I defined this regime as a human rights transnational legal order. Numerous institutional innovations have come about throughout the TB system's existence, including the introduction of new treaties and over 120 NHRIs worldwide. In this sense, the regime is effectively expanding its institutional reach and the engagement between TBs and NHRIs may be considered to play a certain systemizing role.

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[141] International Law Commission, Report of the Study Group of the International Law Commission 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' ('ILC Fragmentation Report') (13 April 2006) UN Document A/CN.4/L.682. para 37.
[142] Tobin (n 138) 14.
[143] S. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' 36 *International Organization* , vol, 186, 1982, p.186
[144] Ibid. p.186
[145] Anu Bradford, *Regime Theory*, Max Planck Encyclopedias of International Law, Encyclopedia Entries, (2007) available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1462.

To find evidence of regime support as an integrating goal of the institutional framework for TB-NHRI engagement, it is useful to examine what external goal-setters (i.e. mandate providers) have said in this regard. Evidence may come from both the original UN human rights treaties' preambles as well as more recent statements offered by State Parties during the 2020 Treaty Body Review process. It addition, further evidence towards the identification of Goal 2 may be gained through an analysis of instruments issued by internal-goal setters such as the NHRI community, TB members and the OHCHR Secretariat.

Evidence of Goal 2 in preambles from UN human rights conventions

As in other fields of public international law, the goals of a UN human rights treaty may be gathered from "the wider aims of the law as may be gathered from its preamble and general tenor."[146] Without stipulating any rights or obligations, they represent "narratives that seek to establish legitimacy with regard to the origins and purposes of a piece of legislation, to outline the processes that led to the enactment of the legislation, and to better communicate these rationales to the document's multiple constituents."[147] Preambles to human rights treaties are introductory statements useful for a GBA evaluation as they set out the treaty's purpose, historical evolution and the intent of the initial drafters.[148] The following analysis will underline the role preambles also have in linking each human rights convention to the broader human rights system. This linkage influences the work of both TBs and NHRIs, in their common ultimate goal of implementation monitoring, categorized as Goal 1 above

Preambular clauses can perform four distinct functions: interpretative, supplementary, binding (clauses-engagement) and incorporative.[149] It is through this last function that we can delineate within which sort of regime the mandate providers decide to set the treaty in question. Incorporative clauses in preambles aim at explicitly taking into account another treaty or a part of another treaty, customary international law, and resolutions of international organizations. Such clauses, also known as 'mutual supportiveness' clauses, signal the supporting relationship between different international agreements. Preambles of UN human rights conventions are characterized by certain commonalities deriving from the formulations specific to the UN

[146] Situation in Democratic Republic of Congo, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's I's 31 March Decision Denying Leave to Appeal, ICC-01/04-168 (13 July 2016), para. 33.
[147] Tove H. Malloy, 'Title and Preamble' in Marc Weller (ed), *The Rights of Minorities in Europe* (Oxford University Press 2005) 56.
[148] VCLT (n 41), Art. 31(1).
[149] Moïse Mbengue Makane, Max Planck Encyclopedias of International Law, Encyclopaedia Entries, Preamble. Oxford Public International Law (2006) available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1456.

Charter and the Universal Declaration of Human Rights (UDHR). As the TB system expanded, however, so did the specificities contained in the newer preambles, which feature more detailed mutual supportiveness clauses referring to other existing UN human rights treaties. As such, all preambles reflect a certain regime-supporting goal by linking each convention to the broader UN system (UN Charter and UDHR) as well as the TB system as a whole. Both TBs and NHRIs, by acting towards their common ultimate goal of implementation monitoring, are necessarily set within the regime established by each convention's preamble

Common to all UN human rights treaties, a standardized set of preambular paragraphs reaffirms those human rights principles set out in the UN Charter and the UDHR. It does so by reflecting the conceptual interrelationship between human rights and other core values of the UN. Indeed, it is both the Charter and the UDHR that authoritatively provided for the development of binding human rights instruments. In this sense, the similar formulations found in the first paragraphs of each UN human rights treaty is a "reflection of the foundational principles of the UN Charter that have since given rise to a detailed human rights system and framework"[150], both at the international and national levels.

The term "principles proclaimed in the Charter of the United Nations" refers to the principles and purposes of the UN enshrined in Articles 1 and 2 of the Charter. The ensuing three pillars of the UN system, namely peace and security, development, and human rights, are considered interrelated purposes behind the UN's establishment and ongoing activity. As former UN Secretary General Kofi Annan stated in his landmark report "In Larger Freedoms", human rights are a precondition for both security and development in the sense that "we will not enjoy security without development and we will not enjoy either without respect for human rights."[151] Furthermore, by recognizing the rights enshrined in the UDHR, all preambles emphasize the interdependence of civil, political, economic, social, and cultural rights. Underlining the inextricable bond that human rights conventions have with the broader human rights framework, many of these paragraphs go as far as lifting almost verbatim the related articles from the UDHR.[152]

Such commonalities are in line with an early call made by the General Assembly for as many similar provisions as possible in order to underline a *unity of purpose* of the regime being

[150] Ibid.
[151] UNGA, Report of the Secretary-General, 'In larger freedom: towards development, security and human rights for all' (21 March 2005) UN Document A/59/2005, para. 17.
[152] E.g. Recital 3 CERD (n 95) (Art. 7 UDHR), Recital 4 CAT (Art. 5 UDHR), Recital 1 CEDAW (Art. 2 UDHR).

delineated.[153] A salient example of such unity of purpose comes from the CEDAW Preamble. By reaffirming the "faith in […] the equal rights of men and women" and the "inadmissibility of discrimination […] including distinction based on sex" found in the UN Charter[154] and the UDHR[155] respectively, recitals 1 and 2 establish a first clear thread between CEDAW and the broader UN system. The inclusion of this same text in the Convention "affirms its status as a UN human rights treaty that sets out States' obligations in fulfilling the objectives of the UN Charter and the UDHR."[156] Adding a further element of unity, Recital 3 notes that "States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights." Here, CEDAW drafters explicitly linked the Convention to the International Bill of Rights, allowing its instruments to be used as interpretative sources. The CEDAW preamble provides more evidence of its regime-supporting goal through recital 4: "Considering the international conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality of rights of men and women." Perhaps the best and most concise representation of a regime-supporting goal, this paragraph enables the CEDAW to be interpreted in light of these treaties and be seen as complementary to them. Furthermore, by not listing the relevant instruments, this paragraph ensures the most comprehensive coverage in light of an expanding human rights legal framework. In addition, in recital 5 the CEDAW underlines the relevance of "resolutions, declarations and recommendations adopted by the United Nations and the specialized agencies promoting equality of rights of men and women."[157] This paragraph ensures the Convention's linkage with the totality of pre-existing instruments adopted under the auspices of the UN by including soft law.[158] The combination of recitals 4 and 5 connects CEDAW to the transnational human rights regime dedicated to its implementation. Both recitals ensure the Convention's linkage with the totality of instruments already adopted under the auspices of the UN to promote equal rights for men and women, including legally non-binding resolutions and declarations.

This unity of purpose continues to be exhorted even in the most recently drafted preambles. The Ad Hoc Committee set up to draft the CRPD, for instance, stated that the ensuing

[153] UNGA, Resolution 543 (VI) (n 34).
[154] Charter of the United Nations (24 October 1945) 1 UNTS XVI Preamble, para. 2.
[155] UN General Assembly, Resolution 217(III), Universal Declaration of Human Rights, UN Doc. A/RES/217(III), 10 December 1948 (UDHR), Preamble, para. 5.
[156] Freeman, Chinkin, and Rudolf (n 62) 40.
[157] CEDAW Preamble, para. 5.
[158] Freeman, Chinkin, and Rudolf (n 62) 43.

Convention did not comprise new rights, but an expression and elaboration of human rights principles already embedded in existing human rights law and in the architecture of the international human rights framework, including treaties, customs, and general principles.[159] Also applicable to other human rights treaties of a specific character, this recital underscores the idea that all conventions are firmly rooted in the existing human rights architecture and that fundamental concepts such as dignity and equality are a common denominator to be jointly monitored by all TBs and its domestic stakeholders. As such, the CRPD identifies at the outset of its Preamble the sources of reference and the legal context of the treaty. Following the unequivocal recognition of the right to dignity of people with disabilities (recital (a)) and their equal entitlement to fundamental rights and freedoms as principles enshrined in the 1945 UN Charter and in the 1948 UDHR (recital (b)), the Preamble expressly grounds the CRPD among the UN core human rights treaties (recital (d)).[160] In such way, CRPD drafters installed a double shield, a higher level of protection under the CRPD *and* other human rights treaties.

With time, preambular paragraphs have thus grown to serve two principal functions useful for determining a regime supporting goal for the institutional framework for TB – NHRI engagement. Firstly, they reaffirm those human rights principles set out in the broader global frameworks delineated by the UN Charter and the UDHR. Secondly, they place prior conventions within the context of the convention in question. Preambles highlight the inter-linked nature of the TB system which, in turn, influence the aims of NHRIs when monitoring the implementation of UN human rights conventions. It is in fact due to such connectivity that TB – NHRI engagement may be expected to contribute to and support the functioning of its overarching regime. Preambles are, in a sense, explanations of the drafters' reasons for adopting the Convention in question, as well as an opportunity to highlight any issue that State Parties ought to be aware of. A relevant limitation might point to the historically relevant value of preambles, their supplemental character useful only when they can fill gaps in the treaty. However, some of the most recent statements on treaty body reform made by state representatives confirm the relevance of the drafters' intentions to this day.

Evidence of Goal 2 from mandate-providers statements

Aside from Preambles, evidence of regime support may also be derived from statements made by state representatives during the most recent discussions on treaty body reform. Especially

[159] Ibid.
[160] Della Fina, Cera, and Palmisano (n 21) 81.

useful evidence for goal identification may be found in statements contained in the States' submissions to the biennial questionnaires on the implementation of General Assembly resolution 68/268 on "Strengthening and enhancing the effective functioning of the human rights treaty body system".[161] This represents, after all, the latest opportunity for states to express their views concerning an improved TB system, which sees improved domestic stakeholder engagement as a fundamental tenet.

Overall, as of July 2020, 55 States submitted their response to the latest OHCHR request for input.**[162]** Each submission presents its own peculiar considerations regarding a variety of proposals towards "any further action to strengthen and enhance the effective functioning of the human rights treaty body system".[163] Crucial to the identification of a regime-supporting goal is the frequent call among submissions for the development of synergies at UN, regional and national level, in order to streamline the overall human rights regime. Among State submissions to the questionnaire, 19 States specifically advocate for stronger synergies between the committees and the wider UN human rights system, both in terms of coordination of the processes and consideration of national reports, Also among submissions, 10 States propose a more sustained interaction with regional human rights systems.[164] A link between the success of the TB system and a more sustained interaction with the wider transnational human rights regime can also be found in other recent statements by state representatives. For example, Costa Rica and 44 other states made a submission to the 31st meeting of Treaty Body Chairpersons, openly alluding to regime support as an ultimate goal of the TB system. [165] Firstly, the submission recommends more coordination between the committees and the wider UN system, 'to boost their complementary function, take advantage of their conceptual findings and contribute to the implementation of their concluding observations on the ground'.[166] Secondly, it broadens the scope of interaction to regional human rights mechanisms in that 'the cooperation between the treaty bodies and the regional mechanisms for human rights should be

[161] OHCHR, Questionnaire in relation to General Assembly resolution 68/268 (2019), available at https://www.ohchr.org/EN/HRBodies/HRTD/Pages/3rdBiennialReportbySG.aspx.
[162] Geneva Human Rights Platform, An Overview of Positions Towards the 2020 Treaty Body Review by States (2020), on file with author.
[163] OHCHR, Questionnaire (2019), on file with author.
[164] Ibid.
[165] Submission to the 2020 Review of the UN Human Rights Treaty Bodies System, Costa Rica and 43 other States Geneva, (20 June 2019), available at <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CHAIRPERSONS/CHR/31/28571&Lang=en> accessed 26 December 2019.
[166] Ibid 4.

pursued and reinforced' and that 'coherence should be strengthened by promoting dialogue between the various treaty bodies and regional systems for the protection of human rights'.[167]

Lastly, throughout the vast majority of State submissions to the Treat Body Review 2020 process, notable attention has been dedicated to the improvement of the treaty body system's accessibility for national stakeholders, including specific reference to NHRIs.[168] In the latest rounds of state submissions, states have often referred to the fact that 'the TB system as it stands today does not allow for an effective domestic stakeholder engagement'.[169] This has been a recurring theme of the review process, and its solution has been found to require 'more accurate and harmonized provision of information and working methods, as well as an increased predictability of the system'.[170] A number of States, including a joint submission by the EU bloc, have persistently called for an aligned methodology for interaction between treaty bodies and NHRIs since the review process started in 2014. Whether the above State submissions will be taken into consideration during the actual 2020 review by the General Assembly is still not certain. What is clear, however, is the intention of a great number of mandate-holders to support connectivity among actors at different levels, within a transnational human rights regime dedicated to the implementation of UN human rights conventions.

Evidence of Goal 2 from NHRIs and OHCHR Secretariat

Actors internal to the institutional framework for TB – NHRI engagement have also expressed their aim of sustaining, through their activity, the expanding transnational human rights regime. Regime support is part of the often-stated bridging role NHRIs play between international and domestic human rights monitoring. Through their participation in the State Reporting procedure, well-functioning NHRIs connect international monitoring efforts with their own national experience of human rights promotion and protection.

Domestically, NHRIs cannot promote and protect human rights alone and they are not expected to do so. On the contrary, the Paris Principles require that NHRIs work in cooperation with all elements in a society, including other State institutions and civil society. As such, cooperation

[167] Ibid 5.
[168] Geneva Human Rights Platform, (n 162).
[169] EU submission to the 2020 Review of the UN Human Rights Treaty Bodies System, EU General Approach to the UN human rights treaty body system strengthening and enhancing process (May 2020), available at <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CHAIRPERSONS/CHR/31/28571&Lang=en> accessed 26 July 2020.
[170] Geneva Human Rights Platform, (n 162).

and engagement should extend to all national actors, including "the Government, parliament and any other competent body".[171] As such NHRIs should aim "to define and delimit the space they occupy in relation to other institutions that protect human rights, within and outside government," and thus "complement rather than displace the work of other bodies."[172]

Internationally, the engagement required of NHRIs is also far reaching with the Paris Principles stating that NHRIs should:

> … cooperate with the United Nations and any other organizations in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights.[173]

According to the SCA General Observations, NHRIs mandates include making statements during debates before review bodies and the Human Rights Council; assisting, facilitating and participating in country visits by United Nations experts, including special procedures mandate holders, treaty bodies, fact finding missions and commissions of inquiry; and monitoring and promoting the implementation of relevant recommendations originating from the human rights system.[174] On this note, GANHRI has underlined the regime-supporting role of NHRI engagement with the TB system:

> Individually and collectively through the GANHRI and their regional coordinating networks, NHRIs have played an important role in supporting the development of international human rights treaties and other norms and standards.[175]

Therefore, NHRIs see themselves as pivotal actors across international, regional, and domestic dimensions. The key Paris Principles provision that NHRIs should be given "as broad a mandate as possible"[176] is further evidence of the regime supporting goal of NHRIs. NHRI representatives have later interpreted this key provision as "a progressive definition of human rights which includes all rights set out in international, regional and domestic instruments,

[171] Paris Principles, 'Competence and responsibilities', para. 3(a).
[172] International Council on Human Rights Policy, *Performance and Legitimacy: National Human Rights Institutions* (2nd edn, ICHRP 2004) 8.
[173] Paris Principles, 'Competence and responsibilities', para. 3(e). See also *GANHRI SCA General Observations as adopted in Geneva in May 2013*, GO 1.4.
[174] SCA General Observation 1.4.
[175] GANHRI, Background Paper, National Human Rights Institutions and United Nations Treaty Bodies (May 2016) 8.
[176] Paris Principles, para. 2.

including economic, social and cultural rights"[177], setting NHRI activity at the center of what I have earlier defined as a transnational human rights legal order. NHRIs thus play the double role of both feeding information from the international level back to national actors and, conversely, from the national level to the relevant international bodies. One of the latest and most comprehensive statements in this regard is the Joint Declaration by the CRPD Committee and the Global Alliance of National Human Rights Institutions, adopted in 2018.[178] This Declaration, although thematically limited to disability, outlines the sort of regime in which both NHRIs and TBs see themselves required to support through their activity:

> NHRIs have a unique and critical role in the promotion and protection of the rights of persons with disabilities by creating linkages with other monitoring mechanisms at the national level, such as national mechanisms for the prevention of torture or National Mechanisms for Reporting and Follow-up, as well as at the international level, with human rights treaty bodies or other mechanisms, such as the Universal Periodic Review of the Human Rights Council or the High Level Political Forum on Sustainable Development.[179]

Lastly, the OHCHR Secretariat has also expanded on the regime supporting role it envisages for NHRIs and TBs. First of all, the report introducing the draft Harmonized Guidelines on Reporting lists the "main purposes" of reporting, and how the revised reporting system would meet those requirements.[180] The first outlined purpose is further proof of what I have categorized as Goal 2. It specifically refers to "the holistic perspective of human rights established by the UDHR and reaffirmed in the human rights treaties: that human rights are indivisible and interrelated, and that equal importance should be attached to each and every right recognized therein."[181] The adopted 2006 Harmonized Guidelines seem to support this approach by highlighting that:

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[177] SCA, General Observation 1.2

[178] Joint Declaration by the Committee on the Rights of Persons with Disabilities and the Global Alliance of National Human Rights Institutions Adopted during the Committee's 19th session, held, from 14 February to 9 March 2018 in Geneva, available at <www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDStatements.aspx> accessed 26 December 2019.

[179] ibid

[180] International Human Rights Instruments, 'Guidelines on an expanded core document and treaty-specific targeted reports and harmonized guidelines on reporting under the international human rights treaties' (n 71) 17–18.

[181] ibid para. 7.

> The reporting process constitutes an essential element in the continuing commitment of a State to respect, protect and fulfil the rights set out in the treaties to which it is party. This commitment should be viewed within the wider context of the obligation of all States to promote respect for the rights and freedoms, set out in the Universal Declaration of Human Rights and international human rights instruments, by measures, national and international, to secure their universal and effective recognition and observance.[182]

Within such interrelated regime, the Secretariat considers NHRIs to have 'a unique role to play in promoting the recommendations made by treaty bodies and regional and other international mechanisms […] in their respective States'.[183] The Secretariat also considers NHRIs to have 'an important role to play in promoting national consultations prior to reporting and in the implementation and follow-up of recommendations'.[184]

In conclusion, it seems inherent from the very nature of NHRIs that when engaging with the TB system their activity strives to achieve a certain regime-supporting role, a view shared by both external and internal goal-setting actors of the institutional framework for TB – NHRI engagement.

2.3. Goal 3: To Legitimize the Institutional Framework Necessary to Support such a Regime

Perhaps less explicit in its formulation, the third ultimate goal of the TB framework for NHRI engagement is that of self-legitimization.

Legitimacy is of fundamental importance for institutions that do not hold judicial powers and act in an advisory and recommendatory manner.[185] An analysis of the legal status of both COBs and NHRI outputs will be dealt with in Chapter 5. For the current goal-setting purpose, it is sufficient to reiterate the non-binding status of both COBs and NHRI recommendations, although both enjoy notable yet ill-specified authority.[186] COBs reflect the outputs of

[182] See International Human Rights Instruments, Report of the Secretary General, *Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties, Report of the Secretary-General* (3 June 2009) UN Document HRI/GEN/2/Rev.6, para. 8
[183] OHCHR, 'Common approach to engagement with national human rights institutions', Note by the Secretariat (9 June 2017), UN Document HRI/MC/2017/3 para. 1.
[184] Ibid.
[185] See Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press 2003) 254.
[186] Michael O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' 6(1) Human Rights Law Review (2006) 33.

conventionally mandated and independent committees of experts. The drafters' decision to entrust functions of monitoring compliance and advising on implementation to such independent bodies may be seen as conferring a potential legitimating role to the system. After all, "independence and professionalism serve as important building blocks of institutional legitimacy that may, in turn, confer legitimacy on other institutions."[187] A certain legitimizing goal can thus be presumed by the TB system's reliance on the independence and professionalism of its membership.[188]

From an NHRI perspective, the combination of their legislative/constitutional nature and the GANHRI-led accreditation process guaranteeing their independence raises NHRI authority somewhat higher than that of other domestic stakeholders. NHRI independence as described in the Paris Principles can be brought back to five essential requirements: (1) legal status; (2) stable, transparent, and participatory appointment; (3) pluralistic composition; (4) own infrastructure and funding; and (5) the competence to take up freely and publicly matters on an advisory basis. "Independence" implies that NHRIs do not belong to any of the three traditional state powers.[189] It should be noted, however, that it has been argued that "seeing NHRIs as part of the state apparatus does not fit with the notion of them as independent institutions," and they should thus be labelled "semi-official independent bodies."[190] Irrespective of formal independence and impartiality, however, a "legal mechanism" is not the same as a court or judicial institution in that "[t]here is a qualitative distinction between decisions judicially arrived at after full legal argument and determinations made without the benefit of a judicial process."[191]

The non-binding nature of TB and NHRI recommendations means that quality of reasoning becomes even more essential than in regular international courts to convince national authorities on the proper interpretation of treaty obligations.[192] As Byrnes states, "the government's and public's perception of the status, role, competence and legitimacy of the body

[187] Shany (n 9) 266–267.
[188] See Chairs of the TBs, Addis Ababa Guidelines on the Independence and Impartiality of Members of the Human Rights Treaty Bodies, 2012.
[189] Anna-Elina Pohjolainen, *The Evolution of NHRIs: The Role of the United Nations* (Danish Institute for Human Rights 2006), 6: "permanent and independent bodies, which governments have established for the specific purpose of promoting and protecting human rights."
[190] See Rachel Murray, *The Role of National Human Rights Institutions at the International Level and Regional Levels: The Experience of Africa* (Hart Publishing 2007), 59, 68.
[191] UNGA, Report of the Human Rights Committee, 'Observations by the United Kingdom under "Observations of States Parties under Article 40", Paragraph 5, of the Covenant' 50th Session (4 February 1996) UN Document A/50/40, Vol. I, Supp. No. 40, 133, para. 12.
[192] Keller and Ulfstein (n 39).

and its decisions" is key to compliance with TB recommendations.[193] These concerns relate to legitimacy in terms of actual acceptance of authority, also referred to as popular legitimacy. Other factors are also at play, such as whether authority "is well founded—whether it is justified in some objective sense"[194], which is also referred to as normative legitimacy. In this regard, "the methodological weaknesses and lack of coherence and analytical rigor" in the interpretative output of TBs have been found to 'compromise their legitimacy.[195] For example:

> Throughout the [Human Rights] Committee's life, [recommendations] have been written in a form that could not be called user-friendly. Rather than highlight issues and argument, they too frequently frustrate the reader because of their rigid structure and excessive information, the disjunction between most of this information and the conclusions of the Committee, the terse statement of these conclusions, and the sheer lack of readability.[196]

A number of factors determine the quality of COBs, including "the degree to which they address issues that are in fact a problem in the country concerned, as well as the usefulness of the recommendations."[197] In addition, accuracy, legality and clarity also affect the quality of COBs. NHRIs can play a key role for all these aspects. The availability of documentation—such as investigations or reports by NHRIs—on the human rights situation in the country concerned is a crucial factor for the quality of TB recommendations. The provision of reliable and implementable recommendations from ground-level, independent, national institutions arguably fosters the legitimacy of TB recommendations and adds an important source of data to the work of TBs.

At the same time, NHRIs' participation in the State Reporting procedure serves to reinforce their independence and effectiveness. Through exchanges with the committees, A-status NHRIs have an opportunity to not only show their legitimacy in the eyes of the UN but also to learn from shared experiences of the multilateral system, basing their activities on the concerns and

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[193] Andrew Byrnes, 'An Effective Complaints Procedure in the Context of International Human Rights Law' in Anne Bayefsky (ed), *The UN Human Rights Treaty System in the 21st Century* (Kluwer Law International, 2000) 139–62, 151.
[194] Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' 93 *American Journal of International Law* (1999) 601.
[195] Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' 42 *Vanderbilt Journal of Transnational Law* (2009) 905.
[196] Harry J. Steiner, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?' in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000) 42.
[197] Kalin in Keller and Ulfstein (n 39) 62.

recommendations expressed in TB recommendations. The establishment of the OHCHR-led NHRI fellowship program underscores the importance of such information sharing.[198] Crucially, cooperation between NHRIs and TBs helps promote and protect NHRIs' independence and effectiveness in-country. GANHRI highlights the value of this ultimate goal succinctly:

> Treaty body concluding observations that address the need for NHRI compliance with the Paris Principles serve as authoritative recommendations for States, and NHRIs themselves, to help ensure that NHRIs are independent and provided with the mandate and adequate resources required for them to operate effectively and in line with the Paris Principles. They are also taken into consideration as a matter of course when the compliance of NHRIs with the Paris Principles is being reviewed in the NHRI accreditation process.[199]

The most clear-cut evidence of the existence of a legitimizing goal for TB-NHRI engagement comes, however, from TBs' issuance of General Comments (GCs) specifically dedicated to their cooperation with NHRIs.[200] In essence, the aim of GCs is to spell out and make more accessible the "jurisprudence" emerging from the committee's work.[201] From a strictly legal perspective, the only manner in which TBs can authoritatively pronounce and interpret issues arising out of the provisions of their treaty of concern is through the issuance of GCs. Although not legally binding,[202] GCs are "secondary soft law instruments," meaning sources of non-binding norms that interpret and add detail to the rights and obligations contained in the respective human rights treaties.[203] GCs have also been considered proof of subsequent practice

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[198] For more information see OHCHR, Fellowship Programme, available at <www.ohchr.org/EN/ABOUTUS/Pages/FellowshipNHRIStaff.aspx.> accessed 27 December 2019.
[199] GANHRI, Background Paper (n 175), 8.
[200] CERD, International Convention on the Elimination of All Forms of Racial Discrimination (CERD), General Recommendation XVII: "On the establishment of national institutions to facilitate the implementation of the Convention", (25. March 1993), UN Document A/48/18 at 116; CESCR, General Comment No. 10: "The role of national human rights institutions in the protection of economic, social and cultural rights", (10 December 1998), UN DocumentE/C.12/1998/25. UN Committee on the Rights of the Child (CRC), General comment No. 2 (2002): "The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child", (15 November 2002), UN DocumentCRC/GC/2002/2.).
[201] Philip Alston, 'The Historical Origins of the Concept of 'General Comments' in Human Rights Law' in Laurence Boisson de Chazournes and Vera Gowland Debbas (eds), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (Martinus Nijhoff 2001), 763–76, 775. Alston defines jurisprudence in the human rights law context as embracing soft law, meaning "a much broader or looser range of sources that can reasonably be taken into account in legal analysis" (764, fn. 6).
[202] ILA, Final Report (n 13), 3 and 5.
[203] Dinah Shelton, 'Commentary and Conclusions' in Dinah Shelton (ed), *Commitment and Compliance* (Oxford University Press 2000), 449–64, 451.

for purposes of Article 31(3)(b) of the Vienna Convention on the Law of Treaties (1969).[204] A third point, and lesser explored alternative position to the subsequent practice argument, is that GCs might count as supplementary means of interpretation under Article 32 of the Vienna Convention.[205] By adopting NHRI-specific GCs, TB members have made it clear that that "national institutions have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights."[206] GCs represent an authoritative recognition of NHRIs' value in monitoring the implementation of TB recommendations and even delineate adequate establishment processes, powers, and resources. As such, GCs may become a powerful tool for NHRIs to legitimize their work in the eyes of governments.

Perhaps due to their more recent drafting, the fact that OPCAT and the CRPD refer to the Paris Principles demonstrates mandate providers' growing intention to legitimize TB-NHRI engagement.[207] Although not implying a required NPMs/NMMs-NHRIs nexus,[208] "it is evident that existing NHRIs can play an important role on this matter, in light of their consolidated experience in the protection of human rights."[209] By including the Paris Principles in a conventional provision, both OPCAT and the CRPD further legitimize the role of NHRIs in monitoring human rights implementation, catalyzing further NHRI activity within its dedicated transnational regime, including the role of NHRIs in their domestic settings. Lastly, such inclusion may even spur the establishment of NHRIs in those countries which ratified the CRPD and have no NHRI. TB-NHRI engagement collectively strengthens both sides' positions, then, and thus contribute to the legitimization of the institutional network.

The same logic applies to domestic civil society organizations. Indeed, NHRIs have been called upon "to express their opinion independently and, where appropriate, in consultation with civil

[204] Vienna Convention on the Law of Treaties (VCLT) (No 41) Art. 31(1) provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Art. 31(3) (b) provides: "There shall be taken into account, together with the context: ... any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."
[205] ILA, Final Report (n 13) 5–6.
[206] CESCR, General Comment No. 10: 'The role of national human rights institutions in the protection of economic, social and cultural rights' (10 December 1998), UN DocumentE/C.12/1998/25 para. 3.
[207] OPCAT (n 40) Art. 17 and CRPD (n 18) Art. 33(2).
[208] International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), Survey of national human rights institutions on Article 33.2 of the convention on the rights of persons with disabilities (2011) 4.
[209] Luigino Manca, "Article 33 – National Implementation and Monitoring" in Della Fina, Cera, and Palmisano (No 21) 600.

society organizations and other domestic bodies."[210] NHRIs have also been recommended to facilitate accessibility to the system of domestic civil society, often less well connected with the TB system generally.[211] Strong stakeholder ownership of TB activities is in fact essential, coupled with an accessible system open to civil society engagement. The Paris Principles, within their Methods of Operation, clearly state that

> (g) In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.[212]

It is thus arguable that the goal of institutional legitimization implicit in TB-NHRI engagement also "trickles down" to the domestic stakeholder framework necessary to support such a regime.

2.4. Conclusions

Throughout this chapter, I have sought to identify the goal-setters and goals of the institutional framework for TB-NHRI engagement. To conclude, I schematically recap the findings of this first stage of a GBA to effectiveness analysis.

Goal-setters of TB-NHRI engagement:

- External Actors: mandate providers; and
- Internal Actors: NHRIs, TB experts and OHCHR Secretariat.

Goals of TB-NHRI engagement:

- Goal 1: To Monitor the Implementation of UN Human Rights Conventions;
- Goal 2: To Support a Transnational Human Rights Regime Dedicated to the Implementation of UN Human Rights Conventions;
- Goal 3: To Legitimize the Institutional Framework Necessary to Support such Regime.

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[210] GANHRI, 'General Observations of the Sub-Committee on Accreditation,' adopted by the GANHRI Bureau at its Meeting held in Geneva on 21 February 2018, available at <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/General%20Observations%201/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf.> accessed 20 December 2019.

[211] Geneva Academy, 'Optimizing the UN Treaty Body System - the Academic Platform Report on the 2020 Review' (May 2018) available at <www.geneva-academy.ch/joomlatools-files/docmanfiles/Optimizing%20UN%20Treaty%20Bodies.pdf.> accessed 7 November 2020.

[212] Paris Principles, Operative Guidelines (g).

Depending on the ultimate goal under consideration, questions relating to its attainment will vary: to what extent does the structure of the institutional framework for TB-NHRI engagement and the process it follows lead to more effective monitoring of TB recommendations? Alternatively, does the combination of its structure and processes facilitate the support of a transnational human rights regime? Lastly, do the current structure and process further legitimize the institutional framework necessary to support such regime?

The following, key stage in a GBA model is evaluating whether the outcomes of the institutional framework for TB-NHRI engagement (changes in the state of the world brought about by the outputs it generates) attain these goals. Due to the inherent difficulties of identifying exact chains of causation between TB-NHRI activity and resulting changes in domestic law/policy, Chapter 5 considers both structural and procedural indicators as proxies for outcome indicators.

Chapter 5. Identifying the Structural and Procedural Indicators

Identifying the goal-setters and goals of the institutional framework for TB - NHRI engagement is only the first step in evaluating its effectiveness. Throughout this chapter, I identify and assess a set of structural and procedural indicators, substituting the framework's outcome assessment with an evaluation of its structural and procedural adequacy. Firstly, the analysis covers six structural indicators: the structural embeddedness of NHRIs in TB instruments, the structural embeddedness of TBs in NHRI instruments, the legal status of both institutions' recommendations, structural independence and impartiality, resources and political support. The chapter concludes with the analysis of two procedural indicators: NHRI accessibility throughout the State Reporting procedure and usage rate/periodicity.[1] This set of eight indicators will be used to assess whether the current institutional framework available for NHRIs to engage with the TB system is effectively designed to attain the goals it was set to achieve. Not all indicators suit all three ultimate goals at the same time. However, all identified structural and procedural indicators identified and assessed in this chapter are an important toolkit for this study. They define and explore the subject of the investigation and, at the same time, feed detail to the effectiveness analysis that follows.

1. Structural Embeddedness of NHRIs in Treaty Body Instruments (Structural Indicator 1)

Structural embeddedness indicators determine the rules of engagement, through formal instruments of a differing nature, regulating the extent that the two bodies are permitted to mutually engage. Guidance on "TB-NHRI engagement" has been widely discussed during recent meetings of TB Chairpersons, arguably in response to the ongoing 2020 review process stemming from UNGA Res. 68/268.[2] The 28th Annual Meeting of Chairpersons acknowledged the vital role of NHRIs in protecting and promoting human rights and their long-standing cooperation with TBs.[3] A year later, the drive for change led to the identification of steps

[1] For an explanation of the method of selection for each indicator, please see chapter 3, section 1.2 (Structrual Indicators as Proxies for Outcome Indicators) and section 1.3 (Procedural Indicators as Proxies for Outcome Indicators).
[2] United Nations General Assembly (UNGA), Resolution 68/268, "Strengthening and enhancing the effective functioning of the human rights treaty body system", 68th session (21 April 2014) A/RES/68/268.
[3] UNGA, "Report of the Chairs of the human rights treaty bodies on their 28th meeting", 71st session (2 August 2016) A/71/270, paragraph 92.

toward a common approach to engagement with NHRIs. The Chairs "recognised the particular value of NHRIs […] in the reporting process,"[4] in the most recent unanimous indication of support for NHRI participation in TB work. Furthermore, a varied set of TB instruments delves into NHRI engagement, offering a rather detailed, albeit irregular, degree of NHRI embeddedness within the different TB frameworks.

Each committee has in fact developed its own institutional framework for NHRI engagement throughout the evolving relationship between NHRIs and TBs. As the analysis that follows shows, there is no systemic approach to NHRI engagement across the different committees. To the contrary, the extent to which NHRI engagement is covered by each committee is to be found through an irregular compilation of rules. As such, I have divided this section in four sub-sections. Embeddedness indicators are assessed by analysing *UN human rights treaty texts, general comments, NHRI-specific statements or papers, rules of procedures, working methods and guidelines* and *practical information notes for NHRIs* issued by individual committees in preparation for each session. These documents vary in terms of their nature, status, and scope, and are published at different locations within each TB webpage hosted by the OHCHR.

Table 5.1. summarizes the varied nature of instruments on NHRI engagement with the State Reporting procedure that are currently available across the TB system. All relevant sources are available for consultation in endnote form at the end of the chapter. Just from a quick glance at the table, it is clear that each committee has developed its own set of instruments on its relation with NHRIs, leading to a somewhat confused panoply of engagement practices.

Table 5.1. TB Instruments with Explicit Reference to NHRI Engagement with the State Reporting Procedure

TB	Treaty Text	General Comments	Rules of Procedure	Working Methods	Guidelines	Statements	Papers	Info Note
CAT			i	ii	iii iv			v
CED			vi	vii			viii ix	x
CEDAW				xi	xii		xiii xiv	xv
CERD		xvi	xvii	xviii	xix xx			xxi

[4] UNGA, "Report of the Chairs of the human rights treaty bodies on their 29th meeting", 72nd session (20 July 2017) A/72/177, paragraphs 45–56.

CESCR		xxii			xxiii			xxiv
CMW			xxv			xxvi		xxvii
CRC		xxviii						
CRPD	xxix		xxx	xxxi	xxxii	xxxiii		xxxiv
HRCtee				xxxv	xxxvi		xxxvii xxxviii	xxxix

Table legend:

Contributions to State Reporting
Follow-up to Concluding Observations

Throughout this section, I provide evidence of the extent of NHRI embeddedness from a selection of the above instruments. This wide diversity of documentation is just one implication of the TB system's disorderly expansion. At the same time, the extent of documentation available is an indication of the growing importance given by both the OHCHR and the TBs themselves to NHRI contributions.

1.1. Embeddedness in UN Human Rights Treaty Texts

Most human rights treaties do not mention NHRIs within their texts with two exceptions, the CRPD and the OPCAT.

The CRPD represents one of the most innovative international human rights treaties to date and NHRIs have played an active role in shaping its text and overall structure.[5] The Convention was, after all, the first human rights treaty to be negotiated following the 1993 Vienna Declaration and Programme of Action, a watershed for the increasing role domestic actors can play in supporting the efforts of the international human rights system.

Emblematic of a shift toward increased domestic stakeholder engagement, CRPD Article 33 articulates the procedures for monitoring its implementation through the introduction of two different yet related positive obligations. By virtue of Article 33(2), the CRPD introduces an obligation to establish within state parties a National Monitoring Mechanism (NMM), taking

[5] Andrea Broderik, 'Art 4 General Obligations' in Ilias Bantekas, Michael Ashley Stein, and Dimitris Anastasiou, *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press 2018) 119.

into account the Principles relating to the Status of National Institutions adopted by the UNGA in 1993.[6] It further states that such mechanisms are created "to promote, to protect and monitor the implementation of [...] the Convention,"[7] thus establishing an explicit linkage between CRPD's core goal and NHRIs.

By referring to Paris Principles-compliant institutions in its conventional provisions, the CRPD drafters raised TB-NHRI engagement to a state obligation under the Convention. This is proof of the high regard for NHRIs' role in the implementation of CRPD obligations. Although NMMs under Article 33(2) are not specifically required to include NHRIs within their institutional purview, state parties are obliged "to take into account" the Paris Principles when establishing such mechanisms. This link firmly embeds NHRI engagement in the CRPD State Reporting procedure, with the Committee recognizing NHRIs' "important role […] in monitoring implementation of the Convention to promote compliance at the national level". [8]

The second evidence of NHRI engagement within treaty provisions can be found under OPCAT Article 18, which requires the establishment of National Preventive Mechanisms (NPMs) in each ratifying State. In doing so, 'States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights'.[9] Due to my focus on State Reporting, a procedure which the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) does not foresee, this research project does not include all aspects related to OPCAT. However, a crucial aspect that is specific to the torture prevention mandate of NHRIs under the State Reporting procedure is the relationship that CAT has to NPMs.

While referring to the Paris Principles, NPMs established under OPCAT Article 18 are not obliged to be part of the state party's NHRI and possibilities for overlap might arise. It is nonetheless to mention that CAT recently expressed its views on "Organizational issues

[6] UNGA, Resolution 48/134 'National institutions for the promotion and protection of human rights, 85th plenary meeting' (20 December 1993), UN Doc A/RES/48/134.
[7] CRPD, Art 33(2).
[8] CRPD, 'Guidelines on independent monitoring frameworks and their participation in the work of the Committee on the Rights of Persons with Disabilities,' (October 2016), UN Document CRPD/C/1/Rev.1.
[9] OPCAT, Article 18(4).

regarding national preventive mechanisms that form part of a national human rights institution."[10] It provides that both CAT Committee and the SPT foresee

> two different and separate structures serving two different mandates and preserving a level of autonomy. While the national preventive mechanism is charged with the core national preventive mechanism functions, this does not preclude other departments or staff of the national human rights institution from contributing to its work, as that cooperation might lead to synergies and complementarity.[11]

As indicated in its Information Note, "The Committee also invites NPMs of the country concerned to submit written information relevant to its activities."[12]The CAT Committee is particularly clear on the value it attributes to its relationship with NHRIs. It defines NHRIs as "bridges between the national and international protection mechanisms" and further notes that "treaty bodies should have procedures that allow them to hear their views during the reporting process, as recommended by the Chairpersons and Inter-Committee Meetings." [13]

1.2. Embeddedness in UN Human Rights Treaty Bodies General Comments

Aside from NHRI embeddedness within conventional provisions in both the CRPD and OPCAT, evidence can also be found through NHRI-specific General Comments, so far issued by three different TBs – the CERD, CESCR and the CRC.

CERD issued *General Recommendation XVII*[14] in 1993, on the same year the General Assembly endorsed the Paris Principles. It is the first general comment that specifically recommends establishing NHRIs in ratifying countries, outlining their role in assisting in the implementation of the Convention. *General Recommendation XVII* lists, under para. 1, essential purposes that NHRIs should have vis-à-vis the Convention, namely (a) To promote respect for the enjoyment of human rights without any discrimination; (b) To review government policy towards protection against racial discrimination: (c) To monitor legislative

[10] CAT, 'Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (22 March 2016), CAT/C/57/4: Annex III Organizational issues regarding national preventive mechanisms that form part of a national human rights institution, paras. 11–23.
[11] Ibid, paras. 18–19.
[12] CAT, 'Information for Civil Society Organisations and National Human Rights Institutions' available at <www.ohchr.org/EN/HRBodies/CAT/Pages/NGOsNHRIs.aspx>. Accessed 20th December 2019.
[13] CAT, 'Information for Civil Society Organisations and National Human Rights Institutions (NHRIs), The mandate of the Committee against Torture,' available at <www.ohchr.org/EN/HRBodies/CAT/Pages/NGOsNHRIs.aspx>. Accessed 20th December 2019.
[14] CERD, General Recommendation XVII: 'On the establishment of national institutions to facilitate the implementation of the Convention' (25 March 1993), UN Doc A/48/18.

compliance with the provisions of the Convention and (d) To educate the public about the obligations of States parties under the Convention. Although of a general nature, these first four purposes listed succinctly delineate the role of NHRIs in the context of CERD promotion and protection. What is somewhat surprising to the NHRI analyst of today is the fifth and last purpose listed, that is:

> (e) To assist the Government in the preparation of reports submitted to the Committee on the Elimination of Racial Discrimination;

Perhaps due to the novelty of NHRIs conceptualization at the time of drafting or the relatively broad wording of the Paris Principles, this recommendation purports to give NHRIs a role that clashes with one of the six main criteria that NHRIs are required to meet under the Paris Principles: autonomy of government.[15] In addition, para. 2 recommends that:

> Where such commissions have been established, they should be associated with the preparation of reports and possibly included in government delegations in order to intensify the dialogue between the Committee and the State party concerned.

Aside from the apparent disregard for NHRI models other than that of Commission, this paragraph neglects the paramount principle of independence from government. In light of normative developments (e.g. the Paris Principles), NHRIs today should not be included in government delegations to any TB, let alone international human rights fora. If the aim is to increase effectiveness and accessibility, the TB system should perhaps be more careful in updating instruments such as this. Outdated authoritative interpretations such as this risk confusing rather than clarifying the expected functions of NHRIs as stakeholders to the system.

CERD has also mentioned NHRIs in subsequent General Recommendations, such as in *General Recommendation XXVIII* on the follow-up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in 2002.[16] One measure it recommends to strengthen CERD's functioning is that NHRIs "assist their respective States

[15] The other five tenets are: a broad mandate, based on universal human rights norms and standards; independence; pluralism; adequate resources; and adequate powers of investigation.

[16] International Convention on the Elimination of All Forms of Racial Discrimination (CERD), General recommendation XXVIII: "On the follow-up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance", (19 March 2002).

to comply with their reporting obligations and closely monitor the follow-up to the concluding observations and recommendations of the Committee.[17]

All in all, while the Committee reacted in a remarkable and timely manner to the institutionalization of NHRIs, CERD General Recommendations indicate a certain confusion as to the role and function of NHRIs in CERD work. A certain level of revision is therefore needed so that NHRIs can benefit from comprehensive guidelines on how to support the work of the CERD.

Also reacting to the proliferation of NHRIs throughout the 1990s, CESCR issued *General Comment No. 10.*[18] Both the General Assembly and the Commission of Human Rights were in fact "strongly encouraging" NHRI establishment during those years, with the OHCHR busy establishing "a major programme to assist and encourage States in relation to national institutions."[19] *General Comment No. 10* is the first TB instrument which acknowledges the various institutional forms that NHRIs can take, ranging from "national human rights commissions through Ombudsman offices, public interest or other human rights 'advocates', to defenseurs du peuple and defensores del pueblo."[20]

The key element, valuable for the wider development and embeddedness of NHRI engagement throughout the TB system, is the interpretation provided with regards to the states parties' obligation under Art 2(1) of the Covenant "to take steps [...] with a view to achieving progressively the full realization of the [Covenant] rights [...] by all appropriate means." This is to be construed as including NHRIs as partners in implementation efforts: "The Committee notes that one such means, through which important steps can be taken, is the work of national institutions for the promotion and protection of human rights."[21]

The CESCR Committee notes that the NHRI's role in promoting and ensuring the indivisibility and interdependence of all human rights "has too often either not been accorded to the institution or has been neglected or given a low priority by it."[22] As such, General Comment No. 10 calls upon States parties to ensure that the mandates accorded to all NHRIs include

[17] Ibid.
[18] CESCR, General Comment No. 10: 'The role of national human rights institutions in the protection of economic, social and cultural rights' (10 December 1998), UN Doc E/C.12/1998/25
[19] Ibid.
[20] Ibid. para 2.
[21] Ibid. para 1.
[22] Ibid. para 3.

appropriate attention to economic, social and cultural rights and requests States parties to include details of both the mandates and the principal relevant activities of such institutions in their reports submitted to the Committee.[23] Crucial to clarifying the role that NHRIs may play in relation to the implementation of the CESCR, the General Comment also includes an indicative list of activities. [24]

As such, the main contribution that the CESCR has provided to embed NHRI engagement in its wider institutional framework is through the adoption of *General Comment No. 10*. The inclusion of NHRI input within the obligation "to take steps […] by all appropriate means" is significant not only for the specific remit of the CESCR, but for locking in NHRI activity throughout the TB system. The list of activities provided is also a valuable indication by Committee members of what is expected of NHRIs in the implementation of the CESCR, a useful tool for operationalizing NHRI strategies as well as legitimizing NHRIs' work in the eyes of states parties.

Lastly, in 2002 CRC issued *General Comment No. 2,* featuring more depth of detail than other related instruments.[25] The CRC Committee "considers the establishment of NHRIs to fall within the commitment made by States parties upon ratification to ensure the implementation of the Convention and advance the universal realization of children's rights."[26] This stems from CRC Article 4, which obliges states parties to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the convention. At the outset, the Committee even specifies the reason for issuing such a general comment: "in order to encourage States parties to establish an independent institution for the promotion and monitoring of implementation of the Convention and to support them in this regard by elaborating the essential elements of such institutions and the activities which should be carried out by them."[27]

The CRC Committee's *General Comment No. 2* touches on multiple crucial aspects of CRC-NHRI engagement. It also dedicates two paragraphs to the potentially overlapping mandates of the various independent national institutions dedicated to the protection of children's rights.

[23] Ibid. para 4.
[24] Ibid. para. 3 (a) – (g).
[25] CRC, General comment No. 2 (2002): 'The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child,' (15 November 2002), UN Doc CRC/GC/2002/2.
[26] Ibid. para 1.
[27] Ibid.

In acknowledging this potential overlap, the Committee demonstrates a clear preference for a more unitary approach to domestic institutionalization, by recommending that "A broad-based NHRI should include within its structure either an identifiable commissioner specifically responsible for children's rights, or a specific section or division responsible for children's rights.[28]

In line with other NHRI-specific General Comments, but with significantly higher amount of detail, the CRC Committee's *General Comment No. 2* lists activities NHRIs should carry out in relation to the implementation of children's rights in light of the general principles of the Convention. The detail provided is noteworthy[29], an indication of the lengths to which the Committee has gone to provide NHRIs with a comprehensive list of possible activities useful for CRC implementation. In contrast to the arguably outdated general recommendation on NHRIs by the CERD committee, the CRC Committee underlines that "it is not appropriate to delegate to NHRIs the drafting of reports or to include them in the government delegation when reports are examined by the Committee."[30]From the above, it seems reasonable to state the CRC Committee's *General Comment No. 2* is one of the most detailed international instruments dealing with TB – NHRI engagement. It also represents a very clear indication of the Committee's reliance on the auxiliary nature of NHRIs, explicitly underlining how "every State needs an independent human rights institution with responsibility for promoting and protecting children's rights" and that "the institution, whatever its form, should be able, independently and effectively, to monitor, promote and protect children's rights".[31]

1.3. Embeddedness in NHRI-specific Papers and Statements

TB members have further entrenched NHRI engagement in their committees' work by issuing a series NHRI-specific instruments. Four TBs have issued Papers and/or Statements on their engagement with NHRIs, yet another sign of a growing embeddedness of NHRIs activity.

The HRCtee has thoroughly elaborated on its engagement with NHRIs in its *Paper on the relationship of the Human Rights Committee with national human rights institutions*.[32] Through the paper's general observations, the Committee recognizes that "close cooperation

[28] Ibid.
[29] Ibid. para. 19 (a) - (t).
[30] Ibid. para. 21.
[31] Ibid. para. 7.
[32] HRCtee, 'Paper on the relationship of the Human Rights Committee with national human rights institutions, adopted by the Committee at its 106th session' (13 November 2012), UN Document CCPR/C/106/3.

between the Committee and national human rights institutions is important for the promotion and implementation of the Covenant its Optional Protocols at the domestic level."[33] The paper also elaborates on "the important role that national human rights institutions have in bridging the gap between international and national human rights systems."[34] The Committee also affirms its commitment to "making its work more accessible to national human rights institutions"[35] and "welcomes the representation of national human rights institutions at its sessions and meetings" as well as "the use of new technology to enhance contributions from national human rights institutions from all regions during its sessions, such as video or telephone conference links and webcasting."[36] The HRCtee 2012 Paper has arguably inspired other Committees to issue similar instruments, something which is clear when comparing the structure and content of the other three existing NHRI *Papers.*

The CED Committee has also dealt with NHRI cooperation and its modalities in numerous instruments. Throughout its decade of existence, the Committee has made clear that it considers "NHRIs as well as specific national mechanisms with a mandate to promote and protect human rights (e.g. national preventive mechanisms), to have a key role to play in assisting the Committee in fulfilling the different activities that it may carry out in accordance with the Convention."[37] CED's main contribution to this field stems from the adoption of the *Paper on the relationship of the Committee on Enforced Disappearances with national human rights institutions*.[38] The depth of this document is perhaps due to its methodology, which benefited from comments from NHRIs before adoption of the document.[39]

Considering that "NHRIs […] have a key role in assisting the Committee in fulfilling the different activities that it may carry out in accordance with the Convention,"[40] the Committee recommends "that all States parties to the Convention should establish and/or strengthen NHRIs, with adequate resources and in full compliance with the Paris Principles."[41] The

[33] Ibid. para 1.
[34] Ibid. para 2.
[35] Ibid. para. 5.
[36] Ibid. paras. 6–7.
[37] CED, 'Information Note for national human rights institutions engagement,' available at <www.ohchr.org/EN/HRBodies/CED/Pages/NHRI.aspx> accessed 20 December 2019.
[38] CED, 'Paper on the relationship of the Committee on Enforced Disappearances with national human rights institutions' (28 October 2014), UN Document CED/C/6: paras. 11–23 and paras. 37–38.
[39] Ibid. para. 2.
[40] Ibid. para. 5.
[41] Ibid. para. 4.

Committee also vows "to ensure that NHRIs have the widest possible access to its work"[42] and "welcomes representation by NHRIs at its sessions and meetings, including by video and/or telephone conference links."[43]

All in all, CED has gone a long way toward providing NHRIs with detailed accounts of how to cooperate with its members and, more specifically, its state reporting procedure. The quality of the NHRI Paper, prepared in consultation with NHRIs, makes it one of the most thorough navigation tools for NHRI engagement with TBs' State Reporting procedure. Repeated encouragement to make "use of technology to enhance contributions from all regions during its sessions, such as video or telephone conference links and webcasting"[44] is further proof of the modernity of CED's institutional framework for NHRI engagement and its willingness to embed NHRIs throughout its cycles of reviews.

In 2016, the Committee on Migrant Workers (CMW) issued its own *Statement on cooperation with NHRIs.*[45] The Statement starts by declaring that both the Committee and NHRIs "share the common goals of protecting, promoting and fulfilling the human rights of migrant workers and members of their families" and considers their "close cooperation [as] critical" whilst exploring ways to further interact.[46] Unique to the CMW Statement is a specification that allows "national human rights institutions with any status (A, B or C) under GANHRI [and non-members of GANHRI, such as ombudsman entities] to participate in most aspects of their work, including by submitting written information and attending public and/or closed briefings with treaty body members."[47] While this is true for all TBs, placing such a clarification in its NHRI-specific statement shows CMW's willingness to incentivize the broadest possible engagement with its domestic stakeholders in fulfilling the human rights of migrant workers and members of their families.

The Committee also recognizes that NHRIs may contribute in various ways to its work throughout the reporting cycle, for example "by providing comments and suggestions on a State party's report"[48] and through "the provision of country-specific information on States

[42] Ibid. para. 9.
[43] Ibid. para. 10.
[44] Ibid. para. 41.
[45] CMW, 'Statement by the Committee on cooperation with national human rights institutions' (21 April 2016) paras. 1–8.
[46] Ibid. para 1.
[47] Ibid.
[48] Ibid. para 7.

parties' reports that are before the Committee, including both qualitative and statistical data."[49] One further useful indication is that such information will highlight "priority issues for the State party concerned regarding the Convention" and that NHRIs "include suggested questions and/or concrete recommendations for the State party, for consideration by the Committee."[50]

Although not as rich in detail as Statements issued by other TBs, the mere fact of an existing instrument specific to the Committee's NHRI engagement is indicative of the importance it gives to NHRIs in the development of its monitoring tasks. It is also interesting to note the openness of the CMW toward engaging with the wider NHRI community, regardless of status and indeed GANHRI accreditation. This demonstrates a readiness to receive information from the wider ecology of national institutions dedicated to safeguarding the rights of migrant workers and their families.

Representing the most recent effort to clarify and develop cooperation with NHRIs, in 2019 the CEDAW Committee issued a *Paper on the cooperation between the Committee on the Elimination of Discrimination against Women and National Human Rights Institutions*.[51] The process that led to the adoption of the 2019 Paper is evidence of CEDAW's efforts to further embed NHRI engagement in their work. Building on the 2008 *Statement by the Committee on the Elimination of Discrimination against Women on its relationship with national human rights institutions*[52], the CEDAW Committee operationalized its commitment to "exploring ways to create further interaction and links with NHRIs"[53] by establishing a Working Group aimed at a systematized reflection towards a more structured engagement between the Committee and NHRIs. It did so by "taking into account procedures and practices developed since by other TBs and comments received during the consultation process of the WG,"[54] thus contributing to the ongoing efforts at harmonization of practices across the TB system.

The 2019 Paper expressly states that "The Committee and NHRIs share common goals to respect, protect, promote and fulfill the human rights of all women and girls through the implementation of the Convention and its Optional Protocol at the national level."[55] By

[49] Ibid.
[50] Ibid.
[51] CEDAW, "Paper on the cooperation between the Committee on the Elimination of Discrimination against Women and National Human Rights Institutions" (adopted by the Committee at its seventy-fourth session, 21 October-8 November 2019).
[52] Ibid.
[53] CEDAW, 'Statement by the Committee on the Elimination of Discrimination against Women on its relationship with national human rights institutions' (2008), UN Document E/CN.6/2008/CRP.1: paras. 1–7.
[54] CEDAW (n 52), para. 2.
[55] Ibid. para. 1.

recognizing their "bridging role between international, regional and national human rights systems," the CEDAW Paper stresses the important role that NHRI have

> in encouraging their respective States parties to meet their reporting obligations and provide treaty bodies in general, including the CEDAW Committee, with independent and valuable information on national human rights situations, and promote implementation of the Convention and the Committee's Concluding Observations at the global, regional, national and local levels.[56]

The CEDAW paper further develops on the role of NHRIs in implementing international human rights standards.[57] In fulfilling this function,

> NHRIs are encouraged to undertake activities such as monitoring developments in international human rights law and conducting assessments of domestic compliance with, and reporting on, international human rights.[58]

The CEDAW Paper, the most recent development of its kind within the TB system, has represented a great opportunity to make use of existing NHRI-related instruments from the distinct TB-specific institutional frameworks. It has also provided a forum for discussion towards a systematization of NHRI engagement across the TB system. Lastly, the CEDAW Committee has recently agreed to maintain a focal point on NHRIs in order to assess periodically the effectiveness of their cooperation. It has also pledged to further operationalize the CEDAW Paper "by issuing Standard Operating Procedures" and "will continue to look into new and innovative ways to improve cooperation and coordination using modern technology."[59] To date, the CEDAW Committee is leading in the efforts to further embed and harmonize NHRI engagement opportunities with the State Reporting procedure.

1.4. Embeddedness in Rules of Procedure, Working Methods, Guidelines and Information Notes

Lastly, TB instruments of a more procedural nature contain ample evidence of NHRI embeddedness. From an analysis of the most updated documents to date, five different TBs expand on NHRI engagement in their Rules of Procedure (CAT, CED, CERD, CMW and CRPD), six TBs do so in their Working Methods (CAT, CED, CEDAW, CERD, CRPD and

[56] Ibid. para. 4.
[57] Ibid. para. 17.
[58] Ibid.
[59] CEDAW (n 51).

the HRCtee), four TBs have issued specific Guidelines on NHRI engagement (CAT, CEDAW, CERD and the CRPD) and eight TBs regularly contain guidance for NHRIs in their session-specific Information Notes (CAT, CED, CEDAW, CERD, CESCR, CMW, CRPD and the HCRtee).

The contents of each of these instruments will be assessed in Section 7 below, when the analysis turns to NHRI accessibility to the different stages of TB review cycles, one of the identified procedural indicators of the institutional framework for TB – NHRI engagement. For now, the extent of detail provided on NHRI engagement with each stage of the State Reporting procedure shows how all TBs have taken domestic stakeholder engagement seriously, further embedding NHRI activity in the different Committees' reporting and follow-up functions. However, as the analysis in Section 7 will clarify, these instruments underscore the procedural dissonance currently facing TB-NHRI engagement.

2. Structural Embeddedness of Treaty Bodies in NHRI Instruments (Structural Indicator 2)

As part of this analysis of structural embeddedness, it is also important to highlight the equivalent guiding instruments issued from a NHRI perspective. A comparative analysis of every NHRI's mandate and provisions on engagement with the TB system was considered superfluous. Each NHRI, by its very nature, is required to meet the criteria enshrined in the Paris Principles, which provide the international benchmarks against which NHRIs can be accredited as such by the Global Alliance of National Human Rights Institutions (GANHRI) Sub-Committee on Accreditation (SCA). It is through such accreditation process that NHRIs are allowed to fully interact with international human rights monitoring mechanisms in the first place. For this reason, indicators of structural embeddedness may be found within the Paris Principles, which stipulate cooperation with international human rights mechanisms and the promotion of ratification of human rights treaties as a key responsibility of NHRIs.[60] Before scrutinizing the relevant provisions within the Paris Principles, we must also note that since 2006 the GANHRI's SCA "has used the knowledge gained through the GANHRI accreditation process to develop an important body of jurisprudence to give meaning to the content and scope

[60] Paris Principles, Part A.3, paras. 3(c) - (d).

of the Principles."[61] As such, the SCA has the authority to develop "General Observations" on common interpretative issues for implementing the Paris Principles. Due to their universal application, general applicability, and multi-stakeholder development,[62] it is also worth bearing the General Observations in mind for the purposes of this analysis.

As first evidence of TB embeddedness within the Paris Principles, Sections A.3(b) and (c) require that NHRIs have the responsibility to promote and ensure the harmonisation of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation. Additionally, they are to "encourage ratification of [these] instruments or accession to those instruments, and to ensure their implementation."[63]To provide clarity, the SCA issued General Observation 1.3, which reflects in more detail on NHRIs' responsibilities vis-à-vis TB engagement. Here, NHRIs are encouraged to undertake the following activities:

- monitor developments in international human rights law;
- promote state participation in advocacy for and the drafting of international human rights instruments; and
- conduct assessments of domestic compliance with and reporting on international human rights obligations, for example, through annual and special reports.[64]

In practice, this requires that NHRIs review relevant national laws, regulations and policies to determine that they are compatible with the obligations arising from international human rights standards and propose the amendment or repeal of any legislation, regulations or policies that are inconsistent with the requirements of these standards.[65] Useful for gauging the more practical aspects of NHRIs' interaction with the State Reporting procedure are Sections A.3(d) and A.3(e) of the Paris Principles, which give NHRIs the responsibility to interact with the international human rights system in specific ways[66].

[61] GANHRI, 'General Observations of the Sub-Committee on Accreditation,' Adopted by the GANHRI Bureau at its Meeting held in Geneva on 21 February 2018: Introduction, para. 4.
[62] In 2011, GANHRI adopted a formalized multi-stage process which includes discussion among SCA members, representatives of GANHRI Regional Networks, and the OHCHR on the topic of the General Observation.
[63] Paris Principles, Part A.3, paras. (b) – (c).
[64] GANHRI, Sub-Committee on Accreditation (SCA), General Observation 1.3 – Encouraging ratification or accession to international human rights Instruments in General Observations of the Sub-Committee on Accreditation, 10.
[65] Ibid.
[66] Paris Principles, Part A.3, para. (d)-(e).

These paragraphs essentially recognize that engaging with the TB system can be an effective tool for NHRIs in the domestic promotion and protection of ratified UN human rights treaties. Further guidance is provided by SCA General Observation 1.4, which interprets Sections A.3(d)–(e) as giving NHRIs the responsibility to interact with the various Committees through the specific activities such as submitting parallel or shadow reports, making statements during debates and promoting the implementation of relevant recommendations originating from the human rights system.[67]

One inherent problem of the TB system is its lack of accessibility. Recent reform proposals have argued for strengthening domestic stakeholder access and ownership, especially in light of the cumbersome nature of current engagement practices.[68] After all, each TB session takes place in Geneva, and direct input to both pre-sessional working groups (PSWGs) as well as to country examinations often require lengthy and costly travel arrangements on the part of all stakeholders who wish to contribute. Taking into account potential capacity-related difficulties that NHRIs may encounter, the SCA recognizes "the primacy of an NHRI's domestic mandate, and that its capacity to engage with the international human rights system must depend on its assessment of domestic priorities and available resources."[69] This interpretation might be construed as a sort of hierarchization of purpose, but in fact it seeks to acknowledge current limitations and encourage NHRIs "to engage wherever possible and in accordance with their own strategic priorities"[70] while availing themselves of technical assistance available from the OHCHR, GANHRI, and indeed other NHRIs.

From the above analysis, it is clear that NHRIs have strongly committed to instances of cooperation with the TB system ever since the drafting of the Paris Principles in the early 1990s. Since then, NHRIs have considered their engagement with the various Committees as an important dimension of their work. Through their participation, NHRIs connect the national human rights enforcement system with international and regional human rights bodies. Domestically, NHRIs play a key role in raising awareness of international developments in

[67] Ibid, General Observation 1.4 – Interaction with the international human rights system, 12.
[68] Geneva Academy, 'Academic Platform on Treaty Body Review 2020 Report,' 34. Available at <https://www.geneva-academy.ch/joomlatools-files/docman-files/Optimizing%20UN%20Treaty%20Bodies.pdf> accessed 20 December 2019.
[69] SCA General Observation 1.4 – Interaction with the international human rights system in General Observations of the Sub-Committee on Accreditation, 13.
[70] Ibid.

human rights through reporting on the proceedings and recommendations of treaty-monitoring bodies. The more recent formulations of General Observations underline and perhaps strengthen these concepts, as NHRI participation in human rights mechanisms through, for example, the production of parallel reports on the State's compliance with treaty obligations, is deemed "to contribute to the work of international mechanisms in independently monitoring the extent to which states comply with their human rights obligations".[71] From the above analysis, it is clear that engagement with the TB system represents a clear priority for NHRIs, which have embedded this important inter-institutional relationship both through their leading set of Principles as well as through the most recent pronunciations by GANHRI, their apex global network.

3. Legal Powers: The Soft Nature of Treaty Body - NHRI Cooperation in State Reporting (Structural Indicator 3)

The non-binding nature of the outputs stemming from TB-NHRI engagement is a crucial factor characterizing both their use and the efforts made toward their implementation. This has to be viewed in light of the now commonplace understanding of an unprecedented proliferation of international normative standards short of positive international law.

More specifically, for an assessment of effectiveness it is crucial to understand the legal status of the direct outputs of TB-NHRI engagement, that is the Committees' LOI/PRs, CoBs, and recommendations under the Follow-up procedure *influenced by NHRI input*. Similarly, NHRIs may also influence the effectiveness of the institutional framework for TB - NHRI engagement by individually acting upon issued TB outputs within their domestic activities. It is thus necessary to explore the legal powers of both TB and NHRI activity vis-à-vis the state party in question. However, it is important to first set this in the contexts of soft law/hard law, binding/non-binding dichotomies, which will illustrate the legal ambiguity of TB-NHRI engagement and the recommendations that stem from their cooperation.

This burgeoning generation of human rights soft-law instruments is seeing its effects in a number of practical ways: soft instruments are today introduced as the starting point for norm-making processes as well as filling the gaps of existing rules of positive laws, providing more detailed rules and more technical standards of interpretation and implementation. The hard

[71] Ibid.

versus soft dichotomy results in the oft-stated ambiguity of these recommendations' legal status, reflecting significant variations in what is to be defined as "soft law." One fundamental challenge of analyzing hard and soft law is that definitions vary across disciplines and schools of thought. Shaffer and Pollack identify three basic positions in the literature: a legal positivist view that associates the hard/soft distinction with a binary binding/nonbinding dichotomy, a constructivist view that considers the purported hardness or softness of law as secondary to its social effects, and a rational institutionalist position that takes a multidimensional and continuous view of hard and soft law.[72]

The vast majority of positivist legal scholars have focused on the normative significance of the hard/soft law divide. A classic definition regards soft law as norms which do not appear in the form of a legal source recognized by international law, but are of some legal relevance yet do not amount to real law.[73] Another view holds that law is by definition "binding,"[74] and soft law is defined as "norms that appear in the form of a legal source recognized by international law, but are not enforceable owing to the generality, vague normative content or subjective nature."[75] Opinions even contrast on whether the term should exist, to the effect that "if a rule meets the criteria for law, then it should be called law. If, however, the rule is not binding […] then it should not have law anywhere in its name."[76] Other positivist commentators have instead focused on the enforcement mechanism accompanying soft-law documents as determinative of their legal status. In this sense, from an international perspective a decision is binding if consequences will follow at the international level in case of non-compliance. From a national perspective, the finding of an international tribunal is binding if it can be executed in the national legal system and if that finding must be obeyed (given effect) in the national legal system.[77]

Constructivist scholars depart from a focus on the formal terms of law as defined at enactment stage and underline the value of "law as part of a process of social interaction that can shape

[72] Gregory C. Shaffer and Mark A. Pollack, 'Hard and Soft Law' in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Oxford University Press 2012) 198–222.
[73] Jan Klabbers, 'The Redundancy of Soft Law' 65 *Nordic Journal of International Law* (1996), 168.
[74] Prosper Weil, 'Towards Relative Normativity in International Law?' 77(3) *American Journal of International Law* (1983) 413–42; Kal Raustiala, 'Form and Substance in International Agreements' 99(3) *American Journal of International Law* (2005) 581–610.
[75] László Blutman, 'In the Trap of the Legal Metaphor: International Soft Law' 59 *International and Comparative Law Quarterly* (2010), 901.
[76] Anthony C. Arend, *Legal Rules and International Society* (Oxford University Press 1999) 25.
[77] Klabbers (n 73) 167.

shared social understandings of appropriate behavior."[78] Contrary to a positivist understanding, they find that the hard-soft dichotomy fails to capture how law operates normatively as part of an interactional process over time.[79] Constructivists of an experimentalist new governance school go as far as privileging soft-law approaches in order to promote responsive governance[80], a position that has found fertile ground among practitioners spanning across soft-law-based international human rights mechanisms.

In the context of the African Commission on Human and Peoples' Rights, a human rights treaty body in itself, commentators agree that instead of coercing states into compliance through sanctions, which is a difficult exercise under international law, "the persuasive force of the treaty body's findings is assumed to increase and hence improve compliance."[81] Similarly, the UN human rights treaty system secures state implementation and compliance with its recommendations through a "communicative approach," soft regulation and soft control. This has been found to be the case also with regards to the Inter-American system[82] as well as in relation to EU governance.[83] The persuasive power of this communicative approach takes "the law as an invitation to dialogue between more or less equal parties,"[84] with recommendations from TBs thus representing a tool which may "supplement" other advocacy strategies.[85] This is especially true when recommendations "provide some form of guidance in how to put the provisions contained in the different international instruments into practice."[86] According to this view, practical contextualization is not the only positive aspect of soft legal instruments, as they are also useful in dealing with "sovereignty sensitivities and uncertainties allow for

[78] Shaffer and Pollack (n 72) 199.
[79] Martha Finnemore and Stephen J. Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics' 55(3) *International Organization* (2001) 743–58; David Trubek, Patrick Cottrell, and Mark Nance '"Soft Law," "Hard Law," and European Integration: Toward a Theory of Hybridity' in Gráinne de Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart 2006) 65–94.
[80] E.g. Charles F. Sabel and William H. Simon, 'Epilogue: Accountability without Sovereignty' in de Búrca and Scott (n 80) 395–412.
[81] Viljoen and Louw, 'State Compliance with the Recommendations of the African Commission' 1(1) *The American Journal of International Law* (2007) 13.
[82] Fernando Felipe Basch, 'The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions' 7(12) *International Journal of Human Rights* (June 2010).
[83] U. Morth, 'Soft Law and New Modes of EU Governance – A Democratic Problem' (November 2005) available at <www.mzes.unimannheim.de/projekte/typo3/site/fileadmin/research%20groups/6/Papers_Soft%20Mode/Moerth.pdf>.
[84] Willem Witteveen and Bart van Klink, 'Why is Soft Law Really Law? A Communicative Approach to Legislation' in H. Luo and H. Bi (eds), *The Challenges of Soft Law* (The Commercial Press, 2001) 332–61.
[85] Dia Anagnostou, 'Does European Human Rights Law Matter?' 14 *International Journal of Human Rights* (2010), 735.
[86] Rachel Murray and Debra Long, *Soft/Hard, Binding/Non-Binding: a Useful Distinction?, The Implementation of the Findings of the African Commission on Human and Peoples' Rights* (Cambridge University Press 2015) 23.

easier compromises between diverse positions and prove to be better for institutional learning."[87] As a legal advisor to the African Commission succinctly explained, "the authorities respond better to something that will not 'criminalize' them and where there will be less public criticism."[88]

Lastly, rational institutionalists have often considered international law and its bindingness with a certain skepticism. Abbot and Snidal have stated that "most international law is 'soft' in distinctive ways" compared to most domestic law.[89] Perhaps the most representative aspect of the institutionalist approach is defining legalization in international relations as varying across three dimensions: (i) precision of rules, (ii) obligation, and (iii) delegation to a third-party decision-maker, such as a TB. In this context, hard and soft law can be defined along a continuum depending on the qualities of a given instrument in these dimensions.[90] Of key significance for TB-NHRI engagement, this understanding presupposes that a non-obligatory instrument with high delegation to an independent third party may actually be more consequential than an obligatory instrument with no delegation. Multidimensionality is an appealing trait, and to take full advantage of this definition "scholars would need to disaggregate hardness and softness into their component parts, and seek to understand the choice of—and effects of—each of these parts individually and in combination."[91]

Both the constructivist and institutionalist understandings enrich the simplistic, positivist distinction between binding and non-binding and may be useful when considering the peculiar characteristics of TB-NHRI engagement. A strict hard/soft distinction downplays the important role the non-binding can play and forgets the "large grey zone in between,"[92] which can provide "another tool in the professional lawyer's armoury."[93] One aspect that falls outside a strict definition of hard law is the authoritative interpretation of treaty provisions,[94] which provide detail that would otherwise be lacking as well as the practical tools for the treaty's

[87] Rilka Dragneva, 'Is "Soft" Beautiful? Another Perspective on Law, Institutions and Integration in the CIS', 29(3) *Review of Central and Eastern European Law* (2004) 279–324.
[88] Interview with Chafi Bakari, former senior legal officer at the African Commission of Human and People's Rights, in Murray and Long (n 86) 17.
[89] Kenneth W. Abbott and Duncan Snidal 'Hard and Soft Law in International Governance' 54(3) *International Organization* (2000) 421–56.
[90] Ibid.
[91] Shaffer and Pollack (n 72) 201.
[92] Klabbers (n 73) 167
[93] A. E. Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' 48(4) *International and Comparative Law Quarterly* (1999) 906.
[94] Ibid. 901.

implementation. In other words, "just as hard law may carry harder sanctions for failure to comply, so soft law carries softer, more conciliatory mechanisms for compliance, such as friendly settlement, promotional tools or indeed [particularly relevant to the TB State Reporting procedure and NHRI cooperation therein], constructive dialogue."[95] This multidimensional model can be useful in expanding the ambit of what may be characterized as soft law, elevating rules and instruments traditionally considered outside the boundaries of international law.[96] In this sense, texts authored by and addressed to non-state actors are to be considered an integral category of soft legal instruments. For TB-NHRI engagement, such categorization is of particular relevance, as part of the plethora of instruments issued outside of state control that nonetheless strive to advance human rights issues domestically.[97]

From a functionalist perspective, although a spontaneous reaction may be that if something is binding it has a better chance for implementation, soft-law instruments offer significant offsetting advantages over hard law. They:

- provide greater flexibility for states to cope with uncertainty and learn over time through information sharing and deliberation;
- allow states to be more ambitious and engage in deeper cooperation than if they had to worry about enforcement;
- impose lower sovereignty costs on states in sensitive areas, such as human rights;
- are easier, less costly to negotiate, and more apt to reform following changing circumstances;
- are more efficient in simple coordination games in which the creation of a focal point is sufficient to induce compliance; and
- can be propagated by non-state actors, including NHRIs among others, and they may be used to complement or displace state authority in transnational governance.[98]

[95] Murray and Long (n 86) 16.
[96] Salem H. Nasser, 'Sources and Norms of International Law' 25 *Leiden Journal of International Law* (2008).
[97] See Chapter 4.
[98] Shaffer and Pollack (n 72) 204.

In sum, although "soft law sometimes [is] designed as a way station to harder legalization, […] often it is preferable on its own terms."[99] When dealing with TB-NHRI engagement, we are in fact not dealing so much with what has been defined as the norm-creating function of soft law.[100] The implicit assumption of this function is that soft law will eventually solidify, as a necessary mechanism related to the traditional consensual nature of international law formation. A study on the effectiveness of cooperation between TBs and NHRIs deals, above all, with soft law in its norm-filling function, where legally binding standards are already in place (ratified UN human rights conventions) but where gaps in implementation and/or interpretation are lacking (highlighted by TB recommendations and NHRI input to the TB State Reporting procedure). As Shelton succinctly puts it: "soft law formulates and reformulates the hard law of human rights treaties in the application of this law to specific states and cases."[101] The cyclical nature of the State Reporting procedure and its increasing openness to domestic stakeholder participation in all its stages serve as tools to fill interpretative and contextually dependent gaps left by UN human rights treaties' broader strokes. Due to the inevitable shortcomings of treaty texts, NHRIs and TB members (among others) assist in gradually filling the gaps through soft law. It follows that soft law initiatives are often couched in larger institutional settings, allowing human rights institutions to frame the agenda and stressing domestic stakeholder engagement as an important voice in this process.[102]

3.1. The Legal Status of Treaty Body Recommendations

TBs do not have judicial powers, so recommendations per se impose no legal obligations on state parties. The preceding section showed that the non-binding nature of TB recommendations is not equivalent to a lack of legal effects, however. As O'Flaherty states, "the issuance of COBs is the single most important activity of human rights treaty bodies. It provides an opportunity for the delivery of an authoritative overview of the state of human rights in a country and for the delivery of forms of advice which can stimulate systemic improvements."[103]

[99] Abbott and Snidal (n 89).
[100] Stéphanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone, *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press 2016) 7.
[101] Dinah Shelton, 'Commentary and Conclusions (on human rights and soft law)' in Dinah Shelton (ed) *Commitment and Compliance* (Oxford University Press 2000) 461.
[102] Lagoutte, Gammeltoft-Hansen, and Cerone (n 100) 7.
[103] Michael O'Flaherty, 'The Concluding Observations of the United Nations Human Rights Treaty Bodies' 6(1) *Human Rights Law Review* (2006) 27.

The status of TB recommendations, and related analyses of their implementation and compliance, should thus not be simplistically reduced to the nature of the issuing institution, which is clearly non-judicial. It is perhaps easier to argue in favor of the bindingness of court decisions than to vouch for the lack of legal effects of TB recommendations. For the latter, it seems "more conclusive and determinative of implementation and compliance" to look at "the respect which the body is accorded, by states in particular, but also by other stakeholders" such as NHRIs. In other words, the non-binding nature of ensuing recommendations may be offset by "the moral and legal authority" which governments and other members of the international community attach to published reports and conclusions of the organs concerned.[104] This advisory and recommendatory nature is furthermore made clear by the actual and persistent choice of wordings adopted within TB recommendations,[105] and has been supported by states representatives throughout the latest submissions to the secretary general in light of the TB 2020 Review process.[106]

Under the state reporting procedure, TB members and state representatives undertake a process of "constructive dialogue," of a clearly non-adversarial nature. The ensuing outputs, which as we have seen may also reflect points made in submissions from NHRIs and civil society, "do not lend themselves to normative expression."[107] LOI/PRs, COBs, and recommendations under the Follow-up procedure are often very case-specific and may offer somewhat experimental approaches to human rights policy that can be seen as departing from a strict reading of conventional provisions. The State Reporting procedure contains other forms of limitations which do not lend themselves to "normative expression." This has been stated as sufficient justification to query the appropriateness of according binding status to TB recommendations from the "necessarily cursory exchange of documentation and views between a State Party and a TB,"[108] which results in "limited, hurried and wide-ranging a process."[109] Although this is indeed the opinion of one, albeit authoritative commentator, the mere fact that the dialogue

[104] Maxime E. Tardu, 'Protocol to the UN Covenant on Civil and Political Rights and the Inter-American System: A Study of Coexisting Procedures' 70(4) *American Journal of International Law* (1976) 778, at 784.
[105] For an analysis of COBs and their hortatory nature see Christian Tomuschat, *Human Rights: Between Idealism and Realism* (OUP 2003) 154.
[106] For more information, see <www.ohchr.org/EN/HRBodies/HRTD/Pages/TBStrengthening.aspx>.
[107] O'Flaherty (n 103) 37.
[108] Ibid.
[109] Ibid.

over a country's human rights situation usually lasts for no more than six hours, every seven to eight years,[110] may validate this critical view.

Notwithstanding evident limitations in the procedure,[111] "no better expertise as to the scope and meaning of any of the human rights treaties can be found than in the expert bodies set up to monitor their observance by states."[112] It would not make sense to claim that such experience in the monitoring practice has no consequences. Scheinin provides a useful explanation here:

> The absence of specific provisions on the legally binding nature of the findings by the pertinent expert body in other human rights treaties does not mean that such findings are merely "recommendations." The treaty obligations themselves are, naturally, legally binding, and the international expert body established by the treaty is the most authoritative interpreter of the treaty in question. Therefore, a finding of a violation by a UN human rights treaty body may be understood as an indication of the State party being under a legal obligation to remedy the situation.[113]

Adding weight to Scheinin's argument, and perhaps further clarifying the legal status of TB outputs, is the reasoning found in the Final Report on the Impact of the Findings of the United Nations Treaty Bodies (2004) by the International Law Association (ILA). By considering TB findings in light of Article 31(3) of the 1969 Vienna Convention on the Law of Treaties (VCLT) - "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" - in an evolutionary fashion, the ILA opens up the possibility of extending this definition to TB recommendations:

> Human rights treaties are different in some important respects from the presumed ideal type of a multilateral treaty which underpins the formulation of the individual provisions of the VCLT. Given these differences, it appears arguable that in interpreting these types of treaties (with third party beneficiaries and an independent monitoring mechanism), relevant subsequent practice might be broader than subsequent State practice and include the considered views of the

[110] Geneva Academy, *Optimizing the UN Treaty Body System, Academic Platform Report on the 2020 Review* (2018) 7.
[111] For more information, see the analysis on the TB Review 2020 in Chapter 1.
[112] Tomuschat (n 105) 183.
[113] Martin Scheinin, 'International Mechanisms and Procedures for Implementation' in Hanski and Suksi (eds), *An Introduction to the International Protection of Human Rights*: *A Textbook* (Institute for Human Rights, Åbo Akademi 1997) 369.

> treaty bodies adopted in the performance of the functions conferred on them by the States parties.[114]

An important clarification on legal status can be also found in the 2010 judgment of the International Court of Justice in the Diallo case (2010), where the Court stated that it accorded "great weight" to the interpretations of the ICCPR by the HRCtee. Its practice is important, said the Court, because that Committee "was established specifically to supervise the application of [the ICCPR]."[115]

To conclude, the following key aspects can be summarized as pertaining to the legal status of TB recommendations under the State Reporting procedure:

a. They have no binding status for states;[116]

b. Nevertheless, as outputs of the TBs they have a notable authority, albeit ill-specified;

c. This authority is most apparent in situations where TBs pronounce on violations of the treaties and where they otherwise purport to interpret treaty provisions;

d. The authority is less clear where the TBs provide general advice on strategies for enhanced implementation of a treaty and when they opine on matters which seem to have little or nothing to do with the actual treaty obligations of the state party.[117]

3.2. The Legal Status of NHRI Recommendations

As part of this discussion on structural indicators of the institutional framework for TB – NHRI engagement, it is also important to assess the legal status NHRI recommendations within the context of the State Reporting procedure. Here one cannot follow the same generalizable path as that used for TB recommendations, however. NHRIs vary greatly, not only in their

[114] International Law Association, Committee on International Human Rights Law and Practice, *Final Report on the Impact of Findings of the United Nations Treaty Bodies* (2004), para. 22, available at: <www.abo.fi/instut/imr/research/seminars/ILA/note_on_the_meeting.htm>.
[115] ICJ, Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) (30 November 2010, unreported).
[116] Although a finding of treaty violation may be understood as an indication of the State party being under a legal obligation to remedy the situation. Scheinin (n 113).
[117] O'Flaherty (n 103) 36.

institutional design model but in the powers each institution holds when acting under each respective mandate. NHRIs' diverse set of institutional formats may be summarized in two main archetypes: the ombudsman model (unitary) and the commission model (multi-member). Within these models, NHRIs vary greatly in terms of mandate and legal powers: some handle complaints and have robust investigatory powers, some serve principally an advisory function to the legislative and executive branches and others only conduct research.[118] Enforcement capacity is relatively weak across the spectrum, however, with NHRIs at times legally limited to making recommendations, unable to bring cases to the courts or to administrative law bodies.[119]

The Paris Principles require that a NHRI's mandate include both the promotion and protection of human rights.[120] The SCA General Observations provide definitional guidance to what this entails for NHRI mandates. "Promotion" includes those functions which seek to create a society where human rights are more broadly understood and respected, including education, training, advising, public outreach and advocacy. "Protection" functions may be understood as those that address and seek to prevent actual human rights violations, including monitoring, inquiring, investigating and reporting on human rights violations.[121]

NHRIs' competence to promote and protect human rights must be reflected in "as broad a mandate as possible."[122] This includes all internationally recognized human rights, so NHRIs should not have their jurisdiction restricted to certain human rights or to rights pertaining to specific groups. The SCA has deliberated on the matter, stating that:

> A National Institution's mandate should be interpreted in a broad, liberal and purposive manner to promote a progressive definition of human rights which includes all rights set out in international, regional and domestic instruments.[123]

[118] Katerina Linos and Tom Pegram, 'What Works in Human Rights Institutions?' 112(3) *The American Journal of International Law* (2017) 7.
[119] It is above all in the African context that we find examples of "judicial NHRIs" with court-like powers, such as the Ghanaian, Kenyan, Ugandan, and Sierra Leonean NHRIs. In Europe, the Polish and Ukrainian NHRIs are very active before the courts.
[120] Paris Principles, para. A.1: "A national institution shall be vested with competence to promote and protect human rights."
[121] GANHRI, SCA General Observation 1.2.
[122] Ibid.
[123] Ibid.

Any restriction on or exclusion from an NHRI's mandate would therefore raise concerns regarding compliance with the Paris Principles, which would have repercussions on both the NHRI's legitimacy and its access to the fora made available to A-status NHRIs at UN level. Only in very specific cases are restrictions to NHRI mandates allowed, such as for national security reasons. While this limitation is "not inherently contrary to the Paris Principles, it should not be not unreasonably or arbitrarily applied and should only be exercised under due process".[124]

Human rights promotion and protection are broad areas of responsibility for which the use of various NHRI functions are required. The Paris Principles list a large number of specific functions that NHRIs should perform. By categorizing these as "responsibilities," the Paris Principles underscore their importance as essential to NHRIs' character and work. [125] In addition, NHRIs can have functions to investigate and attempt to resolve complaints of human rights violations.[126] These functions are additional or optional functions, whereas the previously listed functions are essential for NHRIs.

One further clarification is required at this point. Even though NHRIs may play their role in promoting and protecting human rights in a variety of ways, only a few of these ways can be linked directly to the State Reporting procedure and hence be useful for our analysis. A NHRI complaint or investigation may indeed be the result of a specific TB recommendation or, vice versa, spur a TB to recommend on the independence of the NHRI (for example, by inviting the state party under examination to respect the independence of the NHRI office in their complaints handling or investigatory functions). However, complaint handling, intervention in court proceedings, and national inquiries necessarily deal with allegations of human rights violations that have occurred in the past. These NHRI functions entail fact-finding and redress for victims. Moreover, these are very case-specific and NHRI-specific instances of TB-NHRI cooperation.

In order to offer a generalizable account of this cooperation, the analysis that follows focuses on NHRIs' advisory and monitoring activities only. These are essential elements of any NHRI's mandate and are inextricably linked to the cyclical nature of the State Reporting procedure. It is through their advice and monitoring that NHRIs continuously keep the state's

[124] GANHRI, SCA General Observation 2.7.
[125] Paris Principles, 'Competence and responsibilities,' para. 3.
[126] Paris Principles, 'Additional principles concerning the status of commissions with quasi-jurisdictional competence'.

performance under scrutiny, seeking to deter human rights violations while encouraging change that prevents them. The advisory and monitoring functions are different yet complementary to the other available NHRI functions. Their focus is on current human rights issues, with a view to assisting the state in solving them, in line with its international human rights obligations. That said, all NHRIs, through their advisory and monitoring functions, can participate in all aspects of the work of the treaty monitoring bodies.[127]

This section will now offer a brief overview of these functions. It should be clear from the outset, however, that even when NHRIs are empowered to handle complaints or undertake investigations, they do not generally make binding, enforceable decisions.

NHRI Advisory function

Directly linked to the State Reporting cycle, NHRIs' advisory function is described in detail under the Paris Principles' "competence and responsibilities" section. [128]

According to the Paris Principles, a core responsibility is to provide advice specifically to "Government"[129] and "Parliament."[130] The scope of "any other competent body" is broader, and has been found to "include all other State institutions, including judicial authorities" and should also include bodies outside government entirely, such as civil society organizations and "any bodies that do or can affect human rights, positively or negatively".[131] Such a description of possible recipients of NHRI advice is all-encompassing, and the fields under which NHRIs may provide advice are similarly wide-ranging.[132]

In terms of legal powers, NHRI advice does not have the force of law. Recipients are therefore not formally required by law to accept and eventually implement advice. However, "because of their status as independent State institutions with human rights expertise, their views—their advice and recommendations—should be given due consideration."[133] An often referenced

[127] Paris Principles, 'Competence and responsibilities,' para. 3(d).
[128] Paris Principles, 'Competence and responsibilities,' para. 3(a).
[129] Including ministries, departments, and government agencies, including the police, prison authorities, and the armed forces, unless specifically mentioned in the NHRI mandate.
[130] Including individual members of parliament, parliamentary leaders of political parties, parliamentary committees, parliamentary officers, and other parts of the parliamentary structure.
[131] Asia Pacific Forum, *International Human Rights and the International Human Rights System, A Manual for NHRIs* (July 2012), 125.
[132] OHCHR, *National Human Rights Institutions: History, Principles, Roles and Responsibilities* (Professional Training Series No. 4 (Rev. 1) 2010) 105.
[133] APF (n 131) 129.

recommendation is for the NHRI establishing legislation "to impose on those to whom NHRI advice is addressed a legal obligation to give that advice proper consideration and, within a prescribed period, to give the NHRI a formal response."[134]

To be sure, the advisory responsibility should not stop at advice provision. NHRIs are also called upon to "undertake follow up action to recommendations contained in [their] reports and should publicise detailed information on the measures taken or not taken by public authorities in implementing specific recommendations or decisions."[135] Once again, the OHCHR gives guidance on the means through which such follow-up action should take place, namely through annual or special reports, monitoring, lobbying government, press releases and press conferences. [136]A good means of monitoring implementation is the preparation and publication of follow-up reports that principally focus on implementation. It is to this function that I now turn.

NHRI Monitoring function

Inextricably linked to the State Reporting procedure, NHRIs keep states' performance under scrutiny through monitoring activities, which include monitoring "the implementation of relevant recommendations originating from the human rights system."[137] NHRIs' monitoring function is concerned not only with international human rights reporting cycles but with a process of continuous oversight and review. The OHCHR provides a general definition of monitoring: "the activity of observing, collecting, cataloguing and analysing data and reporting on a situation or event."[138]

As part of their statutory or constitutional obligations, all NHRIs are involved in domestic human rights monitoring, whether through research, reporting, investigative, or educational activities. NHRIs perform their responsibility of oversight either generally or in relation to a particular category of rights, for instance under a specific human rights treaty. General human rights monitoring often culminates in annual "state of human rights" reports, presented to parliament, which also represent one of the main forms of NHRI accountability vis-à-vis the state. Specific human rights monitoring may relate to one human rights concern, be geographically bound to one specifically affected region of the country, or indeed be focused

[134] Ibid.
[135] GANHRI, SCA General Observation 1.6.
[136] OHCHR (n 132) 105.
[137] *GANHRI SCA General Observations as adopted in Geneva in February 2018*, GO 1.4.
[138] OHCHR (n 132) 113.

on one particular group in society. This includes on-site inspection of places particularly susceptible to human rights violations, such as places of detention. This is a notable example of TB-NHRI engagement, as this analysis has already underlined, through the establishment of NPMs under OPCAT, but also relevant for the CAT reporting cycle. Finally, and central to this discussion,

> reports prepared by NHRIs may also be part of the monitoring function where they examine State compliance with human rights obligations broadly, rather than in relation to a specific violation or complaint. All NHRIs do reports of this kind—and are usually undertaken—in conjunction with international scrutiny of State compliance with human rights obligations. [139]

Table 5.2. represents an overview of the TB functions and related NHRI roles. NHRIs find numerous ways to contribute through their own reporting, whether contributing to the State Report, preparing parallel reports, providing their monitoring results to TB members in Geneva, or following up TB recommendations once these have been issued. Some NHRI legislation makes specific mention of these activities, but in most cases it is undertaken as a general NHRI function. TBs offer these cooperation avenues through a variety of instruments.[140] The most prominent example of TB provision that links (although implicitly) NHRI monitoring to TB monitoring is CRPD Article 33(2).[141] This provision "recognises the importance of domestic monitoring institutions to supplement and, indeed, enable the role of international monitoring bodies."[142]

Table 5.2. TB functions and related NHRI roles

Function of treaty monitoring bodies	**NHRI role**
Promotion of ratification of the treaty	- Advocacy with the government for ratification and implementation - Community education and promotion of the treaty

[139] APF (n 131) 151.
[140] See Chapter 4.
[141] CRPD Art 33(2).
[142] APF (n 131) 152.

Examination of the State Report	- Contribution to the development of the State Report - Contribution to the list of issues - Participation in pre-sessional meetings - Shadow or parallel reports - Participation in the session - Promotion of the Concluding Observations and the recommendations
Follow-up	- Monitoring - Submission of information

In this sense, NHRIs feed into the notoriously overburdened capacity of the TB system, providing grounded and up-to-date information through their own monitoring functions. [143]

NHRIs with strong monitoring functions, which enable them to research and report on compliance with and implementation of domestic and international human rights obligations, could thus appear to be a useful partner to the TB system. As discussed, NHRI functions and ensuing recommendations fall short of binding status. Rather, NHRIs assist decision-makers in complying with human rights obligations through their competence in the field and their authority. Through their advisory and monitoring functions, NHRIs adopt soft mechanisms of argumentation, persuasion, and socialization mechanisms in order to bring states' behavior in line with their human rights obligations. The lack of binding force complicates efforts toward an assessment of the ability of NHRIs to exert pressure on state agents. Scholars have long discussed this inherent problematic.[144] Often, insights from socialization mechanisms and normative pressure approaches have been indicated as main factors for change.[145] Others place the main onus of NHRI effectiveness on formal design features, with the presence (or lack) of "formal institutional safeguards" as principal indicators.[146]

[143] Paris Principles, 'Composition and guarantees of independence and pluralism,' para. 1.
[144] Steven Jensen, *Lessons from Research on National Human Rights Institutions* (Danish Institute for Human Rights 2018), available at <www.humanrights.dk/publications/lessons-research-national-human-rights-institutions>.
[145] E.g. Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (OUP 2013).
[146] Linos and Pegram (n 118).

No matter which theoretical underpinning one chooses, it is important that NHRIs act with authority, with strong levels of legitimacy and independence. It is to these two interrelated aspects that I now turn, cognizant of the fact that legitimacy and independence are crucial to both institutions under scrutiny. Due to the soft nature of both TB and NHRI recommendations, their effective mutual engagement, no matter under which specific procedure or function, rests on their legitimate and independent standing.

4. Legitimacy and Independence of Treaty Body - NHRI Engagement (Structural Indicator 4)

Both the TB system and NHRIs are public organizations that make use of independent experts as their ultimate decision-makers. The lack of binding force which characterizes both institutions' decision-making powers increases the importance of such "independent expertise" in three main ways. First, reliance on independent expertise has a legitimating function, increasing the trustworthiness and credibility of decision-making.[147] Second, by ensuring that decisions are based on sound reasoning and empirical knowledge, it may help increase levels of goal-attainment more efficiently. Last, by increasing the authoritativeness of both institutions' decisions, independent experts may act as substantiating actors, thus somewhat filling the gap related to their non-binding nature. It is in fact important that such expertise be recognized as such by all actors involved, above all the states subject to recommendations from both TBs and NHRIs. TB-NHRI engagement will only contribute to the promotion and protection of human rights if these actors are seriously committed to the process.[148] The legitimacy of both the TB system and of NHRIs, inclusive of their mutual engagement, are thus the result of both the objective and subjective elements of "legitimacy," a concept that in this specific inter-institutional cooperation is unequivocally linked to that of independence and pluralism. The following sub-sections take a closer look at legitimacy, including the underlying requirement of independence, as fundamental tenets of TB-NHRI engagement.

[147] Christina Boswell, 'The political functions of expert knowledge: knowledge and legitimation in European Union immigration policy' 15(4) *Journal of European Public Policy* (2008) 471–488.
[148] Cosette D. Creamer and Beth A. Simmons, 'The Proof is in the Process: Self-Reporting Under International Human Rights Treaties' *American Journal of International Law* (forthcoming).

4.1. Independence and Pluralism of Treaty Body members

TBs have been delegated public power at the international level, and as such should fulfill relevant criteria of legitimacy in exercising it. This is of importance from both a normative perspective, due to the lack of TB enforcement powers, and a reputational perspective, in that it is "essential that states perceive the treaty bodies' activities as legitimate in order to promote the effective implementation of their findings."[149] Independence, impartiality, integrity, and professionalism—which represent the only forms of TB accountability, as will be discussed below—are essential elements underpinning both the normative and reputational elements of TB legitimacy. It is no secret that the extent of TB members' actual independence and expertise has been subject to substantial criticism in recent years.[150] Such criticisms have also been made clear by state representatives themselves during the ongoing TB review process.[151]

There seems to be an evident clash between formal and informal rules governing the election of TB members, and the lack of transparency in both instances represents a serious hurdle in the legitimate standing of the TB system as a whole. As recent critics explain, understanding the extent to which elected committees are capable of carrying out their tasks, and the reasons why that might or might not be the case, is important not only to better understand and possibly improve the functioning of these mechanisms, but also for broader discussions on the use of expertise in public organizations.[152] It is one thing for TB members to fulfill the legal requirements on the interpretations of human rights conventions, thus acting in full legality. It is another thing for TB findings to fulfill relevant legitimacy criteria, through their actual or perceived independence.

Through the following analysis, I wish to outline independence as being secured by means of an overall package of terms and conditions, rather than a state which can be achieved merely by ensuring that TB members show no obvious bias.[153]

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[149] Helen Keller and Geir Ulfstein (eds.), *UN Human Rights Treaty Bodies. Law and Legitimacy* (Cambridge University Press 2012).
[150] Valentina Carraro, 'Electing the experts: Expertise and independence in the UN human rights treaty bodies' 25(3) *European Journal of International Relations* (2019).
[151] See State Submissions to Third Biennial Secretary General Report on the Implementation of Res. 68/268, available at <www.ohchr.org/EN/HRBodies/HRTD/Pages/3rdBiennialReportbySG.aspx>.
[152] Valentina Carraro, 'Electing the experts: Expertise and independence in the UN human rights treaty bodies' 25(3) *European Journal of International Relations* (2019) 829.
[153] Philip Alston, 'Hobbling the Monitors: Should UN Human Rights Monitors be Accountable' 52 *Harvard International Law Journal* (2011) 54.

Legal and Operational Independence

Each UN human rights treaty establishes the mandate of its monitoring body.[154] The fulfillment of TBs' monitoring function is entrusted to TB members, who are expected to meet certain requirements:

1. They are nationals of states that are party to the human rights instrument in question;
2. They have been elected by states that are party to the instrument in question[155];
3. They are of high moral standing and are recognized to have competence in the field of human rights.
4. They serve in their personal capacity;
5. They are appointed in a manner that ensures equitable geographic representation and the representation of different legal systems. [156]

The treaties do not define "personal capacity," "independence," and "impartiality," although it is generally understood that TB members should act "in accordance with their consciences, the terms of the treaty and in the interest of the treaty body, and that they should not act on behalf of other stakeholders, such as a Government or NGO. Similarly, members should perform their tasks fairly and without bias."[157]

Indications addressing TB member independence and impartiality are found, although not systematically, in a number of treaty provisions and respective rules of procedure, as well as within the solemn declaration that precedes a member taking up his or her mandate.[158] Such treaty-based guarantees, further summarized in Table 5.3 below, denote a lack of systemic procedural guarantees to oversee compliance with the principle of independence and

[154] Aside from the mandate of the CESCR Committee, established by UN Economic and Social Council Resolution 1985/17.
[155] The Committee on Economic, Social and Cultural Rights is a subsidiary body of ECOSOC. ECOSOC Resolution 1985/17 (§C) stipulates that the members of the committee are experts in the field of human rights and serve in their personal capacity.
[156] Chairs of the TBs, Addis Ababa Guidelines on the Independence and Impartiality of Members of the Human Rights Treaty Bodies, 2012. See also Geneva Academy, *Academy In-Brief No.1, The Independence of UN Human Rights Treaty Body Members* (2012) 7, available at <www.geneva-academy.ch/joomlatools-files/docmanfiles/The%20Independence%20of%20UN%20Human%20Rights%20Treaty%20Body%20MembersGenevaAcademGeneva%20(1).pdf>
[157] OHCHR, *Handbook for Human Rights Treaty Body Members* (2015) 28, available at <www.ohchr.org/Documents/Publications/HR_PUB_15_2_TB%20Handbook_EN.pdf>.
[158] E.g. OPCAT, Art 5(6); ICED, Art 26; ICMW, Art. 72(1)(b); ICCPR, Art. 38; CERD, General Recommendation No. 9: Independence of experts (Art. 8, para. 1), UN doc. A/45/18, 23 August 1990.

impartiality.[159] Somehow filling this gap is the widespread presence, throughout the TB system, of provisions granting TB members the same immunity vested in experts on UN missions,[160] as laid down in the Convention on Privileges and Immunities of the United Nations.[161] In this sense, TB members "shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions."[162] By granting TB members such immunity, states parties give them a level of protection that reinforces their independence, a consideration that has also been stressed by the ICJ on multiple occasions.[163]

Table 5.3. Independence and Impartiality of TB Members

Treaty	References to independence and impartiality
CERD (1965)	✓ Members to serve in their personal capacity (art.8)
ICCPR (1966)	✓ Members to be elected and serve in their personal capacity (art.28) ✓ Members to solemnly declare to perform their functions impartially and conscientiously (art.38)
ICESCR (1966)	✓ Members to serve in their personal capacity (ECOSO res. 1985/17, para (b))
CEDAW (1979)	✓ Members to serve in their personal capacity (art.17)
CAT (1984)	✓ Members to serve in their personal capacity (art.17)
CRC (1989)	✓ Members to serve in their personal capacity (art.43)
CRMW (1990)	✓ Members to be impartial (art. 72) ✓ Members to serve in their personal capacity (art.72)
OPCAT (2002)	✓ Members to serve in their individual capacity (art.5) ✓ Members to be independent and impartial (art.5)

[159] For accountability measures (or lack thereof) pertaining to TB members, see section below.
[160] ICCPR, Art. 43; CAT, Art. 23; OP-CAT, Art. 35; CMW, Art. 72(6); CRPD, Art. 34(10); CED, Art. 26(8).
[161] Convention on the Privileges and Immunities of the United Nations (hereafter, 1946 UN Convention on Privileges and Immunities), adopted by UN General Assembly Resolution 22 A (I), 13 February 1946.
[162] Ibid, section 22.
[163] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports (1949) 183; (ICJ), Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, ICJ Reports (1999) 62.

CRPD (2006)	✓ Members to serve in their personal capacity (art.34)
ICPPED (2006)	✓ Members to serve in their personal capacity (art.26) ✓ Members to be independent and impartial (art. 26)

In contrast to the paucity of provisions related to TB member independence within treaty texts, the TB system offers more widespread coverage within each committee's Rules of Procedure[164] as well as through the adoption of the Guidelines on the Independence and Impartiality of Members of the Human Rights Treaty Bodies ("the Addis Ababa Guidelines").[165] GA res. 68/268 has underlined the importance of TB member independence by encouraging all TBs to implement these Guidelines in accordance with their mandates.[166]

Financial Independence

Membership in TBs is an unpaid, voluntary service to the UN. The UN does provide an elevated daily subsistence allowance to TB members, however. The allowance is meant to cover the costs of accommodation, meals, local transportation, telephone costs, and other incidentals for the duration of the sessions in Geneva. This arguably limits the scope of experts that can be involved in TB membership, as remuneration would serve as guarantee of independence. Calls to introduce fixed salaries for TB members have emerged in the latest TB review consultations,[167] but so far such an innovation seems unlikely, especially due to the cuts to which the TB system has recently been subjected.[168]

Appointment, Composition and Pluralism

The provisions governing the selection and election processes for TB members remain very vague, especially with regards to the selection of candidates within individual member states. No UN rules apply to this crucial aspect of the TB systems functioning aside from the

[164] E.g. Human Rights Committee, Rules of Procedure, UN doc. CCPR/C/3/Rev.10, 11 January 2012, Rule 16; Committee against Torture, Rules of Procedure, UN doc. CAT/C/3/Rev.5, 21 February 2011, Rule 14. See also Committee on Economic, Social and Cultural Rights, Rules of Procedure, CESCR, UN doc. E/C.12/1990/4/Rev.1, 1 September 1993, Rule 13; Committee on the Elimination of Discrimination against Women, Rules of Procedure, UN doc. A/56/38 (SUPP), as amended by UN doc. A/62/38 (SUPP), Rule 15; Rules of Procedure of the Committee on the Elimination of Racial Discrimination, 1989, Rule 14.
[165] Chairs of the TBs, Addis Ababa Guidelines (n 156).
[166] GA Res. 68/268, para. 36.
[167] Suzanne Egan, 'Strengthening the United Nations Human Rights Treaty Body System' 13(2) *Human Rights Law Review* (2013).
[168] For more information see <www.gi-escr.org/latest-news/open-letter-ngos-regarding-critical-funding-gap-affecting-un-human-rights-mechanisms-ohchr>.

requirement to act in a personal capacity, independently from the state that nominated them and free from political pressures.

Each state party can nominate an expert among their nationals. At this stage, we can distinguish between two scenarios. Some countries employ a formal selection procedure generally open a call for applications, interested experts then send their résumés and interviews are held with the most promising candidates. The final selection and appointment of national candidates is normally made by the Ministry of Foreign Affairs. In contrast, most countries reportedly engage in more informal processes for the appointment of candidates. In some cases, these processes involve consultations with different governmental and non-governmental actors, whereas in other cases, candidates either directly approach the ministry expressing their interest or are approached by the ministry.[169]

Upon nomination, such "informal processes" continue at a diplomatic level. It is in fact up to state delegations to "campaign" for their nominee, usually through series of bilateral meetings between the candidate, his/her country's election officer, and other permanent missions' election and human rights officers. During these meetings, the nominee outlines his/her credentials to these potential supporters. Clearly, this procedure is firmly rooted within the diplomatic milieu and is characterized by intense negotiations among states representatives. Before states elect their preferred candidate during a Meeting of States Parties, such negotiations risk falling within an optic of "exchange of votes" that little has to do with the actual expertise of the nominee in question. The promise of support for a candidate can be given in exchange for the promise of a vote in other UN bodies, which can also extend to other areas of focus, such as trade or the environment. Quite eloquent, in this regard, is the following quote: "For many countries, the guiding question will not be 'Is this person the most qualified person to sit on a committee?', but 'Is this person somebody who can help us get a vote for …?'"[170] The risk of political and diplomatic exchange of votes is underscored by the election procedure, which is done by secret ballot on the basis that they not only obtain the largest number of votes but also an absolute majority of the votes of the states parties present and voting.

[169] Valentina Carraro, 'Electing the experts: Expertise and independence in the UN human rights treaty bodies' 25(3) *European Journal of International Relations* (2019) 835.
[170] Ibid. 839.

Notwithstanding the above-mentioned vagueness in terms of nomination and election procedures, each convention makes specific prescriptions for their composition and pluralism. However, it is of concern that 44% of elected members come from professional backgrounds affiliated to the government of their respective countries of nationality. [171] In sum, states are left with extensive leeway to influence TB membership and while some countries do select their candidates based on their recognized knowledge of human rights, others appoint candidates closely related to the government, such as former diplomats or civil servants.[172] Once selected internally, TB experts' election processes also lack of transparency, with "voting decisions often influenced by negotiations among states,"[173] especially due to the sensitivity of assessing states' compliance with their human rights treaty obligations. Consequently, "not all experts sitting on the committees are perceived to possess an equal level of expertise or independence from their home governments, and when independent expertise is lacking in committees, this is considered to be a consequence of the politicized selection and election processes that led to their appointment."[174]

Accountability

A crucial dilemma in the human rights field is whether UN-appointed experts who monitor governmental human rights violations should be held to account by those same governments that nominate and elect them. Differing opinions abound on UN human rights mechanisms' accountability. Some consider the need to hold international actors to account based on democratic theory,[175] others through the application of domestic administrative law principles.[176] At the very end of this "accountability-prone" spectrum, international organizations are considered "lawless creatures" who are "hydra-headed but directionless, self-consuming, and subject to perennial self-serving growth."[177] On the other hand, "increasing the

[171] Geneva Academy, *Diversity in membership of the UN Human Rights Treaty Bodies* (February 2018), available at <www.geneva-academy.ch/joomlatools-files/docman-files/Diversity%20in%20Treaty%20Bodies%20Membership.pdf>.
[172] Carraro (n 169) 835.
[173] Ibid. 836.
[174] Ibid. 845.
[175] Jed Rubenfeld, 'Unilateralism and Constitutionalism' 79 *New York University Law Review* (2004), 2017–18. For more nuanced analyses, see José Alvarez, *International Organizations as Law-makers* (Oxford University Press 2005) 630-40.
[176] Ruth W. Grant and Robert O. Keohane, 'Accountability and Abuses of Power in World Politics' 99 *Am. Pol. Sci. Rev.* (2005); Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, 'The Emergence of Global Administrative Law,' 68 (15) *L. & Contemp. Probs.* (2005).
[177] Matthew Parish, 'An Essay on the Accountability of International Organizations,' 7 *Int'l Orgs L. Rev XX*, 49 (2010).

degree of accountability demanded of the monitors is assumed to diminish their independence and along with it their ability to carry out their responsibilities."[178] The challenge is thus clear: how to reconcile the principles of independence and accountability? This is a challenge that has persistently confronted international actors, in part due to the unavailability of accountability mechanisms that are usual at the domestic level. [179]

In order to approach this challenge, it is useful to clarify the notion of accountability which, in turn, requires a brief theoretical digression on the nature of the relationship between TB members, their mandate providers, and the broader array of relevant stakeholders. In this regard, international relations theory has seen the decreasing relevance of a strictly "principal-agent" narrative in favor of logics of "trusteeship."[180] The classic principal-agent model, whereby states delegate specific mandate and powers to international organizations, has been challenged by the growing number of state and non-state actors involved in the transmission belt between the global and domestic arenas. In addition, this two-agent system has been found to hold inherent structural faults, including unaccountability in relation to "false positives," that is, states which commit to UN treaties without intending to comply.[181]

The principal-trustee approach seems to be a neat fit with the logics underlying the activity of TB members.[182] Alter defines the concept of trustee as someone who is selected because of their personal and/or professional reputation; has been given authority to make meaningful decisions according to the trustee's best judgment or the trustee's professional criteria; and is making these decisions on behalf of a beneficiary.[183]

To conceive of the role of TB members as "trustees" is convincing for three reasons. First, it highlights their expertise and professional independence. Second, it insulates them from the political preferences of the principal. Third, it introduces the notion of a beneficiary, which sits

[178] Alston (n 153) 5.
[179] See, e.g., Sumihiro Kuyama and Michael Ross Fowler (eds) *Envisioning Reform: Enhancing UN Accountability in the Twenty-First Century* (UNU Press 2009).
[180] Kenneth W. Abbot and Duncan Snidal, 'International Regulation without International Government: Improving IO Performance through Orchestration' 42(2) *Venderbilt Journal of International Law* (2009); Tom Pegram, 'Global Human Rights Governance and Orchestration: National Human Rights Institutions as Intermediaries' 21(3) *European Journal of International Relations* (2015).
[181] Beth A. Simmons, *Mobilizing Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009).
[182] Alston (n 153).
[183] See Karen J. Alter, 'Agents or Trustees? International Courts in their Political Context' 14 *European Journal of International Relations* (2008) 39

very easily with the concern that TB members are acting not only on behalf of states but also of a wider range of stakeholders, including NHRIs. In such way, a principal-trustee logic manifests a presumption in favor of the trustee's independence and allows for a situation "where internationally negotiated compromises can be unseated through legal interpretation, where states can come to find themselves constrained by principles they never agreed to, and where non-state actors have influence and can effectively use international law against states."[184] Conceiving of TB members as trustees does not, however, render them unaccountable, especially in cases of perceived deviations from the principals' given mandates, in a process Alter defines as "agency slack."[185] In such cases, it is still within the principal's power to curtail trustees' activity, employing political responses to circumvent their role.[186]

Strictly speaking, TB members are subject to no external form of accountability beyond non-reelection after a four-year term. Another element akin to accountability is that "the members are not removable during their term of office and are not subject to direction or influence of any kind, or to pressure from the State or its agencies in regard to the performance of their duties."[187] No other prohibition is formally set, as seen from the large number of TB members with a current or former professional background in their country's executive. Nor is there any "publicly visible accountability mechanism for the nomination and appointment process to the treaty bodies" which has led specialists to qualify TB member appointment as "a state-driven process."[188]

From a more theoretical standpoint, commentators have approached the notion of accountability in a multitude of ways. At its most limited, "organizational accountability refers to the readiness or preparedness of an organization to give an explanation and a justification to relevant stakeholders for its judgments, intentions, acts, and omissions."[189] By equating accountability with transparency, this definition seems overly simplistic. An example of a most-inclusive definition, the International Law Association espouses a long list of principles, including "good governance, good faith, constitutionality and institutional balance, supervision and control, stating the reasons for decisions or a particular course of action, procedural

[184] Ibid. 55.
[185] Ibid.
[186] Ibid.
[187] Report of the Human Rights Committee, 1998, UN doc. A/53/40, p. 89, Annex III, para. 1.
[188] Carraro (n 169) 836.
[189] Andreas Rasche and Daniel E. Esser, 'From Stakeholder Management to Stakeholder Accountability – Applying Habermasian Discourse Ethics to Accountability Research' 65 *J. BUS. ETHICS* (2006) 251, 252.

regularity, objectivity and impartiality, due diligence, and promoting justice."[190] Such open-ended and evaluative approaches to accountability risk contestation. Bovens offers a useful, more sociologically grounded definition of accountability: "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences."[191] With this definition in mind, we can ask three interrelated questions: who are the main responsibility bearers, to whom is accountability owed to and what kind of conduct should be held to account for.

First, it is clear that individual TB members are the main responsibility bearers, although questions of collective responsibility might arise if the TB is considered in its collegial form. Leaving such instances aside for now, and following the logic of delegation theory, principals (states parties) who are concerned to hold their trustees (TB members) to account have an obligation to abide by their own part of the bargain, and to adhere to the terms of the trusteeship relationship. In this sense, the Meeting of States Parties should take steps to uphold its states parties' commitment to cooperate with the TB in question.

Second, the category of actors to whom such accountability is owed also requires a brief analysis. As shown by the variety of goal-setters of TB-NHRI engagement, multiple stakeholders act simultaneously in the human rights monitoring context. A strict application of a principal-agent logic would lead TB members to be accountable to states, who nominate and appoint them through the Meeting of States Parties. However, an *experimentalist governance* understanding of the TB reporting cycle has shown the variety of stakeholders partaking in the system in a cooperative and iterative manner. In this sense, TB members are also accountable to these actors, including the individuals and groups whose human rights have been violated or are at risk, and those who represent the interests of the victims and their families and communities. This has been expressed in terms of the need for external as well as internal

[190] International Law Association, *Committee on Accountability of International Organizations, Third Report Consolidated, Revised and Enlarged Version of Recommended Rules and Practices* (2002) 2.
[191] Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' 13 *European Law Journal* (2007) 450.

accountability.[192] When external accountability is absent, the result is that "the legitimacy and accountability of international non-governmental organizations becomes disconnected."[193]

Third, it is important to understand what types of conduct mandate-holders should be held to account for. Philp helpfully distinguishes between formal and political accountability. He defines the former as "the requirement that public officials act within the formal responsibilities of their office," while political accountability concerns the "answerability of those in public office to partisan elements within the political system."[194] By way of illustration, he notes that judges are formally accountable, but not politically so.[195] In the context of TB members, the challenge is to reflect that "while they cannot reasonably claim judicial-type immunity from political accountability, they equally cannot be subject to unlimited political accountability without destroying their capacity to carry out their essential functions."[196] In a way, the cyclical and participatory nature of the State Reporting procedure fulfills political accountability measures, through public debate and deliberation. The existing reporting cycle enables TB members to explain the methodologies used, the problems faced, and their priorities, as well as respond to the challenges posed by various stakeholders, including issues of mandate compliance. These elements of "self-regulation" are the very root of the procedure, based on the concept of "constructive dialogue." The introduction of a code of conduct, called for by several states in the latest TB Review 2020 consultations,[197] could make for a higher level of formal accountability, but this may impinge on the key requirement of TB member independence.

To conclude, in cases where accountability is breached, there seems to be no real system for sanctioning TB members aside from non-reelection. Neither dismissal procedures or financial penalties are in place.[198] Loss of credibility is a real threat to the TB system, however, and in terms of the non-binding nature of TB recommendations, legitimacy costs can be seen as

[192] Ruth W. Grant and Robert O. Keohane, 'Accountability and Abuses of Power in World Politics' 99 *American Political Science Review* (2005) 38–39.
[193] Monica Blagescu, Lucy de Las Casas, and Robert Lloyd, *Pathways to Accountability: The Gap Framework 13* (One World Trust 2005) 17.
[194] See Mark Philp, 'Delimiting Democratic Accountability,' 57 *Political Studies* (2009) 38.
[195] Ibid.
[196] Alston (n 153) 67.
[197] For a list of state party submissions to the third biennial report by the secretary general see www.ohchr.org/EN/HRBodies/HRTD/Pages/3rdBiennialReportbySG.aspx.
[198] For our purposes, however, this form of sanction holds limited promise since TB members are unpaid and the budgets allocated to them are miniscule.

important informal consequences for the effectiveness of the TB system.[199] Reputational incentives represent the "default sanctioning mechanism,"[200] vis-à-vis both peers (the broader UN human rights system) and the wider public (including the human rights community more broadly defined, governments, the media, and public opinion generally). This, coupled with "the sufficiency of reporting,"[201] acts as the only accountability measures for the activity of TB members.

4.2. Independence and Pluralism of NHRIs

Effective NHRI activity seems to rely just as much on the amount of legitimacy that the institution holds as TB activity does. NHRIs act in a complex conceptual space, both as bridge between government, the wider state apparatus, and civil society, and as intermediaries between the international and domestic human rights monitoring systems.[202] Independence is a key objective for NHRIs, while at the same time they must seek to maintain cooperation with all relevant stakeholders, both state and non-state. Normatively, NHRIs' lack of enforcement powers underscores the importance of their advisory and monitoring capabilities, with pressure, persuasion, and argumentation as key mechanisms of action. Paris Principles-compliant NHRIs are set up either under a national constitution or through an act of parliament, and they are state-sponsored and state-funded. Different NHRI functions hold the state and other bodies to account in different ways, but to do so effectively it is paramount that NHRIs act autonomously across their mandate. Paradoxically, though, "some of the credibility of NHRIs comes from the fact that they are state sponsored and state funded entities."[203] Thus, the key challenge for a NHRI is not only to define its space, but to protect itself from excessive interference, be it from government, NGOs, or other institutions in society. NHRIs act in a space that "is a little contradictory to achieve [...] and is quite difficult to do in practice, and can be defined as a mixed blessing."[204] The ultimate requirement of independence presents a theoretical conundrum for NHRIs: how can NHRIs, which are usually set up by the state, funded by the

[199] Bovens (n 191) 451–52.
[200] Jens Steffek, 'Public Accountability and the Public Sphere of International Governance' 24 *Ethics and International Affairs* (2010) 45, 55.
[201] Alston (n 153) 49.
[202] On National Human Rights Systems and NHRIs, see Chapter 9.
[203] Anne Smith, 'The Unique Position of National Human Rights Institutions' 28(4) *Human Rights Quarterly* (2006) 909
[204] Interview with Dr. Mohammad-Mahmoud Mohamedou, former research director, ICHRP, and Robert Archer, executive director, International Council on Human Rights Policy, in Geneva, Switzerland (Nov. 2002).

state, given powers and a mandate by the state, and financially accountable to the state, at the same time be visibly and clearly independent of the state?[205]

Legal and Operational Independence

The Paris Principles contain provisions relating to legal and functional independence, funding, and independence of personnel. These are crucial elements for NHRI accreditation, and the SCA has provided useful guidance on the various facets of NHRI independence. The key attributes are set forth in paragraph 2 of the Paris Principles: "A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence".[206]

The nature of the NHRI-establishing instrument primarily shapes NHRIs' legal independence.[207] The most direct way of preserving the independence of an NHRI is through the national constitution. As Burdekin states, "The constitutional entrenchment of an NHRI provides for the protection and promotion of those rights by creating a specialist body with a role parallel to and complementary to that played by the courts."[208] Above all, a constitutional basis provides NHRIs with greater protection against potentially hostile governments due to the limits inherent to constitutional amendments. Whether or not the state grants its NHRI a constitutional basis, NHRIs may also feature in "implementing legislation, since the level of detail required to establish and authorize the functioning of an NHRI is not usually appropriate for a constitution."[209] The second Paris Principles-compliant mechanism for establishing an NHRI—through adopting an act of Parliament—may in fact provide more detailed provisions for its operations, inclusive of financial independence, appointment and dismissal procedures, composition and pluralism, specific functions, and reporting requirements.

Regarding operational independence, it is crucial for NHRIs to have a legal personality that is sufficiently autonomous. This implies that it can decide how to implement its mandate and manage its own workload and staffing structure. In this sense, "a government may therefore play a key role in the establishment of an NHRI but must then step back to enable it to develop

[205] Smith (n 203) 912.
[206] Paris Principles, Competence and Responsibility, para. 2.
[207] GANHRI, SCA General Observation 1.1.
[208] Brian Burdekin and Jasom Naum, *National Human Rights Institutions in the Asia Pacific* (Martinus Nijhoff Publishers 2007) 43.
[209] OHCHR (n 132) 32.

its own agenda and internal procedures; to decide on its own findings and recommendations, activities and daily business; and to appoint and discipline its own staff." [210]

Importantly, an NHRI's integrity also comes from how independently it exercises its functions and its relationships with civil society. The Paris Principles make specific provision for NHRI-civil society engagement.[211] Generally, because of the different tools at their disposal and the differing method of creation, "NHRIs should command more respect and authority than NGOs."[212] NHRIs are however more constrained in their activity by their constitutional or legislative mandate and can thus benefit from the broader scope of action of the many NGOs active in any one country. As such, there should be mutual consultation and cooperation in human rights projects and education.[213] Consequently, NHRIs can act as a bridge by providing the practical link between the governing and the governed.

Financial Independence

The Paris Principles recognize a clear connection between independence and funding, but leave it open to interpretation as to what "adequate funding" actually amounts to.[214] The SCA General Observations provide that to function effectively, a NHRI must be provided with "an appropriate level of funding in order to guarantee its independence and its ability to freely determine its priorities and activities. It must also have the power to allocate funding according to its priorities."[215] The SCA offers some further clarification on the term "adequate funding", providing that, "at a minimum" it should include:

a) the allocation of funds for premises which are accessible to the wider community;

b) salaries and benefits awarded to its staff comparable to those of civil servants performing similar tasks in other independent institutions of the State;

c) the establishment of well-functioning communications systems;

[210] Gauthier de Beco and Rachel Murray, *A Commentary on the Paris Principles on National Human rights Institutions* (CUP 2015), 85
[211] Paris Principles, para. 3(g).
[212] Smith (n 203) 909.
[213] Paris Principles, para. 1.6.
[214] Paris Principles, Composition and Guarantees of Independence and Pluralism, para. 2.
[215] GANHRI, SCA General Observation 1.10.

d) the allocation of a sufficient amount of resources for mandated activities.[216]

In order to prevent NHRIs' decisions or actions being used to justify cuts, the state's funding should also be secure[217] and represent their "core funding," with the possibility of applying for additional funding only in "special and rare circumstances."[218]

Appointment, Composition, and Pluralism

Each NHRI, through its founding legislative act, contains specific, often differing appointment processes, as well as composition and pluralism requirements. We can consider these characteristics in a more generalizable way by considering relevant aspects of the Paris Principles and SCA General Observations. The former provide that members' appointment must be "in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation" and that appointment can be "by means of an election or otherwise."[219] Underscoring the link between membership and independence, the Paris Principles further state that:

> In order to ensure a stable mandate for the members of the national institution without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate.[220]

While the TB system has developed a rather detailed set of guidelines on the independence of its membership,[221] the NHRI community relies on less specific requirements. Viable characteristics of NHRI members are barely considered (the SCA calls for "qualified and independent decision makers"[222]), with a strong focus on pluralism "intended to promote the effective cooperation" among relevant domestic stakeholders. On the selection and appointment of the decision-making body of NHRIs, Section B.1. of the Paris Principles also lists the professional backgrounds NHRI leaders should have. [223] The SCA gives further

[216] Ibid.
[217] Gauthier de Beco and Rachel Murray, *A Commentary on the Paris Principles on National Human rights Institutions* (CUP 2015), 86
[218] GANHRI, SCA General Observation 1.10.
[219] Paris Principles, 'Composition and guarantees of independence and pluralism,' para. 1.
[220] Paris Principles, 'Composition and guarantees of independence and pluralism,' para. 3.
[221] Chairs of the TBs, Addis Ababa Guidelines (n 158).
[222] GANHRI, SCA, General Observation 1.7.
[223] Paris Principles, Section B.1.

guidance on membership by stating that "government representatives and members of parliament should not be members of, nor participate in, the decision-making of organs of an NHRI. Their membership of, and participation in, the decision-making body of the NHRI has the potential to impact on both the real and perceived independence of the NHRI."[224]

Appointment processes are meant to abide to principles of clarity, transparency, and inclusive participation that promote merit-based selection and ensure pluralism.[225] An NHRI's independence, an essential ingredient for its legitimacy, may strongly depend on the personality of its appointees and whether they act under a collegiate (commission) or uni-personal (ombudsman) structure. Appointment, composition, and pluralism are crucial elements for NHRI independence in that "if [the appointee] honestly and competently uses his powers in the interest of the public in accordance with the legislation regulating its work, but without entering the field of public politics, he will be respected both by the citizens and by the authorities."[226] This gives the NHRI a platform of its own from which to defend its independent activity against attacks from the political sphere and reach a level of legitimacy that international human rights monitoring mechanisms can also rely upon. The appointment process for NHRI members is consequential, not least because of the resulting perception of independence. After all, "institutions are only as independent as their members."[227]

Accountability

The notion of accountability is key to NHRI activity. I have already touched upon the broader aspects of this notion vis-à-vis public organizations in the above section on TB member accountability. The same applies to the peculiar nature of NHRIs, whose accountability consists of different layers. At its most basic level, it is upheld by the NHRI's submission of its annual report to the authority that appoints it, such as parliament. Usually referred to as formal accountability, this moment represents an opportunity for the primary founders and funders of an NHRI to receive and analyze the report. After tabling, the annual report should be given ample time during parliamentary debates.

[224] GANHRI, SCA, General Observation 1.9.
[225] GANHRI, SCA, General Observation 1.8.
[226] C. Eklundh, *The Independence of the Ombudsman, in The Work and Practice of the Ombudsman and National Human Rights Institutions, Articles and Studies* (Danish Centre for Human Rights 2002) 13.
[227] OHCHR (n 132) 41.

Aside from this formal aspect of institutional accountability, NHRIs are subject to another, equally important layer: accountability to the public at large. Widespread distribution of NHRI reports and findings allows the public "to see what is being done in their name and ensure that the NHRI is performing properly."[228] Referred to as popular accountability, this represents the mainstay of NHRIs' support and helps the public assess whether an NHRI is acting independently or not. This "scrutiny" function may also be seen when NHRIs establish relationships with civil society organizations, leading to their activity being both monitored and strengthened. In this sense, NHRIs act as "[r]eceptors and transmitters in the cycle of human rights activity [as] they endeavor to implement international norms in practice while simultaneously filtering information from civil society back to the state."[229]

The GANHRI SCA Accreditation procedure

Compliance with the Paris Principles carries significant reputational benefits, especially in terms of NHRI engagement with the TB system. For NHRIs to have full access to the TB State Reporting procedure, inclusive of speaking rights in plenary sessions when available, they are required to be reviewed and accredited by the GANHRI, an international body made up of NHRIs compliant with the Paris Principles. More specifically, it is a subcommittee of GANHRI, the SCA, which periodically reviews NHRIs' compliance with the Paris Principles, and is supported in this activity by the OHCHR Secretariat.

This aspect of TB-NHRI engagement thus rests on a peer review system, not a system of review led by UN member states. NHRIs can receive A, B, or C status in this accreditation process. NHRIs granted A status by the GANHRI SCA are deemed in "full compliance with the Paris Principles" and have full participation rights within the TB system. B status signifies "not being fully in compliance with the Paris Principles," and C status "non-compliance." The SCA is composed of one NHRI accredited A status for each of the four regional groups appointed for a term of three years. The SCA convenes twice a year and reviews multiple applications for accreditation or reaccreditation. Recommendations for accrediting applicants either A, B, or C status are forwarded to the GANHRI Bureau for its approval.[230] Although the accreditation system was strengthened in 2004 and has since been reviewed in order to increasingly "give it

[228] Smith (n 203) 938.
[229] John Hucker, 'Bringing Rights Home: The Role of National Human Rights Institutions' in Frances Butler (ed), *Human Rights Protection: Methods and Effectiveness* (Kluwer 2002) 29, 34.
[230] See GANHRI, SCA Accreditation Process available at <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Pages/default.aspx>.

teeth,"[231] critics are still concerned that the SCA accreditation process based on peer review is inherently flawed.[232] For now, it is sufficient to note that the peer review mechanism for NHRIs described above fits the category that has been defined as "strong monitoring"[233] in that it offers individual assessments and letter grades to particular NHRIs. Theories of socialization, as well as information and learning, also predict that such peer review monitoring mechanisms can be effective.[234] As Linos and Pegram state, "the future credibility of the NHRI project is likely to hinge on the ability of the SCA and OHCHR to enhance the transparency and precision of the accreditation process and to ensure that A status is a meaningful reflection of both design and practice."[235]

4.3. Legitimacy and Independence as Mutually Reinforcing Aspects of Treaty Body - NHRI Engagement

To conclude this section, I propose a short reflection on the mutually reinforcing value of TB and NHRI legitimacy and independence.

As all TBs lack formal legal powers to issue binding decisions,[236] they appeal to non-legal avenues of influence such as argumentation, persuasion, and, central to NHRI engagement, mobilization of domestic stakeholders.[237] Nevertheless, as discussed above, TB recommendations may be deemed to constitute a legitimate source of interpretation of UN human rights conventions, above all when committees do not provide general advice and limit their scope to issues of violation of treaty provisions.[238] At the same time, NHRIs also lack enforcement powers in acting under their advisory and monitoring functions, which are the most relevant functions when considering NHRI engagement with the TB State Reporting procedure. The above analysis sought to highlight the inextricable link between independence

[231] Linos and Pegram, (n 118), 1124.
[232] Peter Rosenblum, 'Tainted Origins and Uncertain Outcomes' in (Ryan Goodman and Thomas Pegram (eds), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (Cambridge University Press 2012) 297.
[233] Kal Raustiala, 'Form and Substance in International Agreements,' 99 *American Journal of International Law* (2005) 581, 585.
[234] Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law* (Oxford University Press 2013)
[235] Linos and Pegram (n 118) 1134.
[236] International Law Association, Committee on International Human Rights Law and Practice, Final Report on the Impact of Findings of the UNTBs, Berlin, 2004 at note 19.
[237] See e.g., Manfred Nowak, *The UN Covenant on Civil and Political Rights: A Commentary* (Engel 1993) 710; Alexandra R. Harrington, 'Don't Mind the Gap: The Rise of Individual Complaint Mechanisms Within International Human Rights Treaties' 22 *Duke J. Comp. & Int'l L.* (2012) 153–176; Beth Simmons (n 152) 165.
[238] Michael O'Flaherty (n 103) 34.

and legitimacy: the higher levels of recognition of TB and NHRI independence, the more legitimate their work will be considered by relevant stakeholders, ranging from states to victims of human rights violations. As both institutions rely on non-legal avenues of influence, their independence and legitimacy can affect the implementation of their recommendations.

In addition, interaction between TBs and NHRIs can intrinsically act as a mutually reinforcing element. On the one hand, it is reasonable to assume that NHRIs benefit from a legitimacy boost just by interacting with a committee, especially considering the accreditation procedure each NHRI must go through for such interaction to happen in the first place. On the other hand, NHRIs also play a legitimizing role, providing independent and expert-driven advice to the cyclical TB State Reporting procedure. Lastly, NHRIs also play a legitimizing role vis-à-vis the state itself, as they "signal the stamp of democratic legitimacy on the deal arrived at: they constitute part of the 'politically correct' approach to constitutionalism."[239]

5. Resources (Structural Indicator 5)

Another useful set of proxies for assessing whether the institutional framework for TB -NHRI engagement is adequately geared toward goal-attainment concerns the framework's available resources.

The ten UN human rights committees are staffed by a total of 172 unpaid experts who perform their role as committee members on an essentially honorary basis; most have other full-time professional commitments. While travel is a discretionary expense for most UN bodies, it is the only cost incurred by the TB system, whose members work without pay but travel for meetings. They are reimbursed for travel and related expenses. The actual servicing of all bodies is provided by the OHCHR, which provides both professional and secretarial support to the TBs. The TBs are essentially dependent on OHCHR funding and on the decisions made by the Secretariat as to staff structure and allocation of funds. In essence, the proper functioning of the TBs thus depends on the existence of a strong professional staff in the Secretariat, with specialized skills and experience.

The Human Rights Council and Treaty Mechanisms Division is the department of the OHCHR with a core mandate to support the Human Rights Council and its subsidiary mechanisms, the Universal Periodic Review and the TBs. In recent years, OHCHR has consistently prioritized

[239] Christine Bell, *Peace Agreements and Human Rights* (Oxford University Press 2000) 198.

the provision of support to these mechanisms and their field presences, as reflected in the Mechanisms pillar of the OHCHR Management Plan 2018–2021.[240] The Division consists of an Office of the Director, the Human Rights Council Branch (HRCB), the Universal Periodic Review Branch (UPRB), and the Human Rights Treaties Branch (HRTB).

Aside from supporting the work of TBs, the HRTB is responsible for promoting the continued improvement and harmonization of this work (through the annual meeting of the TB chairs) and consistent follow-up with the individual TBs. Furthermore, the Division manages the Treaty Body Capacity-Building Programme[241] that was established by GA res. 68/268 on 9 April 2014 as one outcome of the TB strengthening process.

With regards to the State Reporting procedure, OHCHR Secretariat functions include preparing in-depth evaluation of state reports and analysis of the human rights situation in a particular country, as working documents for the committees; working with joint working groups and thematic working groups to prepare guidelines for states parties relating to overlapping instruments; preparing draft lists of issues and questions; follow-up to reporting; preparing drafts of annual reports; and technical advice and assistance to states.

Typically, the secretariat of each committee consists of one secretary (P-4), one to five human rights officers (P-3/2), depending on the workload of the committee, and administrative support staff (General Service (Other level)), supervised by a chief of section (P-5) under the direction of the division director (D-1). On average, one professional staff member needs six weeks (30 working days) to assist a TB with the preparatory review of one state party report.[242] On this basis, presuming the availability of each staff member for 44 weeks per year (taking into consideration official holidays and leave entitlements), one human rights officer can be expected to prepare seven or eight reports per year. In addition, the OHCHR, through its National Institutions and Regional Mechanisms Section (NIRMS), supports the establishment

[240] OHCHR, A Changing Global Context – Management Plan 2018 – 2021 (2017), available at <www2.ohchr.org/english/ohchrreport2018_2021/OHCHRManagementPlan2018-2021.pdf>.
[241] Recognizing that many member states have difficulties in fulfilling their multiple reporting obligations, GA Resolution 68/268 designed a comprehensive capacity-building program to support states parties in building their capacity to implement their treaty obligations. The program was established at the beginning of 2015 with a team that operates from OHCHR headquarters and in the field.
[242] OHCHR, Background paper in support of the intergovernmental process of the General Assembly on enhancing the effective functioning of the human rights treaty body system, A/68/606 (2013).

and strengthening of NHRIs and works closely with them to support the implementation of their broad mandates to promote and protect human rights.[243]

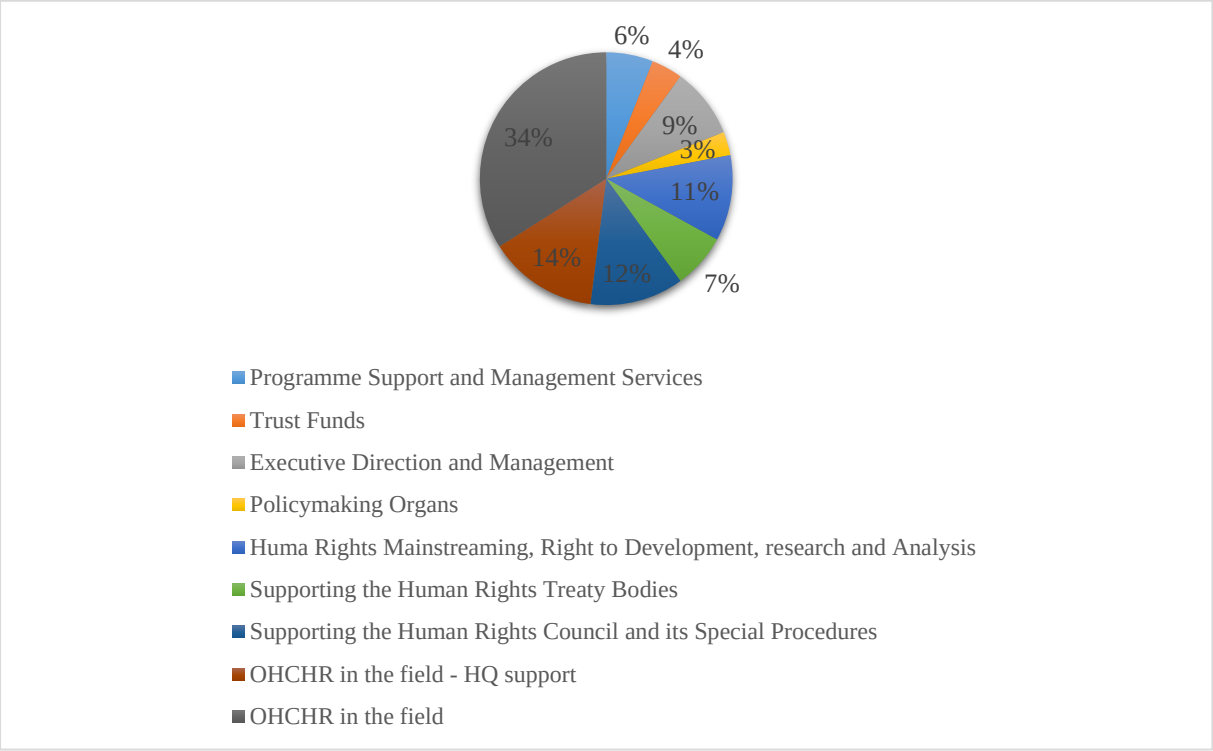
The budget for the overall activities of the OHCHR is determined through the biannual UN Regular Budget: the proposed biennial budget is submitted to the UN's budgetary authorities and is subject to negotiations in the Fifth Committee of the General Assembly. The approved regular budget appropriation for the OHCHR in 2018–2019 is 201.6 million USD, just 3.7% of the total UN regular budget. Arguably, this is a disproportionally low percentage considering that human rights is formally recognized as one of the UN's three pillars, along with peacekeeping and development.

As a result, the OHCHR continues to rely on voluntary contributions to finance as much as 10% of officially mandated activities that ought to be financed by the regular budget. In 2018, a total of 187.1 million USD was raised in voluntary contributions, representing the highest amount it has ever received, compared to 142.8 million USD in 2017. This growth was primarily due to several countries substantially increasing their contributions. Nevertheless, the donated amount still falls far below the 278.3 USD million in extra-budgetary funding that was sought, with the overall funding bearing little relation to the significance of the OHCHR's mandate to promote and protect human rights around the world.

Among the main activities of the OHCHR, Subprogramme 2 is dedicated to "Supporting the Human Rights Treaty Bodies" and the HRTB. In 2018, out of a total of 86,878,000 USD in Regular Budget allotment, approximately 15,396,000 USD was provided to Subprogramme 2, which benefits from an additional 2,643,500 USD of extra-budgetary funding, out of a total of 46,233,000 USD. Figure 5.4. demonstrates that only 7% of the combined OHCHR regular and extra-budgetary expenditure is dedicated to supporting the TB system.

[243] For more information, see <www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx>.

Figure 5.4. OHCHR expenditure by activity in 2018[244]



With these statistics in mind, we can easily identify the roots of what may be perceived as a constant challenge for the TB system: a lack of sufficient resources in the face of ever-increasing demands. The number of TBs has doubled in the last decade, and growth is likely to continue; and the number of ratifications continues to rise, resulting in a considerable backlog in the consideration of reports. NHRIs are also increasingly involved in the State Reporting procedure, with obvious repercussions for their available resources. To fulfil its designated functions, the system arguably needs to be designed and equipped to cope with this growing workload, and this analysis serves the purpose of understanding, within limits, whether the current resources are fit for purpose.

Due to the centrality of Secretariat work and the growing needs of the TBs, recent reform proposals have stressed the need to address current levels of under-resourcing and under-

[244] UN Human Rights Report, 2018 Financial Statements available at <www.ohchr.org/EN/AboutUs/Pages/FundingBudget.aspx>.

staffing.[245] Increasing the resources of the TBs by securing a greater allocation from the UN General Budget might seem the simplest approach, but it is also the most difficult. Inevitably, where reforms would make additional demands on resources, their introduction could require either additional staff or resources provided from outside the UN budget. Aside from the UN General Budget, potential sources of direct funding, servicing, and other support for TBs have included "voluntary contributions" by the states parties, specialized agencies and UN bodies, independent private bodies, and NGOs.

One growing trend among reform proposals is to advocate increasing accessibility to and the visibility of TBs through the use of modern technologies, such as webcasting and video-conferencing, and augmenting dissemination of TB outputs through improved UN databases, social media, and national, regional, and media outlets.[246] Webcasting will likely generate cost-savings opportunities in the long run by replacing the current costly exercise of producing summary records of meetings, while video-conferencing can reduce travel expenses for domestic stakeholders of the system, including NHRIs.

Overall, TBs are the victims of their own success. They struggle to keep up with their workload as more states ratify more treaties and as their work and procedures become better known. The larger workload has not been matched by a corresponding increase in resources, whether staff numbers, level of expertise, or funding measures. Despite provisions in some instruments that "the Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee,"[247] relatively few professional staff and resources have been assigned to TB work.

In the recent past, numerous reform initiatives have been proposed. The latest initiative resulted in GA Res. 68/268, yet decreases to TB-specific funding have not stopped. The most recent

[245] For information on reform proposals leading up to Res. 68/268, see Suzanne Egan, 'Strengthening the United Nations Human Rights Treaty Body System' 13(2) *Human Rights Law Review* (2013), available at https://iow.eui.eu/wp-content/uploads/sites/18/2015/05/Cleveland-03-Egan.pdf.

[246] For a compilation of reform proposals offered in this regard see Geneva Academy, Selected Contribution to the Academic Platform on Treaty Body Review 2020, available at <www.geneva-academy.ch/joomlatools-files/docman-files/Draft%20List%20of%20Submissions%20%20Academic%20Platform%202020%20Review%20without%20Propositions%20.pdf>.

[247] International Covenant on Civil and Political Rights (ICCPR), article 36. See also Convention on the Elimination of Discrimination against Women (CEDAW), article 17.9; Convention against Torture (CAT), article 18.3; Convention on the Rights of the Child (CRC), article 43.11. Different arrangements apply to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and to the Convention on the Elimination of Racial Discrimination (CERD).

planned budget cuts to the committees' work (by approximately 2 million USD) date to spring 2019,[248] due to multiple member states delaying payments to the UN. Although relatively modest, such cuts will yield "disproportionately serious consequences on the implementation of international human rights law,''[249] effectively cancelling TB sessions planned later in the year.[250] The challenge for the committees stems mainly from a 25% cut in travel expenses to ease immediate cash-flow problems.

Each state party examination under the State Reporting procedure is the culmination of years of preparatory reports by the government, NHRI, CSOs, and other stakeholders, thus widening the scope of potential repercussions to the TB monitoring function. Canceling or deferring these hearings "could have a very negative impact on the respect and credibility of the treaty bodies […] Instead of going in a direction where we become more regular and credible, we may be considered less regular, less stable, less credible."[251] This situation is not a novelty for the TB system. The 1993 Vienna Conference and Programme of Action already called for "urgent steps to seek increased extra budgetary resources."[252] What was said 20 years ago in relation to the OHCHR budgetary crisis applies equally to today's situation: "It is clear that the political realities of the UN and the unwillingness of major contributors to the UN budget to approve substantial budget increases, justify the following unpalatable but sober conclusion: the treaty bodies will have to live with the status quo in terms of services available in the foreseeable future."[253]

Against the background of a global pushback against the promotion and protection of human rights, 400 CSOs have urged, through an open letter, that all UN member states "pay their assessed contributions without further delay and initiate discussions on how to reverse the trend of reduced regular budget for OHCHR and ensure that the human rights mechanisms are not disproportionately affected by overall cuts to the UN budget".[254] Pressure to increase TB-

[248] For more information, see <www.nytimes.com/2019/05/24/world/un-budget-cuts-human-rights.html>.
[249] Interview by Rupert Colville, spokesman for Michelle Bachelet, the United Nations High Commissioner for Human Rights, available at <www.nytimes.com/2019/05/24/world/un-budget-cuts-human-rights.html>.
[250] Affected TBs would include the CRC, CCPR, CEDAW, CAT, and CERD.
[251] Interview by Jens Modvig, chairman of the CAT, available at <www.nytimes.com/2019/05/24/world/un-budget-cuts-human-rights.html>.
[252] Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, A/CONF.157/23, 12 July 1993, Plan of Action, paras. 9, 10, 11, 12.
[253] M. Schmidt, 'Servicing and financing human rights supervision' in P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000) 484.
[254] Open NGO letter regarding the critical funding gap affecting UN human rights mechanisms and the Office of the High Commissioner for Human Rights (2018), available at <www.gi-escr.org/latest-news/open-letter-ngos-regarding-critical-funding-gap-affecting-un-human-rights-mechanisms-ohchr>.

related budgets has also come from the secretary general, through the second biannual report on the progress achieved in implementing GA Res. 68/268. In its recommendations, a prominent role is given to: "[…] Stronger recognition of the Secretariat's essential role in supporting the work of the treaty bodies and the allocation of sufficient resources to enable them to function at the commensurate capacity are required."[255]

It remains to be seen whether such calls will resonate with UN member states. What seems clear is that both the unpaid nature of TB membership and the under resourced secretariat that services the work of the committees can hamper the effectiveness of domestic stakeholders' engagement, including NHRIs.

From an NHRI perspective, the Paris Principles require "adequate funding" by the government.[256] In practice, budget and resource allocations are very different across NHRIs, determined in part by the national financial climate. In an OHCHR survey among NHRIs worldwide, respondents indicated significant diversity in the budgets their institution currently received; from less than 10,000 (one from Africa) to over 100mil USD (one from Europe).[257] Responses also showed an enormous diversity in institutional size, in terms of staff numbers; ranging from 2 (e.g. one from Europe) to 1129 (e.g. one from the Americas). Just over half of respondents indicated that they had less than 100 staff.[258] It is beyond the scope of this study to provide NHRI-specific recounts on resources and budgetary allocations. GANHRI's SCA General Observation 1.10 has however deliberated on what aspects of "adequate funding" must be considered in any particular context. The issues the SCA focuses on relate to accessibility to the public, NHRI staff, NHRI members, a communications infrastructure and allocation for activities. On this latter aspect, the SCA makes a specific reference to TB – NHRI engagement, in that

> NHRIs should receive adequate public funding to perform their mandated activities. An insufficient budget can render an NHRI ineffective or limit it from reaching its full effectiveness. Where the NHRI has been designated with additional responsibilities by the State, such as the role of National Preventive or Monitoring

[255] Report of the Secretary-General, Status of the human rights treaty body system, A/73/309 (6 August 2018) 15.
[256] Paris Principles, Section B(2).
[257] OHCHR, Survey on National Human Rights Institutions, Report on the findings and recommendations of a questionnaire addressed to NHRIs worldwide, July 2009, p. 16.
[258] Ibid. p. 19.

> Mechanism pursuant to an international human rights instrument, additional financial resources should be provided to enable it to discharge these functions.[259]

Here, the SCA provides an example of adequate funding specifically targeting possible NHRI responsibilities under the CRPD and OPCAT (but also relevant for other TBs' monitoring functions). Furthermore, adequate funding should be granted to perform NHRIs' "mandated activities". Sections A.3(d) and A.3(e) of the Paris Principles, interpreted by the SCA, establish as key responsibility for NHRIs "to conduct assessments of domestic compliance with and reporting on international human rights obligations".[260] Accordingly, all NHRIs should be provided with adequate funding and resources to address both the advisory and monitoring functions that different TBs' reporting cycles require. The SCA also makes clear that "it is the responsibility of the State to ensure the NHRI's core budget" and that the NHRI has "complete financial autonomy as a guarantee of its overall freedom to determine its priorities and activities".[261] Notwithstanding these institutional safeguards, in a survey among NHRIs, the OHCHR discovered that less than 20% of the institutions surveyed indicated that the staff they had was sufficient[262] and almost half of all NHRIs considered their budget to be insufficient, with a little more than 30% considering it sufficient.[263] This is notwithstanding 60% indicating that their founding law contains a provision obligating the government to provide sufficient funding.[264]

6. Political Support (Structural Indicator 6)

Lastly, a crucial structural indicator to evaluate the feasibility of goal-attainment relates to the amount of political support for TB-NHRI engagement. I have already outlined the willingness of relevant stakeholders to further strengthen and harmonize TB-NHRI cooperation.[265] This section serves to highlight the support of the mandate-providers towards such inter-institutional engagement, a lack of which could seriously undermine any attempt at an effective cooperation between TBs and NHRIs. In this respect, I consider the latest relevant Human Rights Council

[259] GANHRI, SCA General Observation 1.10.
[260] GANHRI, SCA General Observation 1.3.
[261] GANHRI, SCA General Observation 1.10.
[262] Ibid., p. 19.
[263] OHCHR, Survey on National Human Rights Institutions, Report on the findings and recommendations of a questionnaire addressed to NHRIs worldwide, July 2009, p. 17.
[264] Ibid.
[265] See Chapter 1.

and General Assembly resolutions as evidence of political support. Due to their significance for a study on TB-NHRI engagement, I quote relevant paragraphs from these resolutions in full below.

In its Resolution on National Human Rights Institutions,[266] the Human Rights Council welcomes efforts to strengthen UN system-wide coordination in support of national human rights institutions and their networks and recognizes the potential for further cooperation in this regard between UN mechanisms and processes and with national human rights institutions.[267] The Resolution specifically recognizes "the valuable participation and contribution of national human rights institutions and their networks" and encourages further efforts in this regard.[268] The Resolution makes a series of specific recommendations that arguably demonstrate the commitment of Human Rights Council membership to further support NHRI engagement with UN human rights mechanisms, and the TB system more specifically. By recognizing the contributions that NHRIs have made thus far to the promotion and protection of human rights, the Human Rights Council encourages NHRIs "to continue to participate in and contribute to the work of […] the treaty bodies" and includes a number of more practical suggestions on how such contribution may take place.[269] Finally, the Resolution also encourages the UN mechanisms and processes "to strengthen the independent participation of national human rights institutions compliant with the Paris Principles, in accordance with their respective mandates".[270]

Political support for TB-NHRI engagement extends beyond Human Rights Council member states. In fact, the UNGA has also expressed its recognition for strengthened cooperation in its latest Resolution on National institutions for the promotion and protection of human rights.[271] In rather unequivocal terms, the UNGA welcomes

> the continued contribution of national human rights institutions to the work of the United Nations human rights treaty bodies, as well as the efforts of the human rights treaty bodies, within their respective mandates and in accordance with the treaties

[266] Human Rights Council, Resolution 39/17 on National Human Rights Institutions, A/HRC/RES/39/17 (8 October 2018).
[267] Ibid 2.
[268] Ibid.
[269] Ibid. paras. 5, 7, and 8.
[270] Ibid.
[271] GA Res. 74/156, (Third Committee) National Institutions for the Promotion and Protection of Human Rights, A/RES/74/156 (23 January 2020).

> establishing these mechanisms, to promote the effective and enhanced participation by national human rights institutions compliant with the Paris Principles at all relevant stages of their work, and noting with appreciation the ongoing efforts of the United Nations human rights treaty bodies, including by the continued consideration of a common treaty body approach to the engagement of the United Nations human rights treaty bodies with national human rights institutions at all relevant stages of their work.[272]

Accordingly, the UNGA has invited the TBs "to provide for ways to ensure the effective and enhanced participation by national human rights institutions compliant with the Paris Principles at all relevant stages of their work.[273]

Both HRC Res. 39/17 and GA Res. 74/156 are proof of political commitment to strong and effective cooperation between TBs and NHRIs, as obvious partners in furthering the state-given mandates of UN human rights conventions. Without such evidence of political support, any effort to streamline NHRI participation throughout the State Reporting procedure is unlikely to be possible. Ongoing reform processes will tell whether these initiatives will be mere paper-pushing exercises or actually prompt a strengthening of the TB framework for NHRI participation. What is important for the current analysis, however, is that political support seems to be a strong indicator in the assessment of whether the TB framework for NHRI engagement is adequately set up for goal-attainment.

Now, having outlined and assessed the five structural indicators of the institutional framework for TB – NHRI engagement, this chapter turns to the analysis of its procedural indicators: *accessibility* and *usage rate and periodicity*.

7. The State Reporting Procedure and NHRI Accessibility (Procedural Indicator 1)

Opportunities for NHRI participation in the State Reporting procedure are generally available throughout the TB system. As connectors between systems of international and national human rights protection, NHRIs are increasingly recognised by the international community as important partners in monitoring the implementation of UN human rights treaties. GANHRI's

[272] Ibid, 4.
[273] Ibid, para. 8.

accreditation system guarantees NHRIs' independence, accountability, and impartiality, which are essential if the TB system is to rely on NHRI. Most importantly, TBs have welcomed and encouraged NHRI participation and contributions across TB work, both individually and collectively. Most notably, the 29th Meeting of Chairpersons discussed "a common approach by treaty bodies to engagement with NHRIs," but the only endorsements to this effect related to initiatives for "stronger" cooperation.[274] I address the extent of this missed opportunity in the following sections, which analyze the diverse ways in which the different Committees have formalized opportunities for NHRI engagement as well as the latest figures on its usage rate and periodicity.

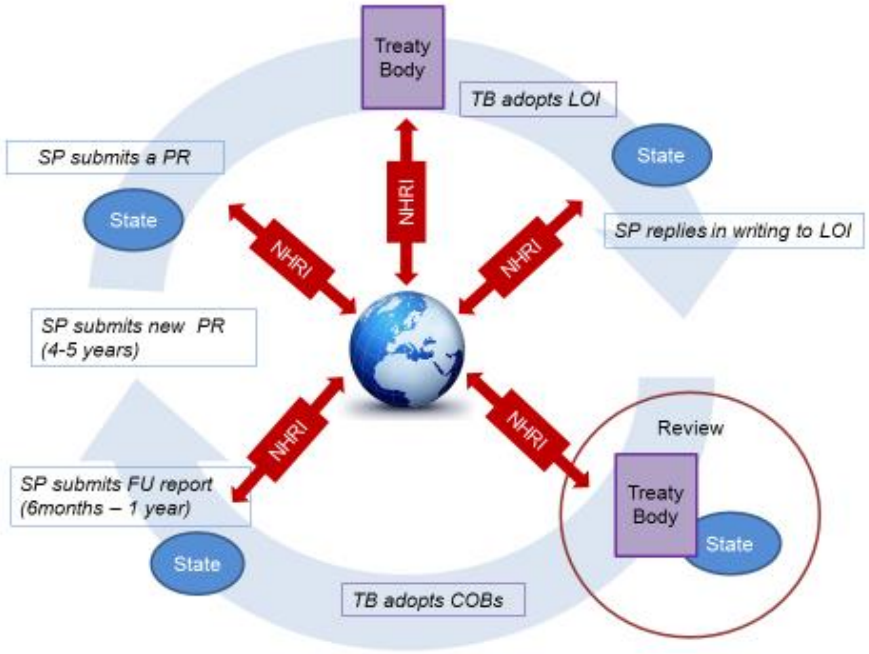
When a country ratifies a UN human rights treaty, it assumes a legal obligation to implement the rights recognized in that treaty and to submit initial or periodic reports to the relevant TB on how the rights are being implemented. In addition, TBs may also receive information on a country's human rights situation from other sources, including NHRIs. Through their observations and analysis, NHRIs have a fundamental role in assessing how states parties implement ratified UN human rights treaties. NHRIs can represent an important link between national concerns and international mechanisms in providing TBs with the required information during the examination of states parties' reports. They may be also important partners when it comes to the implementation of the Concluding Observations, whether through advocacy with the authorities, or under their own monitoring activities.

The State Reporting procedure functions in a cyclical fashion, hence also being referred to as the reporting cycle. We can distinguish three distinct phases of the State Reporting procedure. Before the review of the State Report, the TB adopts a List of Issues or List of Issues Prior to Reporting, which aims to identify the most crucial issues relating to the implementation of the convention. This is followed by the review of the State Report, through a constructive dialogue between the state party and the committee, ultimately leading to the adoption of Concluding Observations. Lastly, several TBs identify follow-up recommendations that require priority attention by the state party. Engagement opportunities at each stage will be set out in further detail below. In light of the already mentioned overburdening of the TB system, there are now two reporting procedures available to state parties for submitting their reports, namely the Standard Treaty Reporting Procedure and the Simplified Reporting Procedure (SRP). The

[274] OHCHR, 'Common approach to engagement with national human rights institutions,' Note by the Secretariat (2017), UN Doc HRI/MC/2017/, para. 45.

following two graphs represent the various stages of both procedures, with NHRI "entry points" highlighted in red therein.

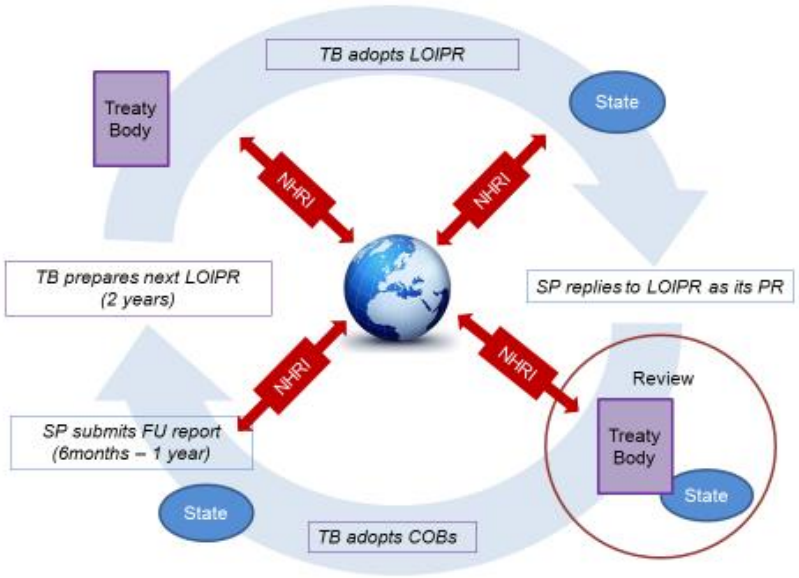
Figure 5.5. Standard Treaty Reporting Procedure and NHRIs



Unlike the Standard Treaty Reporting Procedure, the SRP is optional and entails responding to specific questions sent in advance to the state party by the TB in question.[275] It follows that the configuration of the reporting cycle under the SRP differs from the standard procedure, in that the state party does not submit a report as required first step. Instead, the state responds to a LoIPR issued by the TB, the reply to which constitutes the report of the state party. As such, the SRP effectively eliminates one stage from the standard reporting procedure.

[275] Treaty body Chairpersons Position Paper on the future of the treaty body system, 31st meeting of Chairpersons (24 - 28 June 2019, New York): "All treaty bodies agree to offer the SRP to all States parties for periodic reports and may do so for initial Reports. All treaty bodies offering the SPR for initial reports will develop a standard list of issues prior to reporting (LOIPR)."

Figure 5.6. Simplified Reporting Procedure and NHRIs



The various TBs, individually and collectively through their Annual Meeting of Treaty Body Chairpersons, have welcomed and further encouraged the participation and contributions of NHRIs across the spectrum. During the 28th annual meeting, at the invitation of its chairperson, GANHRI submitted a Background paper which sets out its views about strengthening NHRI participation in TB processes.[276] Following their "constructive engagement" with the GANHRI representative during the 29th meeting, the chairs discussed a common TB approach to engagement with NHRIs. After closely reviewing the note by the Secretariat on this topic[277] the Chairs recognized "the particular value of national human rights institutions […] in the reporting process" and encouraged "written and oral contributions of national human rights institutions […] at all stages of the State reporting process".[278] The Chairs placed particular focus on strengthening NHRI cooperation in relation to follow-up to recommendations, including specific suggestions on the role NHRIs should play vis-à-vis other domestic stakeholders involved in the reporting cycle.[279]

[276] GANHRI, *Background Paper – National Human Rights Institutions and United Nations Treaty Bodies* (May 2016), available at <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCHAIRPERSONS%2fNGO%2f28%2f24737&Lang=en.

[277] OHCHR, Note by the Secretariat on a Common approach to engagement with national human rights institutions, HRI/MC/2017/3 (9 June 2017).

[278] Report of the Chairs of the human rights treaty bodies on their 29th meeting, A/72/177 (20 July 2017), section VI.F

[279] Ibid.

It remains to be seen whether these authoritative statements of purpose will actually be implemented in practice across the TB spectrum. One aim of this thesis is to shadow this call for harmonization, and assess the strengths and weaknesses of the current state of affairs. Currently, all TBs afford NHRIs engagement opportunities in their work, albeit with different statuses and to varying degrees. Numerous rules of procedure, working methods, and practices relating to NHRI engagement with TBs have developed over the years. In the remainder of this section, I divide the possibilities for NHRI access among the highlighted three stages of the State Reporting procedure.

7.1. NHRI Accessibility during Stage 1 – Before the Review of the State Report: Adoption of List of Issues (LOIs) or List of Issues Prior to Reporting (LoIPR)

In 2006, the TBs adopted harmonized reporting guidelines on the content of state parties' reports,[280] later supported and further encouraged by GA Res. 68/268.[281] Accordingly, and irrespective of the reporting procedure under which such a report is submitted (Standard or SRP), the state party report comprises two distinct but complementary documents: the Common Core Document[282] and the Treaty-Specific Report. Periodic treaty-specific reports should in particular include recent developments affecting the "full realization of the rights recognized in the treaty, as well as information on measures taken and progress achieved to follow-up and implement the latest COBs issued by the specific Treaty Body."[283] Periodic treaty-specific reports submitted under the SPR should correspond to the LOiPR sent beforehand to state parties.

It is during the preparation and submission of the state report that NHRIs find their first possibility of engagement, as states parties are invited to consider ways of circulating the draft to stakeholders outside state bodies, preferably by holding public consultations and/or subject-specific meetings with relevant stakeholders, including NHRIs.[284] In this way the preparation process increases its levels of transparency and participation, while carefully safeguarding the

[280] OHCHR, The Harmonized Guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific documents (HRI/MC/2006/3) are available at: https://goo.gl/F0Lmhi
[281] GA Resolution 68/268 on strengthening and enhancing the effective functioning of the human rights Treaty Body system, adopted in April 2014 (A/RES/68/268).
[282] The *Common Core Document* provides information of a general factual nature relating to the implementation of all treaties to which the reporting state is a party and which may be of relevance to all or several TBs.
[283] OHCHR (n 280) 37.
[284] GANHRI (n 276) 18.

notion that the preparation of the state report is a state responsibility. In fact, NHRIs can and should "contribute" to the state report "with due respect for their independence."[285] The Paris Principles see this as a core responsibility of NHRIs. The requirement of respecting NHRI independence implies that "the NHRI should contribute in an advisory capacity, without taking the State's responsibility for determining the content of the report and without detracting from the NHRI's ability to present its own information to the particular TB."[286]

In addition, NHRIs are encouraged by the TBs to contribute their own information, analysis, and views, consistent with their responsibility under the Paris Principles "[t]o cooperate with the United Nations and any other organization in the United Nations system."[287] As official and authoritative institutions, NHRIs should submit to the TBs "credible, independent and evidence-based information about the local application of international human rights norms and standards. In doing so, they provide the TBs with reliable indication about where progress has been made and where implementation challenges remain."[288] As such, an NHRI can contribute to the development of LOIs/LoIPR, either through submitting a parallel report or a separate submission specific to inform the committee toward the issuance of LOIs/LoIPR.

NHRIs may also submit their reports after the adoption of the LOI or LoIPR. In such cases, the information sent to the committee should ideally focus on the issues addressed therein by providing replies in standalone NHRI parallel reports for the review. However, within parallel reports NHRIs are also welcome to submit concerns not raised at this stage, with a view to having them addressed appropriately during the review of the State Report.

Not all TBs have issued guidance on how NHRIs can interact during this stage of the reporting cycle. CERD makes no mention of NHRI engagement during its pre-sessional stage in any of its rules of procedure nor in its working methods. CESCR[289], CAT[290], CRC[291] and CMW[292] provide only cursory indications to NHRIs' possible role during their pre-sessional working

[285] Paris Principles, para. 3(d).
[286] APF (n 131), 82.
[287] Paris Principles, para. 3(e).
[288] GANHRI (n 276) 6.
[289] CESCR, 'Information Note for civil society" (September 2019).
[290] CAT, Information for Civil Society Organisations and National Human Rights Institutions available at http://www.ohchr.org/EN/HRBodies/CAT/Pages/NGOsNHRIs.aspx.
[291] CRC, General comment No. 2 (2002): 'The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child,' (15 November 2002), UN Doc CRC/GC/2002/2, para. 3.
[292] CMW, 'Information Note for Civil Society Organizations (CSOs) and National Human Rights Institutions (NHRIs)' (September 2019).

groups. Whilst CESCR, CAT and CMW only allow for written NHRI submissions, the CRC grants the possibility for NHRIs to interact "through dialogue" with the Committee.

The HRCTee, CEDAW, CRPD and the CED offer more detailed guidance.

The HRCtee, in its *Paper on the relationship with national human rights institutions*[293], dedicates one specific section on NHRI "Contributions to the development of the list of issues"[294]. In the words of the Committee, "Receiving information from national human rights institutions at an early stage of the reporting process is critical for the Committee's work."[295] At this stage, the Committee welcomes both written submissions as well as "the opportunity to meet with the NHRIs concerned prior to the adoption of the list of issues". And to facilitate a timely submission of NHRI reports, the Paper also assures "advance notice of reporting schedules and advice on opportunities to contribute thereto".[296]

The CEDAW also places great emphasis on the pre-sessional stage through its recent *Paper on the cooperation between the Committee and National Human Rights Institutions*.[297] In fact, one section is specifically dedicated to Contributions to the preparation of the list of issues and the list of issues prior to reporting in which the CEDAW states that "Receiving information from NHRIs at an early stage of the reporting process is critical for the Committee's work" and "encourages NHRIs to submit early written contributions to the development of the lists of issues including lists of issues prior to reporting, given the particularities of the simplified reporting procedure".[298] Moreover, the Committee's pre-sessional working group welcomes the opportunity to meet with the concerned NHRI prior to the adoption of the list of issues, either in person or remotely via videoconference.[299]

In its Rules of Procedure, the CRPD has issued specific Guidelines on independent monitoring frameworks and their participation in the work of the Committee.[300] Within these Guidelines

[293] UN HRCtee, 'Paper on the relationship of the Human Rights Committee with national human rights institutions, adopted by the Committee at its 106th session' (13 November 2012), UN Document CCPR/C/106/3.
[294] Ibid. para 12-13
[295] Ibid. para. 12.
[296] Ibid.
[297] CEDAW, "Paper on the cooperation between the Committee on the Elimination of Discrimination against Women and National Human Rights Institutions" (adopted by the Committee at its seventy-fourth session, 21 October-8 November 2019).
[298] Ibid. para. 24
[299] Ibid.
[300] CRPD, Rules of Procedure, CRPD/C/1/Rev.1 (10 October 2016), Annex - *Guidelines on independent monitoring frameworks and their participation in the work of the Committee on the Rights of Persons with Disabilities*, para 23(f)-(g).

the Committee explains the role that NHRIs may have in the preparation of lists of issues, "by identifying and analysing the main implementation gaps and proposing concrete questions and issues that the Committee could take up with a view to improving the quality of the dialogue with the State party". Contributions may be done through written submissions and by participaing in live breifings. NHRIs are also explicelty invited to submit independent written contributions commenting on the State party's replies to the list of issues, thus complementing the information provided to the Committee.

Finally, also CED provides detail on engagement during its pre-sessional stage in its Paper on the relationship of the Committee with NHRIs.[301] Whilst stating that receiving information from national human rights institutions at an early stage of the reporting process is "critical for the Committee's work", the Committee "invites NHRIs to submit written contributions to the preparation of the list of issues". And to facilitate a timely submission of NHRI reports, the Paper also assures "advance notice of reporting schedules and advice on opportunities to contribute thereto".

7.2 NHRI Accessibility during Stage 2 – Review of the State Report: Adoption of Concluding Observations (CoBs)

The face-to-face review of a state party's report by a TB is conducted through a six-hour constructive dialogue between members of the TB and a state party delegation. In addition to the written reports received, "the dialogue helps Treaty Bodies understand and review the human rights situation in the State party as it pertains to the treaty concerned. It serves as a basis for the COBs of the TBs. The constructive dialogue provides an opportunity for State parties to receive expert advice on compliance with their international human rights commitments."[302]

During this crucial stage of the State Reporting procedure, TBs arrange oral briefing sessions for NHRIs prior to the review, in differing formats.[303] Such briefings are usually of an informal nature and do not constitute a formal meeting of the particular TB, but they represent an invaluable opportunity for NHRIs to influence the review proceedings. According to the Asia Pacific Forum, NHRI briefings represent "important occasions in which TB members can

[301] CED, Paper on the relationship of the Committee on Enforced Disappearances with national human rights institutions, CED/C/6 (28 October 2014) para.s 16-17.

[302] OHCHR, *Reporting to the United Nations Human Rights Treaty Bodies Training Guide* (2017) 52.

[303] For TB-specific analysis of NHRI-specific briefing options see Table 5.4.

receive further information about the State and during which they can question NHRI representatives about the contents of the various reports and submissions that have been provided to the members."[304] In addition, "the presence of an NHRI representative can promote a frank and honest exchange between the TB members and the State delegation. The State representatives will be aware that their answers and comments are being listened to and reported back to the NHRI."[305] Some TBs now permit oral presentations during the formal session of review,[306] although informal opportunities of engagement often arise throughout the TB system (during the interval between the two periods of dialogue, providing additional information as required).

Also relevant for Stage 2, TBs frequently include in their COBs concerns related to the NHRI in the state under examination: on its establishment in none yet exists; on necessary action to be taken to fully comply with the Paris Principles; or indeed on NHRI strengthening, inviting the government to be more supportive and give greater weight to its recommendations. COBs thus may in turn be of assistance and support to the NHRI and provide "an international indication of human rights priorities for the attention of the State and of the NHRI itself."[307]

Slightly more detailed accounts of requirements for NHRIs when engaging with Stage 2 of the State Reporting procedure are to be found in the Committee's Working Methods and session-specific Information Notes on the Participation by NHRIs. The latter, issued by the OHCHR Secretariat, encourage concerned NHRIs to provide country-specific information on issues relevant to the implementation of the conventions by the states parties scheduled for consideration at each specific session (both for the committees' Pre-Sessional Working Group and for the session itself**)**. This can be done orally and/or in writing, with written submissions highlighting priority concerns and suggesting country-specific recommendations to facilitate the committee's work.

Substantial discrepancies appear when comparing the different TBs' Working Methods and Information Notes. Firstly, even though all Committees invite NHRIs "to provide reports

[304] APF (n 131) 85.
[305] Ibid.
[306] The procedure for the CESCR Committee seems to be ad hoc rather than formalized. The procedure for the CERD Committee seems to be restricted to "A-status" NHRIs. The procedure for the CMW Committee adopted at its 36th meeting seems to be to allow any NHRI as long as the reporting state does not object. The procedure for the CEDAW Committee has just been adopted at its 74th session (November 2019).
[307] APF (n 131) 86.

containing country-specific information on States parties whose reports are before them"[308], word limits and formats differ between them, ranging from 10'000 to 3'300 words to no indication at all.[309]

Secondly, it is only the CERD, CEDAW and the CRPD which grant NHRIs the possibility to brief the Committee in plenary, during the interactive dialogue with the State party concerned.[310] As of 2020, no other Committee allows NHRIs to address the Committee during State examinations. The HRCtee is explicit on this specific point as it welcomes "NHRIs representatives to attend public meetings of the HRCtee as observers, but [they] will not be given the opportunity to address the HRCtee during its meetings with the State delegation."[311] CAT is less specific, leaving it to the Committee's discretion "how such information, documentation and written statements are made available to the members of the Committee, including by devoting meeting time at its sessions for such information to be presented orally."[312] What is clear, however, is that interactive discussions and sharing of updated additional information between most Committees and NHRIs take place during separate formal private/public sessions with interpretation or through informal briefings. Even here, however, there is no homogeneity among Committees. NHRIs are allowed to brief during separate, formal public sessions of the CEDAW, CESCR and CMW Committees. Formal private sessions are however the practice of the CAT, CED and HRCTee. Whether private or public, these formal sessions are usually set either immediately following the opening of the session or on each Monday during the session, dealing with the State parties under examination that week. CERD and the CRC Committees do not allow NHRIs to brief them during sessions of a formal nature. Lastly, informal/lunchtime briefings for NHRIs are possible under all Committees' Working Methods, aside from the CRC and CAT Committees.

Table 5.4 outlines the substantial discrepancies among the various possibilities for NHRI to engage during Stage 2 of the State Reporting procedure. It is due to this confusing, ad-hoc

[308] UN HRCtee, 'The Human Rights Committee Working Methods: VIII. Participation of non-governmental organizations and national human rights institutions in the activities of the Committees'.
[309] E.g. HRCtee and CESCR, Information Notes (10'000), CEDAW, Information Note (3'300), CERD, Information Note (no indication).
[310] CERD Information Note, CEDAW Information Note, CRPD Information Note.
[311] UN Treaty Body Database, Human Rights Committee, "NHRI Information Note", 124th session, (8 October – 2 November 2018) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fINF%2f124%2f27220&Lang=en> accessed 20 December 2019.
[312] CAT, 'Rules of procedure' (1 September 2014), UN Document CAT/C/3Rev.6: Rule 63 on Submission of information, documentation and written statements.

approach, that in 2017 the Chairpersons discussed a common approach by treaty bodies to engagement with NHRIs[313], something which has yet to be implemented.

Table 5.7. Instructions in Session-Specific Information Notes on Participation by NHRIs

TB	Written submissions	Plenary briefing (in session)	Plenary briefing (separate private/public meeting)	Informal briefing (informal/lunchtime meeting)
CERD	No limit	✓		✓
CESCR	10'000 words		✓ (public)	✓
HRCTee	10'000 words		✓ (private)	✓
CEDAW	3'300 words	✓	✓ (public)	✓
CAT	No limit		✓ (private)	
CRC	No limit			
CMW	"10 pages"		✓ (public)	✓
CRPD	No limit	✓		✓
CED	No limit		✓ (private)	✓

7.3. NHRI Accessibility during Stage 3 - Implementation and Follow-up

One ultimate goal of the TB framework for NHRI engagement is implementation monitoring, which concludes the TB reporting cycle. It is a state responsibility, yet its facilitation may also be provided by other domestic stakeholders. In this sense, NHRIs may both promote and monitor the implementation of COBs. NHRI-led promotion may include disparate activities, including informing the community and relevant key decision-makers about the recommendations, building community support for implementation, and advocating with the government and parliament for implementation. NHRI-led monitoring is provided across

[313] OHCHR, 'Common approach to engagement with national human rights institutions,' Note by the Secretariat (2017), UN Doc HRI/MC/2017/, para. 45.

NHRIs' mandated programs of domestic work and by providing information back to the TB on the results of such monitoring. In this sense, NHRIs also work to increase awareness of and involvement by national-level institutions and actors of the work of the treaty bodies, thereby helping to make the processes more relevant to the national and grassroots level, including to rights-holders themselves.

Once COBs have been issued, the state party is in fact required to provide a formal response to the concerns and recommendations put forward by the TB. Based on their monitoring and reporting mandates, NHRIs monitor the implementation of international human rights norms and standards and their states' commitments, whether through their annual reports, which are public and regularly submitted to government and parliament, or through special thematic reports to provide information about progress made in the implementation of TB recommendations. Evidence of TB instruments that cover NHRIs' role in implementation monitoring are widespread, although varying notably in the extent of detail provided.

CRC General Comment No.2 provides the most detailed list of the types of activities which NHRIs should carry out in relation to the implementation of children's rights.[314] In addition, the CERD Committee included NHRI-specific provisions within its 2006 *Guidelines to follow-up on concluding observations and recommendations*.[315] Intended to help states parties implement and follow up on the Committee's concluding observations and recommendations, these guidelines "invite the State party to involve NHRIs […] in the process of implementation of the Convention and of its concluding observations. This can be done by convening roundtables and workshops on a regular basis with the aim of assessing the progress in the implementation of the concluding observations and recommendations.[316] The HRCtee has also widely discussed its relationship with NHRIs to contributions during follow-up to concluding observations.[317] NHRIs are invited to support implementation in a number of ways, including "broadly disseminating the concluding observations to all stakeholders; organizing follow-up consultations involving Government and non-governmental organizations, as well as

[314] CRC, General Comment No. 2 (2002): 'The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child,' (15 November 2002), UN Doc CRC/GC/2002/2 para.s 19 (a) – (t).
[315] CERD, 'Guidelines to follow-up on concluding observations and Recommendations' (2 March 2006), UN Doc CERD/C/68/Misc.5/Rev.1.
[316] Ibid.
[317] UN HRCtee, 'Paper on the relationship of the Human Rights Committee with national human rights institutions, adopted by the Committee at its 106th session' (13 November 2012), UN Document CCPR/C/106/3.

parliament and other bodies; and advising their respective States to mainstream concluding observations throughout national planning and legislative review processes."[318] Further, the Committee encourages NHRIs "to use their annual reports to monitor implementation of the Committee's concluding observations."[319]

In addition, a number of TBs have introduced a specific Follow-up procedure.[320] To enhance the implementation of the Committees' recommendations by the State parties after the review, these TBs identify between one and three recommendations from the Concluding Observations which require immediate attention and implementation, and request state parties to submit, within one or two years, an interim follow-up report on the measures taken to implement those priority recommendations. NHRIs are invited, to submit their own reports under the follow-up procedure, and in doing so may suggest whether or not the State party has implemented the highlighted recommendations.

Different Committees have developed innovative grading methodologies to monitor the implementation of Follow-up recommendations.[321] For instance, the HRCtee has adopted a detailed grading system, ranging from A (reply largely satisfactory) to E (the measures taken are contrary to the recommendations of the committee), which provides a clear overview of its assessment. NHRIs may provide the TB with information on which issues "require immediate attention" (pre-Follow Up report) and on the implementation measures used by the state in relation to such issues (post Follow Up report).[322] NHRI involvement in the implementation and follow-up phase may benefit from such innovative grading systems, and may build their own domestic activities on the precise findings of (non)compliance outlined by TBs therein. However, NHRIs that report to the different Committees under the follow-up procedure are required to adjust their reporting activity to the TB-specific nature of grading systems, as each Committee introduced distinct sets of assessment criteria.

[318] Ibid. para. 17.
[319] Ibid. para. 18.
[320] The Committees which have introduced a Follow-up procedure are the HRCttee, CESCR, CERD, CAT, CEDAW, CED and CRPD.
[321] For more information on the Follow-up procedure, see https://www.ohchr.org/EN/HRBodies/Pages/FollowUpProcedure.aspx#:~:text=Seven%20treaty%20bodies%20have%20follow,a%20period%20of%2024%20months.
[322] HRCtee, Note by the Human Rights Committee on the procedure for follow-up to concluding observations, Guidelines on the submission of follow-up reports by national human rights institutions, non-governmental organizations and other organizations in, CCPR/C/108/2 (21 October 2013), para.s 11-12.

From the above analysis, it seems clear that NHRIs may play a role at *all stages* of the State Reporting cycle, albeit with significant variations among TBs. I have already discussed the processes leading up to the Treaty Body Review 2020 and the relevance these may have for NHRI cooperation.[323] This section has analyzed the formal infrastructure available for NHRI engagement with the State Reporting procedure, and in doing so it has identified the diversity and incongruence of the relevant committees' current practices across the three stages of the reporting cycle. The lack of clarity and homogeneity risks discouraging the potential flow of useful input from NHRIs toward implementation efforts. Taken together, NHRI engagement with the State Reporting procedure seems to suffer from its own success. The TB system has expanded not just in terms of existing Committees but also in the nature and detail of available instruments issued on its cooperation with NHRIs. Progressively stronger support for NHRI engagement becomes unmistakable and the international community has increasingly recognized NHRIs' integral contribution to ensuring respect for, and effective implementation of, international human rights standards at the national level. Yet if recognition of the added value brought about by strong cooperation between TBs and NHRIs is growing, the institutional framework that should facilitate such cooperation has not developed accordingly. With the proliferation of possible engagement opportunities, the need for procedural coherence becomes ever more urgent. As the 2010 *Marrakech Statement on Strengthening the Relationship between NHRIs and the Human Rights Treaty Bodies System* points out, "the current wide variety and diversity of existing practices among treaty bodies in their interaction with NHRIs is challenging and at times reduces the capacity of NHRIs to significantly contribute to the work of the treaty body system."[324]

8. Periodicity and Usage Rates (Procedural Indicator 2)

The second and last procedural indicator relates to the periodicity and usage rates of the institutional framework for TB – NHRI engagement. Taken as a whole, the procedure begins with the preparation and submission of the state party's report, which constitutes the main element within the continuous review of a state party's progress in implementing the rights

[323] See Chapter 1.
[324] Marrakech Statement on Strengthening the Relationship between NHRIs and the Human Rights Treaty Bodies System (9–10 June 2010), available at <www2.ohchr.org/english/bodies/HRTD/docs/MarrakeshStatement_en.pdf>.

enshrined in the specific treaty. States parties are usually required to submit their initial reports within one or two years after the convention comes into force. Thereafter, the state must submit periodic reports at intervals specified by the distinct committees, as shown in the table below, with specific dates provided both within each set of Concluding Observations as well as each committee's Annual Report. Despite set periodicity, the current system is affected by an accumulation of overdue reports due to either late or non-submission by a state party.[325] To overcome this situation, as well as to encourage reporting by state parties and to assist them in clearing their reporting backlog, TBs allow the combination and submission of overdue reports in a single document (also known as "combined reports"). Table 5.5 provides a summary of the current reporting periodicity under the different treaties.

Table 5.8. Reporting Periodicity under the Treaties[326]

Treaty	Initial Reports (within)	Periodicity of reports
CERD	1 year	2 years but de facto periodicity 4 years
ICESCR	2 year	5 years
ICCPR	1 year	3 – 6 years
CEDAW	1 year	4 years
CAT	1 year	4 years
CRC	2 years	5 years
CMW	1 year	5 years
CRPD	2 years	4 years
ICED	2 years	-

Notwithstanding the evident lack of harmonization in terms of accessibility, the usage rates of NHRI engagement with the TB State Reporting procedure appears to follow a regular pattern. As can be seen from Table 5.6, between September 2018 and July 2019, the TB system received a total of 59 NHRI submissions, with 38 NHRIs actually briefing committees.[327]

[325] See also Compliance by States parties with international human rights Treaty Body reporting obligations, Note by the Secretariat, 1 March 2017, HRI/MS/2017/2.
[326] OHCHR, Report of the Secretary General, National institutions for the promotion and protection of human rights, A/74/226 of 25 July 2019, in Annex III.
[327] Ibid.

Table 5.9. Engagement of NHRIs in the work of TBs (September 2018–July 2019)[328]

Committees	*Number of States parties reviewed*	*Number of States parties with a national human rights institution*	*Submission of information*	*Briefing*
Committee against Torture	12	11	7	7
Committee on the Elimination of Racial Discrimination	–	–	–	–
Committee on Economic, Social and Cultural Rights	11	9	5	4
Human Rights Committee	–	–	–	–
Committee on the Elimination of Discrimination against Women	33	23	9	4
Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families	6	5	1	0
Committee on the Rights of the Child	38	21	13	6
Committee on the Rights of Persons with Disabilities	41	27	22	15
Committee on Enforced Disappearances	6	3	2	2
Total	**147**	**99**	**59**	**38**

By comparing these numbers to the amount of states parties reviewed with a NHRI, the results show that 60% of NHRIs have engaged with the TB State reporting procedure, whether by submitting parallel reports or actually briefing the committees. Compared with the previous reporting period, there was an increase of 3.5 per cent in NHRI submissions of information to TBs.[329] Although reflecting the usage rates of very recent reporting cycles, the above numbers show the relative regularity of NHRI engagement with the different TBs.

It is noteworthy at this point to highlight an important development recently introduced by the HRCtee, with a view of giving further effect to GA res. 68/268. In its 125th Session (March 2019), the Committee decided to move from 2020 to a predictable review cycle in order to improve predictability in reporting and to ensure regular reporting by all States parties. Such predictable review cycle would be based on a 5-year review process, and a 3-year interval after one review process is concluded and the next review process commences (resulting in full 8-

[328] Ibid.
[329] Ibid.

year cycles). According to the Committee, "This would increase the opportunity for the treaty bodies to coordinate their lists of issues prior to reporting and the reviews, to ensure a rational application of the reporting burdens of States, and facilitating more efficient 'division of labor' across the treaty body system as a whole".[330] Creative measures such as this shine a hopeful light with regards to a more harmonized and predictable engagement with domestic stakeholders.

9. Conclusion

In this chapter, I have analysed a set of structural and procedural indicators specific to the current institutional framework for TB - NHRI engagement. Through these indicators, the analysis has unpacked the essential elements that characterize TB-NHRI cooperation and which will be used as proxies to evaluate *whether the institutional framework for TB - NHRI engagement is adequately set up for goal-attainment.*

In order to address concerns over the over formalistic nature of the goal-based approach, it is however important to include in the analysis an additional set of indicators, more context-specific and closer to the actual day-to-day interaction between the TBs and NHRIs. For this reason the next chapter provides an evaluation of the amount of NHRI recommendations that have been included in TB recommendations during a select number of country reviews. By comparing recommendations proposed by NHRI parallel reports and recommendations issued by the different TBs, this exercise will display the extent of (or lack of) consistency between the two sets of recommendations. Only then will the adapted GBA to effectiveness analysis be complete, having provided the necessary elements to tackle these key questions: do the tangible and intangible resources or assets available to the TB framework for NHRI engagement actually enable it to meet its goals? Do the organizational processes facilitate the goals of the institutional framework? Are the outputs consistent with the framework's goals?

[330] HRCtee, Summary of Position Paper on 2020 as Updated in the 126th Session (2019), p. 2. Available at https://www.ohchr.org/EN/HRBodies/CCPR/Pages/PredictableReviewCycle.aspx

[i] CAT, Rules of Procedure, CAT/C/3/Rev.6 (1 September 2014), Rule 63 on Submission of information, documentation and written statements.
[ii] CAT, Working methods, *VI. Documentation supplied and other support provided by the Secretariat* and *VIII. Participation of NGOs and NHRIs in the activities of the Committee*.
[iii] CAT, Guidelines on Initial Reports under Art 19, CAT/C/4/Rev.3 (18 July 2005), para. 4 and para. 5; CAT, Guidelines for follow-up to concluding observations, CAT/C/55/3 (17 September 2015), para.s 14 – 17 and para. 32; CAT, Guidelines on the receipt and handling of allegations of reprisals against individuals and organizations cooperating with the Committee against Torture under articles 13, 19, 20 and 22, CAT/C/55/2 (4 September 2015), para. 8(d) and para. 20.
[iv] CAT, Guidelines for follow-up to concluding observations, CAT/C/55/3 (17 September 2015), *Follow-up submissions by national human rights institutions, non-governmental organizations and other stakeholders*, para.s 14 -16 and *Analysis of information on the status of implementation of the recommendations identified for follow-up*, para. 17 and *Committee web page on the follow-up procedure*, para. 32.
[v] CAT, Information for Civil Society Organisations and National Human Rights Institutions available at http://www.ohchr.org/EN/HRBodies/CAT/Pages/NGOsNHRIs.aspx.
[vi] CED, Rules of Procedure, CED/C/1 (22 June 2012), *XIV. Cooperation and participation*, Rule 44 on Cooperation with and participation of relevant organs, bodies, procedures, State institutions and non-governmental organizations, para. 2 and *XVII. Reports of States parties under article 29 of the Convention,* Rule 52 on Consideration of alternative reports for reports of States parties under article 29 of the Convention.
[vii] CED, Working Methods, *II. Guidelines for reporting by States Parties* – para. 6 and *VIII. Participation of Civil Society in the activities of the Committee* – para.s 34 -37.
[viii] CED, Paper on the relationship of the Committee on Enforced Disappearances with national human rights institutions, CED/C/6 (28 October 2014) para.s 11 – 23 and para.s 37-38.
[ix] CED, Paper on the relationship of the Committee on Enforced Disappearances with national human rights institutions, CED/C/6 (28 October 2014), *L. Contributions to follow-up to concluding observations*, para.s 20 - 22.
[x] CED, Information Note for national human rights institutions engagement, available at http://www.ohchr.org/EN/HRBodies/CED/Pages/NHRI.aspx.
[xi] CEDAW, Ways and means of expediting the work of the Committee on the Elimination of Discrimination against Women, Note by the Secretariat, CEDAW/C/2009/II/4
(2009), Annex III - Overview of the working methods of the Committee on the Elimination of Discrimination against Women in relation to the reporting process, *VIII. Participation of non-governmental organizations and national human rights institutions in the activities of the Committee*, para. 32.
[xii] CEDAW, Methodology of the follow-up procedure to concluding observations, CEDAW Annual Report 2013, A/68/38 (25 March 2013) Appendix III – Decision 54/IX, para.s 9-10 and Appendix *V, Guidelines on the submission of follow-up reports by non-governmental organizations, national human rights institutions and other organizations*,
[xiii] CEDAW, Paper on the cooperation between the Committee on the Elimination of Discrimination against Women and National Human Rights Institutions (adopted by the Committee at its seventy-fourth session, 21 October-8 November 2019).
[xiv] Ibid.
[xv] CEDAW, Information note on the Participation by National Human Rights Institutions, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fINF%2f66%2f25564&Lang=en.
[xvi] CERD, General recommendation XVII on the establishment of national institutions to facilitate the implementation of the Convention, para. 1(c) and para. 2.
[xvii] CERD, Rules of Procedure, Amendment to Rule 40 (List of speakers), Annual Report A/62/18, Annex IX (2007), para.s 1-2.
[xviii] CERD, Working Methods, *B. The Committee's relations with national human rights institutions and non-governmental organizations*.
[xix] CERD, Guidelines to follow-up on concluding observations and recommendations, CERD/C/68/Misc.5/Rev.1 (2 March 2006), *4. Cooperation with national human rights institutions and non-governmental organisations.*
[xx] *Idem.*
[xxi] CERD, Information Note from Secretariat for national human rights institutions, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fINF%2f92%2f25631&Lang=en.
[xxii] CESCR, General Comment no. 10, The role of national human rights institutions in the protection of economic, social and cultural rights (1998), para. 3(f).

[xxiii] CESCR, Guidance on the submission of information related to the follow-up by National Human Rights Institutions in Note on the procedure for follow-up to concluding observations revised at its 64th session (24 September – 12 October 2018).

[xxiv] CESCR, Information Note for civil society, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fINF%2f60%2f25618&Lang=en.

[xxv] CMW, Rules of Procedure, CMW/C/2 (8 February 2019), *X. Participation of Specialized Agencies and other United Nations Bodies, Inter-governmental Organizations and other concerned bodie*s, Rule 30 - Submission of information, documentation and written statements by other bodies.

[xxvi] CMW, Statement on cooperation with national human rights institutions (21 April 2016), para.s 1-8.

[xxvii] CMW, Information Note for Civil Society Organizations (CSOs) and National Human Rights Institutions (NHRIs), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCMW%2fINF%2f24%2f24035&Lang=en.

[xxviii] CRC, General Comment No. 2, The role of independent national human rights institutions in the promotion and protection of the rights of the child, CRC/GC/2002/2 (2002), para.s 20 – 22.

[xxix] CRPD, Art. 33 – National implementation and monitoring.

[xxx] CRPD, Rules of Procedure, CRPD/C/1/Rev.1 (10 October 2016), *VII. Public and private meetings*, Rule 30 – Participation in meetings; *XIII. Participation of specialized agencies and bodies of the United Nations and other competent bodies in the work of the Committee*, Rule 51 – National Human Rights Institutions and Annex - *Guidelines on independent monitoring frameworks and their participation in the work of the Committee on the Rights of Persons with Disabilities*, para 23.

[xxxi] *Idem.*

[xxxii] CRPD, Working Methods, CRPD/C/5/4 (2 September 2011), para 23 and para.s 38 -40.

[xxxiii] CRPD, Guidelines on periodic reporting to the Committee on the Rights of Persons with Disabilities, including under the simplified reporting procedures, CRPD/C/3 (2 September 2016), para. 35(c).

[xxxiv] CRPD, Informative note - stakeholder participation (NHRI section) available at http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx.

[xxxvxxxv] HRCtee Working Methods, *VIII. Participation of non-governmental organizations and national human rights institutions in the activities of the Committees.*

[xxxvi] HRCtee, Note by the Human Rights Committee on the procedure for follow-up to concluding observations, Guidelines on the submission of follow-up reports by national human rights institutions, non-governmental organizations and other organizations in, CCPR/C/108/2 (21 October 2013), para.s 11-12.

[xxxvii] HRCtee, Paper on the relationship of the Human Rights Committee with national human rights institutions, CCPR/C/106/3 (13 November 2012), para.s 9-20.

[xxxviii] HRCtee, Paper on the relationship of the Human Rights Committee with national human rights institutions, CCPR/C/106/3 (13 November 2012), *5. Contributions in follow-up to concluding observations*, para.s 16 -18.

[xxxix] HRCtee, NHRI Information Note, available at <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fINF%2f118%2f24651&Lang=en>.

Chapter 6. An Output-Based Analysis

So far, the overview of the structure and process of the institutional framework for TB - NHRI engagement provides a mixed picture for NHRI cooperation. Regardless of significant initiatives in favour of harmonization, no concrete step has yet been taken in this direction, with notable variations across the whole TB spectrum. What is clear is that, of all TB functions, NHRIs engage regularly with the State Reporting procedure. As outlined in the preceding chapters, the standard way for NHRIs to engage with the State Reporting procedure is by providing written information in the form of a report, sometimes called "alternative" or "parallel" report, at various stages of the reporting cycle. For the wider question of evaluating the effectiveness of TB-NHRI engagement within the State Reporting procedure, a sole focus on structural and procedural indicators risks discarding the day-to-day reality of actual inter-institutional cooperation.

As such, I complement the standard GBA method with one further set of indicators, focusing on the actual outputs of TB – NHRI engagement. More specifically, I consider useful to estimate the amount of TB recommendations that contain issues highlighted in NHRI parallel reports. To complete the picture, it is also important to consider the extent of recommendations found in NHRI parallel reports that are included within the official recommendations that TBs issue to State Parties. This chapter quantifies the actual engagement of a select number of NHRIs within the latest reporting cycle of a select number of TBs, carrying out a comparative content analysis of NHRI parallel reports and influence upon ensuing TB recommendations.

1. Findings on the amount of Treaty Body outputs influenced by NHRI submissions

The aim of this exercise is linked to the broader GBA evaluation, focused on *the likelihood that outcomes be generated as a result of the process employed by the institutional framework for TB - NHRI engagement, utilizing its available structural assets*. Using a *medium-N comparative content analysis*, the exercise consists of a document content analysis of both TB recommendations and NHRI parallel reports issued during the last reporting cycle of the following six TBs: the Committee on the Elimination of Racial Discrimination (CERD), the Human Rights Committee (HRCtee), the Committee on Economic, Social and Cultural Rights

(CESCR), the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee on the Rights of the Child (CRC), and the Committee on the Rights of Persons with Disabilities (CRPD). The ten countries in focus, are: Australia,[1] Canada,[2] Costa Rica,[3] Colombia,[4] Denmark,[5] Germany,[6] Indonesia,[7] Kenya[8], Morocco,[9] and South Africa.[10]

[1] CCPR, Sixth reporting cycle of Australia (2017); CEDAW, Eighth reporting cycle of Australia (2018); CERD, Combined eighteenth to twentieth reporting cycles of Australia (2017); CESCR, Fifth reporting cycle of Australia (2017); CRC, Combined fifth and sixth reporting cycles of Australia (2019); CRPD, Combined second and third reporting cycles of Australia (2019). For more information, see https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=AUS&Lang=EN.

[2] CCPR, Sixth reporting cycle of Canada (2015); CEDAW, Combined Eighth and Ninth reporting cycles of Canada (2016); CERD, Combined twenty-first to twenty-third reporting cycles of Canada (2017); CESCR, Sixth reporting cycle of Canada (2016); CRC, Combined third and fourth reporting cycles of Canada (2012); CRPD, Initial reporting cycle of Canada (2017). For more information, see https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=CAN&Lang=EN.

[3] CCPR, Sixth reporting cycle of Costa Rica (2016); CEDAW, Seventh reporting cycle (2017); CERD, Combined nineteenth to twenty-second reporting cycles of Costa Rica (2015); CECSR, Fifth reporting cycle of Costa Rica (2016); CRC, fourth reporting cycle of Costa Rica (2011); CRPD, Combined second and third reporting cycles of Costa Rica (2018). For more information, see https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=CRI&Lang=EN.

[4] CCPR, Seventh reporting cycle of Colombia (2016); CEDAW, Combined seventh and eighth reporting cycles of Colombia (2019); CERD, Combined fifteenth and seventeenth reporting cycles of Colombia (2015); CECSR, Sixth reporting cycle of Colombia (2017); CRC, Combined fourth and fifth reporting cycles of Colombia (2015); CRPD, Initial reporting cycle of Colombia (2016). For more information, see https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=COL&Lang=EN

[5] CCPR, Sixth reporting cycle of Denmark (2016); CEDAW, Eighth reporting cycle of Denmark (2015); CERD, Combined twentieth and twenty-first reporting cycle of Denmark (2015); CESCR, Sixth reporting cycle of Denmark (2019); CRC, Fifth reporting cycle of Denmark (2017); CRPD, Initial reporting cycle of Denmark (2014). For more information, see https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=DNK&Lang=EN.

[6] CCPR, Seventh reporting cycle of Germany (2018); CEDAW, Combined seventh and eighth reporting cycles of Germany (2017); CERD, Combined nineteenth to twenty-second reporting cycles of Germany (2015); CESCR, Sixth reporting cycle of Germany (2018); CRC; Combined third and fourth reporting cycles (2014); CRPD, initial reporting cycle of Germany 2015). For more information, see https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=DEU&Lang=EN.

[7] CCPR, Initial reporting cycle of Indonesia (2013); CEDAW, Combined sixth and seventh reporting cycles of Indonesia (2012); CERD, Combined initial to third reporting cycles of Indonesia (2007); CESCR, Initial reporting cycle of Indonesia (2014); CRC, Combined third and fourth reporting cycles of Indonesia (2014). For more information, see https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=IDN&Lang=EN.

[8] CCPR, Third reporting cycle of Kenya (2012); CEDAW, Eighth reporting cycle of Kenya (2017); CERD, Combined fifth to seventh reporting cycles of Kenya (2017); CESCR, Combined second to fifth reporting cycle of Kenya (2016); CRC, Combined third to fifth reporting cycles of Kenya (2016); CRPD, Initial reporting cycle of Kenya (2015). For more information, see https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=KEN&Lang=EN.

[9] CCPR, Sixth reporting cycle of Morocco (2016); CEDAW, Combined third and fourth reporting cycle (2008); CERD, Combined seventeenth and eighteenth reporting cycles of Morocco (2010); CESCR, Fourth reporting cycle of Morocco (2015); CRC, Combined third and fourth reporting cycles of Morocco (2014); CRPD, Initial reporting cycle of Morocco (2017). For more information, see https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=MAR&Lang=EN.

[10] CCPR, Initial reporting cycle of South Africa (2016); CEDAW, Combined second to fourth reporting cycles of South Africa (2011); CERD, Combined fourth to eighth reporting cycles of South Africa (2016); CESCR, Initial reporting cycle of South Africa (2018); CRC, Second reporting cycle of South Africa (2016); CRPD, Initial reporting cycle of South Africa (2018). Available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=ZAF&Lang=EN.

Depending on availability, the analysis distinguishes between two phases, relating to the first two stages of the State Reporting procedure:

- towards the adoption of LOIs/LOIPR (stage 1)
- and towards the adoption of COBs (stage 2).

Notable variations arise among the total number of LOIs/LOIPRs (Table 6.1) and COBs (Table 6.2) issued by various TBs. For clarity, the following two tables outline this variance, including variance divided by state party in focus. As example, South Africa received the highest overall number of LOIs (296), with TB-specific LOIs varying between 22 (CERD) and 85 (CRPD). Denmark received the lowest overall number of LOIs (174), with TB-specific LOIs ranging from 14 (CERD) to 37 (CRPD).

Table 6.1. Total TB outputs (LOIs/LOIPRs)

State Party	CESCR	CRPD	HRCtee	CERD	CEDAW	CRC	Total
Australia	29	44	37	24	22	52	208
Canada	31	43	48	23	57	18	220
Costa Rica	31	49	29	17	76	29	231
Colombia	30	32	75	25	22	50	234
Germany	29	25	50	17	33	34	188
Denmark	34	37	35	14	21	33	174
Indonesia	45	0	69	0	29	45	188
Kenya	50	31	61	34	69	51	296
Morocco	28	56	42	14	31	37	208
South Africa	57	85	37	22	50	45	296
Total	364	402	483	190	410	394	2243

Although consisting of higher averages, similar trends appear concerning COBs. South Africa has received the highest overall number of COBs (454), with notable differences among different TBs. The range of issued COBs range from 102 (CESCR) to 28 (HRCTee). Denmark has received the lowest overall number of COBs (241), ranging from 100 (CRC) to 22 (HRCTee).

Table 6.2. Total TB recommendations (COBs)

State Party	CESCR	CRPD	HRCtee	CERD	CEDAW	CRC	Total
Australia	65	82	45	46	93	122	453
Canada	45	91	22	69	95	94	416
Costa Rica	69	30	29	20	69	109	326
Colombia	57	76	30	44	82	113	402
Germany	44	62	14	21	76	82	299
Denmark	24	30	22	28	37	100	241
Indonesia	79	0	26	34	78	93	310
Kenya	36	71	22	34	100	113	376
Morocco	38	73	41	23	27	99	301
South Africa	102	85	28	36	50	153	454
Total	559	600	279	355	707	1078	3578

The comparative content analysis brings to light a positive trend in NHRI influence on TB outputs. Overall, out of the 5821 specific TB outputs analyzed (including LOIs/LOIPRs and COBs issued to the 10 states parties in focus), approximately 1100 reflect recommendations stemming from the respective NHRIs, amounting to 18.9% rate of NHRI influence (Table 6.3).

The TB that appears to have relied the most on NHRI recommendations is CESCR. According to the analysis, 29.1% of CESCR outputs (LOIs and COBs) stem from recommendations in NHRI submissions. Out of 923 outputs, approximately 269 are found in NHRI submissions.

At the opposite end of the spectrum, the TB that appears to have relied the least on NHRI recommendations is the CRC, with only 7% of outputs (LOIs and COBs) stemming from recommendations contained in NHRI submissions. Of 1472 CRC routputs, only 103 mirror NHRI submissions. Table 6.3 summarizes the findings of the comparative analyses on the amount of TB outputs influenced by NHRIs.

Table 6.3. Total amount of TB outputs influenced by NHRI submissions

TB	TB outputs influenced by NHRI submissions	Total TB outputs (LOIs + COBs)
CESCR	29.1%	923
CRPD	21.7%	1002
HRCTee	20.1%	762
CERD	18.2%	545
CEDAW	17.3%	1117
CRC	7%	1472
TOT	18.9%	5821

Despite notable variations among TBs, out of the total amount of analyzed TB outputs, almost one-fifth stem from NHRI submissions, which shows the relative weight NHRIs have had in recent TB reporting cycles.

Table 6.4. Variance of TB outputs influenced by NHRI submissions

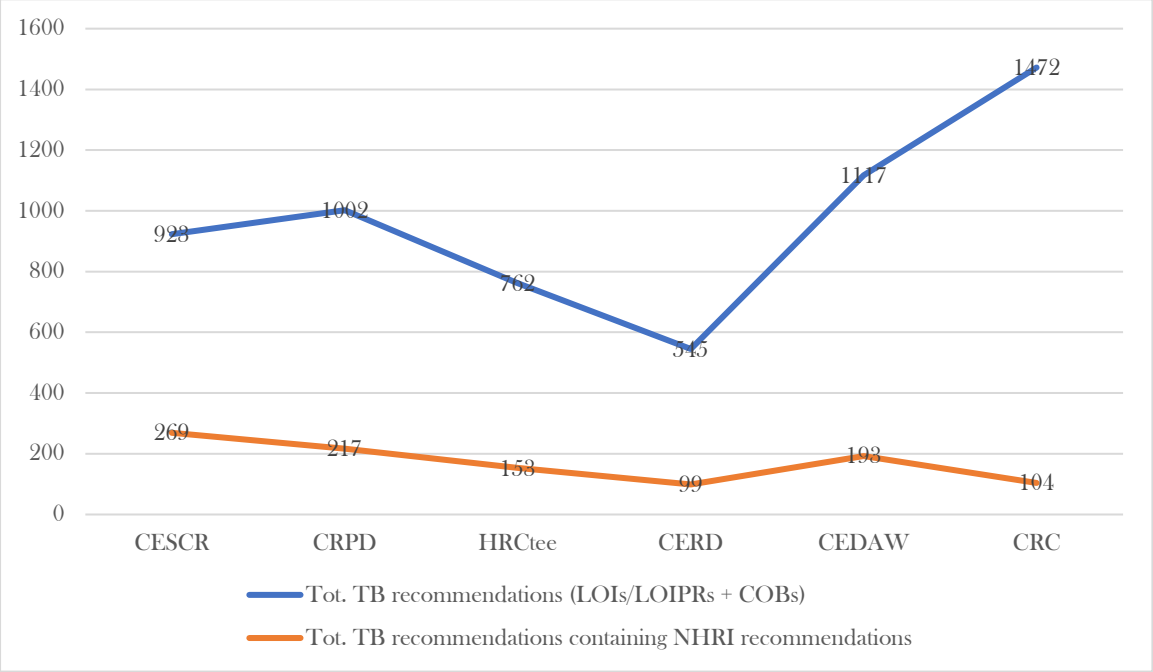


Table 6.5 summarizes the findings on the total amount of TB outputs containing NHRI recommendations, divided between the pre-sessional stage (LOI/LOIPR) and the sessional stage (COBs). By digging deeper into the statistics from the content analysis, there appears to be a substantial difference between stages of the reporting cycle, with 22.7% of COBs containing NHRI recommendations versus 15.1% of LOIs containing them. This trend is evident for CESCR, CRPD, the HRCtee, and CERD, the latter not presenting a single parallel report from the 10 NHRIs toward its LOIs, or "list of themes."[11] For CEDAW and CRC the trend is reversed, with more LOIs containing NHRI recommendations (23.7% and 7.5% respectively) than COBs (10.9% and 6.5% respectively).

Table 6.5. Amount of LOIs/LOIPRs and COBs influenced by NHRI submissions

TB	Total LOIs/LOIPRs	LOIs/LOIPRs influenced by NHRIs	Total COBs	COBs influenced by NHRIs
CESCR	364	26.3%	559	31.9%

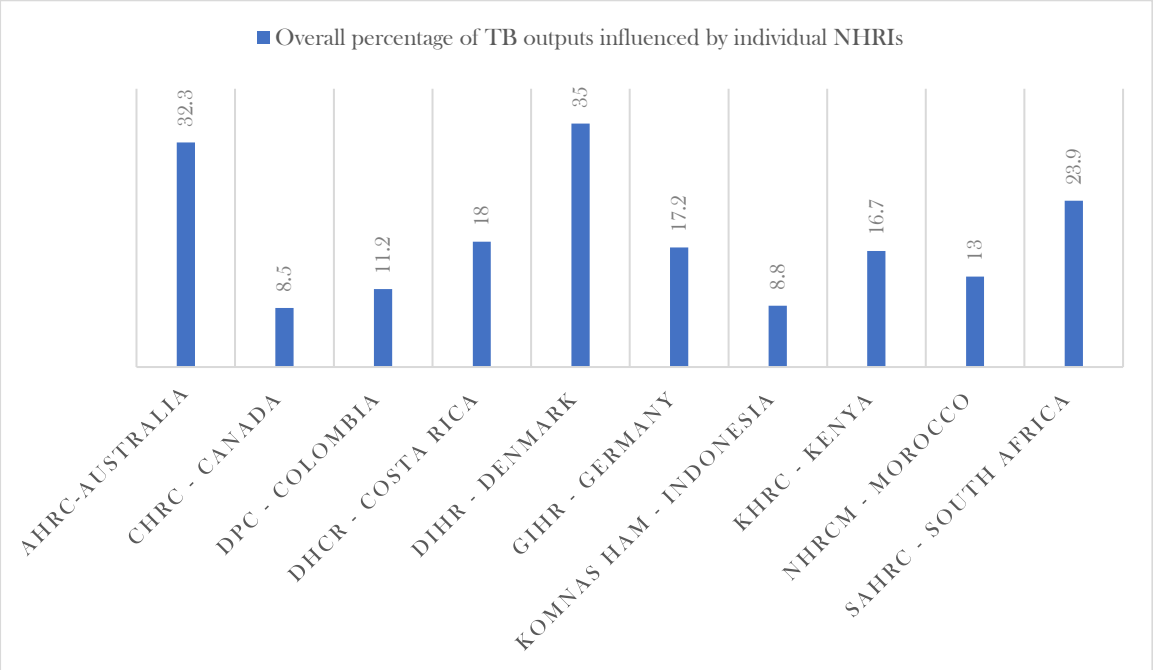
[11] CERD is the only TB to have named LOIs as such.

CRPD	402	17.4%	600	26%
HRCTee	483	15.9%	279	24.3%
CERD	190	0%	355	36.3%
CEDAW	410	23.7%	707	10.9%
CRC	394	7.5%	1078	6.5%
TOT	2243	15.1%	3578	22.7%

Overall, approximately 339 LOIs contain NHRI recommendations out of a total of 2243 LOIs in focus, whereas approximately 812 COBs contain NHRI recommendations out of the 3578 COBs in focus.

In terms of each specific NHRI's influence on the total amount of TB outputs, Table 6.6 offers the overall percentage of TB recommendations (LOIs/LOIPRs and COBs) influenced by individual NHRIs. The Danish Institute for Human Rights (DIHR) ranks first in this list, with 35% of TB outputs containing issues raised in DIHR parallel reports. The Canadian Human Rights Commission (CHRC) ranks last, with only 8.5% of TB outputs containing issues raised in CHRC parallel reports.

Table 6.6. Amount of TB outputs influenced by individual NHRI submissions



To conclude this section, Table 6.7 outlines in detail the amount of TB outputs influenced by NHRI submissions, breaking down the findings per country analyzed and per stage of the reporting cycle. Taking as example the case of Australia, 661 outputs have been issued by the six TBs in focus, including 208 LOIs and 453 COBs. The document content analysis shows that 22.6% of LOIs contain recommendations raised by the Australian Human Rights Commission (AHRC) parallel reports. This is an aggregate of the six TB-specific LOIs, ranging from 51.7% (CECSR) to zero (CRPD, CERD and HRCtee), where zero is due to non-submission of a parallel report by AHRC to the PSWG stage. Concerning COBs, 42% contain recommendations raised by the AHRC. This is an aggregate of the six TB-specific COBs, ranging from 64.4% (HRCTee) to 19.3% (CEDAW). In total, 32.3% of TB outputs contain issues highlighted in AHRC parallel reports.

Table 6.7. Comparative country tables – amount of LOIs and COBs influenced by NHRI submissions (LOIs and COBs)

Type of TB output	**CRC**	**CRPD**	**CEDAW**	**CERD**	**CESCR**	**HRCtee**	**Total %**	**Tot TB outputs**
Australia								
LOIs	38.5%	■	45.4%	■	51.7%	■	22.6%	208
COBs	29.5%	50%	19.3%	56.5%	32.3%	64.4%	42%	453
Total	34%	25%	32.4%	28.3%	42%	32.2%	**32.3%**	**661**
Canada								
LOIs	■	20.9%	■	■	3.2%	■	4%	220
COBs	■	14.9%	5.3%	23.2%	11.1%	22.7%	12.9%	416
Total	0%	17.9	2.65%	11.6%	7.15%	11.35%	**8.5%**	**636**
Colombia								
LOIs	■	6.25%	27.3%	■	50%	■	13.9%	234
COBs	■	11.8%	9.75%	■	22.8%	6.7%	8.5%	402
Total	0%	9%	18.5%	0%	36.4%	53.4%	**11.2%**	**636**
Costa Rica								
LOIs	■	■	25%	■	54.8%	■	13.3%	231
COBs	■	■	11.5%	35%	31.8%	57.9%	22.7%	326
Total	0%	0%	18.25	17.5%	43.3%	29%	**18%**	**557**

Denmark								
LOIs	9.1%	45.9%	76.2%	■	■	■	21.9%	188
COBs	5%	86.7%	24.3%	71.4%	37.5%	63.6%	48.1%	299
Total	7.1%	66.3%	50.3%	35.7%	18.8%	31.8%	**35%**	**487**
Germany								
LOIs	11.8%	40%	15.2%	■	24.1%	■	15.2%	174
COBs	9.75%	37.1%	18.4%	29.5%	20.5%	■	19.2%	241
Total	10.8%	38.6%	16.8%	14.8%	22.3%	0%	**17.2%**	**415**
Indonesia								
LOIs	■	■	48.3%	■	■	■	8.1%	188
COBs	■	■	20.5%	■	12.7%	23.1%	9.4%	310
Total	0%	0%	34.4%	0%	6.4%	11.6%	**8.8%**	**498**
Kenya								
LOIs	■	25.8%	■	■	■	■	4.3%	296
COBs	■	26.8%	■	47.1%	100%	■	12,3%	376
Total	0%	26.3%	0%	23.6%	50%	0%	**8,3%**	**672**
Morocco								
LOIs	8.1%	12.5%	■	■	32.1%	38.1%	15.1%	208
COBs	8.1%	17.8%	■	■	34.2%	4.9%	10.8%	301
Total	8.1%	15.2%	0%	0%	33.2%	21.5%	**13%**	**509**
South Africa								
LOIs	17.8%	22.4%	■	■	47.4%	54.9%	23.8%	296
COBs	12.4%	15.3%	■	100%	15.7%	■	23.9%	454
Total	15.1%	18.9%	0%	50%	31.6%	27.5%	**23,9%**	**750**

2. Findings on the extent of recommendations contained in NHRI submissions integrated in Treaty Body outputs

The analysis now turns to the second integrating aspect of TB-NHRI engagement during the TB reporting cycle. As said in relation to the overall number of TB outputss, variance is also discernible when considering the total number of NHRI recommendations within submitted parallel reports. The analysis utilizes a grading of likeliness as 0, 1, or 2, where 0 is the absence

of similar recommendation, 1 is a proxy partial similarity, and 2 is a proxy perfect or quasi perfect resemblance. Table 6.8. displays a qualitative example of such grading.

Table 6.8. Qualitative example of likeliness grading (TB – NHRI recommendations)

List of Issues				
South Africa				
UN Doc.	TB outputs	NHRI recommendations	Similarity (0-2)	Comments
CCPR/C/ZAF/Q/1	16. Please update the Committee on measures taken to outlaw and prosecute labour brokers involved in the exploitation of migrant workers.	The Committee should recommend that the South African government take steps to outlaw labour brokers, and specifically target the mining industry.	2	Identical TB – NHRI outputs
CCPR/C/ZAF/Q/1	21. Please provide updated information on measures taken to improve the conditions of detention in the State parties' places of incarceration and particularly in reducing overcrowding.	How does the government plan to improve upon existing programmes intended to help and treat those it detention, in order to best situate these detainees for a successful life and the full enjoyment of their human rights upon leaving their detention?	1	Similar TB recommendation but not covering the full extent of the NHRI recommendation
//	//	What measures the government has put in place to address the continued polarisation between those persons in informal settlements and townships and those in more affluent neighbourhoods.	0	No equivalent TB recommendation

This ranking helps to depict a more representative picture of any one NHRI's influence on specific LOIs/LOIPRs and COBs. The following two tables outline such variance, divided between NHRI recommendations towards LOIs/LOIPRs (Table 6.9) and COBs (Table 6.10).

As explanation of Table 6.9, the South African Human Rights Commission (SAHRC) issued the highest amount of recommendations towards LOIs (150). This is an aggregate of recommendations in TB-specific parallel reports submitted to the Pre-sessional Working Groups, ranging from *61 recommendations contained in the SAHRCs parallel report to CESCR* to *zero recommendations in relation to CERD and CEDAW*, due to non-submission of a parallel report. The Kenyan Human Rights Commission (KHRC) submitted the lowest amount of recommendations towards LOIs (17), due to its only parallel report submitted to CRPD's Pre-sessional Working Group.

Table 6.9. Total NHRI Outputs (LOIs)

NHRI	CESCR	CRPD	HRCtee	CERD	CEDAW	CRC	Total
AHRC	46	0	0	0	34	60	140
CHRC	4	17	0	0	0	0	21
DHCR	57	0	0	0	30	0	87
DPC	21	3	78	0	6	0	108
GIHR	32	26	0	0	15	12	85
DIHR	0	26	0	0	29	6	61
KOMNAS HAM	0	0	0	0	27	0	27
KHRC	0	17	0	0	0	0	17
NHRCM	33	16	32	0	0	9	90
SAHRC	61	25	39	0	0	25	150
Total	254	130	149	0	141	112	786

The same logic applies to Table 6.10. As example, the Australian Human Rights Commission (AHRC) issued the highest amount of recommendations towards COBs (292). This is an aggregate of recommendations in parallel reports submitted to each TB session, ranging from

68 recommendations contained in AHRC's parallel report to CRPD to 26 recommendations contained in AHRC's parallel report to CESCR. The Defensoria del Pueblo of Colombia (DPC) submitted the least recommendations towards COBs (49), ranging from 21 recommendations to CESCR and zero recommendations to both CERD and CRC, in absence of a parallel report.

Table 6.10. Total NHRI recommendations (COBs)

NHRI	CESCR	CRPD	HRCtee	CERD	CEDAW	CRC	Total
AHRC	26	68	62	44	32	60	292
CHRC	10	15	6	26	8	0	65
DHCR	57	0	19	23	16	0	115
DPC	21	10	4	0	14	0	49
GIHR	32	24	0	16	19	10	101
DIHR	29	31	35	29	15	6	145
KOMNAS HAM	12	0	11	0	27	0	50
KHRC	74	22	0	46	0	0	142
NHRCM	33	16	4	0	0	9	62
SAHRC	44	15	0	41	0	25	125
Total	338	201	141	225	131	110	1146

As previously described, NHRIs have omitted to submit toward TB's Pre-sessional Working Groups 32 times, while they have only missed such opportunity 16 times towards TB Sessions. This equates to NHRIs seeking to influence the issuance of COBs twice as much than in relation to LOIs/LOIPRs.

Combining all NHRI parallel reports from the 10 countries in focus, a total of 1905 recommendations have been submitted. Out of this, an approximate total of 28.7% have been

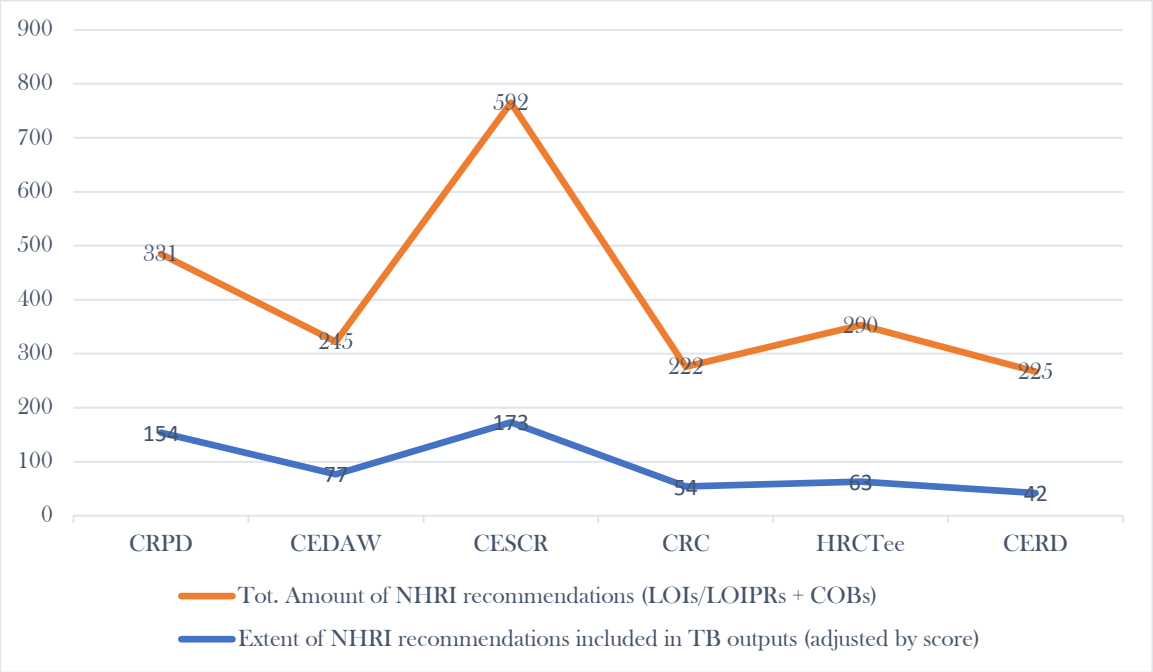
integrated within TB outputs (LOIs/LOIPRs and COBs). Out of the total amount of analyzed NHRI recommendations contained in NHRI parallel reports, almost 1/3 are taken up in TB outputs. Table 6.11. summarizes the findings of the comparative content analyses on the extent of NHRI recommendations integrated within TB outputs.

Table 6.11. Extent (score) of NHRI recommendations included in TB outputs

TB	Extent of NHRI recommendations included in TB outputs (adjusted by score)	Total amount of NHRI recommendations towards LOIs and COBs combined
CRPD	46.4%	331
CEDAW	31.6%	245
CESCR	29.3%	592
CRC	24.5%	222
HRCTee	21.8%	290
CERD	18.6%	225
Total	28.7%	1905

The above shows that the highest extent of NHRI recommendations included in TB outputs results from CRPD reporting cycles. Out of 331 recommendations submitted by the 10 NHRIs in focus, approximately half were included within CRPD outputs (46.4% of LOIs/LOIPRs and COBs combined). At the opposite end of the spectrum is CERD: out of a total of 225 NHRI recommendations, only 18.6% were included in CERD outputs.

Table 6.12. Variance among the extent of NHRI recommendations included in TB outputs



Dividing between the pre-sessional stage (LOI/LOIPR) and the sessional stage (COBs), Table 6.13. completes the findings of the comparative analysis on the extent of NHRI recommendations included in TB outputs.

Table 6.13. Extent of NHRI recommendations contained in TB outputs (LOIs and COBs)

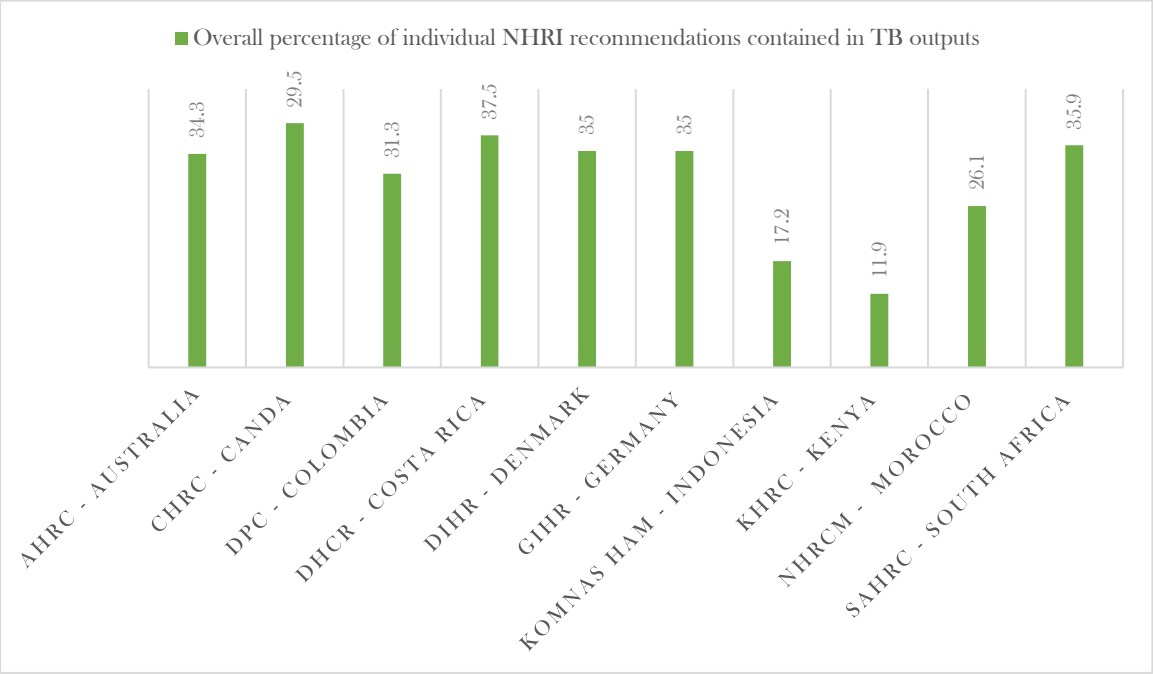
TB	Tot. NHRI recommendations towards LOIs	Extent of NHRI recommendations included in LOIs	Tot. NHRI recommendations towards COBs	Extent of NHRI recommendations included in COBs
CRPD	130	31.3%	201	61.4%
CEDAW	114	28%	131	35.1%
CESCR	254	19.3%	338	39.2%
CRC	112	16.2%	110	32.8%
HRCTee	149	13%	141	30.6%
CERD	-	-	225	37.2%

Total	759	18%	1146	39.4%

There appears an even stronger difference between the pre-sessional and sessional stages when considering the extent of NHRI recommendations contained in TB outputs. Out of all submitted NHRI parallel reports, 39.4% of recommendations contained therein feature within issued COBs, versus 18% featured in LOIs. This trend is confirmed throughout the six TBs in focus. It is indicative that for almost all TBs analyzed, the difference between NHRI recommendations contained in LOIs and COBs is almost double in case of the latter, with CRPD and the HRCTee even exceeding that by a slight margin. The most even difference between stages can be found with regards to CEDAW, while CERD does not present any findings in the LOI column due to the lack of NHRIs submitting parallel reports toward its pre-sessional stage.

On the extent of NHRI recommendations included in TB outputs, Table 6.14. offers the overall percentage of individual NHRI recommendations contained in TB outputs. The Danish Institute for Human Rights ranks first in this specific list, with 37.5% of recommendations from its parallel reports included in TB outputs. The Kenyan Human Rights Commission (KHRC) ranks last, with only 11.9% of recommendations from its parallel reports included in TB outputs.

Table 6.14. Extent of Individual NHRI Recommendations contained in TB outputs



In conclusion to this section, Table 6.15. outlines in detail the amount of NHRI recommendations contained in TB outputs, breaking down the findings per country analyzed and per stage of the reporting cycle. Taking as example the case of the Australian Human Rights Commission (AHRC), its parallel reports to the six TBs in focus contain 432 recommendations, including 140 towards LOIs and 292 towards COBs. The document content analysis shows that 14.5% of AHRC recommendations result in issued LOIs. This is an aggregate of recommendations from all AHRC parallel reports submitted to the six TB's Pre-sessional Working Groups, ranging from 36.7% (CEDAW) to zero (CRPD, CERD and HRCtee), where zero is due to non-submission of a parallel report by AHRC to the PSWG stage. Concerning AHRC recommendations towards COBs, 54% result in issued COBs. This is an aggregate of recommendations from all AHRC parallel reports submitted to the six TB's Sessions, ranging from 69% (CRPD) to 37.9% (HRCtee). In total, 34.3% of recommendations from AHRC parallel reports result in issued TB outputs.

Table 6.15. Comparative country tables – extent of NHRI recommendations contained in TB outputs (LOIs and COBs)

Type of TB output	**CRC**	**CRPD**	**CEDAW**	**CERD**	**CESCR**	**HRCtee**	**Total %**	**Tot NHRI rec.**
Australian Human Rights Commission								
LOIs	25%	■	36.7%	■	25%	■	14,5%	140
COBs	55.8%	69%	50%	53.4%	57.7%	37.9%	54%	292
Total	40.4%	34.5%	43.35%	26.7%	41.4%	19%	**34.3%**	**432**
Canadian Human Rights Commission								
LOIs	■	41.2%	■	■	12.5%	■	9%	21
COBs	■	83.3%	43.8%	57.7%	40%	75%	50%	65
Total	0%	62.3%	21.9%	28.9%	26.3%	37.5%	**29.5%**	**86**
Defensoria del Pueblo de Colombia								
LOIs	■	33%	75%	■	61.9%	■	28.3%	108
COBs	■	80%	50%	■	50%	25%	34.2%	49
Total	0%	56.5%	62.5%	0%	56%	12.5%	**31.3%**	**157**
Defensoria de los Habitantes de la Republica de Costa Rica								
LOIs	■	■	58.3%	■	24.5%	■	13.8%	87
COBs	■	■	43.75%	54.5%	31.5%	50%	30%	115
Total	0%	0%	51.1%	27.3%	28%	25%	**21.9%**	**202**
Danish Institute for Human Rights								
LOIs	41.7%	53.8%	44.8%	■	■	■	23.4%	85
COBs	75%	75.8%	50%	44.8	27.6%	38.6%	52%	101
Total	58.4%	64.8%	47.4%	22.4%	13.8%	19.3%	**37.5%**	**186**
German Institute for Human Rights								
LOIs	21%	42.3%	26.7%	■	17.2%	■	17.9%	61
COBs	71%	77%	63.2%	78.1%	23.4%	■	52.1%	145
Total	46%	59.7%	45%	39.1%	20.3%	0%	**35%**	**206**
Human Rights Commission of Indonesia								
LOIs	■	■	38.9%	■	■	■	6.5%	27

COBs	■	■	50%	■	62.5%	54.5%	27.8%	50
Total	0%	0%	44.5%	0%	31.3%	27.3%	**17.2%**	**77**
Kenyan Human Rights Commission								
LOIs	■	32.4%	■	■	■	■	5.4%	17
COBs	■	77.3%	■	32.6%	■	■	18.3%	142
Total	0%	54.9%	0%	16.3%	0%	0%	**11.9%**	**159**
National Human Rights Council of Morocco								
LOIs	22.2%	40.6%	■	■	16.7%	37.5%	19.5%	90
COBs	66.7%	71.9%	■	■	31.8%	25%	32.6%	62
Total	44.5%	56.3	0%	0%	24.3%	31.3%	**26.1%**	**152**
South African Human Rights Commission								
LOIs	52%	70%	■	■	35.2%	53.8%	35.2%	150
COBs	60%	80%	■	51.2%	28.4%	■	36.6%	145
Total	56%	75%	0%	25.6%	31.8%	26.9%	**35.9%**	**295**

3. Conclusion

This chapter has served the purpose of analysing the direct products of TB – NHRI engagement, in other words the outputs of its dedicated institutional framework. By comparing recommendations proposed by NHRI parallel reports and outputs issued by the various TBs, it has been possible to quantify the complementarity between the two sets of recommendations. Overall, relatively positive results stem from the document content analysis. Out of the selected pool, 18.9% of TB outputs contain issues raised in parallel reports submitted by NHRIs. On a similarly positive note, 28.7% of recommendations from NHRI parallel reports are integrated as official TB outputs. The statistics provided throughout this chapter suggest that the institutional framework available is at least likely to facilitate an effective engagement between NHRIs and TBs in the context of the State Reporting procedure. The following chapter ultimately concludes the GBA to effectiveness analysis. By going back to what were found to be the ultimate goals of the institutional framework for TB - NHRI engagement, I will assess whether the *structure* and the *process* of this framework, taken together with the results of the comparative content analysis, can realistically lead to the attainment of the identified goals.

Chapter 7. A Tentative Measurement of Goal Attainment

The final step of the adapted GBA to effectiveness analysis is to return to what were found to be the ultimate goals of the institutional framework for TB - NHRI engagement and examine whether the *structure* and the *process* of this framework can realistically lead to goal attainment. To strengthen this reverse engineering analysis, it is important to do so also in light of the output findings on the actual engagement of ten NHRIs and six TBs. As a reminder, the three generic goals identified are the following:

1. To monitor the implementation of UN Human Rights Conventions (Goal 1)
2. To support a transnational human rights regime dedicated to the implementation of UN Human Rights Conventions (Goal 2)
3. To legitimize the institutional framework necessary to support such a regime (Goal 3)

I approach each goal in a specific section below, revisiting the adequacy of the relevant indicators identified as proxies for outcome assessment. For each goal-specific section, I first come back to relevant structural indicators, followed by relevant procedural indicators. Each indicator will be evaluated according to a three-pronged grid, differentiating between strong, variable and weak indicators, based on evidence found in previous chapters. For clarity's sake I recall the identified structural and procedural indicators in tables 7.1 and 7.2 below. Through such evaluation, this chapter provides an assessment of the likelihood of goal-attainment by the institutional framework for TB – NHRI engagement.

Table 7.1. Structural indicators as proxies for outcome assessment

Structural Indicators	Determinants
Structural embeddedness (of NHRIs in the TB framework)	UN Human Rights Treaties, General Comments, Rules of Procedure, Working Methods, Statements, Guidelines, Papers and Info Notes featuring guidance on NHRI engagement.
Structural embeddedness (of TBs in the NHRI framework)	The Paris Principles and GANHRI SCA General Observations featuring guidance on TB engagement.
Legal powers	The legal status of TB and NHRI recommendations when acting under the State Reporting procedure.
Structural independence	The conditions in place to ensure that members of both TBs and NHRIs, as well as the staff servicing these institutions, are free of influence from other actors.

Resources and personnel capacity	The operations budgets, facilities, and other material capabilities specific to TB – NHRI engagement.
Political support	The extent of support from states parties for further strengthening NHRI engagement with the TB system.

Table 7.2. Procedural indicators as proxies for outcome assessment

Procedural Indicators	Determinants
Accessibility	Available TB-specific NHRI "entry points" throughout the stages of the State Reporting procedure (RoPs, WMs, Statements, Guidelines, Papers and Info Notes)
Usage rate and periodicity	The duration of TB reporting cycles and the frequency of NHRI input therein

This final step of the adjusted GBA to effectiveness analysis of the institutional framework for TB-NHRI engagement presents mixed conclusions. On one hand, the specific analysis of structural and procedural indicators in chapter 5 suggests that the institutional framework for TB-NHRI engagement may encounter certain difficulties in realizing its goal-attaining potential. The very nature of the institutional framework, reliant on TB-specific instruments with different modalities for NHRI input, may pose limitations on effective engagement throughout the different stages of the State Reporting procedure. In terms of resources, even if one accepts that the personal dedication of TB members provides enough guarantees of quality performance, it is hard to imagine how each committee can meaningfully engage with domestic stakeholder submissions and briefings from all state parties under consideration within the narrow confines of their available assets. On the other hand, guidance on TB -NHRI engagement has been steadily growing in both TB and NHRI instruments. Furthermore, the amount of TB recommendations influenced by NHRI submissions, as seen through the document content analysis, indicates TB members' relatively high reliance on NHRI input: approximately 1100 of the 5821 analyzed TB recommendations contain recommendations from NHRI parallel reports. Equally positive are the findings on the extent to which recommendations contained in NHRI parallel reports were integrated in TB recommendations: approximately 547 of the 1905 analyzed NHRI recommendations feature in issued TB recommendations. The following sections revisit these findings in more detail, thus completing the GBA to effectiveness analysis of the institutional framework for TB-NHRI engagement.

1. Attainment of Goal 1: To Monitor the Implementation of UN Human Rights Conventions

1.1. Structural indicators

The analysis in Chapter 4 showed that the first, and most explicitly stated, goal for TB-NHRI engagement is monitoring the implementation of conventional provisions. Relevant structural indicators to assess this goal's attainment potential are the embeddedness of NHRIs in the TB framework, the embeddedness of TBs in the NHRI framework, both institutions' legal powers, dedicated personnel capacity and resources and political support. Table 7.3 offers an evaluation of these indicators, together with the determinants behind the proposed evaluation. I will then provide a more detailed explanation for each structural indicator in the remainder of this section.

Table 7.3. Structural Indicators for Goal 1

Indicators	Determinants	Evaluation
Structural embeddedness (of NHRIs in the TB framework)	UN Human Rights Treaties *General Implementation Measures*, General Comments and TB-issued instruments (RoPs, WMs, Statements, Guidelines, Papers and Info Notes) featuring guidance on NHRI engagement.	Strong
Structural embeddedness (of TBs in the NHRI framework)	Paris Principles A.3(b) and A.3(c) and SCA General Observations 1.3 and 1.4 featuring guidance on TB engagement.	Strong
Legal powers of TB/NHRI recommendations	Non-binding but authoritative due to independent expertise	Variable, dependent on legitimacy (actual and perceived)
Personnel capacity and resources	Few TB members and OHCHR staff, low number of weeks per year, low budget	Weak
Political support	Human Rights Council Res. 39/17 and General Assembly Res. 74/156	Strong

With regards to the **structural embeddedness of NHRIs in the TB framework**, only one convention, the CRPD, Art. 33(2), and one optional protocol, the OPCAT, Art. 18(4), explicitly include references to Paris Principles-compliant institutions as monitoring partners to their

respective committees, the CRPD Committee and the SPT. In both cases, States Parties are obliged to "take into account" and "give due consideration" the principles relating to the status and functioning of national institutions for protection and promotion of human rights. And notwithstanding the SPT's lack of a state reporting procedure, OPCAT's reference to the Paris Principles is also relevant to its 'sister' committee, the Committee Against Torture, which "invites NPMs of the country concerned to submit written information relevant to its activities."[1]

Explicit reference to NHRIs as monitoring partners to the TBs can also be found in specific General Comments, so far issued by three different TBs.[2] Although in differing levels of detail, these instruments represent the clearest indication of the growing recognition by TB members of the role that NHRIs may play in aiding their efforts of monitoring the implementation of UN human rights treaties.

In addition to conventional provisions and general comments, four committees have expanded on the role NHRIs should play in implementation monitoring through specific Papers and Statements.[3] The role of NHRIs as TB monitoring partners is covered in rich detail within these instruments and represent a strong indication of the framework's goal attainment potential. A clear example of this comes from the CEDAW Paper, which explicitly underlines at the outset how "The Committee and NHRIs share common goals to respect, protect, promote and fulfill the human rights of all women and girls through the implementation of the Convention and its Optional Protocol at the national level."[4]

To complete the picture on the structural embeddedness of NHRIs in the TB framework, five different TBs expand on NHRI's monitoring role in their Rules of Procedure (CAT, CED, CERD, CMW and CRPD), six TBs do so in their Working Methods (CAT, CED, CEDAW,

[1] CAT, 'Information for Civil Society Organisations and National Human Rights Institutions' available at <www.ohchr.org/EN/HRBodies/CAT/Pages/NGOsNHRIs.aspx>. Accessed 20th December 2019.
[2] CERD, General Recommendation XVII: 'On the establishment of national institutions to facilitate the implementation of the Convention' (25 March 1993), UN Doc A/48/18; CESCR, General Comment No. 10: 'The role of national human rights institutions in the protection of economic, social and cultural rights' (10 December 1998), UN Doc E/C.12/1998/25; CRC, General comment No. 2 (2002): 'The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child,' (15 November 2002), UN Doc CRC/GC/2002/2.
[3] HRCtee, 'Paper on the relationship of the Human Rights Committee with national human rights institutions, adopted by the Committee at its 106th session' (13 November 2012), UN Document CCPR/C/106/3; CED, 'Paper on the relationship of the Committee on Enforced Disappearances with national human rights institutions' (28 October 2014), UN Document CED/C/6: paras. 11–23 and paras. 37–38; CMW, 'Statement by the Committee on cooperation with national human rights institutions' (21 April 2016) paras. 1–8; CEDAW, "Paper on the cooperation between the Committee on the Elimination of Discrimination against Women and National Human Rights Institutions" (adopted by the Committee at its seventy-fourth session, 21 October-8 November 2019),
[4] CEDAW (n. 3).

CERD, CRPD and the HRCtee), four TBs have issued specific Guidelines on NHRI engagement (CAT, CEDAW, CERD and the CRPD) and eight TBs regularly contain guidance for NHRIs in their session-specific Information Notes (CAT, CED, CEDAW, CERD, CESCR, CMW, CRPD and the HCRtee).

Further evidence of how the TB system has embedded the monitoring role of NHRIs within its institutional framework may come from interpreting the different conventions' general measures of implementation. In doing so, it is possible to seek elements that pertain not only to the ratifying states' obligations, but to the roles for NHRIs therein. In most conventions, "general measures of implementation" of "general obligations" figure at the very forefront of the list of conventional articles and are of an accessory character, not establishing standalone and subjective rights but rather duties of states parties based on the rights recognized in the convention.[5] Also known as "umbrella clauses," they play a fundamental role in the systematic interpretation of the Covenant and its engagement with domestic stakeholders, including NHRIs. The usual purpose of a general measures of implementation clause—states' obligation to ensure effective national implementation, including appropriate remedies—implies the utility of or need for domestic counterparts to facilitate the monitoring of implementation measures. This demonstrates the mutuality of purpose between TBs and NHRIs. Within each specific facet of the state parties' obligations, NHRIs can play an important role, through monitoring, promoting, or indeed partaking in the implementation of UN human rights treaties' provisions and related TB recommendations.

A number of examples may be useful at this point. I identify two categories of general implementation measures among UN human rights treaties, depending on the level of detail provided for contracting state parties. The first category of general implementation measures features a more programmatic approach to compliance, including a comprehensive list of specific actions. As such, it seems easier to interpret NHRI engagement within their purview. CERD, CEDAW, and CRPD fall into this category. The second category of general implementation measures are poorer in detail, thus giving less explicit guidance on the specific roles that domestic stakeholders, including NHRIs, should play. Both Covenants and the CRC belong in this category.

CERD presents one of the most detailed general obligations clauses, and its already complex Article 2(1) has been further expanded by interpretations by CERD Committee members. The

[5] CCPR, Art. 2; CESCR, Art.2; CERD Art. 2; CEDAW Art.2; CRC art.4; CRPD Arts. 1 and 4.

obligation "to pursue by *all appropriate means* and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races" has been interpreted as encompassing wider strategies, including a broad understanding of the concept of policy-making,[6] institution building, and the setup of national mechanisms.[7] Furthermore, the wording of Article 2(1)(e),[8] although not expressly referencing NHRIs, is the most overt inclusion of NHRI activity in the work of TB implementation without an express reference, and "reaches out to NHRIs, especially those that attempt to translate CERD principles into action and disseminate them to a wider public."[9]

With regards to CEDAW, its general obligations, found in Article 2 (a)–(f), also contain open-ended clauses that help place NHRI engagement within its purview. This committee has set out a number of elements of state policy that will be conducive to the fulfillment of Article 2 obligations including, inter alia, ensuring that independent monitoring institutions, such as NHRIs, are established, or that the mandates of existing national institutions extend to the rights guaranteed under the Convention.[10] Once again, the obligation "to ensure, *through law and other appropriate means*, the practical realization [of the principle of equality of men and women]"[11] and the obligation "to ensure through competent national tribunals *and other public institutions* the effective protection of women against any act of discrimination"[12] provide a solid base for NHRI engagement in monitoring the implementation of CEDAW. As is the case for CERD, "remedies may also be available through administrative bodies, NHRIs, anti-discrimination agencies or ombudsman procedures."[13] Article 24 is of relevance for CEDAW-NHRI engagement[14] and NHRI-related issues to be addressed are often found under the Article 24 heading. [15] Specifically, the article can be viewed as affirming that

[6] Ion Diaconu, *Racial Discrimination* (Eleven International 2011) 178–82 offers an extended reflection on "types and forms of policies."
[7] CERD General Recommendation 31, para 5.
[8] ICERD Art. 2(1)(e): "Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division."
[9] Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2016), 196.
[10] CEDAW General Recommendation 28, para 28.
[11] CEDAW, Art 2(a).
[12] CEDAW Art 2(c).
[13] Marsha Freeman, Christine Chinkin, and Beate Rudolf, *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP 2012) 84.
[14] CEDAW Art 24: "States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention."
[15] UN Doc A/63/38 part II (2008) Annex X.

> the Convention is an instrument which imposes obligations to take positive measures at the national level to ensure the realization of equality between women and men […] and that these measures should be comprehensive and should also include national level machineries to give effect to the Convention.[16]

This highlights the committee's view that NHRIs fall within the scope of Article 24, as they relate to monitoring implementation measures at the national level.

Lastly, the CPRD's general implementation clauses, found in Article 4, have been uniquely designed in a programmatic fashion, representing "a guide [for stakeholders] on the nature and implementation of States' legal obligations."[17] This is perhaps due to the inclusion of both NHRIs and "national disability institutions" in the deliberations on the new convention.[18] CRPD Article 4 is one of the most cross-cutting provisions of the whole TB system and encourages national legal and policy reform, guiding domestic implementation of the convention. Most importantly, under Article 33(2) the CRPD contains an obligation to establish within state parties a national monitoring mechanism, taking into account the Paris Principles relating to the Status of National Institutions adopted by the UNGA in 1993.[19] By stating that such mechanisms are created in order "to promote, to protect and monitor the implementation of [...] the Convention," Article 33(2) establishes an explicit link between the CRPD Committee's core goal and NHRIs.

Turning to the second category of general implementation measures, we can dismiss the lack of detail on NHRI engagement by considering the broadness of the language used to express the measures of implementation and the actors that should be involved. Obligations such as "to take steps," "to adopt such laws or other measures necessary," and "to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the convention" have all been interpreted as including NHRI activity within their purview.

As such, even in cases of less detailed implementation measures, NHRIs may be seen as included in the necessary domestic infrastructure for treaty implementation. CCPR is the most obvious example, with Article 2(2) requiring states "to adopt such laws *or other measures* as

[16] Freeman, Chinkin, and Rudolf (n 13) 540.
[17] See the comments of Canada, Ad Hoc Committee, Daily Summary of discussions at the seventh session of UNCRPD (30 January 2006).
[18] Report of the Ad Hoc Committee, UN. Doc. A/57/357 (2002), para. 11.
[19] A number of records—drafting proposals as well as records of oral contributions made during the years in which the CRPD was under negotiation—seem to leave no doubt as to which international standard was meant. See Asia Pacific Forum of National Human Rights Institutions, *Human Rights and Disability: A Manual for National Human Rights Institutions* (2017) 49.

may be necessary to give effect to the rights recognized in the present Covenant" and Article 2(3) ensuring that any person claiming a remedy "shall have his right thereto determined by competent judicial, *administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State.*" These provisions "do not relate solely to repressive remedies against violations that have already taken place but include preventive measures and steps to ensure the necessary conditions for unimpeded enjoyment of rights ensured by the Covenant."[20] Through an analysis of the travaux préparatoires, permissible remedies include "investigations by parliamentary committees, commissions and inspectors, as well as such organs as ombudsmen, which are formally assigned to the legislative branch and are subject to a reporting duty to Parliament."[21] This is corroborated by General Comment 31, in which the Human Rights Committee outlines that "NHRIs, endowed with appropriate powers, can contribute [to providing remedies to victims of ICCPR violations]."[22]

As for the ICESCR, Article 2(1) spells out the general legal obligations applicable to all substantive rights. The rights contained in the ICESCR, defined as "programme rights from the state" that require "progressive realization," lend well to non-judicial and non-legislative initiatives typical of NHRIs. The means which should be used in order to satisfy the obligation *to take steps* are stated to be "all appropriate means, including particularly the adoption of legislative measures." In addition to legislation, the committee understands the term "appropriate means" to encompass "the provision of judicial remedies" and states that they "include, but are not limited to, administrative, financial, educational and social measures."[23] These articulations outline the *open* nature of the obligation to take steps, which does not preclude non-legislative measures as part of the state's obligation to fulfill the rights enshrined in the Covenant. The CESCR Committee subsequently made the link explicit, through its General Comment No. 10, noting that one such means, "through which important steps can be taken, is the work of national institutions for the promotion and protection of human rights."[24] The explicit inclusion of NHRI activity within the "appropriate means" through which CESCR implementation may be fostered, coupled with the slightly more "programmatic" nature of its language vis-à-vis the ICCPR, indicate the common goal of the committee and NHRIs to

[20] Oscar Schachter, 'The Obligation to Implement the Covenant in Domestic Law' in Louis Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981), 319.
[21] A/5655, para. 27
[22] HRCTee General Comment No. 31, para. 15.
[23] CESCR General Comment No. 3 (The Nature of States Parties' Obligations), para. 7 and General Comment 9, paras. 3–5, 7.
[24] CESCR General Comment No. 3 (The Nature of States Parties' Obligations).

monitor the "progressive achievement" of states parties' full realization of the Covenant's rights.

Turning to the CRC, its general obligation under Article 4 "represents an amalgam of the equivalent implementation provisions under the twin Covenants"[25] and as such inclusion of NHRIs in monitoring implementation is equally applicable. The Committee's General Comment No. 5 further outlines a number of "legislative, administrative and other measures" as outlined in CRC Article 4. The Committee explicitly places NHRIs within this obligation, as "an effective review process requires a form of independent scrutiny which can be provided by, for example, […] national human rights institutions."[26] It follows that even for the CRC Committee, establishing an NHRI is an appropriate measure that can be taken by a state under Article 4 of the Convention and, if already established, NHRIs can share the committee's goal of monitoring the implementation of the CRC in states parties. The issuance by the CRC of General Comment No. 2 on the role of NHRIs in the promotion and protection of human rights[27] strengthens this view.

All in all, the open-ended yet carefully drafted words of both categories of general implementation measures have allowed for a mitigation of the "statist" culture that permeated the early years of the TB system. As such, NHRI cooperation in monitoring the implementation of UN human rights treaties seems to fit within even the most "legalistic" of implementation measures. More specifically, "administrative and other measures" has become an umbrella term to capture a variety of measures that contribute to implementing UN human rights treaties, including NHRI engagement.

In terms of the **embeddedness of TBs in the NHRI framework**, the analysis of related structural indicators show the strong footing on which TB-NHRI engagement stands. Sections A.3(b) and (c) of the Paris Principles require that NHRIs have the responsibility to "promote and ensure the harmonisation of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation."[28] In addition, the SCA-issued General Observation 1.3 reflects in more detail

[25] CRC, Art. 4.
[26] CRC General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child (November 2003), UN Doc CRC/GC/2003/527, para 18.
[27] CRC, General Comment No. 2 (2002): 'The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child,' (15 November 2002), UN Doc CRC/GC/2002/2.
[28] Paris Principles, Sections A.3(b) and (c).

on NHRIs' responsibilities vis-à-vis TB engagement. Accordingly, NHRIs are encouraged to monitor developments in international human rights law and conduct assessments of domestic compliance with and reporting on international human rights obligations.[29]

It makes sense then that NHRIs have strongly committed to instances of cooperation with the TB system and consider engagement with the various committees as an important dimension of their work. The more recent developments of SCA General Observations underline and perhaps strengthen this concept:

> Through their participation, NHRIs connect the national human rights enforcement system with international and regional human rights bodies. Domestically, NHRIs play a key role in raising awareness of international developments in human rights through reporting on the proceedings and recommendations of treaty-monitoring bodies [….] Their independent participation in human rights mechanisms through, for example, the production of parallel reports on the State's compliance with treaty obligations, also contributes to the work of international mechanisms in independently monitoring the extent to which states comply with their human rights obligations.[30]

In sum, TB members' expansive interpretation of general measures of implementation, whether through issuing NHRI-specific General Comments or by outlining NHRIs' roles within General Comments on the Nature of States Parties' Obligations, provides a solid base on which both TBs and NHRIs may plan their engagement. In addition, NHRIs have also underlined in detail the value and means for this cooperation, both within the Paris Principles and SCA General Observations. It follows that Goal 1 of the institutional framework for TB-NHRI engagement is set on strong, "formal" foundations, both from a TB and NHRI perspective.

The second structural indicator useful to assess goal-attaining potential is the **legal power** of the institutional framework for TB-NHRI engagement, essentially referring to the legal status of TB recommendations and the scope and nature of NHRI recommendations when acting under the State Reporting procedure.

[29] GANHRI, SCA General Observations as adopted in Geneva in May 2013, G.O. 1.3 – Encouraging ratification or accession to international human rights instruments in General Observations of the Sub-Committee on Accreditation, 10.
[30] GANHRI, SCA General Observations as adopted in Geneva in May 2013, GO 1.4.

Concerning the legal status of TB outputs, the analysis in chapter 5 has shown how they have no binding status for states.[31] However, due to the naturally legally binding status of treaty obligations, and the fact that TBs are the most authoritative interpreters of the treaties, "a finding of a violation by a UN human rights treaty body may be understood as an indication of the State party being under a legal obligation to remedy the situation."[32]

Concerning the legal status of outputs from NHRI activity directly related to the State Reporting procedure, it is clear that both the advisory and the monitoring functions do not imply binding force. As such, recipients of advice and related follow-up activity are not formally required by law to accept and eventually implement NHRI recommendations. However, "because of their status as independent State institutions with human rights expertise, their views—their advice and recommendations—should be given due consideration."[33] In this regard, an often referenced recommendation is for the NHRI establishing legislation "to impose on those to whom NHRI advice is addressed a legal obligation to give that advice proper consideration and, within a prescribed period, to give the NHRI a formal response."[34]

In essence, even though lacking binding status, NHRIs can assist decision-makers in complying with human rights obligations through their competence in the field and their authority. Through their advisory and monitoring functions, NHRIs adopt soft mechanisms of argumentation, persuasion, and socialization in order to bring states' behavior in line with their human rights obligations.

Due to the soft nature of both TB and NHRI recommendations, their effective mutual engagement, no matter under which specific procedure or function, rests on their legitimate expertise and independent standing. If we consider the strong structural base on which Goal 1 of the institutional framework for TB-NHRI engagement is fixed, it seems that interaction between these two sets of institutions increases the *likelihood* that monitoring the implementation of UN human rights conventions happens fruitfully.

[31] See Chapter 5, 187.
[32] Martin Scheinin, 'International Mechanisms and Procedures for Implementation' in Hanski and Suksi (eds), *An Introduction to the International Protection of Human Rights*: *A Textbook* (Institute for Human Rights, Åbo Akademi 1997) 369
[33] APF, Manual on National Human Rights Institutions (2018) 129.
[34] Ibid.

In terms of **resources personnel and capacity**, TBs are varyingly composed of between 23[35] and 10[36] unpaid experts, with the majority composed of 18 experts.[37] Aside from the members themselves, each TB is serviced by a team of approximately five OHCHR Secretariat staff (plus one or two interns per session). Although they meet for an average of 7.3 weeks per year for state party reviews,[38] the work of TBs is not strictly limited to their meeting time, but is a continuous process during which NHRIs may varyingly interact with the committees "in any way they see fit."[39] Since the number of UN human rights treaties state parties largely coincides with that of the UN (193 states parties), most of the 123 existing NHRIs (79 of which have A-status)[40] may engage with the committees' procedures. Furthermore, aside from obvious variations depending on each specific institution, NHRIs are supported by the Geneva representation of the GANHRI Secretariat, currently amounting to only five full-time staff.[41] GANHRI's role is precisely that of aiding NHRIs in liaising with the UN human rights system, including by representing specific NHRIs unable to attend TB sessions in Geneva. The analysis requires more precise budgetary details earmarked for NHRI interaction, but we do know that only 7% of the total expenditure of the OHCHR is dedicated to the TB system.[42]

These structural components relating to the number of dedicated personnel and resources suggest that TB-NHRI engagement may suffer overload, with limited available capacity to operate efficiently.

The last identified structural component to take into account when assessing whether the institutional framework for TB-NHRI engagement meets its ultimate Goal 1 is **political support**. This aspect is relatively easy to cover, as the analysis in Chapter 5 outlined. Both the Human Rights Council, through Res. 39/17, and the General Assembly, through Res. 73/44, show unequivocal support for the effective and enhanced participation of NHRIs compliant with the Paris Principles at all relevant stages TB work. Furthermore, the vast majority of State

[35] CEDAW.
[36] CAT and CED.
[37] CERD, HRCTee, CESCR, CRC, and CRPD.
[38] Estimate calculated from the number of weeks per year for state party reviews (incl. 5% margin) in 2020–2021 available in Report of the Secretary General, Status of the Human Rights Treaty Body System, Annexes, Annual meeting time in 2020–2021 by type of activity, A/73/309 (6 August 2018). For more information, see <www.ohchr.org/EN/HRBodies/HRTD/Pages/2ndBiennialReportbySG.aspx>.
[39] CEDAW, 'Statement by the Committee on the Elimination of Discrimination against Women on its relationship with national human rights institutions' (2008) UN Doc E/CN.6/2008/CRP.1 paras. 1–7.
[40] GANHRI, 'Chart of the status of national institutions' (May 2019), available at <www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf> accessed 15 July 2019.
[41] For more information see <https://nhri.ohchr.org/EN/Pages/default.aspx>.
[42] For comparative purposes, 12% of the OHCHR expenditure is dedicated to the UN Human Rights Council procedures.

submissions to the Treat Body Review 2020 call for an improvement of the treaty body system's accessibility for national stakeholders, including specific reference to NHRIs. Although based on indicators of a more formal nature, this represents strong indication that Goal 1 seems obtainable from a political perspective. Such dedicated resolutions empower both TBs and NHRIs to continue their cooperative efforts, thus increasing the *likelihood* that monitoring the implementation of UN human rights conventions happens fruitfully.

1.2. Procedural indicators

Turning to relevant procedural indicators to assess this first goal's attainment potential, I identified the institutional framework's accessibility and its usage rate and periodicity. Table 7.4 outlines these indicators, together with its evaluation and rationale.

Table 7.4. Procedural Indicators for Goal 1

Indicators	Determinants	Evaluation
The TB framework – accessibility	Lack of harmonization across the TB system	Weak
The NHRI framework – accessibility	Mandate-specific	Variable
Periodicity and Usage rates	Yearly, 60% of NHRI in states under consideration submit parallel reports; and yearly, 38% of NHRI in states under consideration brief TBs.	Strong

In terms of **accessibility**, it appears that the TB system suffers from a heterogeneous framework for granting direct access to NHRIs throughout State Reporting cycles. Each TB provides NHRIs with a distinct set of "entry points" which may hamper the effectiveness of their engagement. Examples stemming from the comparative content analysis in Chapter 6 corroborate the repercussions of this procedural dissonance. For example, with no indication within CERD instruments of how NHRIs may interact during the Committee's Pre-Sessional Working Group, none of the analyzed LOIs/LOIPRs issued by CERD were found to be influenced by the 10 NHRIs in focus.[43] As an additional example, one can observe a correlation between the CRC Committee's low percentage of TB recommendations influenced by NHRIs, at approximately 7%, with the impossibility for NHRIs to brief the committee in plenary.

[43] In contrast, 36.3% of analyzed COBs issued by CERD appear to be influenced by NHRIs.

Table 7.5 summarizes the available yet dissonant TB-specific "entry points" for NHRIs at all three stages of the State Reporting procedure. Each "tick" represents the specific manner in which NHRIs are allowed to participate in the reporting cycle of each TB.

Table 7.5. Available TB-Specific Entry Points for NHRIs

TB	PSWG	Session				Follow Up
	PSWG	Private (informal) ad-hoc briefings	Public plenary briefing	Private plenary briefings	Contribution to the dialogue with the state party	FU to COBs
CERD		✓			✓	✓
CESCR	✓	✓	✓			
CCPR	✓ (briefing)	✓		✓		✓
CEDAW	✓ (briefing)	✓		✓	✓	✓
CRC	✓	✓				
CRPD	✓ (briefing)	✓		✓	✓	✓

During the Pre-sessional Working Group stage, all analyzed TBs except CERD emphasize the "critical value" of receiving information from NHRIs early on. Accordingly, almost all committees encourage NHRIs to submit early written contributions to the development of the LOIs, including LOIPRs. However even among the TBs that include NHRI participation in the Pre-sessional Working Group in their framework, disparities arise. CESCR and CRC, although welcoming submissions from NHRIs that contribute to LOI/LOIPR preparation, do not envision the possibility that they brief the committees at this early stage.[44] Concerning CEDAW and the HRCtee, both committees' Statements on cooperation with NHRIs similarly "welcome the opportunity to meet with the concerned NHRI prior to the adoption of the list of issues," with CEDAW adding that such meetings may happen "either in person or remotely via videoconference." In addition, the CRPD allows for participation of NMMs (thus including

[44] In its Guidelines for the Participation of Partners, the CRC states that it "will issue a written invitation to selected NGOs to participate in the pre-sessional working group of the Committee which provides a unique opportunity for dialogue with partner (max. 15 minutes remarks)" (CRC/C/90, Annex VIII).

NHRIs) in private oral briefings, "on their own, or, upon previous agreement, together with civil society organizations."[45]

During the Sessional stage, all TBs provide for the possibility of private (informal) NHRI briefings, constituting the only instance of homogenous indications for NHRI engagement with the TB State Reporting procedure.

When it comes to NHRI briefings with the plenary (not during the constructive dialogue with the state party), three different approaches may be discerned. Firstly, the CRC and CERD Committees do not envision such a possibility, thus limiting NHRI briefings to private, informal meetings with relevant TB members.[46] Secondly, the CESCR allows NHRIs to brief the committee in public plenary meetings, during which all interested stakeholders may attend, including representatives of states parties under consideration. NHRIs who have submitted a report may accordingly "make a brief oral presentation on a Monday morning and/or organize lunchtime briefings, typically from 13.15 to 14.30 pm, on the day of the dialogue."[47] Until 2019, the CEDAW also opted for public plenary meetings with NHRI representatives. Within each single CEDAW session, a total of three 30-minutes sessions were dedicated to oral exchanges with NHRIs. Each NHRI that had submitted a parallel report could present for a maximum of 10 minutes, strictly adhered to by time-keeping measures. With the adoption of the 2019 Paper on the cooperation between the Committee on the Elimination of Discrimination against Women and National Human Rights Institutions, this practice has been discontinued in favor of private plenary meetings. Thirdly, the HRCtee, CEDAW, and CRPD grant NHRIs the possibility to address the committee as a whole in formal private meetings with interpretation. Such meetings allow for interactive discussions and sharing of updated additional information between the Committee and NHRIs. The privacy of the meeting "aims to ensure unfettered and effective engagement with the Committee without fear of intimidation or reprisal."[48] To facilitate these informal private meetings, the Committees' Secretariat will liaise with the NHRI as early as possible in the process.

[45] CRPD, Informative note – stakeholder participation (NHRI section), available at <www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>.

[46] "On a personal level and in informal meetings outside the Committee's working hours" in CERD, Working Methods, B. The Committee's relations with national human rights institutions and non-governmental organizations, para.s (a)–(c).

[47] CESCR, Information Note for civil society, available at <http://tbinternet.ohchr.org/ layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fINF%2f60%2f25618&Lang=en>.

[48] CEDAW, Paper on the cooperation between the Committee on the Elimination of Discrimination against Women and National Human Rights Institutions (2019), para. 25.

It is also important to see which TBs allow for NHRI contribution to the actual dialogue with the state party. Currently only CERD, CEDAW (since 2019), and CRPD envision such a possibility. The CERD committee expanded its modalities of NHRI engagement in 2007 by granting accredited NHRIs access and the right to intervene in official TB sessions. Accordingly, NHRIs are now allowed "with the consent of the concerned State party, to address the Committee in official meetings, in an independent capacity and from a separate seating, on issues related to the dialogue between the Committee and a State party, the report of which is being considered by the Committee."[49] CEDAW has only recently included this possibility: "the Committee will offer NHRIs with A Status, at their request, an opportunity to present during a defined period of time an opening statement during the formal dialogue with the State party."[50] Consistent with its innovative approach, the CRPD allows for three different modalities of engagement during the dialogue: by making an opening statement, by answering questions posed by experts of the committee, and by making closing remarks. Although the time allotted for NHRI opening and closing statements amounts to 5 and 2 minutes respectively, CRPD also allows NHRIs to answer questions posed by the committee throughout the dialogue (in addition to all previously outlined avenues of NHRI engagement).[51]

To conclude the analysis of available NHRI "entry points" throughout the State Reporting procedure, four TBs explicitly mention NHRI engagement in their follow-up stage. CERD, the HRCTee, CEDAW, and CRPD all specify that NHRIs can submit alternative FU reports. Furthermore, the committees invite state parties to involve NHRIs in the process of implementation of the convention and of its COBs. This can be done "by convening roundtables and workshops on a regular basis with the aim of assessing the progress in the implementation of the concluding observations and recommendations."[52] The CESCR and CRC committees have not yet issued any instrument pertaining to NHRI involvement with the FU stage.

Overall, NHRI access to the various stages of the TB State Reporting procedure has increased, albeit variably, in recent years. Four major trends can be discerned. First, increasing system-wide efforts to ratchet up NHRI submissions in all three stages of the procedure. Second, a

[49] CERD, Rules of Procedure, Amendment to Rule 40 (List of speakers), Annual Report A/62/18, Annex IX (2007), para.s 1-2.
[50] CEDAW (n 48), para. 26.
[51] CRPD, Informative Note for the participation of stakeholders, available at <www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx>.
[52] CERD, Guidelines to follow-up on concluding observations and recommendations, CERD/C/68/Misc.5/Rev.1 (2 March 2006), *4. Cooperation with national human rights institutions and non-governmental organisations.*

growing understanding spreading among TB members of the value of NHRIs briefing the plenaries in person. This is clear both for the Pre-sessional Working Group stage and the Session. Third, stronger preference for closed-door plenary briefings as a way to shield NHRI representatives from possible reprisals in their home countries. Last, the most recently issued TB instruments underline the value of videoconferencing, as a way to counter the inequality of access to the detriment of NHRIs in countries distant from Geneva and/or with budget limitations.

Such positive developments have come with notable exceptions. The lack of guidance on NHRI engagement with CERD's Pre-sessional Working Group stage, the possibility for NHRIs to only brief the CRC committee in a private/informal setting, and the absence of instruments that inform NHRI FU activity concerning both the CESCR and CRC committees are all problematic aspects of the current TB framework for NHRI engagement.

Notwithstanding an evident lack of harmonization, the second procedural indicator specific to **periodicity and usage rates** provides more positive findings. According to OHCHR statistics the average de facto periodicity of reports amounts to four years across the TB spectrum.[53] Due to the nature of NHRI parallel reporting, such span of time is likely to be complied with by NHRI submissions as well. The three stages of the reporting procedure further dissect such span of time, with possible NHRI input to the LOIs, COBs and in terms of follow-up. Furthermore, it appears that NHRIs have regularly contributed to recent TB reporting cycles. Throughout the period 2018–2019, NHRIs submissions have increased (albeit marginally, a 3.5 per cent increase) in comparison to the 2017–2018 period.[54] More specifically, OHCHR statistics show that from September 2018 to July 2019, the different Committees reviewed 99 states parties with an accredited NHRIs. Out of these, 59 NHRIs submitted information and 38 participated in NHRI-specific briefings in relation to their country's examination. In other words, 60% of accredited NHRIs engaged with the TB State Reporting procedure, with 38% participating in live interactions with the different Committees.

[53] OHCHR, Reporting to the United Nations Human Rights Treaty Bodies Training Guide (2017).
[54] OHCHR, Report of the Secretary General, National institutions for the promotion and protection of human rights, A/74/226 of 25 July 2019, in Annex III.

1.3. Goal Attainment

The analysis outlines two evident barriers to the attainment of Goal 1. From a structural perspective, currently limited resource and personnel capacities are at risk of overload, with recent UN budget cuts potentially curtailing TB sessions and related NHRI engagement.[55] From a procedural perspective, the lack of harmonization for NHRI access to the various TBs may curtail an effective monitoring of implementation by TB-NHRI engagement.

However, the results stemming from output identification show a positive trend in the influence NHRIs have had in all reporting cycles in focus. For instance, I have identified how the CRPD committee offers wide possibilities for input during dialogue, as shown by the varied instances for NHRIs to engage throughout the actual constructive dialogue between the committee and the state delegation.[56] It should come as no surprise that the CRPD committee features as the TB with the second highest percentage of recommendations influenced by NHRIs (21.7%). Even more significant for NHRI access is the finding that 46.4% of NHRI recommendations have been included in CRPD recommendations, making it the TB with the highest extent of NHRI recommendations adopted (in relation to both LOIs and COBs).

Overall, the fact that 18.9% of TB recommendations contain recommendations from NHRI submissions is evidence that Goal 1 is obtainable under the current institutional framework for TB - NHRI engagement. This is particularly striking due to the array of different stakeholders that regularly submit during each review cycle. TBs have gradually expanded their recognition of the unique role NHRIs may play in promoting the implementation of UN human rights conventions at the national level, including in the overall prevention and protection of rights enshrined therein. This is also true in relation to the enhancement of public awareness of such rights and the related legal obligations of the state party. Such percentage of NHRI influence is further proof of the mutuality of purpose between the TBs and NHRIs in monitoring the implementation of UN human rights treaties. However, as the TB system and NHRI community expands, the framework for engagement requires reform, in terms of both strengthening relevant resources and systemically harmonizing NHRI access.

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[55] For more information, see International Service for Human Rights, 'UN human rights bodies facing unprecedented and unacceptable cuts to their work' (29 June 2019) available at <www.ishr.ch/news/treaty-bodies-un-human-rights-bodies-facing-unprecedented-and-unacceptable-cuts-their-work> and Nick Cumming-Bruce, 'Budget Cuts May Undercut the U.N.'s Human Rights Committees' New York Times (New York, 25 May 2019), available at <www.nytimes.com/2019/05/24/world/un-budget-cuts-human-rights.html>.

[56] CRPD, 'Informative Note for the Participation of Stakeholders' (2015), available at <www.ohchr.org/EN/HRBodies/CRPD/Pages/InformativenoteforStakeholders.aspx> (accessed 15 July 2019).

2. Attainment of Goal 2: To Support a Transnational Human Rights Regime Dedicated to the Implementation of Conventional Provisions (Regime Support)

2.1. Structural indicators

Turning to the attainment of Goal 2, I have defined the regime in which both TBs and NHRIs operate as a Human Rights Transnational Legal Order. In the last thirty years, this regime has seen the gradual growth in the numbers of both UN human rights conventions and NHRIs. At the same time, NHRIs have been vested with wider margins of action within each TB's institutional framework. In this sense, the regime is effectively expanding its institutional reach and the engagement between TBs and NHRIs may be considered to play a certain systemizing role. For an assessment of whether the regime supporting goal is attainable, it is important to first underline that through their mere participation, NHRIs have the potential to connect the national human rights protection system with international human rights bodies. Domestically, NHRIs play a key role in raising awareness of international human rights standards and developments in human rights policy through reporting on the recommendations of treaty-monitoring bodies. Their independent participation in human rights mechanisms through, for example, parallel reports on the state's compliance with treaty obligations, also contributes to the work of international mechanisms in independently monitoring the extent to which states comply. Regime support is part of the often-stated bridging role that NHRIs play between international and domestic human rights monitoring. Relevant structural indicators for the attainment of the regime supporting goal are the embeddedness of NHRIs in the TB framework, the embeddedness of TBs in the NHRI framework, personnel capacity and resources and political support. Table 7.6 provides an evaluation of these indicators, together with an explanation of the rationale behind the proposed evaluation.

Table 7.6. Structural Indicators for Goal 2

Indicators	Determinants	Evaluation
Structural embeddedness (of NHRIs in the TB framework)	UN Human Rights Treaties Preambles, recent TB statements and OHCHR Secretariat initiatives	Strong
Structural embeddedness (of TBs in the NHRI framework)	Paris Principles A.3(b) and A.3(c) and SCA General Observations 1.3 and 1.4	Strong

Personnel capacity and resources	Few TB members and OHCHR staff, low amount of weeks per year, low budget	Weak
Political Support	Treaty Body Strengthening Process	Strong

In terms of **structural embeddedness**, the Paris Principles are the first, and perhaps clearest, evidence that TB – NHRI engagement works towards supporting the regime in which both institutions operate. NHRIs should be given "as broad a mandate as possible"[57] encompassing the promotion of "a progressive definition of human rights which includes all rights set out in international, regional and domestic instruments, including economic, social and cultural rights."[58] The SCA of GANHRI has made this regime-supporting function clear in its General Observation 1.4 which states that "Through their participation, NHRIs connect the national human rights enforcement system with international and regional human rights bodies".[59]

I have built on this and further analyzed the attainment of Goal 2 through a comparative textual analysis of UN human rights conventions' preambles, together with evidence from other sources such as NHRI instruments and statements from representatives of state parties and the OHCHR Secretariat.

The focus on preambles is useful because it is through their content that the wider aims of the law may be gathered. As acknowledged in Chapter 4, preambles represent "narratives that seek to establish legitimacy with regard to the origins and purposes of a piece of legislation, to outline the processes that led to the enactment of the legislation, and to better communicate these rationales to the document's multiple constituents."[60] Preambles pertaining to the UN human rights treaty system present numerous commonalities, reflecting a certain regime-supporting goal by linking each convention to the broader UN system (UN Charter and UDHR) as well as the TB system as a whole.

[57] Paris Principles, para. 2.
[58] GANHRI, SCA General Observation 1.2. See also C. R. Kumar, 'National Human Rights Institutions and Economic, Social and Cultural Rights: Towards the Institutionalization and Developmentalization of Human Rights' 8 *Human Rights Quarterly* (2006) 779.
[59] SCA General Observation 1.4 – Interaction with the international human rights system in General Observations of the Sub-Committee on Accreditation, 13.
[60] T. H. Malloy, 'Title and Preamble' in M. Weller (ed), *The Rights of Minorities in Europe* (Oxford University Press 2005) 56.

Common to all UN human rights treaties, preambles reflect "the conceptual interrelationship between human rights and other core values of the United Nations".[61] Explicit references to the principles—or indeed states' obligations—proclaimed in the UN Charter, as well as those stemming from the UDHR, represent a unity of purpose for the broader UN system. In such way, preambles are a "reflection of the foundational principles of the UN Charter"[62] and affirm that each UN human rights treaty sets out states' obligations in fulfilling the objectives of the UN Charter and the UDHR.[63]

Furthermore, most preambles create an explicit link between the convention in question and relevant rights contained in already existing UN human rights conventions. By considering the international conventions concluded under the auspices of the United Nations that promote and protect human rights, preambles enable both the TBs and NHRIs to interpret conventional provisions in light of other UN human rights treaties, thus underlining the complementarity of the TB system as a whole. These preambles firstly trace antecedent instruments along the lines of other preambular paragraphs in human rights treaties and secondly place prior conventions within the context of the convention in question.

Inextricably linked to the drafters' intentions, UN human rights treaties' preambles highlight the complementarity of a transnational human rights regime dedicated to implementing UN human rights conventions. In addition to preambles, guidance on how TB – NHRI engagement should act in supporting the regime in which it operates is also present within the different NHRI-specific Papers issued by different committees. For instance, in the *Paper on the relationship of the Human Rights Committee with national human rights institutions*[64] the Human Rights Committee "recognizes the important role that NHRIs have in bridging the gap between international and national human rights systems".[65] Similarly, by issuing the *Paper on the cooperation between the Committee on the Elimination of Discrimination against Women and National Human Rights Institutions*[66]the CEDAW Committee stresses that "NHRIs have a

[61] Janet E. Lord, 'Preamble' in Elias Bentekas, Michael Ashley Stein, and Dimitris Anastasiou, *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press 2018).
[62] Ibid.
[63] Freeman, Chinkin, and Rudolf (n 13) 40.
[64] UN HRCtee, 'Paper on the relationship of the Human Rights Committee with national human rights institutions, adopted by the Committee at its 106th session' (13 November 2012), UN Document CCPR/C/106/3.
[65] Ibid. para 3.
[66] CEDAW, "Paper on the cooperation between the Committee on the Elimination of Discrimination against Women and National Human Rights Institutions" (adopted by the Committee at its seventy-fourth session, 21 October-8 November 2019), available at <https://tbinternet.ohchr.org/_layouts/15treatybody external/Download.aspx?symbolno=INT/CEDAW/BAP/8997&Lang=en> accessed 20 December 2019.

bridging role between international, regional and national human rights systems".[67] The Committee expands on how TB – NHRI engagement should support the regime in which they operate: "[NHRIs] have an important role in encouraging their respective States parties to meet their reporting obligations and provide treaty bodies in general […] with independent and valuable information on national human rights situations and promote implementation of the Convention and the Committee's Concluding Observations at the global, regional and local levels".[68] It is through such explicit statements that the current institutional framework available for NHRIs to engage with the TB system appears effectively designed to attain the regime supporting goal it was set to achieve. Although conventions themselves might not be as explicit, TB members have made it clear that NHRIs have developed to become key partners in supporting the work of the TB system across the human rights TLO in which both institutions operate.

Similar calls can also be found in contemporary statements offered by state parties and the OHCHR Secretariat, including political support initiatives given to the ongoing implementation of GA Res. 68/268.[69] To this end, states parties have recently underlined two crucial tenets which signal **political support** to the value of Goal 2. The first is the need for the TB system to further develop synergies at both UN and regional human rights levels.[70] Coordination and dialogue between TBs, UN human rights mechanisms and regional human rights systems are required in order to increase their effectiveness, to exchange best practices by taking advantage of each others' findings, and to jointly contribute to implementation on the ground. The second tenet highlighted by recent states parties' initiatives penetrates even further to the core of TB-NHRI cooperation, and that is improved stakeholder engagement. A Joint Statement issued in 2019 on behalf of 39 states confirms this view: "the Treaty Body Strengthening Process should be based on the observance of a number of key principles such as the inclusivity of all relevant stakeholders […]. All stakeholders—be it States, treaty bodies, OHCHR, *NHRIs* or civil society—should give due consideration to their respective role in this process."[71] Even these most recent political initiatives give value to what has been identified

[67] Ibid. para. 4.
[68] Ibid.
[69] See Chapter 1.
[70] Non paper 2020 review of the UN human rights treaty bodies system submitted by Costa Rica and 43 other States, available at <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CHAIRPERSONS/CHR/31/28571&Lang=en>.
[71] Joint statement delivered by Belgium on behalf of 39 countries on 13 October 2017 at the Third Committee under item 72(a), available at <www.ohchr.org/Documents/HRBodies/TB/TBS/Status/2018/JointStatementByBelgium.pdf>.

as the second ultimate goal of the TB framework for NHRI engagement, in other words the aim to support a transnational regime dedicated to UN human rights treaty implementation.

From an OHCHR Secretariat perspective, a number initiatives give further value to this second goal. For example, as part of the Harmonized Guidelines on Reporting under the International Human Rights Treaties, the Secretariat stated that the reporting process should be viewed

> within the wider context of the obligation of all States to promote respect for the rights and freedoms, set out in the Universal Declaration of Human Rights and international human rights instruments", by measures, *national and international*, to secure their universal and effective recognition and observance.[72]

It follows that NHRI activity when engaging with the TB State Reporting procedure is, according to all stakeholders involved, meant to achieve a certain regime-supporting role by bringing together national and international monitoring of UN human rights treaties implementation. It remains to be seen whether such statements of political support will be matched with a strengthening of both personnel capacity and resource allocation, which seriously risk of hampering maximally effective cooperation between TBs and NHRIs. In fact, in terms of **resources personnel and capacity**, the structural components relating to the number of dedicated personnel and resources highlighted in the previous section suggest that TB-NHRI engagement may suffer from an overload, with limited available capacity to operate efficiently. In turn, this may hamper the regime supporting goal of the institutional framework for TB-NHRI engagement.

2.2. Procedural indicators

Turning to relevant procedural indicators to assess this second goal's attainment potential, I identified the institutional framework's accessibility and its usage rate and periodicity. Table 7.7 outlines these indicators, together with its evaluation and rationale.

Table 7.7. Procedural Indicators for Goal 2

Indicators	Determinants	Evaluation
The TB framework – accessibility	Lack of harmonization	Weak

[72] See Harmonized Guidelines on Reporting under the International Human Rights Treaties, including Guidelines on a Core Document and Treaty-Specific Documents, in *Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties, Report of the Secretary-General*, 3 June 2009, UN Doc. HRI/GEN/2/Rev.6, para. 8

The NHRI framework – accessibility	Mandate-specific	Variable
Periodicity and Usage Rates	Average de facto periodicity is 4 years, broken down in the 3 stages (PSWG, Session and FU); Yearly, 60% of NHRI in states under consideration submit parallel reports and 38% of NHRI in states under consideration brief TBs.	Strong

In terms of **accessibility,** I have already discussed in relation to the attainment of Goal 1 how both procedural elements of the institutional framework for TB-NHRI engagement vary from TB to TB. Such variance is evident both in terms of available "entry points" during the three stages of the reporting cycle, as well as the different instruments that each TB has issued in relation to cooperation with NHRIs. The lack of a homogenous set of rules that guide NHRI participation across the TB system represents a weak procedural indicator vis-à-vis the aim of supporting the overarching regime in which both institutions operate. NHRIs would in fact be better placed to provide information under each TB's reporting cycle with the higher degree of clarity and predictability that would result from a harmonized set of participation rules.

Turning to **periodicity and usage rates** however, indicators show a more positive light. First, the average de facto periodicity of reporting cycles amounts to 4 years. Within such lapse of time, NHRIs may contribute, albeit varyingly, to all three stages of the State Reporting procedure. Such iterative process allows NHRIs, mandate and resource permitting, to support TB monitoring through their independent and localized capacity. Secondly, and notwithstanding TB-specific nuances, all committees have recently enjoyed productive cooperation with NHRIs. The latest figures from the OHCHR show that between September 2018 and July 2019, out of 147 reviewed states parties a total of 59 NHRIs submitted information toward both PSWGs and Sessions.[73] Of these, 38 NHRIs briefed the various committees, either in person or through videoconference arrangements. As only 99 of the reviewed states parties had an accredited NHRI during this time, this means approximately 60% of available NHRIs engaged with the TB system through submitting information while

[73] OHCHR, Report of the Secretary General, National institutions for the promotion and protection of human rights, A/74/226 of 25 July 2019, in Annex III.

38% went as far as briefing the committees. In comparison to the previous reporting period, there was an increase of 3.5% in NHRI submissions to TBs.[74] These two sets of very recent instances of TB-NHRI engagement in the State Reporting procedure show that information flow from the national to the international level has increasingly been facilitated by the institutional framework for TB-NHRI engagement. Furthermore, the combined findings of the document content analysis show that 18.9% of TB recommendations cover issues raised by NHRI submissions. Also significant for considering the attainment of Goal 2 is the finding that 28.7% of recommendations within NHRI parallel reports have been included in TB recommendations. In such way, such cooperation appears to be an integral, supporting dialectic of the broader regime complex.

2.3. Goal Attainment

Arguably, identified procedural indicators suggest that a transnational system is in place, with NHRIs influencing the scope of action of international monitoring bodies on the implementation of human rights treaty provisions. It follows that Goal 2 of the institutional framework for TB-NHRI engagement is achievable within its available structure and process. By receiving NHRI submissions and providing NHRIs a space for dialogue within its State Reporting procedure, the TB system has (at least) supported a transnational human rights regime dedicated to implementing treaty provisions. A harmonized approach to NHRI engagement across the TB system would, however, be a further step toward the full attainment of Goal 2.

3. Attainment of Goal 3: To Legitimize the Institutional Framework Necessary to Support such a Regime

3.1. Structural indicators

The preceding chapters traversed how legitimacy is of fundamental importance for institutions that do not hold judicial powers and act in an advisory manner.[75]

Both the TB system and NHRIs are public organizations that make use of "independent experts" as their ultimate decision-makers. The lack of binding force, which characterizes both institutions' decision-making powers, increases the importance of such independent expertise

[74] See OHCHR, 'Report of The Secretary General, National Institutions for the Promotion and Protection of Human Rights' A/HRC/39/20 of 14 August 2018, in Annex III.
[75] See Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press 2003) 254.

in multiple ways. Firstly, reliance on independent expertise carries out a legitimating function, increasing the trustworthiness and credibility of decision-making.[76] Secondly, by ensuring that "decisions are based on sound reasoning and empirical knowledge,"[77] it may help increase levels of goal-attainment more efficiently.[78] Finally, independent experts, by increasing the authoritativeness of both institutions' decisions, may act as substantiating actors, thus somewhat filling the gap related to their non-binding nature. It is in fact essential that such independent expertise be recognized as such by all involved actors subject to recommendations from TBs and NHRIs.

For both TBs, "independence and professionalism serve as important building blocks of institutional legitimacy that may, in turn, confer legitimacy on other institutions,"[79] including NHRIs. It is due to the non-binding nature of both institutions' outputs that "the government's and public's perception of the status, role, competence and legitimacy of the body and its decisions" is key to a most effective TB framework for NHRI engagement.[80]

Relevant structural indicators to assess this goal's attainment potential are the embeddedness of NHRIs in the TB framework, the embeddedness of TBs in the NHRI framework and structural independence and impartiality. Following the same approach as the preceding sections, Table 8.8 offers an evaluation of these indicators, together with an explanation of the rationale behind the proposed evaluation.

Table 7.8. Structural Indicators for Goal 3

Indicators	Determinants	Evaluation
Structural Embeddedness (of NHRIs in the TB framework)	Only CRPD Art 33(2) and 3 GCs (CERD, CESCR and CRC) on NHRI engagement	Weak
Structural Embededness (of TBs in the NHRI framework)	Paris Principles A.3(b) and A.3(c) and SCA General Observations 1.3 and 1.4	Strong
TB Structural Independence and Impartiality	Lack of transparency and potential political bias in TB election processes	Weak

[76] Christina Boswell, 'The political functions of expert knowledge: knowledge and legitimation in European Union immigration policy' 15(4) *Journal of European Public Policy* (2008) 471–488.
[77] Ibid. 147.
[78] Ibid.
[79] Yuval Shany, 'Assessing the Effectiveness of International Courts: A Goal-based Approach' (2014) 106 *American Journal of International Law* (2012) 266–267.
[80] A. Byrnes, 'An Effective Complaints Procedure in the Context of International Human Rights Law' in A. F. Bayefsky (ed), *The UN Human Rights Treaty System in the 21st Century* (Kluwer 2000) 139–62, 151.

NHRI Structural Independence and Impartiality	Mandate – dependent NHRI appointment processes	Variable

I will first tackle the **structural embeddedness** indicators. From a strictly legal perspective, the only way TBs are able to authoritatively pronounce and interpret issues arising out of the provisions of their treaty of concern is through issuing General Comments (GC).[81] Although not legally binding,[82] GCs are "secondary soft law instruments," meaning sources of non-binding norms that interpret and add detail to the rights and obligations contained in the treaties.[83]

Modalities of NHRI engagement with the State Reporting procedure of the TB system have not been included in actual conventional provisions, except in relation to the role and functioning of NMMs, as outlined in CRPD Article 33(2). The varied nature of instruments on NHRI cooperation that are currently available across the TB system represents one of the weakest indicators of the institutional framework for TB - NHRI engagement. Furthermore, only CERD, CESCR, and CRC have issued GCs on their engagement with NHRIs.[84] According to a strict interpretation of the value of TB instruments, it is only these three TBs that have authoritatively interpreted their respective conventions in light of NHRI institutionalization, thus formally incorporating NHRIs as legitimate partners of the State Reporting procedure. CRPD has not produced a NHRI-specific General Comment to date, but its drafters have gone a long way toward legitimizing NHRIs in the work of the CRPD. The legitimization of the institutional framework for CRPD-NHRI engagement is made explicit through the inclusion of Article 33(2). By including a reference to Paris Principles-compliant institutions within its conventional provisions, the drafters raised TB-NHRI engagement to a state obligation under the convention, proof of the highest regard with which NHRIs are considered for implementing the CRPD. Approximately a decade after the entry into force of the convention, in 2016 the committee further elaborated on the role and functions of such "independent monitoring

[81] With regards to CEDAW, 'General Recommendations' pursuant to Article 21 of the Convention.
[82] Committee on International Human Rights Law and Practice, 'Final Report on the Impact of Findings of the UNTBs' (Berlin 2004) (International Law Association, Berlin, 2004) note 3 and 5.
[83] Dinah Shelton, 'Commentary and Conclusions' in Shelton (ed), *Commitment and Compliance* (Oxford University Press 2000).
[84] CERD, General recommendation XVII on the establishment of national institutions to facilitate the implementation of the Convention, para. 1(c) and para. 2; CESCR, General Comment no. 10, The role of national human rights institutions in the protection of economic, social and cultural rights (1998), para. 3(f); CRC, General Comment No. 2, The role of independent national human rights institutions in the promotion and protection of the rights of the child, CRC/GC/2002/2 (2002), para.s 20 – 22.

frameworks."[85] By considering these structural features in conjunction with the peculiarly varied entry points available for NHRIs throughout the committee's State Reporting procedure,[86] a GBA analysis suggests that Goal 3 is obtainable from a CRPD perspective. On the other hand, the lack of specific General Comments on NHRI engagement from the HRCtee, CESCR, CERD, and CEDAW arguably hampers the overall, systemic achievement of Goal 3.

With regards to **structural embeddedness of TBs in the NHRI framework**, it is a much more positive evaluation. Both the Paris Principles (Sections A.3(d) and A.3(e)) and their interpretation through SCA General Observations 1.4 explicitly consider "interaction with the international human rights system" as "an effective tool for NHRIs in the promotion and protection of human rights domestically."[87] More specifically, the SCA encourages NHRIs to monitor the states' reporting obligations under […] the international treaty bodies, including through dialogue with the relevant treaty body committees."[88] These fundamental NHRI instruments play a strong legitimating function in terms of TB engagement, thus suggesting that Goal 3 is obtainable from a NHRI framework perspective.

I now turn to the **independence and impartiality** indicators. For the TB system, the analysis has covered how states parties have delegated power to the committees to monitor the implementation of UN human rights treaties. As such, it is paramount that TB members fulfill relevant criteria of legitimacy in exercising such power. This is of importance from both a normative perspective (lack of TB enforcement powers) and a reputational perspective, in that it is "essential that states perceive the treaty bodies' activities as legitimate in order to promote the effective implementation of their findings."[89] Cooperation with domestic stakeholders may counterbalance "the methodological weaknesses, lack of coherence and analytical rigor"[90] that at times compromise TB outputs and their legitimacy. Two factors determine the quality of COBs: "the degree to which they address issues that are in fact a problem in the country concerned, as well as the usefulness of the recommendations."[91] NHRIs can play a key role for both aspects. The availability of documentation on the human rights situation in the country

[85] CRPD, Guidelines on independent monitoring frameworks and their participation in the work of the Committee, CRPD/C/1/Rev.1 of 10 October 2016.
[86] CRPD, Informative Note for the participation of stakeholders, available at <www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx>.
[87] GANHRI, SCA General Observation 1.4.
[88] Ibid.
[89] Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012) 421.
[90] K. Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' 42 *Vanderbilt Journal of Transnational Law* (2009) 905.
[91] Walter Kalin, 'Examination of state reports' in Keller and Ulfstein (n 95) 62.

concerned—such as investigations or reports by NHRIs—is crucial for the quality of TB recommendations. In providing reliable and implementable recommendations from ground level, independent national institutions arguably foster the legitimacy of TB recommendations, adding an important source of data to TBs' work.

For NHRIs, engaging with the TB system is also beneficial from a legitimization perspective. By participating in the State Reporting procedure, NHRIs reinforce their legitimacy in the eyes of the UN while learning from shared experiences in the multilateral system and basing their domestic initiatives on the concerns and recommendations expressed in TB recommendations. Of crucial importance is the fact that the TB system fosters the promotion and protection of NHRI independence. Through issuing recommendations on the situation of NHRIs in states parties under consideration, the TBs "help ensure that NHRIs are independent and provided with the mandate and adequate resources required for them to operate effectively and in line with the Paris Principles."[92] Furthermore, TB recommendations that address the need for NHRI compliance with the Paris Principles are taken into consideration as a matter of course when such compliance is being reviewed in the NHRI accreditation process.[93]

However, there appears to be certain problems in terms of the independence of both TBs and NHRIs, especially in the nomination processes of both institutions' independent experts.

From a TB perspective, the provisions governing the selection and election processes for TB members remain very vague, especially the selection of candidates within individual member states. No UN rules apply to this crucial aspect of the TB system's functioning aside from the requirements to act in a personal capacity, independently from the nominating state and free from political pressures. States are left with extensive leeway to influence the results of these elections and "while some countries do select their candidates based on their recognized knowledge of human rights, others appoint candidates closely related to the government, such as former diplomats or civil servants."[94] Once selected internally, TB experts' election processes also lack transparency, with voting decisions often influenced by negotiations among states, especially due to the sensitivity of assessing states' compliance with their human rights treaty obligations.[95] Consequently, not all experts sitting on the committees are perceived to

[92] GANHRI, Background Paper, National Human Rights Institutions and United Nations Treaty Bodies (May 2016) 8.
[93] Ibid.
[94] Valentina Carraro, 'Electing the experts: Expertise and independence in the UN human rights treaty bodies' (2019) 25(3) *European Journal of International Relations* 835.
[95] Ibid. 836.

possess an equal level of expertise or independence from their home governments, and "when independent expertise is lacking in committees, this is considered to be a consequence of the politicized selection and election processes that led to their appointment."[96]

In sum, there is "no publicly visible accountability mechanism for the nomination and appointment process to the treaty bodies," which has led professionals in the field to qualify TB member appointment as "a state-driven process."[97]

From an NHRI perspective, appointment mechanisms constitute one of the most important ways to guarantee their independence, diversity, and accessibility. The appointment process emits a clear signal to the public about an institution's independence. As the OHCHR states:

> An appointment process that includes the legislature and civil society is likely to be independent, and to be perceived as such. Appointments made purely by the executive in a state have the potential to undermine efforts to establish an independent over-sight body. Normally, direct appointment by the executive branch of government is undesirable. This does not preclude the capacity for members to be appointed by the executive once appointments have been confirmed by a separate and independent body.[98]

Appointment processes vary greatly among institutions. Regardless of whether NHRI-establishing instruments are of constitutional or legislative, appointment procedures are usually laid out within each institution's implementing legislation, "since the level of detail required to establish and authorize the functioning of an NHRI is not usually appropriate for a constitution."[99]

While the TB system has developed a relatively detailed set of guidelines on the independence of its membership,[100] the NHRI community relies on less specific requirements. Prerequisites for NHRI membership are barely considered (the SCA calls for "qualified and independent decision makers"[101]), and there is a strong focus on pluralism "to promote the effective

[96] Ibid. 845.
[97] Ibid. 836.
[98] OHCHR, Appointment Procedures of National Human Rights Institutions, Paper for the discussion of the International Coordinating Committee of National Human Rights Institutions (2017) 6.
[99] OHCHR, National Human Rights Institutions: History, Principles, Roles and Responsibilities, Professional Training Series No. 4 (Rev. 1), 2010, 32
[100] Chairs of the TBs, Addis Ababa Guidelines on the Independence and Impartiality of Members of the Human Rights Treaty Bodies, 2012.
[101] SCA, General Obs. 1.7.

cooperation" among domestic stakeholders. On the selection and appointment of NHRIs' decision-making bodies, Section B.1. of the Paris Principles does list the professional backgrounds which candidates should have.

The Paris Principles provide that the appointment of members must be "in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation." The appointment can be "by means of an election or otherwise."[102] Underlying the link between membership and independence, the Paris Principles further state that:

> In order to ensure a stable mandate for the members of the national institution without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.[103]

The SCA gives further guidance on membership by stating that "government representatives and members of parliament should not be members of, nor participate in, the decision-making of organs of an NHRI. Their membership of, and participation in, the decision-making body of the NHRI has the potential to impact on both the real and perceived independence of the NHRI."[104] The OHCHR reiterates that the appointment process for NHRI members is crucial not least because of the resulting perception of independence: "Institutions are only as independent as their members."[105]

It is clear, as discussed, that appointment processes require clarity, transparency, and inclusive participation to ensure merit-based selection and pluralism.[106] Although representing a solid, broad basis on which NHRI-establishing states can act, "the Paris Principles do not pay sufficient attention to this critical area which affects the independence of the NHRI."[107] This is because the realities of day-to-day politics is a serious threat to NHRI appointment mechanisms. When parliament does not fully exercise its independent oversight, NHRI appointment processes may be seriously undermined. The requirements of both absolute and

[102] Paris Principles, 'Composition and guarantees of independence and pluralism', para. 1.
[103] Paris Principles, 'Composition and guarantees of independence and pluralism', para. 3.
[104] GANHRI, SCA General Observation 1.9.
[105] OHCHR, *National Human Rights Institutions: History, Principles, Roles and Responsibilities* (Professional Training Series No. 4 (Rev. 1) 2010) 41.
[106] GANHRI, SCA General Observation 1.8.
[107] OHCHR (n 105) 6.

simple majority are at high risk of falling into logics of party politics, which may result in a more or less partisan NHRI appointee depending on political representation in parliament.

3.2. Goal Attainment

In sum, the attainment of Goal 3 by the institutional framework for TB - NHRI engagement seems not as straightforward as the previous two ultimate goals. On the one hand, it is reasonable to assume that just by interacting with the different committees, NHRIs benefit from a legitimacy boost, especially considering the accreditation procedure that each NHRI must go through in order for such interaction to happen in the first place. The same reasoning applies to TBs, in that the provision of first-hand, ground level, and independent information by NHRIs may strengthen the legitimacy of the recommendations they issue.

On the other hand, the lack of transparency and the real risk of political bias in the appointment procedures of both TBs and NHRIs do taint the overall legitimacy of the TB framework for NHRI engagement. Furthermore, looking at explicit references to NHRI engagement across the different TB frameworks has shown that the instruments adopted do not provide for a comparable level of legitimacy across the board, with only three TBs issuing General Comments on cooperation with NHRIs.

4. Conclusion

To conclude, measuring the effectiveness of any public organization can be an extremely difficult task, especially due to the broadness of the goals implied, the challenge of quantifying public goods resulting from their activity, and the dependence of their performance on the external environment in which they act. Past scholarship on TB performance evaluations has offered mixed conclusions in evaluating domestic human rights implementation.[108] A number of such studies have offered a bleak picture of UN human rights treaty effectiveness, associating ratification with increase in state repression[109] or highlighting the limits of the system, with states parties lacking incentives to police their compliance with TB recommendations.[110] This project has proposed organizational effectiveness theory to unpack

[108] E. Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights' *Journal of Conflict Resolution* (2005); Y. Lupu, 'Best Evidence: The Role of Information in Domestic Judicial Enforcement of International Human Rights Agreements' 67 *International Organizations* (2013) 469; W. Cole, 'Mind the Gap : State Capacity and the Implementation of Human Rights Treaties', 69 *International Organizations* (2015) 405–435; H. Smith-Cannoy, *Insincere Commitments: Human Rights Treaties, Abusive States and Citizen Activism* (Georgetown University Press 2012); D. W. Hill, 'Estimating the Effects of Human Rights Treaties on State Behavior' 72 *Journal of Political Studies* (2010).

[109] E. M. Hafner Burton and K. Tsuitsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises' 110 *American Journal of Sociology* (2005) 1373–1411.

[110] O. A. Hathaway, 'Do Human Rights Treaties Make a Difference?' 111 *Yale Law Journal* (2002) 1935.

the black box of TB operations specific to engagement with NHRIs, one of the fundamental dialectics for an effective national human rights system. A GBA model offers clear assessment guidelines for effectiveness analysis that move beyond the act of ratification, while allowing for a systematic analysis of structural and procedural characteristics useful for reform proposals. This is timely, considering the 2020 review of the measures taken pursuant to GA Res. 68/268 on strengthening and enhancing the effective functioning of the TB system. The effectiveness of both the TB system and existing national human rights systems cannot be strengthened without giving due attention to improving and streamlining NHRI engagement. The GBA model for effectiveness analysis may provide helpful guidelines to comparatively assess existing modalities of engagement and to highlight areas in need of reform. It may be particularly useful considering the relatively unchartered processes specific to the expanding "domestic institutionalization" of human rights.[111]

From the analysis of both structural and procedural indicators of the current institutional framework for TB - NHRI engagement, we can conclude the effectiveness analysis with cautious optimism.

Concerning the attainment of the first two ultimate goals, that is monitoring of UN human rights conventions implementation (Goal 1) and regime support (Goal 2), the framework relies on a strong structural elements. Whether through explicit reference or by evolutive interpretation, UN human rights treaties provide guidance for comprehensive NHRI engagement in relevant Preambles, General Implementation Measures, and multiple General Comments. TBs themselves have also expanded on their cooperation with NHRIs through a wide variety of internal instruments, including Rules of Procedure, Working Methods, Statements, Guidelines, Papers, and session-specific Information Notes. Recent Annual Meetings of TB Chairpersons have further pushed for harmonizing TB-NHRI engagement. OHCHR Secretariat initiatives have strengthened these efforts, together with strong political support from UN member states. HRC Res. 39/17 and GA Res. 74/156 represent the most up-to-date indications that NHRIs are seen as an important players in monitoring implementation efforts and in integrating the actors of the transnational human rights regime that supports such monitoring efforts.

[111] Steven LB Jensen, Stéphanie Lagoutte & Sébastien Lorion, The Domestic Institutionalisation of Human Rights: An Introduction, 37(3) Nordic Journal of Human Rights (2019), 165-176.

The community of NHRIs also benefits from strong structural elements, as both the Paris Principles and SCA General Observations are clear on the role they can and should play when engaging with the TB system. My content analysis strengthens this mild optimism, as TB recommendations are often found to include issues raised by NHRI parallel reports (18.9%). Also significant is the finding that NHRI submissions are seriously considered by TB members (28.7% of NHRI recommendations were integrated within issued TB recommendations).

The analysis also throws up two clear obstacles to the attainment of an effective monitoring and the support of a dedicated transnational human rights regime. From a structural perspective, limited personnel capacity and resources risk overloading the system, especially due to the simultaneous increase in ratifying states, NHRI establishment, and UN budget cuts. Without adequate resources, the institutional framework for TB - NHRI engagement risks failing to keep up with growing expectations and requirements. From a procedural perspective, the vast array of TB-specific instruments available on NHRI engagement, and the different modalities of NHRI access that these provide, constitute yet another obstacle to effective monitoring. Despite numerous calls for harmonization, NHRIs still face diverse procedures for their cooperation depending on which TB they are called to submit information to. This state of affairs arguably hampers the effectiveness of NHRI contribution, especially when considering the preparatory work each NHRI goes through before engaging with the TB system. It seems that a harmonized set of guidelines would reform the TB system for the better, instead of the somewhat confusing and multi-faceted framework currently in place.

Turning to the attainment of the third identified ultimate goal, legitimizing the institutional framework necessary to support a regime dedicated to the implementation of UN human rights conventions, a few larger obstacles arise. From a structural perspective, only the CRPD explicitly considers the existence and relevant role of NHRIs in the implementation of its provisions under the state reporting procedure.[112] In addition, only the CERD, CESCR, and CRC committees have authoritatively interpreted their conventions in light of NHRI expansion, by issuing NHRI-specific General Comments. All other TBs consider NHRI cooperation, albeit with significant detail, in internal and exclusively procedural instruments such as Rules of Procedure, Working Methods, Statements, and so on. From a strictly legal perspective, the mere development of instruments of this nature does not provide NHRIs with fully legitimate recognition as monitoring partners of the TBs when assessing the implementation of

[112] CRPD, Art. 33(2).

conventional provisions. What's more, the lack of transparency in the processes of TB nomination and election, as well as NHRI appointment, are significant procedural hurdles to the attainment of Goal 3. Informal processes of selection, at times directly linked to diplomatic and ministerial interests, taint the legitimacy of the whole framework. The risk of political and diplomatic exchange of votes is underscored by both institutions' election procedures, whether during a Meeting of States Parties in the case of TBs or, at best, in national parliaments in the case of NHRIs. Negotiations of both TB and NHRI members may fall within an "exchange of votes" optic that little has to do with the actual expertise of the nominee in question, once again impinging on the legitimacy of the framework as a whole. States are left with extensive leeway to influence both institutions' membership. While we cannot dismiss the many instances of appointment due to recognized knowledge of human rights and independence from the state, the current lack of transparency may lead to the appointment of representatives closely related to the government of the day. This is a serious concern, especially due to the inextricable bond linking both TBs' and NHRIs' effectiveness to their independent standing.

A reform of both institutions' appointment procedures would significantly strengthen the overall legitimacy of the TB framework for NHRI engagement. This is perhaps the most crucial reform needed, as it is closely related to all identified goals of the framework. That idea is supported by the theoretical model on NHRI effectiveness developed by Linos and Pegram, which focuses on "formal institutional safeguards" as effectiveness indicators.[113] They term these features "safeguards" because "they can help protect an active NHRI from efforts to change its leadership or structure, as well as from allegations that it exceeded its mandate [and] 'formal' because they are found in writing in legal documents—typically in an NHRI's charter, which can in turn form part of a national constitution, legislation, or executive decree."[114]

Institutions who lack the power to issue binding decisions rely on their authority and independent expertise for the effective implementation of their recommendations. Political bias in both TB election and NHRI appointment processes has the potential to diminish the overall effectiveness of TB-NHRI engagement. Be as it may, such institution-specific reforms will likely come up against further structural and procedural complications without an adequate and receptive domestic human rights dimension. It is thus important to follow up this goal-based approach analysis with a more contextualized approach to TB-NHRI engagement. In other

[113] Katerina Linos and Tom Pegram, 'What Works in Human Rights Institutions' 112 *American Journal of International Law* (2017) 3.
[114] Ibid. 4.

words, we now turn to the role that initiatives implemented at the domestic level can have in facilitating the receptiveness of TB recommendations and the monitoring of their implementation by both TBs and NHRIs.

Part C

Assessing the Impact of TB – NHRI Engagement in Context

Chapter 8. The Role of Treaty Body - NHRI Engagement in the National Human Rights System

1. Introduction

Arguably, the findings of the GBA analysis represent only one, albeit crucial, dimension of how effective TB – NHRI engagement currently is. International efforts aimed at increasing the effectiveness of such inter-institutional engagement[1] require adequate institutional frameworks at the domestic level, a definitional corollary and integral part of the TLO structure described in Chapter 1. The underlying assumption of this domestic turn is that without an adequate and receptive domestic human rights dimension, structural and procedural complications might undermine UN-level efforts toward a more inter-connected and effective system of human rights monitoring.

Before plunging into the context-dependent case study, this chapter introduces one conceptual tool that may strengthen the GBA analysis of TB – NHRI engagement by building an additional framework for assessing the impact of TB-NHRI engagement domestically. More specifically, I consider the National Human Rights System (NHRS) framework as a useful tool to simplify analyses of the various "national human rights protection systems" available worldwide. The notion of *system* underscores the fact that "human rights promotion and protection entail continuous interactions between a complex whole of actors and processes."[2] The notion of a *national* system underlines "that human rights are implemented locally through a state's ability to meet its human rights duties and rights-holders' ability to claim their rights."[3] With these elements in mind, we define a functioning NHRS as *a system where the state guarantees human rights protection to everyone*. Such guarantees of human rights protection are ensured when "all actors of the NHRS—i.e. governmental state actors, independent state actors and non-state actors—respect and promote human rights and when the state effectively respects, protects and fulfils its human rights obligations."[4]

[1] E.g. Report of the Secretary-General, Status of the Human Rights Treaty Body System, A/74/643, 10 January 2020; OHCHR, Common approach to engagement with national human rights institutions – Note by the Secretariat, HRI/MC/2017/ (2017).
[2] The Danish Institute for Human Rights, *HRS Concept Note – National Human Rights Systems and State Human Rights Infrastructure* (2016) 3.
[3] Ibid.
[4] Ibid. 2.

Every NHRS consists of different sets of actors, each with its own designated mandate to monitor and/or implement UN human rights recommendations. In one of the most recent and detailed analysis on the matter, Lagoutte identifies three main NHRS components: actors, interactions and frameworks.[5] The ensuing analysis will dissect this trichotomy, with the understanding that "most of these frameworks, actors and interactions are state driven, some of them are both state driven and independent, such as the work of courts or NHRIs, and others are driven by civil society."[6] Critically, there is no standardized NHRS formulation and its components are affected by contextual variations in each country of reference. A useful common denominator to contrast the potentially infinite NHRS variations, however, is that when actors, interactions and frameworks are purposefully set up to integrate and monitor human rights in-country, the state will be better equipped to abide by its international human rights commitments. Of course, this is not to say that all these NHRS conditions are necessary nor that they are sufficient for compliance purposes. Nonetheless, from a probabilistic perspective, these conditions arguably increase the chances of better human rights implementation.

In sum, I contend that the formalist approach typical of the GBA model may be strengthened by a more contextualized understanding of the intricate dynamics of TB-NHRI engagement domestically. By situating TB – NHRI engagement within the NHRS analytical framework, it will be possible to assess whether the necessary preconditions are in place for such engagement to have an impact on domestic human rights implementation. This approach, enriched by the bottom-up, participatory, and "ground-level" form of empiricism typical of the NLR tradition, will form the framework necessary to embark on the case-study analysis of TB-NHRI engagement in in the Australian context.

Throughout this chapter, I will unpack these dynamics by identifying how different NHRSs may ultimately shape the impact of TB – NHRI engagement in monitoring the implementation of human rights treaties. Towards this, it is first useful to introduce a broad categorization of relevant contextual factors that may influence the work of both TBs and NHRIs. Secondly, it is important to dig deeper into the definition of NHRS, including an analysis of how NHRS establishment is tied to certain obligations under UN human rights treaties as well as an overview of the actors, interactions and frameworks that make a NHRS. To complete the

[5] Stéphanie Lagoutte 'The Role of State Actors Within the National Human Rights System' 37(3) *Nordic Journal of Human Rights* (2019) 177–194.
[6] Ibid. 183.

picture, it is also important to assess the role of NHRIs vis-à-vis different NHRS actors. With all these elements in mind, the chapter concludes with some reflections on the value of "NHRS-thinking" in the assessment of TB – NHRI engagement.

2. Contextual Factors Shaping Treaty Body - NHRI Engagement

A first useful step towards assessing the impact of TB and NHRI cooperation on domestic human rights implementation is to consider the range of contextual factors that influence the creation, expansion, or dissipation of their "authority."[7] I follow Alter et al's tripartite categorization of these contextual factors and adapt them to the logics of TB-NHRI engagement. The three analytically distinct categories relate to the institution-specific context, the constituencies' context, and the global, regional, and local political context.[8]

When assessing the impact and effectiveness of TB-NHRI engagement domestically, institution-specific contextual factors relate to the particular NHRI under scrutiny. Depending on its structure and process[9], NHRI-specific contextual factors may impact the ways in which audiences relate to the NHRI itself and, ultimately, the TB-influenced recommendations it issues. Complementing the "top-down" analysis in Part B, the analysis requires a bottom-up approach that looks into the specific, practical work of NHRIs, in order to understand how it can feed back into international human rights monitoring. As was the case for the GBA model, a crucial step for an impact-related analysis 'in context' is the formal infrastructure regulating NHRI activity domestically, relying on an institution-specific understanding and microanalysis of institutional structures and processes. Instead of the institutional framework for TB - NHRI engagement, I am now interested in the NHRI-specific infrastructure that monitors the implementation of TB recommendations domestically. The NHRI mandate and the processes it entails shape the impact that each NHRI's activity may have in monitoring the implementation of TB recommendations.

Aside from institution-specific contexts, "different constellations of constituencies can assist or impede [TB-NHRI engagement] from gaining narrow, intermediate, and extensive authority."[10] In order to analyze this specific set of factors, it is important to regard "the state"

[7] Karen J. Alter et al., 'How Context Shapes the Authority of International Courts' 79 *Law and Contemporary Problems* (2016) 1–36.
[8] An essential feature of NLR is the theorization of the interaction of law's formal aspects with different political, economic, social, and psychological contexts.
[9] Examples include formal mandate, internal structure, priorities, resources, relevant domestic procedures, etc.
[10] Alter et al. (n. 7) 22.

as contextually skewed and focus on the relative advantages of different forms of state institutions in different contexts. The "state," in this sense, is emergent: "it emerges from the interaction of legal subjects and of different institutions […] The "state" is not imposed from on high, either by governors or by legal theories. It emerges from real-world interaction."[11] It is thus useful to disaggregate its various constituent parts, including sub-state (government officials, national courts, and administrative agencies, and so on) and non-state (civil society, the media, and so on) constituencies.

In order to grasp the extent of NHRI impact toward the implementation of TB recommendations, I agree with Alter that, in practice, "it is the lack of support that constrains […] authority" and that "variation that is rooted in the constituencies themselves thus provides an implicit aid or hurdle to creating and building […] authority."[12] Variation in audience recognition is incredibly important for institutions, such as TBs and NHRIs, which do not issue decisions of a binding nature. TB-NHRI engagement gains de facto authority through an iterative process that key audiences recognize and respond to with consequential steps toward compliance. The multifaceted and contextually dependent nature of "the state," inclusive of a variety of state and non-state actors, suggest that there are multiple pathways for both TBs and NHRIs to gain authority in fact. This, in turn, influences the impact that both institutions have on human rights implementation.

TB-NHRI engagement may also see its authority bolstered or hindered by specific political contexts. From a geopolitical perspective, "trends and practices produce global frameworks of power and ideas, which in turn influence and enable actions in international institutions and in regional and national settings."[13] Such influences can, of course, strengthen or weaken authority. This is especially true in the human rights field, as UN human rights conventions may reflect externally supported rights that local audiences do not necessarily share.[14] In such instances, it might be hard for TB-NHRI engagement to acquire any kind of authority in practice. The disjuncture between externally and internally held ideals may be bridged by NHRIs themselves vernacularizing TB recommendations to accommodate internal audiences.

[11] H. Erlanger et al., 'Foreword: Is It Time for a New Legal Realism?' *Wisconsin Law Review* (2005) 339.
[12] Alter et al. (n. 7) 22.
[13] Ibid. 26.
[14] For examples, see State Responses to Questionnaire on implementation of GA res. 68/268, Third biennial report by the Secretary General (2019), available at <www.ohchr.org/EN/HRBodies/HRTD/Pages/3rdBiennialReportbySG.aspx>.

Yet another way to "mediate the pathologies created by disjunctures between global and local interests"[15] is through so-called regionalism.[16]

Finally, and perhaps most significantly, shifts in domestic politics may have a strong impact on the level of authority NHRIs may hold vis-à-vis the executive or indeed the public at large. As different executives alternate at the helm of government, so does the extent to which NHRI activity is considered an authoritative voice in the country. NHRIs in countries where different political parties often succeed one another may fluctuate between having little to no authority and to rapidly-expanding authority. The same applies to TB recommendations, as more "globalist" governments may regard them as extensively authoritative while more "localist" governments may see recommendations from Geneva as imposing on their sovereignty.

3. The National Human Rights System (NHRS)

The tripartite responsibility to respect, protect, and fulfill human rights stands as one of the precepts of the contemporary transnational human rights legal order. Without an adequate and receptive domestic human rights dimension, this responsibility risks facing structural and procedural complications a priori of any substantive deliberations on the matter. According to Ramcharan, such responsibilities are the founding pillars of "one of the most strategic concepts for the universal realisation of human rights" that is, a functioning and effective NHRS.[17]

By adopting the Millennium Declaration, member states agreed to strengthen their domestic capacity to implement the principles and practices of human rights.[18] As then UN Secretary General Kofi Annan put it in his 2002 *Strengthening of the United Nations* report:

> Building strong human rights institutions at the country level is what in the long run will ensure that human rights are protected and advanced in a sustained manner. The emplacement or enhancement of a national protection system in

[15] Alter et al (n 7) 27.
[16] Moravcsik, for example, attributes the success of the ECtHR to the social and political interests of member states in protecting liberal democracy in the context of the Cold War. For more information, see Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *Int'l Org.* 220.
[17] Bertrand G. Ramcharan, 'National Responsibility to Protect Human Rights' 39(2) *Hong Kong Law Journal* (2009).
[18] United Nations Millenium Declaration, A/RES/55/2 (2000), paras. 25 and 26.

> each country, reflecting international human rights norms, should therefore be a principal objective of the Organization.[19]

Soon thereafter, Mary Robinson, former UN High Commissioner for Human Rights, also noted in this regard:

> We still do not put adequate emphasis on helping […] to build […] national protection systems for human rights […]. This means the courts, the legislature, as well as national human rights institutions or human rights commissions. It also means the educational system and human rights education programmes. It includes space for civil society, human rights defenders and support for their relationship with the formal system of promotion and protection of human rights.[20]

In broader terms, such an understanding joins a prospering academic field focused on the role of national human rights actors and procedures, a trend recently branded as the domestic institutionalization of human rights.[21] According to Lagoutte,

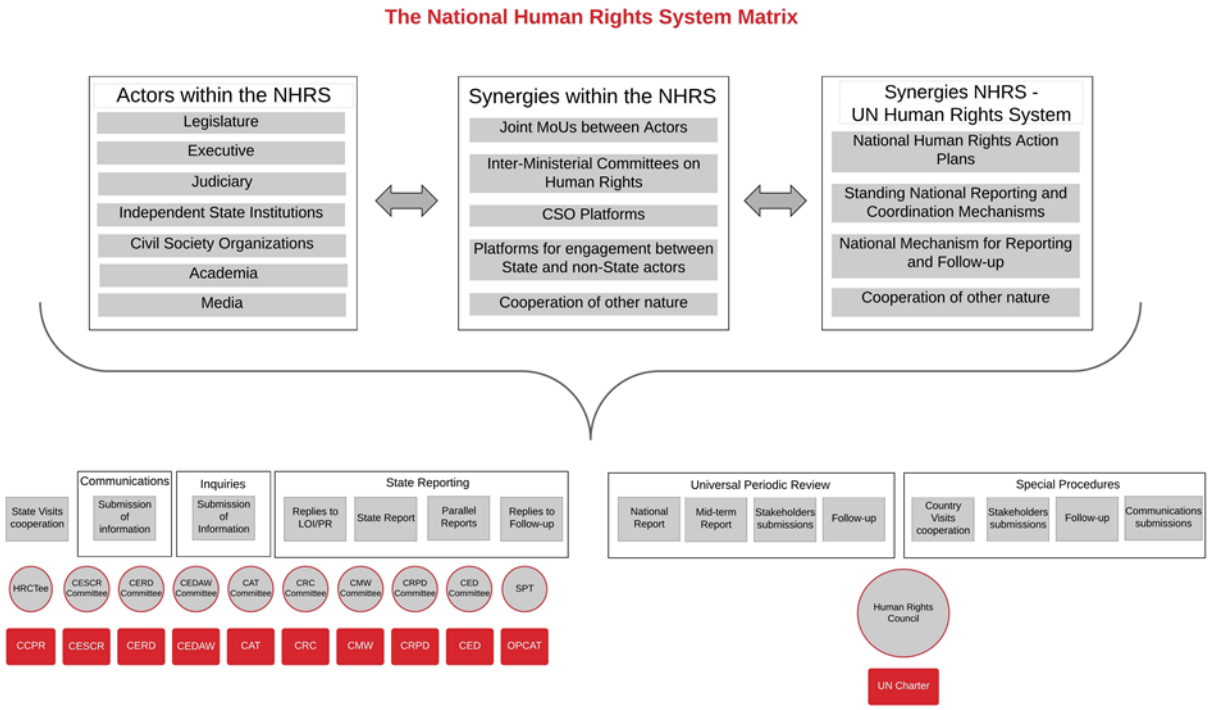
> "a systems approach to the role of state actors in human rights protection and promotion allows us to capture the political and institutional complexity of domestic human rights implementation. Such an approach values coordination of the state human rights action (horizontal dimension) and on its interaction with supra national human rights mechanisms (vertical dimension)".[22]

By adopting this understanding and adapting its novel analytical framework to explain domestic human rights dynamics, it is possible to devise a matrix that exemplifies the different components that shape a NHRS. Graph 1 represents such matrix in more detail. Every NHRS consists of different sets of actors, each with its own designated mandate to monitor and/or implement UN human rights recommendations. A strong NHRS is one that prescribes formal and informal interactions among its actors as well as frameworks that connect the domestic and

[19] OHCHR, Report of the Secretary-General, Strengthening of the United Nations: an agenda for further change, A/57/387 (9 September 2002), para. 50.
[20] Mary Robinson, 'From Rhetoric to Reality: Making Human Rights Work' 1 *European Human Rights Law Review* (2003) 6–7.
[21] S. L. B. Jensen, S. Lagoutte, and S. Lorion, 'The Domestic Institutionalisation of Human Rights: An Introduction' 37 Nordic Journal of Human Rights 3 (2019), 165 – 176.
[22] Lagoutte (n. 5), 179. For earlier discussions on the importance of systemic studies on 'National Human Rights Protection Systems' see also B. G. Ramcharan (n. 17); M. Robinson, 'From Rhetoric to Reality: Making Human Rights Work' 1 European Human Rights Law Review (2003); and UNGA, Report of the Secretary-General, Strengthening of the United Nations: An Agenda for Further Change, UN Doc. A/57/387, 9 September 2002.

international efforts of human rights monitoring. In such way, the NHRS fosters synergetic action throughout the Human Rights TLO. These synergies can be both horizontal (through cooperation among actors within the NHRS, at central and local levels) and vertical (between NHRS actors and the UN Human Rights system).

Graph 8.1. The National Human Rights System Matrix



3.1. The Obligation of NHRS Support and the Role of NHRIs

A strong NHRS is not just a wished-for outcome of UN declarations and statements of top UN officials. I argue that the conceptualization of a NHRS is substantially tied to obligations stemming from the UN human rights treaty system itself. More specifically, ensuring the operation of a NHRS (and the role of NHRIs therein) can be implied by the obligation for each state party *to take steps/measures* to ensure the realization of the rights enshrined in each treaty. It thus is necessary to delve into the meaning of "taking steps," using the examples of the earliest conventional provisions, the two covenants.

Article 2(2) of the ICCPR requires that "each State Party to the present Covenant undertakes *to take the necessary steps* […] *to adopt such laws or other measures* as may be necessary to give effect to the rights recognized in the present Covenant." It follows that, unless covenant rights are already protected by their domestic law or practices, states parties are required on

ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the covenant.[23] ICCPR Article 2(3) requires that, in addition to effective protection of covenant rights, states parties must ensure that individuals also have accessible and effective remedies to vindicate those rights, "determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State."

What the two above provisions require is, in essence, that states parties ensure support the operation of its NHRS, through adopting legislative, judicial, administrative, educative, and other appropriate measures in order to fulfill their legal obligations. Through General Comment No. 31, the HRCtee supports this argument and specifically mentions the value of NHRIs in its purview.[24]

Turning to the ICESCR, Article 2(1) spells out the general legal obligation applicable to all substantive rights protected by the covenant: "Each State party undertakes *to take steps*, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."[25]

It is through General Comment No. 3 that the CESCR committee elaborates on the nature of states parties' obligations under the covenant, and as such the requirement "to take steps" is widely analyzed. The means which should be used to satisfy the obligation *to take steps* are stated to be "all appropriate means, including particularly the adoption of legislative measures," through "the provision of judicial remedies," and "include, but are not limited to, administrative, financial, educational, and social measures."[26] These articulations outline the *systematic* nature of the obligation to take steps, in essence providing for an early, somewhat vague definition of a NHRS.

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[23] HRCtee *General Comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 13.
[24] Ibid. para. 15: "The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. […] Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. *National human rights institutions*, endowed with appropriate powers, can contribute to this end".
[25] CESCR, Art 2(1).
[26] CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23.

With regard to the role of NHRIs within these obligations, the CESCR Committee is even more explicit than its civil and political rights counterpart is. In General Comment No. 10 on the Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights, it stipulates that:

> Article 2 (1) of the Covenant obligates each State party "to take steps ... with a view to achieving progressively the full realization of the [Covenant] rights ... by all appropriate means". The Committee notes that one such means, through which important steps can be taken, is the work of national institutions for the promotion and protection of human rights.[27]

The principles contained in ICCPR General Comment No. 31 and ICESCR General Comment No. 3, read in conjunction with General Comment No. 10**,** reflect the obligations of states parties to the wider set of human rights treaties generally and the obligations of governments under international human rights law.[28] What ensues from the above conventional articles and their authoritative interpretations is an indication of an obligation to systematically (legislatively, judicially, administratively, financially, educationally, socially, etc.) act toward realizing conventional provisions (NHRS support). As part of this obligation, TBs have made clear that the establishment and operation of independent NHRIs may be an important measure to support a NHRS.

Institution-building, institutional strengthening and inter-institutional cooperation are at the core of such obligations. In this context, it is useful to juxtapose them with the most recent discussions on NHRS, which, as discussed, have identified three main components: actors, interactions, and frameworks. Importantly, there is no standardized NHRS formulation and components are affected by contextual variations in each country of reference.

As also mentioned, the common denominator for the NHRS concept as a whole is that when actors, interactions, and frameworks are purposefully set up to integrate and monitor human rights in-country, the state is better equipped to abide by its international human rights commitments. Moreover, each actor, interaction, and framework which forms part of the NHRS transcends the domestic element in which it is established, and serves as connector within the broader TLO structure. In essence, the NHRS is the domestic stage of the transnational and iterative whole that is the human rights TLO.

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[27] Ibid.
[28] Ramcharan (n 17).

The obligation "to take steps," found throughout the UN human rights treaty system since 1966, is applicable to the most recent definition of a NHRS. The State has a duty to establish and maintain the actors and processes that ensure and support the formulation and implementation of the domestic human rights policy and legal frameworks. The implementation of the legal and policy frameworks is monitored through evaluation and consultation (with both state and non-state actors), and adjusted through law and policy reforms.[29]

A detailed analysis of all the various actors, interactions, and frameworks that make a NHRS is beyond the scope of this chapter. Such a detailed study would require deep contextual knowledge in relation to each state under scrutiny. It is however useful to sketch out the generally applicable categories of the NHRS, especially for the case-study analysis that will follow. In such way, I argue that an assessment of TB – NHRI engagement and the impact it may have on domestic human rights implementation rests on a solid and comprehensive analytical framework.

3.2. The Actors of a NHRS

Every NHRS consists of different sets of actors, each with its own designated mandate to monitor and/or implement UN human rights recommendations. We can distinguish three generally applicable categories of NHRS actors, namely governmental actors, independent state actors and non-state actors.

Governmental state actors consist, first of all, in the ministerial bodies, including both politically nominated officials and career bureaucrats acting under their ministries of belonging. Within each ministry, internal human rights focal points and related structures can also be envisaged as well as inter-ministerial coordination bodies for an organic streamlining of governmental human rights action. Second, governmental state actors include law enforcement and security bodies, such as the armed forces, police, and detention services. On both counts, the decentralization of public authority and the general organization of the state will affect the relevance of local government and administration, which are nonetheless to be considered as potential governmental state actors involved in human rights implementation.

Turning to independent state actors, four target bodies can be distinguished.

Firstly, *the judicial power*, consisting of the entire court system of the country in question. Here too, context plays a major role, with notable distinctions between, for example, a constitutional

[29] Lagoutte (n. 5), 185.

or supreme court structure. Once again, a NHRS requires an independent court system mandated to monitor conformity of legislation with both the constitution and the fundamental rights enshrined therein, as well as with the state's international human rights obligations. Secondly, *Parliament*, although some reservations may apply when considering the actual independence of members of parliament in dealing with human rights monitoring outside of party politics. Within each parliament, depending once again on the characteristics of each system (for example, single or double chamber), inter-parliamentary committees are often established with thematic focuses. Such committees are useful for streamlining parliamentary efforts that require technical and/or contextual knowledge, as is the case with human rights. Thirdly, *ombudsman bodies* are also part of the independent state actor category, and are sometimes recognized as NHRIs. The recent endorsement by the Committee of Ministers of the Council of Europe of the Principles on the Protection and Promotion of the Ombudsman Institution (the "Venice Principles") reiterates the state's duty "to support and protect the Ombudsman Institution and refrain from any action undermining its independence."[30] Although not explicitly linked to the international human rights system, ombudsman institutions not recognized as NHRIs may also have a part in human rights implementation.[31] Centrally to the current analysis, *NHRIs* are par excellence state actors mandated to promote and protect human rights independently from the government of the day. As stated by the General Assembly , NHRIs play an important role in "promoting and protecting human rights and fundamental freedoms, strengthening participation, in particular of civil society organizations, and promoting the rule of law and developing and enhancing public awareness of those rights and freedoms."[32] Variations have a major presence within this category, with the Paris Principles specifying that "the national institution shall have an infrastructure which is suited to the smooth conduct of its activities"[33], essentially allowing the state to decide on its composition. NHRI structural models are indeed varied. The GANHRI SCA summarizes these diverse models as "commissions; ombudsman institutes; hybrid institutions; consultative and advisory bodies; research institutes and centres; civil rights protectors; public defenders; and

[30] Council of Europe, Committee of Ministers adoption of the European Commission for Democracy Through Law (Venice Commission), Principles on the Protection and Promotion of the Ombudsman Institution ("the Venice Principles"), CDL-AD(2019)005 (3 May 2019).
[31] Ibid. paras. 12–13.
[32] GA Res. 74/156, (Third Committee) National Institutions for the Promotion and Protection of Human Rights, A/RES/74/156 (23 January 2020).
[33] Paris Principles, Composition and guarantees of independence and pluralism, Section A(2).

parliamentary advocates."[34] No matter what configuration, the key elements are a broad human rights mandate and independence from government, in compliance with the Paris Principles.

In addition, non-state actors are a crucial component in the architecture of the NHRS and among the main beneficiaries of a strong system. In relation to this, the OHCHR outlines five elements that optimize civil society's transformative potential:

- a robust legal framework compliant with international standards and a strong national human rights protection system that safeguards public freedoms and effective access to justice;
- a political environment conducive to civil society work;
- access to information;
- avenues for participation by civil society in policy development and decision-making processes; and
- long-term support and resources for civil society. [35]

In a context of shrinking space for civil society worldwide, it is important that each NHRS creates and maintains an enabling environment for civil society. Furthermore, "international human rights law places an obligation on States to respect rights and freedoms that are indispensable for civil society to develop and operate."[36] Serving as basis for CSO activity are the rights to freedoms of opinion and expression, peaceful assembly and association, the right to participate in public affairs, and the principle of non-discrimination.[37] The OHCHR has gone as far as defining its engagement as a threshold issue: "if space exists for civil society to engage, there is a greater likelihood that all rights will be better protected."[38] States thus have an

[34] GANHRI, General Observations of the Sub-Committee on Accreditation, para. 7, 2. For a more complete discussion of the different model-types, the SCA refers to United Nations Office of the High Commissioner for Human Rights, *Professional Training Series No. 4: National Human Rights Institutions: History, Principles, Roles and Responsibilities* (2010) 15–19.
[35] OHCHR, Report, Practical recommendations for the creation and maintenance of a safe and enabling environment for civil society, based on good practices and lessons learned, HRC Res. A/HRC/32/20 (11 April 2016), para. 4.
[36] Ibid. para. 5.
[37] These rights are guaranteed by the International Covenant on Civil and Political Rights (arts. 19, 21, 22 and 25); the International Covenant on Economic, Social and Cultural Rights (arts. 8 and 15); the Convention on the Elimination of All Forms of Discrimination against Women (art. 3); the International Convention on the Elimination of All Forms of Racial Discrimination (art. 5); the Convention on the Rights of the Child (arts. 13 and 15); the Convention on the Rights of Persons with Disabilities (arts. 21, 29 and 30); the International Convention for the Protection of All Persons from Enforced Disappearance (art. 24); and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (art. 26).
[38] OHCHR, Report on Civil Society No. 38 (2016), para. 11.

obligation to facilitate CSOs in their advocacy campaigns, through monitoring and reporting activities, awareness raising and education, and research.

3.3. Interactions and Frameworks of a NHRS

In any NHRS, all actors involved are connected through their participation in interactions characterized by distinct levels of formalization. In turn, such interactions are nested within wider frameworks, stemming from treaties, soft law and policies, legislation, and regulations. If the nature and numbers of actors pertaining to a NHRS are very much dependent on contextual factors within each country, interactions among actors multiply the possibilities of available formats. As previously mentioned, these synergies can be both horizontal and vertical.[39] Horizontal synergies may include national coordination structures, processes and dialogues, joint MoUs between two state actors or include more elaborate frameworks, among several state actors. It is often the case that non-state actors are invited to these (in)formal platforms, either as integrating participants with decisional powers or as simple observers of the process. Vertical synergies may enable regular interaction between NHRS actors and the UN human rights system, through strengthened national ownership of reporting and follow-up. Usually of a formal nature, vertical synergies are set to systematize and rationalize the engagement with international and regional human rights mechanisms, including the preparation of reports, and coordinate follow-up initiatives, thereby ensuring national coherence.

What follows are three examples of formalized NHRS interactions which have shaped recent efforts toward a "domestic institutionalization of human rights,", namely National Human Rights Action Plans, Standing National Reporting and Coordination Mechanisms and National Mechanisms for Reporting and Follow-up. Common to all three is the reliance on iterative, two-way processes of dialogue between the (sub-)national and international level. These interlinkages are essential for the effectiveness of the overall human rights TLO, inasmuch as an integrated and complex network of transnational human rights mechanisms requires a solid NHRS to meet its demands in terms of data collection, monitoring, and follow-up. As shown above, the state has a duty to take steps toward effective implementation of conventional provisions. In a well-functioning NHRS, state actors play a central role in the various reporting

[39] The establishment of formal interactions and frameworks has surged since the 1990s. One recent example stems from the TB system, as CRPD Art. 33 imposes a three-legged "framework" by distributing roles and responsibilities to focal points in ministries and administration in charge of implementing the convention's provisions, Paris Principles-compliant agencies, as well as civil society.

processes entered into and facilitate interactions with relevant independent state actors as well as with CSOs. It is through this facilitating role that the state fulfills its "duty to take steps," securing a pluralist and transparent approach to the duty.

A solid NHRS also functions as a counterbalance to one of the main problems of the current UN human rights system—the extent of overlapping recommendations coming from different monitoring bodies. States are often subject to similar obligations under multiple human rights treaties, and a solid NHRS, through its streamlining potential, can solve the often stated overburdening of the state apparatus vis-à-vis its international commitments.[40] The establishment of a systematic multi-institutional network, involving both state and non-state actors, responds to the current nature of the UN human rights monitoring framework as a regime complex. A siloed institutional response at the domestic level fails to focus on the fact that every human rights treaty is part of a highly interconnected web of treaties dealing with the same or similar subject matters. Through these overlapping treaty connections, the enforcement of one individual human rights treaty has the potential to impact, and be impacted by, the enforcement of other human rights treaties.[41]

National Human Rights Action Plans (NHRAPs)

An early sign of the need for a methodical approach in developing and supporting NHRSs comes from the 1993 Vienna World Conference on Human Rights, which recommended that "each State consider the desirability of drawing up a *national action plan* identifying steps whereby that State would improve the promotion and protection of human rights."[42] In proposing national action plans, the conference took the view that a comprehensive structured approach to human rights planning would facilitate the achievement of positive outcomes. A cornerstone of this approach is the understanding "that each country starts from its own political, cultural, historical and legal circumstances" and that "lasting improvements in human rights ultimately depend on the government and people of a particular country deciding to take concrete action to bring about positive change."[43] NHRAPs essentially place human rights improvements in the context of public policy, so that governments and communities can

[40] See Geneva Academy, Academic Platform on Treaty Body Review 2020, Selected Contributions, available at <www.geneva-academy.ch/tb-review-2020/selected-contributions>.
[41] Pamela Quinn Saunders, 'The Integrated Enforcement of Human Rights' 45(1) New York University Journal of International Law & Politics (2012) 105.
[42] Vienna Declaration and Programme of Action, Part II, para. 71.
[43] Ibid.

endorse human rights improvements as practical goals, devise programmes to ensure the achievement of these goals, engage all relevant sectors of government and society, and allocate sufficient resources.

The obligation to adopt a detailed plan of action dates back to the ICESCR (1966), specifically applied to the right to education under Article 14.[44] However, an analysis of the CESCR Committee's reports and recommendations shows that this understanding has also been applied to other rights under the covenant.[45] The Committee formalized this interpretation in General Comment No. 1, which holds that:

> While the Covenant makes this obligation explicit only in article 14 in cases where "compulsory primary education, free of charge" has not yet been secured for all, a comparable obligation "to work out and adopt a detailed plan of action for the progressive implementation" of each of the rights contained in the Covenant could arguably be implied by the obligation in article 2, paragraph 1 "to take steps ... by all appropriate means".[46]

The Committee in General Comment No 1 not only establishes a clear obligation for the states parties to adopt a NHRAP for implementing all the rights contained in the ICESCR but it also provides a conceptual basis for this obligation which applies readily to other UN human rights committees.[47]

There are different types of human rights- related action plans, broadly divided in two distinct categories, comprehensive and rights-specific NHRAPs. As the name suggest, states adopt comprehensive NHRAPs to implement their obligations under all ratified international human rights instruments. On the other hand, rights-specific NHRAPs are focused either on the implementation of a specific convention or a specific theme.[48] Both categories offer distinct advantages and it is up to each state to consider the most appropriate setup for its own national context. The adoption of comprehensive NHRAPs avoids the need to develop multiple

[44] ICESCR, Art 13: Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed *plan of action* for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.
[45] Azadeh Chalabi, The Nature and Scope of States' Obligation to Adopt a National Human Rights Action Plan, 18 *The International Journal of Human Rights* (2014), 392.
[46] CESCR, *General Comment No. 1: Reporting by States Parties*, 27 July 1981, E/1989/22.
[47] Chalabi (n. 45), 68.
[48] E.g. National Action Plans on Women, Peace, and Security and National Action Plans on Business and Human Rights.

NHRAPs, a potentially unwieldy process which risks further fragmenting an already complex endevour. Moreover, a comprehensive NHRAP allows for resource optimization and can serve the interrelatedness of human rights. However, adopting rights-specific NHRAPs may allow more effective and transparent implementation, according to the understanding that each convention is unique and deserves specificity. Separate plans, with more specific targets, may also be easier to be monitor and evaluate.

In the case study chapter on Australia, I will consider three distinct NHRAPs. For now, it is important to highlight the relevance that this form of domestic human rights institutionalization plays towards a functioning NHRS.

Standing National Reporting and Coordination Mechanism

The recent TB strengthening process has also contributed to a shift toward increasing domestic-level efforts for implementing human rights. In her 2014 report, then High Commissioner for Human Rights Navy Pillay advocated the establishment of a standing national reporting and coordination mechanism (SNRCM) in each state aimed at "reinforcing the capacity of States to continuously engage with and benefit from the United Nations human rights system, towards a more effective implementation of their human rights obligations"[49] and "that that would serve as the core reference body in relation to human rights protection at the country level, particularly with regard to the treaty bodies."[50] Notably, although the focus of this at the UN is on the TB level, the importance of national involvement in follow-up is still pertinent in the context of the broader implementation crisis affecting the international human rights system.[51]

The SNRCM is the first sign of NHRS operationalization by the OHCHR. Variance among possible SNRCMs mirrors what has already been said of the NHRS, in that many variations are possible as to the composition of national drafting mechanisms: "As recommended by most treaty bodies, the SNRCM should receive inputs from all stakeholders […] In recent years, more States parties have begun to include representatives of stakeholders outside the Government, not only as contributors of information but as full members of drafting committees".[52]

[49] OHCHR, Strengthening the United Nations Human Rights Treaty Body System (Res. A/66/860) from now on the Pillay Report (June 2012), para. 4.5.4., available at www.ohchr.org/EN/HRBodies/HRTD/Pages/TBStrengthening.aspx.
[50] Ibid.
[51] Rachel Murray and Debra Long, *Soft/Hard, Binding/Non-Binding: a Useful Distinction? The Implementation of the Findings of the African Commission on Human and Peoples' Rights* (CUP 2015) 24.
[52] The Pillay Report (n. 49), para. 4.5.6.

No matter what the form, a SNRCM analyzes and clusters recommendations from all human rights mechanisms, thematically and/or operationally, identifies relevant actors involved in the implementation of the recommendations and guides them throughout the process. Governments should ensure the permanent involvement of all branches of State, NHRIs, civil society, academia and others that may offer valuable information and perspectives should also be included. The Pillay Report also touches upon the second element of a functioning NHRS - relevant interactions among actors. To this end, the report recommends state parties mandate the SNRCM to establish and execute the modalities for systematic engagement with national stakeholders, including NHRIs, civil society actors and academia.[53]

The Pillay Report is a clear indication that a functioning NHRS is at the root of reform proposals toward a stronger human rights TB system, and a possible solution to the overarching human rights implementation crisis. However, the resulting GA Res. 68/268 did not quite reflect this.[54] The closest to a mention of the NHRS concept is a rather feeble *recognition* that "some States parties consider that they would benefit from improved coordination of reporting at the national level".[55]

National Mechanisms for Reporting and Follow-up

Despite the apparently cursory attention in GA Res. 68/268 to the need for states to approach reporting at a systematic level, several important developments did arise out of the Treaty Strengthening Process. The key novelty was its development of the SNRCM concept into what has been redefined as national mechanism for reporting and follow-up (NMRF). In 2016, the OHCHR published a practical guide[56] and accompanying study[57] on "Effective State Engagement with International Human Rights Mechanisms through NMRFs." According to the OHCHR, a NMRF is

[53] Ibid.
[54] UN GA. Res.68/268, Strengthening and enhancing the effective functioning of the human rights treaty body system, A/RES/68/268 (21 April 2014), para. 17(b) available at www.ohchr.org/en/hrbodies/hrtd/pages/tbstrengthening.aspx.
[55] Ibid. para. 20.
[56] OHCHR, National Mechanisms for Reporting and Follow-up, *A practical guide to effective state engagement with international human rights mechanisms* (2016), available at www.ohchr.org/Documents/Publications/HR_PUB_16_1_NMRF_PracticalGuide.pdf
[57] OHCHR, National Mechanisms for Reporting and Follow-up, *A study of state engagement with international human rights mechanisms* (2016), available at www.ohchr.org/Documents/Publications/HR_PUB_16_1_NMRF_Study.pdf

> a national public mechanism or structure that is mandated to coordinate and prepare reports to and engage with international and regional human rights mechanisms (including treaty bodies, the universal periodic review and special procedures), and to coordinate and track national follow-up and implementation of the treaty obligations and the recommendations emanating from these mechanisms.[58]

From a NHRS perspective, it is important to stress that a NMRF establishes a national coordination structure among ministries, specialized State bodies, parliament and the judiciary, as well as in consultation with the NHRI and civil society. As a government mechanism or structure, it derives its mandate from the state's obligations and commitments to implement and report on treaty obligations and recommendations from human rights mechanisms.

The introduction of a NMRF may have substantial impact on the effectiveness of the NHRS as a whole, and on TB – NHRI engagement more specifically. Firstly, it establishes a national coordination structure, thereby creating national ownership of reporting and follow-up and regular interaction within ministries and with ministries engaging seriously in reporting and follow-up. Secondly, it systematizes and rationalizes the engagement with international and regional human rights mechanisms, including the preparation of reports, and coordinates follow-up, thereby ensuring national coherence. Thirdly, it allows for structured and formalized contacts with parliament, the judiciary, NHRI and civil society, thereby mainstreaming human rights at the national level, strengthening public discourse on human rights, and improving transparency and accountability. This includes establishing strategic national partnerships, including with NHRIs and civil society, thus ensuring a more participatory, inclusive and accountable human rights based governance.[59]

The latest OHCHR Management Plan (2018–2021) provides further evidence of a heightened attention to the role of domestic human rights actors. During this period, the OHCHR has been supporting existing NMRFs to enhance implementation of recommendations of all international human rights mechanisms.[60] In doing so, the OHCHR specifically has reached out to NHRIs "to build networks for cross-learning, develop a one-stop online platform for engagement with the mechanisms, and exploit up-to-date communications to facilitate two-

[58] OHCHR (n 56), 2.
[59] Ibid. 4–5.
[60] Ibid.

way exchange of information during mechanisms' hearings."[61] In order to enable the broadest audience to have access to UN human rights mechanisms, the OHCHR has continued to upgrade its existing online repository of recommendations, the Universal Human Rights Index.[62] In a new development, the OHCHR is developing the National Human Rights Recommendations Tracking Database, "an electronic tool that aims at facilitating the recording, tracking and reporting on the implementation of human rights recommendations emanating from international, regional and national human rights mechanisms at the national level."[63] When the above initiatives are added to the "increased interest in a number of countries towards establishing a NMRF,"[64] the domestic institutionalization trend is clear.

In sum, all actors within a NHRS can benefit from institutionalized interactions and frameworks, such as global/rights-specific NHRAPs and SNRCMs/NMRFs. Various national contexts may also adopt mixed approaches, with other sources of coordination that are either non-human rights specific (e.g. parliamentary committees, national auditing institutions, etc.) or locally-developed practices (e.g. dedicated human rights ministries or inter-ministerial committees). The NHRS-thinking directs attention to the role of these mechanisms and the importance of building their capacity.[65] As corollary to this, all processes require cooperation initiatives with NHRIs, through regular dialogue and consultation. Strengthening interactions and coordination among governmental actors, NHRIs and non-state actors enables equal and meaningful participation of all stakeholders in all relevant processes as well as enhancing accountability through monitoring and independent oversight. An effective and sustainable set of interactions and frameworks within a NHRS is beneficial from both top-down and bottom-up perspectives. On the one hand, it allows contextualizing international human rights standards into the domestic level, thus supporting promotion and protection on the ground. On the other hand, it enables domestic human rights actors to participate meaningfully in the iterative cycles of monitoring that stem from international human rights mechanisms. In such way, "a state with a well-functioning NHRS will have the capacity to fulfil its obligation to participate in international cooperation on human rights and to shape and develop the human rights agenda."[66] Of importance to this thesis, the clear and systematized approach typical of

[61] Ibid 19.
[62] OHCHR, Universal Human Rights Index, available at https://uhri.ohchr.org/en.
[63] OHCHR, Second Biannual Report of the Secretary-General on the Status of the human rights treaty body system, A/73/309 (6 August 2018).
[64] Ibid.
[65] The Danish Institute for Human Rights (n 2), 7.
[66] Ibid.

'NHRS-thinking' helps to ensure comprehensiveness when assessing the impact that TBs and NHRIs may have on domestic human rights implementation. As a last step for this chapter, it is now necessary to situate NHRIs within the broader ecology of actors that make the NHRS.

4. Situating NHRIs in the NHRS

The first obvious point of analysis for situating NHRIs within the NHRS is to see how the Paris Principles mandate NHRIs to act vis-à-vis other domestic actors within its responsibilities and methods of operation. At the same time, it is useful to consult the authoritative interpretations issued through the General Observations of GANHRI's SCA.

As outlined in Chapter 5, NHRIs monitor and advise public authorities on human rights issues. The Paris Principles indicate that public authorities include government, Parliament and any other governmental body. The latter may include a variety of national bodies that have decision-making powers, including regional bodies in federal States as well as local bodies in any State.[67] Importantly, NHRI advice may be provided "either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral."[68] NHRIs can thus act upon request or on their own motion to provide support to said public authorities.

NHRIs may also urge public authorities to take measures to implement human rights. This is done through their monitoring function, which differs from its advice-giving function in that it is not reactive but preventive. Monitoring happens in an iterative fashion and continuous well beyond the finding of potential human rights violations. NHRIs have a double role in this sense: they act as watchdogs vis-à-vis public authorities and as guardians of ratified human rights treaties. This double role manifests a preventive effect "because public officials who know that they are being watched might be deterred from violating human rights treaties."[69]

Aside from briefly outlining which public authorities NHRIs should liaise with, the Paris Principles state that NHRIs should maintain consultation with other domestic human rights actors, including civil society organizations.[70] They do so, however, without providing a comprehensive list of actors with whom the NHRI should interact. SCA General Observation

[67] Gauthier de Beco and Rachel Murray, *A Commentary on the Paris Principles on National Human rights Institutions* (CUP 2015), 48.
[68] Paris Principles, Methods of Operation, Section C(a).
[69] De Beco and Murray (n 67), 54.
[70] Paris Principles, Methods of Operation, Sections C(f) and C(g).

1.5 fills this gap to an extent, outlining what is understood for engagement with national stakeholders. Interactions should happen in a "regular, constructive and systematic" manner, which can be achieved if NHRIs "develop, formalize and maintain working relationships—with various actors—as broad engagement with all stakeholders may provide a better understanding of the breadth of human rights issues across the state."[71] It is also important that the NHRI consults with the broadest range of stakeholders in order to distinguish its specific role vis-à-vis the rest, strategize its positions in the political sphere, enhance its accessibility, and act with the utmost transparency.[72] The SCA considers such avenues of broad cooperation necessary to ensure the full realization of human rights nationwide. Of particular relevance for situating NHRIs within the NHRS concept, the SCA specifically points to the importance of "national human rights frameworks":

> The effectiveness of an NHRI in implementing its mandate to protect and promote human rights is largely dependent upon the quality of its working relationships with other national democratic institutions such as: government departments; judicial bodies; lawyers' organizations; non-governmental organizations; the media; and other civil society associations. Broad engagement with all stakeholders may provide a better understanding of: the breadth of human rights issues across the state; the impact of such issues based on social cultural, geographic and other factors; gaps, as well as potential overlap and duplication in the setting of policy, priorities and implementation strategies. NHRIs working in isolation may be limited in their ability to provide adequate human rights protections to the public.[73]

NHRIs should aim thus to define and delimit the space they occupy in relation to other institutions that protect human rights, within and outside government, in a careful exercise of complementing and not displacing the work of other bodies.

Following the same structure to that adopted in introducing the concept of the NHRS, I divide the various domestic NHRI stakeholders into governmental state actors, independent state actors, and non-state actors.

[71] GANHRI, SCA General Observation 1.5.
[72] Ibid.
[73] Ibid.

4.1. Governmental State Actors

NHRIs are required to have a special, in some ways paradoxical, relationship with government: they act under an inherent "tension between cooperation with government and the ability to take position against it."[74] Yet it is exactly because of this special relationship that NHRIs can operate on an inside track with government departments, increasing the likelihood of influence.

Governmental state actors often partake in the appointment and composition of NHRIs, a practice that has its inherent problems. Because public officials are those to whom NHRIs address their recommendations, they should not be allowed to participate in the decision-making of the institution's operations. A cautious approach is required to strike the right balance: even if the individual in question is able to remove his government hat when sitting as a member of the NHRI, the perception that it provides is more damaging than his ability to personally operate in distinct roles. As De Beco and Murray point out: "as much of an NHRI's reputation is centred on perceptions of its operation—rather than necessarily how it does actually function in practice—this is crucial to consider and therefore on balance leads to the conclusion that government representatives on the NHRI in anything other than an advisory capacity will diminish rather than enhance its effectiveness.[75]

Similarly, governmental representations should not be involved in the appointment process as this might obviously lead to political bias.[76] Regardless, NHRI engagement with governmental departments requires regular, if not "daily"interaction.[77] Such dialogue allows NHRIs to become acquainted with the government's human rights-related priorities, difficulties, and initiatives. It also fosters official data collection, crucial for NHRI reports and inquiries and it increases the avenues for NHRI findings to reach relevant decision-makers. It also enables follow-up activity to proceed in a smoother, more coordinated fashion.[78]

Examples of NHRI collaboration with governmental actors range from establishing joint standing working groups with relevant governmental departments, to ad hoc meetings dedicated to discussions on NHRIs findings, to informal relationships established between NHRI and governmental departments' staff. NMRFs represent one recently established forum for NHRI-government engagement as national consultations or other forms of regular dialogue,

[74] De Beco and Murray (n 67), 120.
[75] Ibid. 79.
[76] GANHRI, SCA General Observation 1.9.
[77] Ibid.
[78] GANHRI, SCA General Observation 1.6.

convened by the NMRF and involving NHRIs and civil society, can provide an opportunity to openly discuss draft reports and responses to international and regional human rights bodies.[79]

The establishment of an NMRF, and the inclusion of the NHRI within its formal consultative function, might represent the most straightforward way in which the NHRI role is set within the wider NHRS. Depending on whether the government establishes a NMRF as an ad hoc or standing mechanism, a NHRI's monitoring and advisory capacities have variable influence on the domestic human rights legal and policy discourse.

Regardless of which specific framework is adopted, the unique space occupied by NHRIs within the NHRS can lead them to play a key role in coordination activities. This role includes, but is not limited to, exposing "fundamental problems in coordination, allocation and acceptance of responsibilities between different government departments and levels of governments" and suggesting responses.[80]

4.2. Independent State Actors

The Judiciary

Although "judicial institutions are one of the most important partners of an NHRI,"[81] the judiciary appears infrequently in the Paris Principles or the SCA General Observations. One such mention is provided in the context of the quasi-judicial mandate of NHRIs, in that an NHRI may be able to seek compliance with its decisions through the judiciary.[82] The Paris Principles also invite NHRIs to submit recommendations, proposals, or reports on "any legislative or administrative provisions, as well as provisions relating to judicial organizations."[83]Arguably, regular engagement between the NHRI and judicial institutions could lead to positive rulings on cases brought by the NHRI. In this sense, establishing cooperation with the judiciary should be either through the NHRI's actual referral of cases or by submitting amicus briefs/third-party interventions in its capacity to follow up on its own

[79] OHCHR (n 56) 20.
[80] United Nations, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (Geneva: Centre for Human Rights, Professional Training Series No 4, 1995).
[81] R. Carver and A. Korotaev, *Assessing the Effectiveness of National Human Rights Institutions* (UNDP 2007) para. 4.2.
[82] GANHRI, SCA General Observation 2.10.
[83] Paris Principles, Competence and responsibilities, Section A(3)(a)(i).

recommendations. The power to litigate depends on the individual NHRI's mandate, so it is difficult to generalize on this specific cooperation.

Some NHRIs can also benefit the activities of judicial institutions by receiving complaints, "thereby relieving the existing case-load of courts."[84] Judicial institutions may further benefit from cooperation if their members receive training on human rights from the NHRI. As with other national stakeholders, a good working relationship between NHRIs and the judiciary is underlined by "the need for the courts to see human rights standards as tools for legal interpretation rather than advocacy" and this may also depend "on how the judiciary employs international human rights instruments and how the NHRI itself is perceived by judges."[85] Whether through formal or informal avenues of interaction, structured and regular collaboration between the NHRI and the country's judicial bodies may facilitate the fulfillment of international human rights law domestically.

Parliament

Recent years have seen increasing recognition of the value of NHRI-parliament cooperation in both research and policy arenas. The participation of parliaments in the operation of NHRIs is mutually advantageous, as Parliament is an essential ally to NHRIs and can use the NHRI's human rights expertise in its daily work.[86]

According to the Paris Principles and the SCA General Observations, the legislature engages with NHRIs in five areas: (1) parliament appoints and dismisses members of the NHRI; (2) NHRIs comment on draft and existing legislation; (3) NHRIs are financially accountable to parliament; (4) NHRIs monitor parliamentary compliance and (5) parliament follows up on the NHRI's recommendations.

First, the Paris Principles include parliaments among those actors who should be guaranteed representation within the NHRI appointment procedure. They are expressly mentioned in order to contribute to the pluralist representation of the NHRI.[87] Parliament is in the ideal position to ensure "a transparent selection and appointment process, as well as for the dismissal of the

[84] Nairobi Declaration, Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights Nairobi, Kenya, 21–24 October 2008, para. 33(a).
[85] De Beco and Murray (n 67), 117–118.
[86] Ibid. 76; Rachel Murray, 'The Relationship Between Parliaments and National Human Rights Institutions' in John Morison, Kieran McEvoy, and Gordon Anthony, *Judges, Transition, and Human Rights* (OUP 2007) 357.
[87] Paris Principles, Composition and guarantees of independence and pluralism, Section B(1).

members of the NHRIs in case of such eventuality, including civil society if appropriate."[88] The OHCHR has recommended that "Parliament should be directly involved in this process by appointing these members upon nomination of civil society organisations, thereby ensuring an overall balance in the composition."[89] However, the possibility of having parliamentarians as NHRI members comes with the obvious risk of political bias, which might lead to conflicts of interest and perceived lack of independence. The SCA has been clear on this aspect, in a rare case of contradicting the Paris Principles:

> Government representatives and members of parliament should not be members of, nor participate in, the decision-making of organs of an NHRI. Their membership of, and participation in, the decision-making body of the NHRI has the potential to impact on both the real and perceived independence of the NHRI.[90]

If parliamentarians participate in the decision-making organs, "the NHRI's legislation should clearly indicate that such persons participate only in an advisory capacity."[91]

Second, NHRIs evaluate the compliance of draft and existing legislation with human rights treaties and their interpretation by human rights bodies. This applies to legislation at all levels, such as pieces of legislation at "state" level within federal states or indeed at local levels. NHRI staff are expected to have a sound understanding of international human rights law and its procedures but also domestic legislation, including the latest legislative developments, in order to review possible human rights implications.

Third, due to parliament's role in the adoption of NHRI founding legislation and within NHRI appointment/dismissal procedures, it also plays a crucial role in overseeing that the institution is fulfilling its mandate. The SCA makes it clear that it is "the democratically-elected authority, such as the legislature, to which the National Institution is accountable."[92] Parliaments hold NHRIs accountable mainly through two practices: the examination of NHRI annual reports and the allocation of the budget. Annual reports cannot be simply "tabled" to parliament but must involve sufficient time for effective discussion, in order to increase

[88] Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments, Belgrade, 22–23 February 2012, para. 10, http://nhri.ohchr.org/EN/Themes/Portuguese/DocumentsPage/Belgrade%20Principles%20Final.pdf.
[89] ICHRP and OHCHR, Assessing the Effectiveness of National Human Rights Institutions (2012), 14.
[90] GANHRI, SCA General Observation 1.9.
[91] Ibid.
[92] GANHRI, SCA General Observation 2.3.

transparency and "public accountability."[93] Parliament also assures accountability through allocating NHRI budgets, using any financial accountability mechanisms that exist in the state.[94]

The fourth point, the relationship between parliaments and NHRIs in their monitoring capacity, has been the subject of recent policy initiatives. The 2012 Belgrade Principles on the Relationship between National Human Rights Institutions and Parliaments[95] recognized several ways, formal and informal, through which such cooperation can complement the monitoring of human rights implementation. In terms of formal cooperation, the Belgrade Principles recommend that "Parliaments should identify or establish an appropriate parliamentary committee which will be the NHRI's main point of contact within Parliament" and that "NHRIs should develop a strong working relationship with the relevant specialised Parliamentary committee including, if appropriate, through a memorandum of understanding."[96] Informal cooperation can take many forms, including the set-up of "regular meetings".[97] NHRIs should be consulted by Parliaments on the content and applicability of proposed new legislation with respect to ensuring human rights norms and principles are reflected therein. Parliaments should involve NHRIs in the legislative processes, including by inviting them to give evidence and advice about the human rights compatibility of proposed laws and policies. Furthermore NHRIs should advise and/or make recommendations to Parliaments on issues related to human rights, including the State's international human rights obligations.[98]

Lastly, in terms of follow-up, the SCA General Observations do not expressly prescribe interaction with parliament. The SCA takes a more general approach, stating that NHRIs "should also undertake rigorous and systematic follow up activities to promote and advocate for the implementation on its recommendations and findings, and the protection of those whose rights were found to have been violated."[99] This clarification may arguably be applied to all actors of the NHRS involved in follow-up activities.

[93] GANHRI, SCA General Observation 1.11.
[94] Ibid.
[95] Belgrade Principles (n. 91).
[96] Ibid paras. 22–23.
[97] Ibid.
[98] Ibid para. 25.
[99] GANHRI, SCA General Observation 1.6.

"Ombudsmen, mediators and similar institutions"

The Paris Principles recommend NHRIs develop relationships with public bodies that are responsible for the promotion and protection of human rights and "in particular ombudsmen, mediators and similar institutions".[100] The SCA's General Observation 1.5 elaborates on this provision by requiring that NHRIs should develop, formalize and maintain working relationships, with other domestic institutions established for the promotion and protection of human rights, including sub-national statutory human rights institutions and thematic institutions.[101] Joint activities with such similarly situated bodies "include the sharing of knowledge, such as research studies, best practices, training programmes, statistical information and data, and general information on its activities."[102] In doing so the NHRI "needs to be able to define a space for itself and to set out the exact boundaries of its relationships with these other bodies having similar and potentially overlapping mandates."[103] This can be done by formalizing their interaction through MoUs, regular meetings and adopting joint policies/activities.

4.3. Non-State Actors

Civil Society Organizations

The SCA General Observations considers civil society involvement an essential partner for an NHRI, emphasizing "the importance of [NHRIs] to maintain consistent relationships with civil society," which is in and of itself a matter for consideration when the SCA is asked to assess accreditation applications.[104] This relationship, like any other that NHRIs develop with NHRS actors, is based on a somewhat awkward dynamic: NHRIs need to cooperate with civil society while remaining independent from it. In other words, "just like its relationship with government, NHRIs need to be independent from NGOs and civil society groups so as to ensure that they are not overly influenced by a particular interest group."[105] In case of actual or perceived bias in favor of civil society positions, this might endanger the delicate relationship with government.

[100] Paris Principles, Methods of Operation, Section C(f).
[101] GANHRI, SCA Gen Observation 1.5.
[102] Ibid.
[103] De Beco and Murray (n 67), 119.
[104] GANHRI, SCA General Observation 1.7.
[105] A. Smith, The Unique Position of National Human Rights Institutions: A Mixed Blessing?, 28 *Human Rights Quarterly* (2006) 932.

As is the case for previously outlined actors, NHRI-CSOs interaction can be of mutual benefit. CSOs provide for rooted, contextualized knowledge of human rights on the ground. CSOs can increase the NHRI's accessibility, bringing in updated information on the problems affecting the lives of local communities. In turn, NHRIs may enhance the influence of CSOs in policymaking by channeling these organizations' demands to public authorities, relying on the special NHRI relationship with governmental actors. NHRIs also strengthen the capacity of CSOs, whether by sharing knowledge or sponsoring/sharing costs of initiatives. If needed, NHRIs have the power to compel hearings and provide evidence which may be useful for CSO-led campaigns.

This mutually beneficial interaction may take place through procedures enabling effective cooperation with diverse societal groups. Interaction with civil society can take many forms, perhaps the most immediate being through the NHRI appointment process itself. There are diverse models of ensuring the requirement of pluralism set out in the Paris Principles and pluralism can be achieved when "[m]embers of the governing body represent different segments of society as referred to in the Paris Principles."[106] CSOs can participate directly in consultative bodies and working groups or through steering committees or advisory bodies. NHRIs may also create networks on specific issues and organize public forums with all organizations concerned. They can also consult CSOs before issuing recommendations and even involve them in providing information or expert advice.[107]

The Media

With regards to interaction with media outlets, the Paris Principles state that NHRIs should "publicise human rights [...] by increasing public awareness, especially through information and education and by making use of all press organs" and that it should "address public opinion directly or through any press organ, particularly in order to publicise its opinions and recommendations."[108] Although not thoroughly covered by available instruments, a good, stable relationship with the media is crucial for NHRIs. Building a public profile and broadening public support has positive repercussions both in terms of legitimacy and strategy "for dissemination, promotion and denouncement […] and is a subtle instrument of persuasion,

[106] Ibid. 908.
[107] De Beco and Murray (n 67), 127.
[108] Paris Principles, Methods of operation, Section C(3).

which allows the institutional image to be strengthened."[109] The use of modern technology is paramount and NHRIs are increasingly invited to develop a clear media and communications strategy.[110] This brings about a number of positive developments, such as the possibility to receive online complaints and increasing institutions' accessibility for the general public.

The General Public

Without a strong and stable interaction with the general public, NHRI performance cannot express its full potential. We are dealing with the direct beneficiaries of the NHRS as a whole, after all. For this interaction to flourish, NHRI accessibility is key. This includes the possibility of being contacted through various means as well as an accessible actual, physical location. For the latter, the Paris Principles encourage an NHRI to "set up local or regional sections to assist it in discharging its functions."[111] So-called in-field presence is crucial for states of a larger size, as well as federal states, as much depends on the context and particular jurisdiction in which the NHRI office operates. In addition, "locating the office within government offices or within the region where government offices are present may also influence the degree to which it is seen as independent."[112] NHRIs should also ensure sure that "everybody can benefit from their promotional activities, especially the most disadvantaged groups."[113] This does not only mean physical access for persons with disabilities but also access in a broader sense, such as organizing "public forums"[114] where the general public can get acquainted with their human rights and available NHRI functions, and the NHRI can get a better idea of the general public's actual enjoyment of such rights.

5. Conclusion - The Value of "NHRS Thinking" for Assessing Treaty Body - NHRI Engagement

The TB system does not prescribe strict measures of implementation to be adopted by states: all state actors (governmental actors, independent state actors, and non-state actors) have a role to play. A system-thinking approach enables this broadness to be reduced to a collection of components organized around a common purpose. This common purpose, which in our case is

[109] A. de Camperio, 'The Ombudsman's Relations with the Media' in Danish Centre for Human Rights, *The Work and Practice of Ombudsman and National Human Rights Institutions, Articles and Studies* (2002) 17.
[110] De Beco and Murray (n 67) 130.
[111] Paris Principles, Methods of operation, Section C(e).
[112] De Beco and Murray (n 67) 131.
[113] ICHRP and OHCHR, Assessing the Effectiveness of National Human Rights Institutions (2005)17.
[114] GANHRI, SCA General Observation 2.1.

implementation of ratified UN human rights treaties, holds the system together.[115] A functioning NHRS is characterized by the coexistence of frameworks, actors and interactions, including more or less formalized processes that link all actors of the system together.

The NHRS concept posits that the coordination of human rights implementation makes a crucial contribution to, inter alia:

- better management of human rights initiatives and increased ability to prioritize strategically and create synergies;
- systematic and explicit integration of accountability, non-discrimination and transparency as guiding principles for action;
- avoiding duplication of mandates;
- reducing the risk of isolating human rights in one dedicated body or having "blind-spots" in the human rights implementation;
- more democratically regulated institutional mandates and thereby enhancement of accountability and the rule of law.[116]

It should be clear that the NHRS concept is not a fix-all solution to the compliance gap. Resources, political will, and the overall capacity of each state will all continue to affect human rights implementation efforts. What is crucial in this respect is, however, that a NHRS is a prerequisite for impact, in that "when all actors, framework and procedures are in place at domestic level, the state will be in a better position to comply with all its human rights obligations."[117]

For example, states are required to gather relevant and reliable data in order to analyze human rights implementation at all levels of the state. This is part and parcel of the NHRS concept. NHRIs, as independent state institutions with a mandate to promote and protect human rights, can play a key role in facilitating interactions among the various NHRS actors, leading to a more coordinated national data collection effort. In turn, NHRIs may better equip the panoply of NHRS actors to interact with the international human rights monitoring system. In this way, domestic efforts at data collection are channelled to the international monitoring bodies, who then review them and recommend further action vis-à-vis international obligations. NHRIs may

[115] See Azadeh Chalabi, 'Law as a system of rights: a critical perspective,' 15 *Human Rights Review* (2014) 120.
[116] The Danish Institute for Human Rights (n 2), 7.
[117] Lagoutte (No 5), 184.

thus be seen as possible guarantors of the NHRS, while simultaneously contextualizing international standards for domestic actors and facilitating their participation across the international human rights system.

This understanding falls squarely within compliance theories focused on domestic mobilization dynamics.[118] We could even go as far as saying that such an integrated and coordinated domestic response to international human rights recommendations is, per se, an obligation for states. As said, the conceptualization of a NHRS is substantially tied to obligations stemming from the UN human rights treaty system itself. More specifically, ensuring the operation of a NHRS (and the role of NHRIs therein) can be implied by the obligation for each state party *to take steps/measures* to ensure the realization of the rights enshrined in each treaty. This idea is not novel. In fact, by conducting a textual analysis of all the human rights conventions, general comments, reports and concluding observations, recent literature has found that "under the nine core human rights conventions […] states parties have the obligation to adopt a plan of action for implementing all the rights embodied in the conventions."[119] By considering NHRAPs as one example of possible NHRS interactions, we can easily transpose such finding to the NHRS concept itself. In addition, by considering NHRIs as key independent state actors of the NHRS and indeed as one means through which important *steps* can be taken,[120] we can also presume an obligation to ensure the independent operations of NHRIs, when established, as part of the necessary measures to support a NHRS.

Regardless of whether one agrees with this conclusion or not, to apply a systemic approach to human rights implementation efforts is, at least, methodologically useful. Understanding why states implement and comply with TB recommendations is a complex endeavor, above all due to their non-binding nature, resting on disparate logics of influence such as persuasion and socialization.[121] Understanding why states implement and comply such recommendations based on NHRI activity is even more challenging, as the variables in potential influences rise drastically. Yet central to these discussions is the importance of identifying what happens to

[118] X. Dai, International Institutions and National Policies, Cambridge University Press (2007); X. Dai, *The Compliance Gap and the Efficacy of International Human Rights Institutions*, in T. Risse, S. C. Ropp and K. Sikkink (eds.) The Persistent Power of Human Rights. From Commitment to Compliance, Cambridge University Press (2013); B. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009).
[119] Chalabi (n 45) 405.
[120] CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, 14 December 1990, E/1991/23.
[121] See e.g. H. H. Koh, 'Transnational Legal Process' 75 *Neb. L. Rev.* (1996) 181; Jeffrey T. Checkel, (ed) *International Institutions and Socialization in Europe* (CUP 2007); M. Perloff, *The Dynamics of Persuasion: Communication and Attitudes in the 21st Century* (2nd edn., Lawrence Erlbaum Associates, 2003).

mutually reinforcing TB-NHRI recommendations. Do states respond to them, and, if so, in what way? Do other actors (governmental, independent, or non-state) refer to them in their work? To what extent do all these actors "use" the recommendations and advice?

Instead of taking a narrow approach and looking only at state or TB actions and behaviors, the NHRS concept helps analyze the "use" of both TB and NHRI activity by other actors and how that can influence states' actions and behaviors through formal or informal interactions. In other words, "*use* is therefore part of implementation […]. Although implementation focuses on the State, to comprehend the bigger picture one needs also to look at the use of findings not only by States but by a wider range of actors."[122]

By considering where and how complementary TB-NHRI recommendations are "used" in the NHRS, "we can identify factors that can assist in determining the mechanisms for implementation of those recommendations as well as what might then be the most appropriate tools of follow-up and monitoring of that implementation by other actors."[123] There is a close nexus between the level of use and awareness of NHRI activity stemming from the TB system's cycles of reviews and its effectiveness in contextualizing TB recommendations in-country. The NHRS framework may help in identifying more detailed information on the process of implementation and compliance by the state, which can in turn assist in determining the effectiveness of any follow-up and monitoring mechanisms employed by both TBs and NHRIs. In doing this, we can also analyze the role of the various actors that can make up the domestic "compliance coalition" within each NHRS.

[122] Murray and Long (n 51), 43.
[123] Ibid.

Chapter 9. Assessing Treaty Body – NHRI Engagement in the Australian Human Rights System

1. Introduction

Australia's system for human rights protection is often referred to in terms of a "patchwork" of international, Commonwealth and State laws and institutional arrangements.[1] In 2019, UN High Commissioner for Human Rights Michelle Bachelet relied on the term in giving the keynote speech at the Australian Human Rights Commission (AHRC), *Free and Equal: A National Conversation on Human Rights*:

> Australians rely on a *patchwork* of laws that address different forms of discrimination […] As a result, the model is dispute-focused and remedial, rather than system-focused and proactive […]. Australians would benefit greatly from a comprehensive human rights law to systematically protect all their rights.[2]

My intention with this chapter is twofold. Firstly, I wish to systematize (as much as it is possible) the intricacies of the current human rights protection system in Australia and the roles of both the TB system and AHRC therein. This will be done by positioning AHRC-TB engagement within the NHRS model, in what I categorize as *preconditions for impact*. The main idea behind the conceptualization of a NHRS is that, when all actors, interactions, and frameworks are in place at domestic level, the state is in a better position to comply with all its human rights obligations. The chapter will therefore first tackle AHRC-TB engagement by addressing the following question:

1. *Are legal and policy structures in place domestically and do these allow for establishing and supporting effective engagement between the AHRC and the TB system?*

Concentrating on the formal infrastructure available for AHRC-TB engagement is a first step which must precede a more qualitative assessment of how such engagement works at the national and local levels. Accordingly, my second intention in the chapter is to assess more

[1] Andrew Byrnes, Hilary Charlesworth, and Gabrielle Mckinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press 2009) 36.
[2] Statement by Michelle Bachelet, UN High Commissioner for Human Rights Australian Human Rights Commission conference, Free and Equal: An Australian Conversation on Human Rights (8 October 2019), available at www.humanrights.gov.au/about/news/speeches/un-human-rights-commissioner-speaks-out.

specific instances of AHRC-TB engagement. I have selected two such instances, the first concerning the issue of inequality in health standards of Aboriginal and Torres Strait Islanders and the second concerning children in immigration detention. For each topic, I address the following two interrelated questions:

2. *In what way have complementary AHRC-TB recommendations been referred to, used, and discussed at the domestic level?* (intermediate impact)
3. *To what extent have complementary AHRC-TB recommendations had 'effects and influence' or 'repercussions' on domestic policy?* (policy impact)

In essence, I trace the impact and effects of two typical instances of AHRC-TB engagement involving disparate NHRI functions and TB review cycles. By doing so, the analysis offers a generalizable set of factors useful for identifying the strengths and weaknesses of cooperation between the AHRC and specific TBs. A focus on *intermediate impact*, understood as the "use" made of complementary AHRC-TB recommendations by different domestic stakeholders, allows categorization to take place depending on the extent of references made by other domestic actors in their own work.[3] A focus on *policy impact*, however, goes beyond that. It is also important that relevant domestic stakeholders meet such "use" with meaningful action in order to give full effect to ensuing recommendations.[4] For this reason, this analysis also looks at whether both selected examples of AHRC-TB engagement have led, through time, to legal and/or policy effects in either field of focus.

Combining these three approaches (preconditions for impact, intermediate impact, and policy impact), the chapter strives to tackle the current intricacy of the Australian patchwork of human rights protection vis-à-vis the TB system and assess the AHRC's role therein. It also challenges the binary claim that effective implementation efforts reside either at the international or the national level to show that they benefit from a transnational, iterative continuum exemplified by the TLO concept. As part of this introduction, it is however important to first outline two historical features of the Australian system of government: Australia's "reluctance about rights" and the role of "party government" on human rights protection in Australia. Both represent two contextual characteristics that, in my view, may influence the effective functioning of the broader NHRS and AHRC-TB engagement more specifically.

[3] For an explanation of the different degrees of intermediate impact adopted, please refer to Chapter 3, Table 3.4.
[4] Karen J. Alter et al., 'How Context Shapes the Authority of International Courts' 79 *Law and Contemporary Problems* (2016).

1.1. The Australian "Reluctance about Rights" and Reliance on Party Politics

Australia is the only Western liberal democracy without a bill of rights, meaning other institutions must be appealed to for human rights protection. Constitutional, common law, parliamentary, administrative, and international law protection of rights all play a role. The idea that the combination of complementary national actors would provide an adequate safeguard against possible human rights infringement by the government dates back to the time of federation.[5] Since then, one formal instrument protecting human rights has been considered unnecessary and this 120-year-old belief still applies today. Several factors lie at the root of Australia's so-called "reluctance about rights".[6] These include the doctrine of responsible government, faith in parliamentary sovereignty, reliance on the protection of the common law and current political attitudes that consider international human rights law as a foreign construct.

The doctrine of *responsible government*[7] is a Westminster tradition, which holds that the executive is "responsible" to the people via the people's elected representative in parliament. It is considered as "the major reason for the disinclination [by the framers of the Constitution] to incorporate in the Constitution comprehensive guarantees of individual rights."[8] Throughout Australian history, political leaders have reinforced the view that rights are adequately protected through the doctrine of responsible government. [9]

Linked to the above, *faith in parliamentary sovereignty* has been, and still very much is, the cornerstone of Australian government. The underlying assumption is that, on achieving democracy, Australians could simply rely on Parliament to give them the protection they needed. A constitution dense with limitations on Parliament's ability to respond flexibly and according to the people's will was not considered appropriate to deal with the continuous progress required by emerging political problems. In other words, "to limit Parliament by

[5] "The great underlying principle is that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power", Harrison Moore, *The Constitution of the Commonwealth of Australia* (1st edn. John Murray 1902) 329.
[6] See Hilary Charlesworth, 'The Australian Reluctance about Rights', 31(1) *Osgoode Hall Law Journal* (1993) 195.
[7] In a nutshell, this Westminster tradition holds that the executive is "responsible" to the people via the people's elected representative in parliament.
[8] Australian Capital Television v Cth (1992) 177 CLR 106, 135-6 per Mason CJ.
[9] Robert Menzies, 'Central Power in the Australian Commonwealth' (1967) in Louise Chappell, John Chesterman, and Lisa Hill, *The Politics of Human Rights in Australia* (CUP 2014) 20; Australia's response to (inter alia) UPR recommendation 70, UPR 2nd cycle (February 2016) https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/upr-recommendations/Pages/Recommendations/70.aspx.

entrenching rights was to question the motives of Parliament and, implicitly, to assume progress was questionable."[10]

Flexibility is also central to another key element of Australia's "reluctance about rights", that is reliance on the *protection of the common law*. Qualified as "the least important institution in terms of upholding human rights" in Australia[11], it nonetheless contains two advantages over a bill of rights. First, judges are free to revise past practice and are responsible for adapting the law to accommodate contemporary standards and to deal with problems that may not have been foreseen. Second, and once again placing the onus on the legislature, judicial action may be kept in check by Parliament, which can enact legislation to override undesirable judicial decisions.

Lastly, *political attitudes* towards human rights in Australia seem to reflect the view that "they are foreign norms, few of which are appropriate to local traditions."[12] Human rights treaty ratifications have come at a steady pace throughout the country's history, yet successive governments have been wary of enshrining rights in domestic legislation. This trend is so pervasive that today it seems more effective for CSOs to advocate for implementation of TB recommendations "without mentioning the UN, focusing on the substantive content of recommendations rather where the recommendations initially have come from," essentially "not using the language of the conventions when speaking to governmental actors."[13] The failure to address a number of important human rights issues at home have undercut Australia's efforts to promote human rights abroad. For instance, whilst Australia leads international efforts in strengthening the role and work of NHRIs,[14] recent political attacks by Australian politicians on the independence and integrity of the AHRC President have badly damaged Australia's credibility to lead on this issue. Even after the UN Special Rapporteur on Human Rights Defenders urged Australia to halt such attacks, Australia's then Immigration Minister soon thereafter called the AHRC President a "complete disgrace" and suggested her role was

[10] Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (CUP 2000) in Louise Chappell, John Chesterman, and Lisa Hill, *The Politics of Human Rights in Australia* (CUP 2014) 43.
[11] Robert Menzies, 'Central Power in the Australian Commonwealth' (1967) in Louise Chappell, John Chesterman, and Lisa Hill, *The Politics of Human Rights in Australia* (CUP 2014), 33.
[12] Adam Fletcher, *Australia's Human Rights Scrutiny Regime* (MUP Academic 2018) 102.
[13] Nowroz, interview.
[14] General Assembly, Annex to the note verbale dated 14 July 2017 from the Permanent Mission of the Australia to the United Nations addressed to the President of the General Assembly Candidature of Australia to the Human Rights Council, 2018-2020, A/72/212, 24 July 2017 available at https://dfat.gov.au/international-relations/international-organisations/un/Documents/ga-doc-a-72-212-voluntary-pledges-hrc-australia.pdf.

untenable.[15] Such peculiar political context may represent one major contextual factor influencing TB – NHRI engagement in Australia. It is arguably the case that Australia, more than most countries, involves actors other than judges and lawyers in human rights-related decision-making. The lack of a national bill of rights has often made politicians, not judges, the ultimate arbiters of compliance with international human rights law. This may well complicate matters when it comes to implementing TB recommendations, as can be seen by recent Australian governments' fluctuating perceptions of the TB system and its authority.[16]

Ultimately, Australia's "reluctance about rights" cannot simply be linked to dynamics of specific party politics; it has evidently pertained to both sides of the aisle. In Australia, "rights do not arise as a constitutional issue […] in the same way as in comparable countries. Rather […] rights protection is dependent on institutional arrangements in ways that cannot be fully appreciated until the institutions themselves are understood."[17] In order to understand the work of the AHRC and its engagement with the TB system, it is thus necessary to understand the institutional arrangements involved in and around its work. This so-called "Australian exceptionalism"[18] essentially revolves around the peculiar nature of its NHRS, to which we now turn.

2. The Normative Framework of the Australian NHRS

In order to start my analysis on the impact of AHRC – TB engagement on domestic human rights implementation, it is important to assess whether legal and policy frameworks are in place domestically and whether they allow for establishing and supporting effective engagement between the AHRC and the TB system. I have defined this stage of my analysis as "preconditions for impact". As such, I begin with an analysis of the normative framework of the Australian NHRS.

Australia's model of government is commonly described as a hybrid, with a large dose of comparative legal influences from the British Westminster system of responsible parliamentary democracy and the US presidential/federal system. As will be made evident through the

[15] For more information, see https://www.hrw.org/report/2015/09/22/australia-human-rights-council/ready-leadership-role

[16] Prime Minister Scott Morrison, Lowy Lecture (3 October 2019) available at www.lowyinstitute.org/publications/2019-lowy-lecture-prime-minister-scott-morrison.
See 'Tony Abbott: Australians "sick of being lectured to" by United Nations, after report finds anti-torture breach,' Sydney Morning Herald, 10 March 2015: www.smh.com.au/politics/federal/tony-abbott-australians-sick-of-being-lectured-to-by-united-nations-after-report-finds-antitorture-breach-20150309-13z3j0.html

[17] Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart 2011) 257.

[18] AHRC, *Discussion paper: A model for positive human rights reform* (2019) 4.

following pages, the various features of this model "do not always coexist smoothly."[19] According to the AHRC, Australian "domestic law is far from comprehensive in its implementation of Australia's human rights commitments". [20] This has led to a situation where domestic law and policy can clash with international human rights obligations. This section wishes to outline the existing normative framework of the Australian NHRS, focusing first on the constitutional, statutory and common law system of human rights protection, followed by an analysis of the mandate and functions of the AHRC. This section concludes with a brief outline of Australia's international human rights obligations.

2.1. Constitutional, Statutory and Common Law Protection of Human Rights in Australia

The Australian Constitution dates back to 1901 and contains very limited explicit human rights references.[21] These expressly guaranteed rights and freedoms, mainly framed in terms of limitation of government power, relate to right to vote (Section 41), the right to just terms if the Commonwealth compulsorily acquires property (Section 51(xxxi)), the right to trial by jury on indictment (Section 80), freedom of religion (Section 116) and the right to be free from "disability or discrimination" on the basis of interstate residence (Section 117). According to Debaljak, these rights have most often been interpreted narrowly by the courts, "giving greater freedom to the representative arms of government in their creation and enforcement of Commonwealth law, without any strong rights-based constraints".[22]

While intended to be a living document, the Constitution does not always keep pace with changes to Australian society. Fundamental human rights have been considered best left to the protection of the common law and Parliament.[23]

Aside from its Constitution, Australia enjoys a federal constitutional system in which powers are shared between federal institutions, the six states (New South Wales, Victoria, Queensland, Western Australia, South Australia, and Tasmania), and three self-governing territories (the Australian Capital Territory, the Northern Territory, and the Territory of Norfolk Island). Each

[19] Ibid. 28.
[20] Ibid. 8.
[21] See Parliament of the United Kingdom, Commonwealth of Australia Constitution Act 1900.
[22] Julie Debeljak, 'Does Australia need a Bill of Rights?' in Paula Gerber and Melissa Castan, *Contemporary Perspectives on Human Rights Law in Australia* (Thompson Reuters 2012) 39.
[23] See Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australia and the United States Experience' (1986) 16 *Federal Law Review* 8.

of the states has its own constitution, a democratically elected parliament, and an independent judiciary. Australian human rights statutory regimes, pertaining to Commonwealth on the one hand, states, and territories on the other, partly implement international human rights obligations through a series of acts.

While the statutory protection net introduced by Parliament is thematically rather broad,[24] the most relevant Commonwealth statutes for a study on AHRC-TB engagement are the following:

- *The Racial Discrimination Act 1975 (Cth) (RDA);*
- *The Sex Discrimination Act 1984 (Cth) (SDA);*
- *The Disability Discrimination Act 1992 (Cth) (DDA)*[25]*;*
- *The Australian Human Rights Commission Act 1986 (Cth) (formerly Human Rights and Equal Opportunity Commission Act 1986 (Cth))*[26]*;*
- *The Age Discrimination Act 2004 (Cth) and*
- *The Human Rights (Parliamentary Scrutiny) Act 2011*

Although the suite of statutory instruments is broader than constitutional protections, these legislative measures appear to be inadequate in a number of respects. Firstly, the scope of protection under these statutes does not fully cover the rights of Australia's ratified international human rights treaties. For example, the RDA, SDA, and DRA fall short of providing for equality and protection from discrimination on *any* ground as required by Article 26 of the ICCPR.[27] Secondly, and inherent to the statutory nature of these instruments, they represent a rather fragile system of human rights protection, vulnerable to repeal or amendment by later legislation. Thirdly, due to the federal nature of the Australian system of government,

[24] E.g. part of the Migration Act 1958 (Cth) (for example, non-refoulement protections); part of the Criminal Code 1995 (Cth) (for example, the prohibition on torture); *Privacy Act 1988* (Cth); Fair Work Act 2009 (Cth) (for example, implementation of economic and social rights, such as labour rights); and Paid Parental Leave Act 2010 (Cth).

[25] Under the Disability Discrimination and other Human Rights Legislation Amendment Act 2009 (Cth), the Human Rights and Equal Opportunity Commission was renamed the Australian Human Rights Commission

[26] The Australian Human Rights Commission Act 1986 (Cth) articulates the AHRC's role and responsibilities as well as restating the obligations Commonwealth authorities have under key human rights instruments namely the ICCPR; the Convention Concerning Discrimination in Respect of Employment and Occupation (ILO 111); the CRPD; the CRC; the Declaration of the Rights of the Child; the Declaration on the Rights of Disabled Persons; the Declaration on the Rights of Mentally Retarded Persons; and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

[27] The ACT Bill of Rights Consultative Committee, ACT Legislative Assembly, *Towards an ACT Human Rights Act* (2003) [2.52]–[2.53] ("*ACT Consultation Report*"); *National Consultation Report* [5.10].

there has been an historical lack of uniformity of standards and protections across jurisdictions.[28]

One notable improvement comes from the latest statutory introduction. The *Human Rights (Parliamentary Scrutiny) Act 2011* has introduced two important new components to the Australian NHRS, representing the most far-reaching development of the past 30 years.

First, the requirement for members of parliament introducing legislation to table an accompanying Statement of Compatibility (SoC) assessing its compatibility with the rights and freedoms recognized in the seven core international human rights treaties Australia has ratified. According to the AHRC, "this is an important mechanism which helps Parliament consider the human rights impacts of a law before it is passed. However, these statements are largely educative. They can inadequately justify a breach of human rights."[29] The reason is that SoCs cannot be challenged, do not bind a court or tribunal, and do not affect the validity, operation, or enforcement of a bill.[30]

Second, the act requires the establishment of a Parliamentary Joint Committee on Human Rights (PJCHR). Its mandate includes the examination of bills, acts, and legislative instruments for compatibility with human rights[31]; and the power to inquire into any matter relating to human rights which is referred to it by the attorney-general.[32] The PJCHR is composed of ten members—five from the House of Representatives and five from the Senate—and is supported by a secretariat and an external legal advisor. In performing its functions, it has the ability to call for submissions, hold public hearings, and call for witnesses. Essentially, the PJCHR process can help Parliament to consider the human rights impact of a bill in more depth.[33] PJCHR statements and reports may also assist a court in interpreting legislation, where the meaning of a provision is ambiguous.[34] However, crucially for the effectiveness of the scrutiny process, the PJCHR cannot compel Parliament to alter or abandon a bill, law, or policy, even

[28] Peter Bailey and Anne-Marie Devereux, 'The Operation of Antidiscrimination Laws in Australia' in David Kinley (ed), *Human Rights in Australian Law* (Federation Press 1998) 292, 296–300.
[29] AHRC (n. 18) 11.
[30] Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), ss 8(4), 9(3) and Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), ss 8(5), 9(4) respectively.
[31] Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), s 7(a)–(b).
[32] Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), s 7(c).
[33] See description of the committee's work in Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129, 2015) 41–43
[34] Acts Interpretation Act 1901 (Cth), ss 15AB(2)(c), (e) and Acts Interpretation Act 1901 (Cth), s 15AB(1) respectively.

if it is incompatible with human rights. Also of key importance for our project, the PJCHR mandate does not cover the domestic consideration, follow-up, and oversight of the implementation of recommendations and views of UN human rights mechanisms.[35] In sum, while ensuring the appropriate recognition of human rights issues in legislative and policy development, the PJCHR does not engage directly with international human rights mechanisms. Furthermore, the AHRC expressed the concern that the findings of the PJCHR are rarely taken into account by Parliament. "In many instances - the AHRC argued - bills are voted upon prior to the PJCHR tabling its views meaning that identified human rights concerns are not brought to the attention of parliamentarians until it is too late to consider the implications of this."[36] The PJCHR has ended up "working with logics typical of a politically divided committee."[37] Perhaps an unescapable aspect of parliamentary committees, this political aspect has influenced the PJCHR even in relation to the AHRC. According to numerous interviewed officials, no interaction takes place between the PJCHR and the AHRC, the exception being some training sessions upon the committee's establishment in 2012 and contact through personal connections.[38]

Turning to State and Territory-level statutory frameworks, the Australian Capital Territory (ACT), Victoria, and most recently Queensland have all passed their own specific bills of rights. Under the Australian federal system, States and Territories enjoy autonomous jurisdiction and, counter to the Commonwealth's reluctance, have introduced more far-reacing human rights instruments. Both the ACT Human Rights Act 2004 and the Victorian Charter of Human Rights and Responsibilities Act 2006 establish a "dialogue model" which seeks to ensure that human rights, largely drawn from the ICCPR, are taken into account when developing and interpreting state law. The Queensland Human Rights Act 2019, described as the most "broad reaching and accessible" human rights act in Australia[39], extends beyond similar legislation in the ACT and Victoria to protect economic, social, and cultural rights to education and healthcare and establishes for human rights complaints to be made to the Queensland Human Rights Commission.

[35] UN Human Rights Council, *Contribution of parliaments to the work of the Human Rights Council and its universal periodic review*, available at www.ipu.org/sites/default/files/documents/report_a_hrc_38_25_-_english.pdf.
[36] AHRC (n 18) 12
[37] Dick and Woolcott, interviews
[38] Ibid.
[39] See Queensland Advocacy Incorporated, Factsheet – Human Rights Act 2019 (Qld) (06 June 2019) available at https://qai.org.au/factsheet-human-rights-act-2019-qld/.

As formal acts of parliament, all three human rights bills preserve parliamentary sovereignty. As such, the possibility of repeal by future legislatures is real. Regardless, they provide important features for human rights protection within their jurisdictions. From a formal perspective, upon introduction of legislation the relevant ministries have to provide statements of compatibility as part of the explanatory material, although varying in detail among the acts. This represents "an important new vehicle for the promotion of rights-compatible administration and policy development within the public service."[40] Another important role relates to courts' interpretation of legislation. Although a cautionary approach has been adopted thus far, consistent with a strong separation of powers between legislative and judicial, these acts' potential effects on future judicial review seems notable. [41]

In sum, the Australian system of constitutional and statutory protection of human rights essentially reiterates the unconstrained nature of executive and parliamentary power. This relates to both TB and AHRC activity, as the second part of this chapter will show in further detail. Notwithstanding continuous requests by TBs for more comprehensive implementation, the Australian disjointedness in statutory human rights protection persists.

To conclude this section, it is also necessary to include the role of the judiciary in the protection of human rights in Australia. In fact, an analysis of the normative framework would not be complete without a brief mention of the most significant interpretative "tools" in relation to human rights. Rules of statutory interpretation give some scope for judicial protection of rights. One example is the interpretative presumption that governments intend to legislate consistently with their international obligations, unless expressly indicated otherwise. As Williams states, "where statutory law is silent on rights, Australian judges have interpreted it to uphold rights and will only do otherwise if Parliament is unmistakably clear in its intent to restrict fundamental freedom."[42] One further example is the presumption that legislation that affects rights is to be construed strictly, which has been used throughout history to protect rights originating from the common law tradition.[43] In addition, "where legislation is ambiguous, an interpretation consistent with international human rights obligations should be preferred to one that is inconsistent."[44] Lastly, the High Court has at times taken the view that the Constitution

[40] Fletcher (n 12) 35.
[41] Momcilovic v R (2011) 245 CLR 1.
[42] Chappell, Chesterman, and Hill (n 9) 35.
[43] *Coco v The Queen* (1994) 179 CLR 427; *Commissioner of Taxation (Cth) v Citibank Ltd* (1989) 20 FCR 403.
[44] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 282.

does not operate in a political vacuum but is "to be interpreted in light of the foundations upon which it is built, namely democracy as it developed into a form of responsible government."[45] This sort of jurisprudence falls under the category of implied constitutional rights.[46]

Taken as a whole, these rules of statutory interpretation are collectively referred to as the "principle of legality." According to Debeljak, "the principle of legality has the capacity to support rights-based statutory interpretation, and is increasingly referred to by the judiciary and commentators."[47] In 2011, the High Court codified the principle of legality in Momcilovic v the Queen[48] and as such it is currently an important element in the normative framework of the Australian NHRS. However, as a principle of statutory interpretation, parliamentary sovereignty qualifies its importance, in that "any express or implicit parliamentary indication circumscribing rights prevents judicial rights-based interpretation."[49] In essence, if the intention of the legislators is to erode rights in any specific case, the common law is powerless to counter it. Once again, the legislature's dominance in the Australian system of responsible government curtails all other means of redress outside of parliamentary/executive processes.

2.2. The Australian Human Rights Commission

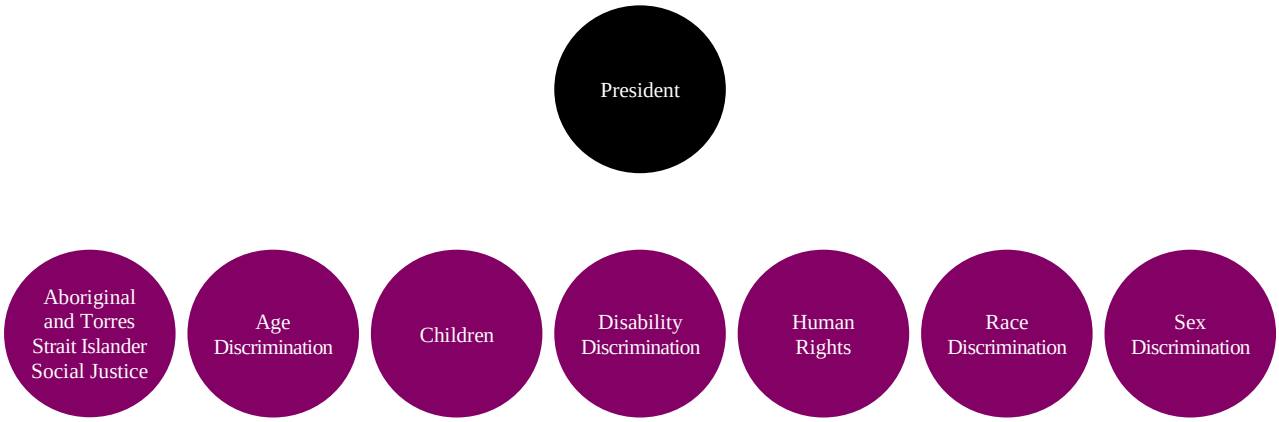
Within this relatively 'rights averse' environment, the task of independently monitoring human rights protection rests on the AHRC, Australia's A-status NHRI. It operates, naturally, under a patchwork of statutory instruments, first and foremost the Australian Human Rights Commission Act 1986 (Cth), which establishes the AHRC and outlines its powers and functions. The very creation of the Commission is a result of political battles on the introduction of a human rights bill. More specifically, the Whitlam government had proposed a human rights bill in 1973, which struggled in a debate about interference in state matters. Since then, the need for a statutory body for human rights monitoring started to surface in Australia. Three historical stages characterize the history of the AHRC: the first Commission was launched in 1981, replaced in 1986 by the Human Rights and Equal Opportunity Commission. It was then renamed under its current title following the adoption of the Australian Human Rights Commission Act 1986 (Cth) in 2008.

[45] Nick O'Neil, Simon Rice, and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (Sydney Federation Press 2004) 97.
[46] E.g. Australian Capital Television Pty Ltd v Commonwealth (1992) and Nationwide News Pty Ltd v Wills (1992).
[47] Debeljak (n 22) 48
[48] *Momcilovic v The Queen* (2011) 280 ALR 221, 241-245, especially 244-5.
[49] Debeljak (n 22) 48.

Importantly, "human rights" are defined by the *AHRC Act 1986* as the rights and freedoms recognized in the ICCPR, and declared or recognized "by any relevant international instrument" in respect of which a declaration is in force. What this latter provision entails is that "human rights" also includes the CRC and CRPD but excludes other ratified human rights treaties such as the ICESCR and CAT. The powers and functions of the AHRC also include those stemming from a set of federal laws that seek to ensure freedom from discrimination. These are The Racial Discrimination Act 1975 (Cth), the Sex Discrimination Act 1984 (Cth), the Disability Discrimination Act 1992 (Cth) and the Age Discrimination Act 2004 (Cth). The AHRC has further specific responsibilities under the Native Title Act 1993 (Cth) and the Fair Work Act 2009 (Cth). It is thus an independent statutory, commission-model NHRI whose functions operate under said patchwork of federal legislation.

In terms of structure, Figure 9.1. outlines the thematic division of the President, who is the accountable authority responsible for its financial and administrative affairs[50], and the seven Commissioners, which inform the day-to-day activities of the AHRC today.

Figure 9.1. AHRC President and Commissioners[51]



During the latest review by the SCA in 2016, several concerns were directed at AHRC's selection, appointment, and dismissal procedures. The Australian Human Rights Commission Act and a number of Anti-Discrimination Acts provide that the governor-general appoints AHRC members on the recommendation of the attorney-general. The SCA noted that

[50] The president is the accountable authority of the AHRC under the *Public Governance, Performance and Accountability Act 2013* and is also responsible for the complaint handling function of the Commission.
[51] AHRC, *Annual Report 2017–2018*, p. 6

> if the Attorney-General is not satisfied with the proposed candidates, he or she may unilaterally propose an alternate appointee […]. Such appointment has the potential to bring into question the legitimacy of the appointees and the independence of the NHRI. The SCA is of the view that it is critically important to ensure the formalization of a clear, transparent and participatory selection and appointment process for an NHRI's decision-making body, and the application of the established process in all cases.[52]

With regards to the dismissal process, the governor-general may remove the commissioner on the advice of the Executive Council. The SCA found the available reasons provided by the AHRC Act to not be sufficiently defined or objective.[53]

Another focus of the SCA relates to adequate funding and financial autonomy. Recent budgets cuts were found to "erode the AHRC's base level of funding and therefore its capacity to fulfil its legislative mandate," and concern was expressed about the conferral of work and the appointment of additional commissioners without an additional budget allocation. The SCA reiterated that "to function effectively, an NHRI must be provided with an appropriate level of funding in order to guarantee its ability to freely determine its priorities and activities. Further the NHRI ought to be provided with adequate funding for its operations and ensure that the Commission retains adequate discretionary funding to independently set its own program of work."[54]

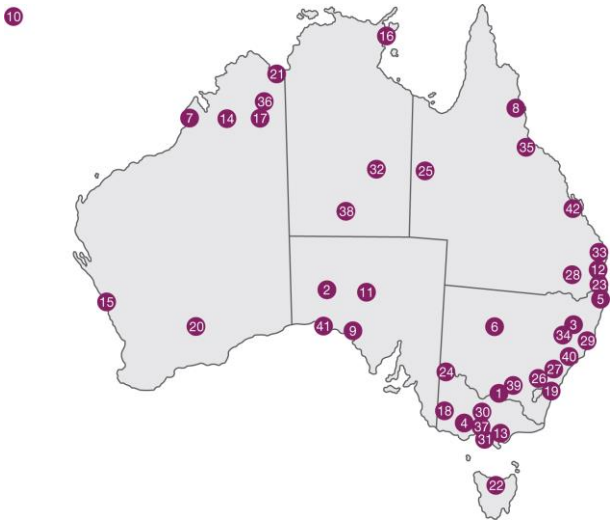
Lastly, the current definition of human rights in the *AHRC Act 1986* does not explicitly refer to either CAT or ICESCR. While acknowledging that the AHRC interprets its mandate to encompass all human rights, the SCA urged it "to continue advocating for amendment of the definition of 'human rights' within the AHRC Act to include the seven core human rights treaties ratified by Australia (matching the definition used by the Parliamentary Joint Committee on Human Rights)."[55] Despite these concerns, still not acted upon by the government of Australia, the AHRC was re-accredited with A-status.

Although based in Sydney, the AHRC engages with communities in rural, regional, and remote areas, ensuring national coverage of its work. It is an important feature of the Commission, as this ensures human rights monitoring and promotional activities to reach all communities in

[52] GANHRI, *Sub-Committee on Accreditation Report* (November 2016) 11.
[53] Ibid.
[54] Ibid 12.
[55] Ibid 13.

Australia. The figure below shows AHRC's rural, regional, and remote activity by location in 2017–18.

Figure 9.2. AHRC's rural, regional, and remote activity by location in 2017–18[56]



1 Albury, NSW
2 APY Lands, SA
3 Armidale, NSW
4 Ballarat, VIC
5 Ballina, NSW
6 Bourke, NSW
7 Broome, WA
8 Cairns, QLD
9 Ceduna, SA
10 Christmas Island
11 Coober Pedy, SA
12 Deception Bay, QLD
13 East Sale, VIC
14 Fitzroy Crossing, WA
15 Geraldton, WA
16 Gulkula, NT
17 Halls Creek, WA
18 Horsham, VIC
19 Jervis Bay, NSW
20 Kalgoorlie, WA
21 Kununurra, WA
22 Launceston, TAS
23 Logan, QLD
24 Mildura, VIC
25 Mount Isa, QLD
26 North Nowra, NSW
27 North Richmond, NSW
28 Oakey, QLD
29 Port Macquarie, NSW
30 Puckapunyal, VIC
31 Rosebud, VIC
32 Sandover, NT
33 Sunshine Coast, QLD
34 Tamworth, NSW
35 Townsville, QLD
36 Turkey Creek, WA
37 Upwey, VIC
38 Utopia, NT
39 Wagga Wagga, NSW
40 Williamtown, NSW
41 Yalata, SA
42 Yeppoon, QLD

In terms of international engagement, the AHRC has an express mandate to cooperate with UN human rights mechanisms, including by participating in TB periodic review processes; responding to calls for submissions, questionnaires, and requests for information from UN agencies; participating in working groups for the drafting of human rights conventions, declarations and optional protocols and participating in the newly established Standing National Human Rights Mechanism (SNHRM). Under the terms of reference for the SNHRM, the AHRC is to be in relation to TB reporting processes and UPR, and may be invited to attend meetings of the Commonwealth Inter-departmental Committee.[57]

As the following analysis will highlight, international human rights treaties are not directly a part of Australian law. This strict dualist approach, coupled with Australia's historical reluctance about rights, has led former AHRC President Gillian Triggs to suggest that

[56] AHRC, *Annual Report 2017–2018*, 10.
[57] AHRC, *Annual Report 2017–2018*, 5.

> the AHRC and government are like ships passing in the night, oblivious to each other. When the Commission reports a violation of a human rights treaty, governments and courts respond that it is not binding on them. In short, human rights and the AHRC's powers can be a shield but not a sword in Australia.[58]

2.3. Australia's International Human Rights Obligations

Australia is a founding member of the UN, has been an active participant in UN institutions for over 70 years, and is the 12th largest contributor to the UN regular and peacekeeping budgets.[59] To grasp Australia's current commitment to international human rights law, it is useful to note examples of its outstanding role in ensuring that human rights play a central role in the UN's mandate.

One significant contribution to this effect was given by notable Australians across time. Of specific relevance to our study, a great contribution to strengthening the TB system came from the well-known Australian international lawyer, Philip Alston. In 1988, Alston was appointed by the UN secretary general to suggest reforms on "enhancing the long-term effectiveness of the UN human rights treaty system." His major reports in 1989, 1993, and 1997 effectively started the process of reforms which eventually led to GA Res. 68/268 in 2014. Also relevant for this topic of research, the activity of yet another distinguished Australian greatly benefitted the establishment and worldwide expansion of NHRIs. Brian Burdekin, the first Federal Human Rights Commissioner of Australia from 1986 to 1994, was Australia's delegate to the Commission of Human Rights meeting in Paris which drafted the Paris Principles, on which NHRI activity stands today.[60] As well as being a key player in that drafting process, Burdekin worked towards the establishment of NHRIs in more than 50 countries as special adviser on national institutions to the first three UN high commissioners for human rights, from 1995 to 2003. Since then, Australia has made NHRI support a key feature of its foreign policy, the latest evidence of which may be seen in its Voluntary Pledge toward Australia's candidature for the UN Human Rights Council 2018–2020. One of the five Pillars of the Voluntary Pledge was to "promote strong national human rights institutions and capacity-building" due to Australia being "a strong advocate for strengthening the capacity of national human rights

[58] Gillian Triggs, *Speaking Up* (Melbourne University Press 2018), 88.
[59] For more information, see Australian Mission to the United Nations in Geneva, available at https://unny.mission.gov.au/unny/AustraliaatUN.html.
[60] CHR Res. 1990/73 of 7 March 1990.

institutions to promote and protect human rights."[61] The support for NHRI establishment, development, and operations is arguably the strongest evidence of executive commitment.

In terms of engagement with the TB system, Australia has ratified seven of the nine core UN human rights treaties,[62] with the two exceptions being the Convention on Migrant Workers and the Convention on Enforced Disappearances. Australia is also party to six Optional Protocols, including TB complaints mechanisms under the ICCPR, CAT, CEDAW, and CRPD (but not the ICESCR or CRC).[63] The obligations stemming from these ratifications represent the main international component of Australia's body of human rights law due to the lack of a regional human rights mechanism in the Asia-Pacific region. However, Australia is also party to a number of other multilateral treaties relating to human rights,[64] and maintains bilateral dialogues on human rights with China, Vietnam, and Laos.[65]

Table 9.1. Australia's Ratification of and Reservations to Core UN treaties

Treaties	**Date of Ratification/ Accession**	**Reservations/ Declarations**
CERD	30/09/1975	Art 4(a)
ICCPR	13/08/1980	Art 10,14 &20
ICCPR-OP-2	02/10/1990	No
ICESCR	10/12/1975	No
CEDAW	28/07/1983	Art 11(2)
CAT	08/08/1989	No
CAT-OP	21/12/2017	No
CRC	17/12/1990	Art 37(c)

[61] General Assembly, Annex to the note verbale dated 14 July 2017 from the Permanent Mission of the Australia to the United Nations addressed to the President of the General Assembly Candidature of Australia to the Human Rights Council, 2018-2020, A/72/212, 24 July 2017 available at https://dfat.gov.au/international-relations/international-organisations/un/Documents/ga-doc-a-72-212-voluntary-pledges-hrc-australia.pdf

[62] See Australian Government Attorney-General's Department, *International human rights system*: https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/International-Human-Rights-System.aspx.

[63] The Optional Protocols in question are the Optional Protocol to the International Covenant on Civil and Political Rights establishing an individual communication mechanism; the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty; the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, and the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

[64] These are primarily treaties relating to refugees, terrorism, and slavery.

[65] See Parliamentary Joint Committee on Foreign Affairs, Defence and Trade, *More than just talk: Australia's Human Rights Dialogues with China and Vietnam:* www.aph.gov.au/Parliamentary_Business/Committees/Joint/Completed_Inquiries/jfadt/HRdialoguechinavietnam/report/index.

CRC-OP-AC	26/09/2006	No
CRC-OP-SC	08/01/2007	No
CMW	-	-
CED	-	-
CRPD	17/07/2008	No

Of crucial importance for our analysis, and in line with the strict application of the doctrine of parliamentary sovereignty, Australia has adopted a dualist system of law. As such, all ratified international treaties through an act of the executive require formal translation into domestic law, through an act of Parliament, before becoming enforceable by Australian authorities. Law-making powers thus remain with the Australian Parliament and not the executive. As we shall see in the following section, the federal Parliament has had a mixed record in enacting international human rights treaties. For now, it suffices to state that the Commonwealth has not introduced domestic legislation implementing each ratified human rights convention in full. Furthermore, the lack of a bill of rights complicates the role of the High Court of Australia in utilizing the available standards of international human rights law in their decision-making.

It should come as no surprise that, considering all the above, human rights protections in Australia are at the mercy of statute law, with the exception of a small number of express and implied constitutional guarantees.[66]

3. The Actors and Interactions of the Australian NHRS and AHRC – Treaty Body Engagement

The above analysis has portrayed the intricate patchwork that creates Australia's exceptionalism in terms of human rights protection, which some call a "reluctance" about rights. In order to get a full picture of whether legal and policy structures are in place domestically, and whether these allow for establishing and supporting an effective AHRC-TB engagement, an overview of available actors and processes is required. Following the depiction of the idealised NHRS in Chapter 8, this section outlines relevant national actors and the possibilities for systematized interactions among them, the AHRC, and the TB system.

[66] See e.g. Adam Fletcher, 'The High Court and International Law' in Janina Boughey, Matthew Groves, and Dan Meagher (eds), *Legal Protection of Human Rights in Australia* (Hart 2019, forthcoming).

3.1. Governmental State Actors

In terms of governmental actors, three Australian Government departments share responsibility for TB reporting. The *Attorney-General's Department* (AGD) is responsible for international legal issues relating to treaties, especially any requirements for implementing legislation. The AGD is responsible for determining whether existing legislation is sufficient or if new legislation is necessary to give effect to a treaty. It also reports under the ICCPR, the ICAT, the CRPD, and the CRC. The *Department of Foreign Affairs and Trade* (DFAT) has "primary responsibility" for treaties in that all aspects of the negotiating, concluding, collecting, formatting, tabling, publishing, and interpreting of treaties falls under its mandate. DFAT is responsible for reporting under the ICESCR and the CERD. Finally, the *Department of the Prime Minister and Cabinet* (PMC) Office for Women (OfW) is responsible for reporting under CEDAW.

Once the lead department has prepared the report, other relevant departments (for example the Department of Social Services (DSS)) are involved in the subsequent process of updating and providing content to TB state reports. All relevant departments provide delegates to appear before the committees and contribute content to written submissions, delegation briefing, responses, and responses/monitoring of recommendations. Usually the Policy Office or the International Law Section leads each department's contributions to these reporting processes.

Upon issuance of the COBs, the fundamental task of supervising implementation is less straightforward. All matters related to implementing TB outputs, whether LOIs, COBs, recommendations for FU, or communications, are officially within the AGD's purview only. What this brings about is one first hurdle of the Australian NHRS: while TB recommendations are directed at the department responsible (CESCR and CERD COBs, for example, are submitted to DFAT), it is the AGD that "leads" in domestic implementation matters. As one DFAT official stated, once recommendations reach their department: "COBs do not touch DFAT's portfolio. We act as post-box for the rest of government and make sure deadlines are met. However there is no oversight on what is being reported back."[67] The same happens with CEDAW recommendations reaching PMC's OfW, in that "they lead in reporting but not on domestic implementation."[68] This results in a "problematic role" for departments other than the AGD, as no streamlined procedure is in place that allows the same "lead" department to

[67] Chestnutt, interview.
[68] Ibid.

monitor and follow-up on TB recommendations once they have been issued.[69] Monitoring the implementation of international obligations falls within the International Law Department of the AGD's portfolio, giving "primary support, as in pulling together all the briefings, to other federal departments (e.g. DFAT for CESCR and CERD)."[70] Canberra-based officials are aware of this "problematic role," as made clear by several officials confirming that "there will be future centralization" in this regard.[71]

Albeit not TB-related, one useful tool that AGD has introduced to counter the dispersion of information among departments is a tracker on the implementation of UPR recommendations. It has worked with the AHRC to develop a website with a mechanism for reporting on recommendations and responses, and communicating policy and priorities as they change over time and across governments.[72] As the site states, information "has been collated from a range of Australian Government agencies and […] was updated as part of Australia's UPR Mid-Term Review and is current as at August 2019. Where possible, links to relevant information on state and territory policies and programs are provided and it is anticipated that Australian Government responses to each recommendation will be reviewed and updated annually."[73] According to interviewed officials, the intention is to expand this online monitoring tool to include recommendations from the various TBs.[74]

Due to the complicated nature of the federal system, recommendations must also reach relevant authorities in the states and territories, which "increases the complexity for a streamlined implementation due to the separations of mandates."[75] The Australian Government must often rely on the states and territories to give domestic effect to TB recommendations, particularly where the subject matter falls within an area of state and territory responsibility. As a result, the Australian, state, and territory governments have adopted a cooperative approach toward implementing Australia's international obligations.

[69] Ibid.
[70] Walter, interview.
[71] Chestnutt and Walter, interviews.
[72] UPR tacking tool available at www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/upr-recommendations/Pages/default.aspx.
[73] Ibid.
[74] An online tool to monitor human rights recommendations stemming from both UPR and TBs has already been introduced in New Zealand. For more information, see New Zealand Human Rights Commission, New Zealand's Plan of Action available at https://npa.hrc.co.nz/.
[75] Chestnutt, interview.

The peak intergovernmental forum in Australia is the Council of Australian Governments (COAG), established in 1992, whose role is to manage matters of national significance or matters that require coordinated action by all Australian governments.[76] Eight councils are now responsible to COAG to ensure collaboration and coordination of policy development at a national levels.[77] These councils collectively constitute the COAG council system, which include the Disability Reform Council, the Education Council, the Health Council, and the Joint Council on Closing the Gap.[78] Collaborative arrangements between the two tiers of the federal government touch now almost every area of government activity in Australia, and have arguably helped to partly overcome the problems thrown up by divided sovereignty.[79] Examples of potentially successful coordination is the enactment of the National Plan to Reduce Violence against Women and their Children 2010–2022[80] – which guides government policy and investment to reduce violence against women - and the National Framework for Protecting Australia's Children 2009–2020,[81] which represents the highest level of collaboration between federal, state, and territory governments and civil society in seeking to ensure the safety and wellbeing of children in Australia. Both plans demonstrate, on paper, Australia's commitment to upholding the human rights of Australian women through CEDAW and CRC. One further collaborative arrangement is the Closing the Gap initiative,[82] commenced in 2008 and ongoing, which aims to reduce disadvantage among Indigenous Australians, with targets specifically relating to children. I will analyze thoroughly the Closing the Gap campaign in the second part of this chapter, as it originates in part from AHRC-TB engagement.

All the above collaborative arrangements are guided by national implementation plans, which set out initiatives in all jurisdictions. Although useful in bridging federal barriers, COAG-led frameworks are not perfect entities. Being executive-led, academics have opined that they are

[76] The members of COAG are the prime minister, state and territory first ministers, and the president of the Australian Local Government Association. The prime minister chairs COAG.
[77] COAG Councils members are the ministers of the Commonwealth and each state and territory with the relevant subject responsibility.
[78] This is the first COAG Council to include non-government members as equal partners in decision-making and marks a historic change in the way Australian governments are working with Aboriginal and Torres Strait Islander peoples.
[79] Walter, interview.
[80] For more information, see www.dss.gov.au/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children-2010-2022.
[81] For more information, see www.dss.gov.au/our-responsibilities/families-and-children/programs-services/protecting-australias-children.
[82] For more information, see https://closingthegap.niaa.gov.au/.

not subject to the same scrutiny that operates at state and Commonwealth levels: "COAG agreements often have little public scrutiny and contain policy decisions that sidestep the normal lines of accountability in the Australian system of government."[83] Due to these cooperative arrangements being the domain of the executive, intergovernmental cooperation under COAG has been referred to as "executive federalism," leaving little to no space for non-governmental actors to shape policies. In this sense, there is no explicit link between COBs, AHRC activity, and COAG initiatives.

Interactions between Government and the AHRC

The diverse array of national actors requires avenues for formal interaction, so that the Australian NHRS can facilitate implementation of TB recommendations and support the independent role of the AHRC in fulfilling its duty effectively. The intricate nature of the Australian system of government and its historical reluctance toward establishing a bill of rights contribute to this interaction requirement.

During the preparation of responses to LOIs and of state reports, different single government departments lead engagement with different TBs, basing their work on COBs from the previous reporting cycle. However, it is rarely the case that all the relevant human rights issues lie within the ministerial portfolio responsible for responding to the review. In this first, preparatory stage an "iterative and informal process is set up in order to get the AHRC views."[84]

The government department engaged in the review may take responsibility for communicating with and involving all branches and level of government (including state and territories governments). According to interviewed officials, coordination during the drafting of state reports is not systematic, and relies on the Standing National Human Rights Mechanism (SNHRM), acting under the auspices of the Standing Parliamentary Committee on Treaties (SCOT), headed by the PMC. The SNHRM was established in 2016 after numerous recommendations from Australia's second and latest UPR. On such occasion, Australia committed to designate a standing national mechanism to strengthen overall engagement with UN human rights reporting.

[83] Paul Kildea, 'Making Room for Democracy in Intergovernmental Relations' in Paul Kildea, Andrew Lynch, and George Williams, *Tomorrow's Federation: Reforming Australian Federation* (Federation Press Sydney 2012).
[84] Walter, interview.

Under the terms of reference for the SNHRM, the AHRC may be consulted in relation to TB reporting processes and UPR, and may be invited to attend meetings involving departments responsible for UN human rights reporting and domestic human rights policies.[85] This ensures that the AHRC is part of ongoing internal government consultations on preparing reports, preparing for appearances, and implementing COBs.

Requests for input to treaty matters are normally received via the SCOT email box, through which "an email is sent out by the lead Department to contacts in other relevant Departments, a deadline for response is given and then the lead Department puts it into a package."[86] The final draft of the state report is then compiled by the lead department and, one year before the report is due, "sent out in order to seek for further input." This e-interaction is also sought four months ahead of submission. Even during this formal stage of drafting, "the AHRC is included in the mailing list," allowing it to provide input even prior to the second pre-submission stage, a public consultation.

The period of public consultation for which the Australian Government releases the draft report during the second stage of the state report preparation includes the AHRC and civil society. The lead department "consults with the AHRC and civil society as to particular issues that should be addressed in the report."[87] Furthermore, in preparing the report, the Australian Government considers issues raised by the AHRC throughout the reporting period, including through mechanisms such as submissions to parliamentary inquiries or national inquiries as well as the recommendations and the issues raised in the AHRC's shadow report.[88] As one government official noted, during the preparation of the state report "no official face-to-face interaction or meeting takes place between AHRC and relevant departments,"[89] with input sought in the form of email exchanges. According to a DFAT official, the lack of official interactions between departments and AHRC is dictated by the NHRI independence

[85]At the UPR [Australia] 2016, the Australian Government gave a voluntary commitment to "work with the Australian Human Rights Commission, to develop a public and accessible process for monitoring progress against universal periodic review recommendations. This will include a periodic statement on progress against the recommendations on behalf of the Government. Australia will also designate a standing national mechanism to strengthen its overall engagement with United Nations human rights reporting." See: United Nations General Assembly, *Report of the Working Group on the Universal Periodic Review: Australia*; 2016, UN Doc. No: A/HRC/31/14 [para 146].
[86] Ciaran, interview.
[87] Reddel, interview.
[88] Reddel, interview.
[89] Reddel, interview.

requirement, as "it is not correct to shape AHRC's work and their advice during the drafting of the State Report is not a role [the AGD] have called AHRC to give."[90]

One further role that the AHRC has at this stage, highlighted by most interviewed officials, is that of "supporting CSO engagement, in a sort of coordinative role."[91] The AHRC acts "as a bridge between government actors and CSOs" and in doing so, "does quite a good job in narrowing the focus of CSO submissions, corralling people into having common positions."[92] It seems that the interaction between governmental departments and the AHRC is at its most effective in this specific arena, by facilitating CSO participation to the TB process. Although not systematized, it is often the case that "lead" departments provide the AHRC with earmarked funding for CSO engagement, whether directed at the development of alternative reports or at travel arrangements for CSO representatives to TB session in Geneva.[93] This has often been the case with for CRPD and disability rights organizations, and examples were also given of CSO support provided for attendance to other TB sessions, most notably CESCR and the HRCtee.[94]

During the week of Australia's appearance before a TB, the Australian Government organizes frequently a civil society pre-brief and debrief, which includes representatives of the AHRC, hosted by the Permanent Mission of Australia to the UN in Geneva. As one government official described, "The pre-brief allows the AHRC and other civil society members to discuss their priorities for the appearance. The debrief allows the AHRC and other civil society members to discuss the major issues and themes raised in the appearance and the government's role in implementation and following up."[95] Although not formally constituted, these briefings are now "a standing practice, an opportunity to see what each party has to say."[96] Furthermore, "AHRC documentation is always included in the briefing folder for the Australian delegation,"[97] and the value of AHRC reports seems to be appreciated by department representatives. As one stated, "It is important that submissions be factually accurate and AHRC have good lawyers who usually put things right. In comparison to CSO submissions,

[90] Chestnutt, interview.
[91] All, interviews.
[92] Walter, interview.
[93] Innes, interview.
[94] For both CESCR and CCPR, Kingsford and HRLO, interviews.
[95] Riddel, interview.
[96] Walter, interview.
[97] Riddel, interview.

AHRC reports are usually of good standard, providing more accurate information and clearer recommendations."[98]

At the appearance stage, the AHRC has typically been represented by a statutory commissioner with responsibility for the relevant subject matter. Depending on the various TBs' Rules of Procedure, the AHRC is then allowed to brief the committee in public and/or private sessions, with a number of TBs allowing to contribute to the constructive dialogue between the committee and the delegation.

Once the COBs are issued by the committee, the lead departments receive them and then act as "mailboxes" to all relevant authorities to which specific recommendations are aimed. The AGD has portfolio responsibility for driving the implementation of the government's human rights policy agenda. More specifically to TB reporting, the AGD is responsible for implementing international obligations through its Office of International Law (OIL).[99] As mentioned, the intricate system under which different departments are called to "lead" TB reporting does not match with AGD's primary mandate of implementing international obligations. The SNHRM is once again "activated" and a meeting among the relevant departments is scheduled to plan the tracking of Australia's implementation efforts. Although there is no public information available on the nature of this day – long meeting, according to an AGD official, "the AHCR is involved during the first half of this meeting."[100]

Aside from involvement in the SNHRM, the AHRC may influence the implementation phase (and government action in this regard) in several other ways. Direct interaction with civil society in between TB reviews is naturally an essential aspect of any NHRI's work and will be the focus of the section on non-state actors below. Other important aspects of the AHRC's activities relate to the broadly defined concept of "lobbying," which a DFAD official translated as "keeping each other informed" on the practical implications of TB recommendations.[101] Recent examples show AHRC attempted influence on governmental work through "lobbying" by various commissioners. For instance, in the context of children in detention, the children's rights commissioner's interaction with government officials following CRC's issuance of LOIs "was very influential" on initiatives related to torture, according to a government official[102]; following the numerous recommendations stemming from Australia's latest UPR on OPCAT

[98] Walter, interview.
[99] Walter, interview.
[100] Walter, interview.
[101] Chestnutt, interview.
[102] Walter, interview.

ratification, the human rights commissioner's efforts to raise awareness of the added value in establishing an NPM influenced the ensuing ratification. The commissioner's efforts in raising awareness, especially at state and territory level, is said to be particularly fruitful and represent an "important lobbying strategy"[103] on behalf of the AHRC. On this and other occasions, "one effective AHRC strategy has been the organization of roundtables, during which the AHRC and government representatives may discuss new initiatives in a constructive and non-adversarial manner."[104] Interviewed officials have however warned that fruitful interaction is at times harder "on issues which the government has a firm policy on, such as in relation to offshore detention facilities."[105] From the government's perspective, AHRC input is welcome when it is "pragmatic and not ideological."[106] One other element affecting AHRC-departments interaction reflects the specific nature of the people involved. As one interviewed official stated, "the sophistication of commissioners is quintessential for a productive engagement," perhaps hinting at the perceived overly activist attitude of some past commissioners. Be that as it may, the pertinence of the attitude of individual AHRC and ministerial representatives on the success of the cooperation was agreed upon by almost all interviewed officials.

In sum, interviewed officials from all three "lead" departments (AG, DFAD, and PMC) affirmed the fruitfulness of AHRC input during the implementation phase of TB recommendations.[107] According to all interviewed government officials, the AHRC is "consulted on government proposals and on relevant international procedures" and "if something is wrong, the AHRC lets the relevant department know by sharing their input."[108] Indeed,

> "TB recommendations can influence the discourse but it is not enough if these are left untouched by other relevant actors. It is important that the AHRC uses them as advocacy tools. It is also important that the AHRC turn these often generic recommendations into pragmatic, step-by-step recommendations that government can then evaluate."[109]

[103] Walter, interview.
[104] Ibid.
[105] Ibid.
[106] Ibid.
[107] All, interview.
[108] Walter, Chestnutt, Riddel, interviews.
[109] Ibid.

Successful interaction is not however synonymous with impact or influence, for as one interviewed official from the DSS succinctly stated: "whilst AHRC input is taken into account, it is not a major contributor in the development of new policies."[110] This mixed picture is reinforced by conflicting opinions on which party to this interaction is the more available. According to three departmental staff, "engagement is more forthcoming from departments to the AHRC than vice versa," whereas interviewed AHRC commissioners were of precisely the opposite opinion. In the first 18 months since appointment, the human rights commissioner raised concerns with "both DFAT and AG approximately nine to ten times" whereas those two departments asked for his advice twice.[111]

3.2. Parliament

As described at the beginning of this chapter, Parliament plays a fundamental role in all aspects of Australian rights protection. According to many commentators, however, Parliament is unable to scrutinize legislation effectively or adequately check and restrain the government's use of executive power.[112] This is due to a number of factors. Firstly, the executive branch of government has witnessed continual expansion since the turn of the 20th century, and governmental regulatory activities now include issues ranging from equal opportunities for various social groups and race relations to social welfare. Governmental responsibility is clearly hindered by this expansion, exacerbated by party domination of the legislature. Political parties in Australia are characterized by historically disciplined parliamentary membership, through which "the executive has gained firm control of the legislative process and of the conduct of Parliament."[113] Party caucuses' decisions are faithfully represented in Parliament, with MPs very rarely "crossing the floor" of both houses. This has obvious effects on MPs' accountability, which has led commentators to argue that the concept of responsible government is better described in Australia as "responsible party government." This situation has repercussions on parliamentary procedures, which the government has gone to great lengths to mould to its own advantage. Let us now look at some of these procedures in relation to the enactment of legislation.

[110] Riddell, interview.
[111] Santow, interview.
[112] Alan Fenna, Jane Robbins and John Summers, *Government and Politics in Australia* (Pearson Australia 2014), 36.
[113] Ibid.

As possible counterbalances to the growth of the executive's reach over legislative practices, the Australian system of government benefits from two inherent features: the power of the Senate and the expanding system of parliamentary committees.

First, the establishment of the Senate as elected second chamber, in which each state is equally represented, is an important departure from the Westminster model, with positive repercussions on possibility of legislative scrutiny. The introduction of proportional representation for Senate elections is the reason for Australia's "strong" bicameral system, which decreases the potential for the majority party in the lower house to also control the Senate. This means government legislation is more likely to be scrutinized, amended, or even defeated through the logics of bicameralism.

Second, the expansion of the committee system in both houses of Parliament has arguably strengthened Parliament vis-à-vis the executive.[114] It is through the work of parliamentary committees that thematic inquiries are undergone and proposed legislation is examined in detail by both MPs and senators. Importantly, they also provide Parliament with a range of community views through their power to collect third-party evidence. In addition, because committees' work attracts less public and media attention, it has been claimed that "members are more likely to be bipartisan and to bring a cooperative approach to the examination and improvement of legislation."[115] Although not generalizable, it is clear that the committee system brings more detailed examination of bills passing through Parliament. One other notable manner through which committees keep an important check on the work of the government is through Senate Estimates hearings. Twice a year, when budget and supplementary estimates are tabled to Parliament, the Senate Committees sit as the Estimates Committees. It is through estimates hearings that ministers and senior public servants are questioned over government actions and spending of public funds. However, while parliamentary committees undoubtedly improve Parliament's capacity to examine legislation and check on government, they have also been subject to the executive overreach that affects Parliament as a whole. Parties who obtain a majority in any of these committees may seek political advantage by effectively "politicizing" the process of deliberation, as "parliamentary committees are like icebergs, there is a lot beneath."[116]

[114] The two original standing committees established in 1913 (the Public Works and the Public Accounts Committees) have expanded to what are today 69 Committees, set up either by the Senate, House of Representatives, or by both houses together in the form of joint committees.
[115] Fenna, Robbins, and Summers (n 112) 38.
[116] Byrnes, interview.

For a proposed bill to become an official act of Parliament, it has to go through three readings and be considered by both houses in a "committee stage." Whereas the first and last readings are by and large a formality, during the second reading the bill is "scrutinized" in detail. The requirement of three readings and the committee stage usually means MPs and senators need weeks to examine proposed new legislation. Throughout Parliament's history, however, practices have been introduced to speed up the process and avoid scrutiny by both Parliament and third parties such as the AHRC and CSOs. Such practices include:

- the government majority terminating debates on a question using the closure motion or "gag";
- the government setting the timeline for the discussion of a bill through dissecting the bill into sections in the so-called "guillotine" procedure; and
- shortening the whole legislative discussion, including bypassing the committee stage requirement, through specific "standing orders."

These internal practices clearly create potential for any majority in parliament to fast-forward legislation, pre-empting any sort of scrutiny, whether it is among parliamentary peers or indeed by independent state actors, such as the AHRC. It is essentially through these two means that proposed Bills may be subject to scrutiny over their human rights implications, and the possibility for "party governments" to foreclose any such possibilities raises questions concerning the adequacy of Australian parliamentary procedure and oversight mechanisms.

Interactions between Parliament and the AHRC

The AHRC has a key role to play in increasing the human rights knowledge and awareness of parliamentarians. NHRI-Parliament engagement represents an essential interaction for human rights protection, so much so that a set of recommended approaches have been recognized by both the OHCHR and GANHRI in the Belgrade Principles. The value of engaging with Parliament is especially decisive in Australia, where the doctrine of parliamentary sovereignty permeates across the NHRS. This interaction may take many forms, including regular engagement with parliamentary scrutiny processes, direct engagement with parliamentarians, and the provision of human rights knowledge and awareness training.

In relation to parliamentary scrutiny, the AHRC "considers it a key part of the role of an 'A' status NHRI to provide written submissions to parliamentary committees in relation to

legislation and other matters engaging human rights." [117] The commission may also be called on to provide oral evidence to parliamentary committees in the course of their inquiries, and multiple submissions have been lodged by the AHRC in recent years.[118]

With regards to AHRC interactions with the Australian Federal Parliament and its committee system, there is arguably room for improvement. According to Triggs, "Committees have acted as political tools in recent years and the AHRC has witnessed this trend to its detriment."[119] The AHRC's recent engagement with the Legal and Constitutional Affairs Committee of Senate Estimates makes this antagonism quite clear. Senate Estimates represent an important asset to democratic parliamentary procedures, in that senators appointed to the committee have a mandate to question public servants and heads of government agencies about compliance with their statutory obligations. This opportunity to examine the operations of government plays a key role in the parliamentary scrutiny of the executive, as well as statutory bodies such as the AHRC. In the words of Triggs, "the reality, however, is a travesty of democracy and an abuse of parliamentary privilege."[120] More specifically, "some, if not most, senators use the opportunity in front of the cameras to ask questions as a means of attacking political opponents […] the luckless public servant is merely a conduit for achieving political ends or personal aggrandisement. No legal recourse is possible, as anything a senator says in committee is immune from civil or criminal prosecution."[121]

The most "virulent" condemnation by parliamentarians in the Estimates Committee concerned the 2015 AHRC inquiry and the Forgotten Children Report, which was denounced as a biased exercise to damage the sitting government. Instances such as this led to a campaign to discredit the AHRC and its president, both in Parliament and the media, calling for Triggs' resignation and the abolition of the commission, "along with thousands of words and dozens of cartoons thundering disapproval to our work."[122] Last but not least, then Attorney-General Brandis and Prime Minister Abbot made declarations of "no confidence" in the work of the AHRC and offered Triggs another government position if she to step down, representing a clear attempt to

[117] Rosalind Croucher, President of AHRC, Parliaments as promoters of human rights, democracy and the rule of law (4 May 2018) available at https://www.ohchr.org/Documents/Issues/Democracy/Forum2018/20180504AustralianHumanRightsCommission.pdf.
[118] For a list of AHRC submissions to the PJCHR see https://www.humanrights.gov.au/our-work/rights-and-freedoms/parliamentary-joint-committee-human-rights.
[119] Triggs (n 58) 20.
[120] Ibid. 22.
[121] Ibid. 22–23.
[122] Ibid. 24.

breach the Paris Principles mainstay of NHRI independence. The Australian NHRS partly redeemed itself when the Senate passed a censure motion against Brandis for failing to defend the AHRC from "malicious attacks," seeking to obtain Triggs' resignation, refusing to account for his role, and undermining Australia's commitment to uphold human rights.[123] The attacks on the AHRC have diminished since Brandis appointed its new president, Rosalind Croucher, in 2017.

The controversy that followed the publication of the Forgotten Children Report is just one of many instances in which the AHRC has been publicly attacked by government officials in recent years.[124] The fact that these attacks have been made in the context of estimates hearings, where estimates of government expenditure are referred to Senate committees as part of the annual budget cycle, is significant. In fact, according to Triggs, the "budget is the biggest weapon to curtail the influence of an NHRI, which leads the Australian context into a quandary as it all boils down to politically set priorities, even though issues related to AHRC activity should be considered as cross political."[125]

Another Parliamentary committee with which the AHRC's mandate would suggest comprehensive interaction is the recently established PJCHR. However, according to the overwhelming majority of interviewed officials from both the AHRC and the PJCHR secretariat, "little to no engagement" took place from the year of the Joint Committee's establishment in 2010.[126]According to former Race Discrimination Commissioner Tim Southepoomane, members of the PJCHR "only once visited the Sydney office" during his four-year mandate.[127] According to current Human Rights Commissioner Ed Santow, the committee has "never invited [him in] during hearings on draft legislation" since his appointment in 2016.[128] Elizabeth Broderick, sex discrimination commissioner from 2007 to 2015, similarly stated that the PJCHR had "no engagement with the AHRC," although she hoped more interaction would take place in the future, "especially on new legislation on counterterrorism, where the risk of executive overreach may require thorough human rights scrutiny."[129] The only recent instance of AHRC-PJCHR interaction recorded is a June 2018 visit by PJCHR

[123] Ibid
[124] See Triggs' "baptism of fire" with the Senate Estimates Committee concerning the findings of the Basikbasik case arising from a complaint to the Commission (2012) in Triggs (n 58) 20.
[125] Triggs, interview.
[126] Rice, Byrnes, Broderick, Southepoomane and Santow, interviews.
[127] Southepoomane, interview.
[128] Santow, interview.
[129] Broderick, interview.

members to the AHRC headquarters in Sydney. According to the 2018 PJCHR Report, "the committee was briefed on different areas of the Commission's work."[130]

Due to the paucity of formalized avenues for AHRC-PJCHR interaction, it is "through personal connections that this engagement has mostly developed," as the legal advisor to the PJCHR stated.[131] This has been accomplished above all through awareness-raising on both general human rights issues as well as on specifics of TB recommendations. Although the PJCHR has mainly dealt with treaty compliance and not so much with TB recommendations, it is hard to gauge this interaction in terms of impact assessment.[132] The lack of mutual contributions is evident in the statement that the only direct connection between TB recommendations and the PJCHR is "through the work of the legal advisor and secretariat staff, who use TB recommendations in their supporting role vis-s-vis the committee members." Even then, "the committee has almost always been hostile to this, representing a clear impediment to achieving policy goals."[133]

Furthermore, aside from aspects related to day-to-day politics, it seems that the very modus operandi of the PJCHR does not allow for an effective interaction with the AHRC. As stated, parliamentary procedures allow for bills to enter a "fast track" through Parliament, effectively precluding AHRC input and possible influence. Interviewed officials saw this as suggesting that the Joint Committee "does not care for AHRC opinions."[134] It is specifically due to this time-bound constraint that the "PJCHR is not seen as a crucial space" by the AHRC.[135]

Lastly, the AHRC may engage directly with state parliamentarians on human rights issues within their portfolios, evidence of which was recently given by AHRC President Croucher:

> In my role as President, I have engaged with parliamentarians specifically on the issue of parliamentary scrutiny and human rights. In relation to training, following the introduction of a human rights scrutiny mechanism in the NT

[130] PJCHR, 2018 Annual Report, 35, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/Annual_Reports/Annual_Report_2018.
[131] Mowbray, interview.
[132] Dick and Woolcott, interview.
[133] Rice, interview.
[134] Santow, interview.
[135] Santow, interview.

> Parliament, the Commission provided human rights training to governmental and parliamentary officers in the NT.[136]

Throughout my empirical research, it has seemed that aside from the often-used practice of issuing submissions to parliamentary inquiries and modest examples of human rights training, the AHRC is not interacting with Parliament in a comprehensive manner. This failure suggests two main arguments regarding ongoing impediments to human rights protection in Australia.

Firstly, an ideological objection to the AHRC, which has led to prominent politicians to repeatedly call for its abolition. Secondly, the disconnect between Australia's legal obligations under ratified human rights treaties and national laws. In this sense, the AHRC performs its functions within a constant dilemma: while several government practices represent violations of ratified conventional provisions, these violations do not necessarily have an equivalent in Australian law. This puts the AHRC in an uncomfortable situation, as Triggs explains with a notable example:

> The dilemma is thus to explain to sometimes antagonistic government representatives that, while the prohibition on arbitrary detention without trial in the ICCPR is not directly part of national law, the prohibition forms part of the definition of "human rights" for the purposes of the AHRC mandate [under the Australian Human Rights Commission Act].[137]

Not all is lost, however. A tentative move toward détente, essential in a country with such a strong parliamentary role in human rights scrutiny, was recently made by the current AHRC president:

> The Commission considers that NHRIs are in a unique position to offer objective and accurate advice to parliaments in relation to human rights and to instill rights mindedness in the exercise of parliamentary functions. It encourages all NHRIs to consider opportunities for engaging with the parliaments operating in their states.[138]

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[136] Rosalind Croucher, President of AHRC, Parliaments as promoters of human rights, democracy and the rule of law (4 May 2018) available at www.ohchr.org/Documents/Issues/Democracy/Forum2018/20180504AustralianHumanRightsCommission.pdf.
[137] Triggs (n 58) 23.
[138] Rosalind Croucher, President of AHRC, Parliaments as promoters of human rights, democracy and the rule of law (4 May 2018), available at www.ohchr.org/Documents/Issues/Democracy/Forum2018/20180504AustralianHumanRightsCommission.pdf.

3.3. The High Court of Australia

I have already detailed several limitations in the role of courts in the Australian NHRS. No more significant expression of this situation can be found than Triggs' recent words on the matter:

> As an international lawyer, I am dismayed by the reluctance of Australian courts to consider the jurisprudence of international tribunals and organisations, or the standards nations have accepted in treaties, declarations and practices. The High Court has preferred to confine its analysis to principles of statutory and constitutional interpretations when considering the effect of a statute. Such a narrow view of the law in a globalized world has contributed to Australia's isolation and growing exceptionalism with respect for human rights.[139]

The High Court's attitude to treaty obligations has not always been so conflictual with international human rights. In a 1995 case, the court considered whether government officials should have considered the primary interests of the child under the CRC when deciding to deport the claimant's father, a non-citizen convicted of drug offences.[140] *Teoh's* case, as it became known, famously recognized that government decision-makers should take into account international human rights obligations. It has historical value in expounding the "legitimate expectation" doctrine, which essentially means that statutes will not be interpreted as inconsistent with human rights "unless such intention is clearly manifested by unmistakable and unambiguous language."[141] Aside from Teoh's case, the most widely recognized rights-protective judgement has been *Mabo v. Queensland*. Its importance rests not only in its substantive effect, which finally granted native title to Indigenous Australians, but also due to the "groundbreaking" reasoning that led to that decision. In handing down his judgement, Chief Justice Brennan stated that "if a postulated rule of the common law expressed in earlier cases seriously offends contemporary values [of justice and human rights] the question arises whether the rule should be maintained and applied."[142] While the majority of the sitting High Court judges agreed on changing the common law in that specific instance, and in doing so relied on international human rights law, the ensuing reaction split the country in two. For many, the Mabo case overreached the principle of parliamentary sovereignty, allowing judges

[139] Triggs (n 58) 82.
[140] Minister of State for Immigration and Ethnic Affairs v Teoh [1995] HCA 20.
[141] Plaintiff S157/2002 v Cth (2003) 211 CLR 476 per Gleeson CJ [30].
[142] Brennan J in Mabo v Queensland [No.2] (1992) 175 CLR 1, 29–30.

to override political support and legislators' more "informed policy judgements."[143] For others, it showed a flexible way of dealing with outdated legislative attitudes and the reluctance to create statute law to adequately address Indigenous land rights.

However, these are isolated cases. In 2003, the "legitimate expectation doctrine" expounded in the *Teoh* decision was followed to the letter, to the detriment of rights protection. In *Re Woolley*, the mandatory detention of children of asylum seekers was upheld as there was no uncertainty about the legislature's intention to curtail the rights of all asylum seekers.[144] A more recent case is Al *Kateb v Godwin*,[145] in which the High Court concluded that the mandatory detention of asylum seekers under the Migration Act was a clear and unambiguous law that replaced any common law to the contrary. The claimant in this case was detained for five years by the Australian Government without charge or trial.

Overall, although the judiciary can ensure Australia's international human rights obligations in domestic law, it has done so only in a small number of cases. This limited role is further proof of the monopoly in practice that the representative arms of government possess over human rights policy and practice in Australia.

Interactions between courts and AHRC

The AHRC has engaged infrequently with the judiciary, which is not surprising given the latter's approach. However, it is within the AHRC's mandate to seek leave of a court to intervene in proceedings that involve human rights, either at its own initiative or at the court's request. It can contribute a specialist and objective view in processes which might require human rights considerations.

There is a disparity in terms of AHRC use of judicial avenues of human rights protection. For instance, in terms of challenges to the various forms of administrative detention without trial, *Al Kateb v Godwin* "was a frustrating impediment to the AHRC's advocacy."[146] In such cases, Triggs suggest that these challenges would be deflected by the minister for immigration simply on the grounds that "the treaty prohibition on detention without trial was not part of Australian law and that the relevant legislation authorized administrative detention."[147]

[143] Al-Kateb v Godwin [2004] HCA 37.
[144] Re Woolley; Ex parte Applicants M276/2003 by their next friend GS [2004] HCA 49.
[145] Al-Kateb v Godwin [2004] HCA 37.
[146] Triggs (n 58) 81.
[147] Ibid.

In other, less politically explosive fields, the AHRC is sometimes invited to intervene and its legal submissions on human rights implications have been quoted favorably by the courts. One such field is family law. In 2013, the AHRC made a submission to the Family Court in the case of *Re Jamie*,[148] recommending that for childhood gender-identity hormone treatment, prior permission by the court for the second phase of treatment should not be required. Similarly, following multiple TB recommendations, in 2017 the AHRC intervened in another Family Court case in *Re Kelvin*,[149] which essentially cleared the way for young transsexual people to access hormone treatment without court authorization.[150] Following AHRC's submissions, both instances saw the Family Court deliberate accordingly, a significant advance in the timely treatment of gender dysphoria. Another successful engagement with the Family Court was for the 2016 Farnell case[151] on parenting orders for a child, one of a set of twins born through international surrogacy. The AHRC recommended that international conventions, more specifically the CRC, guide the deliberations.

3.4. Non-State Actors

The Paris Principles articulate an important role for NHRI-CSO cooperation.[152] NHRI engagement with CSOs is especially important in the Asia-Pacific region, as it currently lacks an overarching regional mechanism for the promotion and protection of human rights.[153] Indeed, NHRIs have assumed significant social, legal, and political roles within many states. In Australia, therefore, the mutually reinforcing role of the AHRC and CSOs in advocating for strong and effective institutions has been crucial. From the AHRC's perspective, aside from the specific commissioners' mandates,[154] the Australian Human Rights Commission Act states clearly that: "For the purposes of the performance of its functions, the Commission may work with and consult appropriate persons, governmental organisations and non-governmental organisations."[155]

[148] Jamie [2015] FamCA 455.
[149] Re Kelvin [2017] FamCA 78.
[150] For a summary of the case see www.hrlc.org.au/human-rights-case-summaries/2017/12/20/family-court-of-australia-clears-the-way-for-young-trans-people-to-access-hormone-treatment-without-court-authorisation.
[151] Farnell & Anor and Chanbua [2016] FCWA17.
[152] Paris Principles, Methods of Operation, para (g).
[153] The ASEAN Inter-governmental Commission on Human Rights, a sub-regional human rights mechanism, was established in 2009.
[154] E.g. AHRC Act, Part IIA, para 46(c)(3): "(3) In the performance of functions, or the exercise of powers, under this section, the Commissioner may consult any of the following: (a) organisations established by Aboriginal or Torres Strait Islander communities; (b) organisations of indigenous peoples in other countries; (c) international organisations and agencies; (d) such other organisations, agencies or persons as the Commissioner considers appropriate."
[155] AHRC Act, Para 15.

In addition to AHRC's own efforts, the goal of achieving productive NHRI-CSO engagement has been advanced by the emergence of the Asia Pacific Forum of National Human Rights Institutions (APF), headquartered within the same building as the AHRC in Sydney. Since its inception in 1996, the APF has sought to foster relations between its members and CSOs. At the APF's first regional workshop, CSOs were participants and contributors to the Larrakia Declaration that emanated from it, emphasizing that "the promotion and protection of human rights is the responsibility of all elements of society and all those engaged in the defence of human rights should work in concert to secure their advancement." One decision of the Larrakia Workshop was that the newly created forum would "encourage governments and human rights non-government organisations to participate in forum meetings as observers."[156] In 1999, the APF convened a regional meeting of NHRIs and NGOs in Kandy, Sri Lanka, to discuss the partnership between NHRIs and NGOs. The meeting produced the Kandy Program of Action as a guide for both parties to encourage their cooperation.[157] They agreed that "there should be mutual consultation and cooperation in human rights projects and education."[158] Consultation between NHRIs and NGOs should be "regular, transparent, inclusive and substantive."[159] The Kandy-Plus Program of Action currently in place describes areas for cooperation between NHRIs and NGOs in education, complaints and investigations, national human rights inquiries undertaken by NHRIs, relations with parliaments, advising on legislation, establishing new NHRIs, and engaging with the international human rights system.

This means CSO engagement happens as corollary to most AHRC-led initiatives. At the national level, AHRC has forged close partnerships with civil society to broaden the reach, impact, and scope of its work. In most cases, civil society groups are consulted throughout AHRC activities, especially in supporting the AHRC to undertake projects with vulnerable groups. CSOs engaged in TB reporting include the Equality Rights Alliance, the National Congress of Australian First Peoples, the Refugee Council of Australia, the Disabled Peoples Organization Australia, Kingsford Legal Centre, and the Human Rights Law Centre (HRLC).

[156] Larrakia Declaration, First Regional Workshop of the Asia Pacific Forum of National Human Rights Institutions, Darwin, Australia, 8–10 July 1996, available at <www.asia pacificforum.net/about/annual-meetings/lst-australia-1996/downloads/larakia.pdf>.
[157] APF, *Kandy Program of Action: Cooperation between National Institutions and Non-Governmental Organisations* (1999).
[158] Ibid. para. 1.6.
[159] Ibid. para 2.1.

This "obvious collaboration" is not free from problems when engaging with TB cycles of reviews. For NHRIs in general, managing relationships with NGOs can be challenging and difficult. Each country has only one NHRI but there are generally hundreds, perhaps thousands, of NGOs. According to interviewed CSO representatives, fruitful engagement is strongly dependent on the commissioners' background: "when a commissioner comes from a CSO background, his/her team is also more conducive to CSO input, with meetings set up in the lead-up to the TB session as well as in Geneva and with regards to follow-up."[160] The quality of AHRC-CSO engagement decreases when AHRC commissioners' previous careers align closer to government positions and/or private law firms. In such cases, "the AHRC approach appears to be more careful and there appears to be no standardized engagement with CSOs, making civil society input very difficult."[161] Such criticisms are inevitable due to the disparate nature of NHRIs and CSOs, as the scholarly analysis has made clear:

> It is possible that the relationship will always be one of fundamental tension. NHRIs will rarely be robust enough and independent enough to satisfy CSOs. The activism of CSOs often will not suit the modus operandi of NHRIs, who see benefits in cooperating with state agencies to make human rights gains. The challenge is to ensure that the inevitable tension is a productive one.[162]

After all, "NHRIs and NGOs have different roles in the promotion and protection of human rights and […] the independence and autonomy of civil society and NGOs and of national human rights institutions must be respected and upheld."[163]

According to an AHRC official, "it is often problematic to meet the required word limits for our submissions, due to the sheer number of CSO reports submitted. For strategic planning it would be beneficial to have one joint NGO report which could then inform the AHRC alternative report."[164] In Australia, it seems that the lack of a joint CSO approach to TB reviews hampers NHRI work.

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[160] Kingsford, interview.
[161] Kingsford, interview.
[162] Catherine Shanahan Renshaw, National Human Rights Institutions and Civil Society Organizations: New Dynamics of Engagement at Domestic, Regional, and International Levels (July–Sept. 2012) 19(3) Global Governance 312.
[163] APF, *Kandy Program of Action: Cooperation between National Institutions and Non Governmental Organisations*, 1999, para. 1.5.
[164] Dick, interview.

Despite tension, an AHRC official highlights the symbiotic relationship exists between CSOs and NHRIs in Australia: "CSOs recognize that NHRIs have access to the authority and resources of the state to address human rights problems" and "NHRIs recognize that, as state institutions, perceptions about their independence and credibility are enhanced by the support of CSOs,"[165] providing legitimacy to an institution that might otherwise be seen as a pawn of the state. CSOs are also able to extend the reach of NHRI services (and information gathering) to parts of the community that NHRIs might otherwise be unable to reach.

The AHRC has used a variety of mechanisms to respond to the challenge of dealing with large numbers of NGOs, including:

- appointing an NGO focal point, either at the commissioner or staff level, who is responsible for developing and implementing a strategy for NGO engagement, including consultation and coordination;
- conducting a major annual consultation with NGOs, inviting large numbers of NGOs to meet with commissioners and staff to discuss issues, priorities, and strategies (for instance, since 2014 the Forum on Human Rights for NGOs has been hosted by the AHRC in Sydney)[166];
- conducting issue-specific forums and inviting those NGOs relevant to the issue, such as the various consultations with Indigenous health rights groups in relation to the Close the Gap campaign[167]; and
- convening meetings with NGOs around specific AHRC projects, to seek their views and cooperation, such as Free and Equal: An Australian Conversation on Human Rights, set up to identify what makes an effective system of human rights protection for 21st-century Australia.[168]

The AHRC also used to play a coordination role for CSO engagement with the TB system, but "since approximately two decades ago it has been civil society itself that coordinates its input, through the lead of major CSOs such as HRLC and Kingsford Legal Centre."[169]

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[165] Ibid.
[166] See Fletcher (n 12) 83.
[167] For more information, see <www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/close-gap-indigenous-health>.
[168] For more information, see <www.humanrights.gov.au/free-and-equal>.
[169] Kingsford, interview.

The above analysis suggests quite extensive avenues for AHRC-CSOs interaction as well as AHRC-coordinated forums for CSO-government engagement. However, aside from AHRC-led initiatives, CSO influence on government human rights policy seems limited. For one, the support structure for CSO legal mobilization has historically been "relatively weak, under-developed and poorly funded."[170] During the last decade in Australia, the ability of CSOs to make their voices heard though formal channels in the area of human rights has been compromised in several ways,

> especially those who disagreed with the government on major issues, including the treatment of asylum seekers, refugees and indigenous policy, […] difficulties arose as a result of the withdrawal of government funding for some organizations in preference for others that were more closely aligned with government policy, as well as the closure of access points for CSOs to communicate their views to ministers.[171]

In light of these developments, the role of the AHRC in fostering CSO participation in TB parallel reporting and follow-up seems an important aspect of its efforts towards human rights implementation in Australia.

3.5. National Human Rights Action Plans

In a decentralized system of government such as Australia, national coordinative solutions to human rights monitoring are essential. This chapter has displayed the intricacies of human rights monitoring in the Australian system of government. The sheer number of actors involved and the relative lack of a comprehensive set of interactions among them have led to an often ad-hoc approach to human rights monitoring in Australia. While the AHRC has made the most of the disjointed nature of the Australian NHRS, bringing independent and thorough evidence-based findings and recommendations to "compliance actors" as well as CSOs and the media, the task of ensuring an effective NHRS is clearly beyond an NHRI.

In all its complexity, the patchwork that has traditionally represented the Australian NHRS clashes with a stronghold of Australian human rights policy, foreign and domestic. Not only has Australia led the institutionalization efforts and expansion of NHRIs worldwide, but it is also considered "the world leader in the formulation of National Human Rights Action Plans

[170] Tom Campbell at al, *Protecting Human Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate 2006) 36–7.
[171] Chappell, Chesterman, and Hill (n 9) 55.

(NHRAPs)". Australia developed the world's first NHRAP, as recommended at the Vienna Conference in 1993–1994 and Successive Australian governments reaffirmed their commitment to the protection of human rights, through the development of two other NHRAPs, in 2004[172] and 2012.[173] Although laudable in terms of initiatives, Australian NHRAPs have suffered from the same faults identified in the wider Australian NHRS.

The first NHRAP was developed in late 1993 by an interdepartmental committee of government officials, led by the DFAT and the AGD. The plan was made public, although there was no media campaign associated with its launch and evidently little to no consultation beyond governmental actors.[174] A discussion paper prepared by the AHRC offers a critical view of Australia's first NHRAP:

> Australia had advanced the concept of national action plans in the context of the World Conference with the idea that it would be implemented by other countries, not by Australia. However, it was apparent that, having successfully pushed for endorsement, Australia had to demonstrate credibility by preparing and adopting its own plan.[175]

The main purpose of the plan seems to have been political, both in terms of foreign and domestic policy. It did not feature AHRC cooperation initiatives and had little impact in improving human rights observance in Australia.[176]

Australia's second NHRAP, the National Framework for Human Rights: National Action Plan, was developed in 2004.[177] It represented a small step forward in terms of comprehensiveness of the actions planned as well as its inclusiveness at planning phase, but notable faults surfaced once it was published. One such example exemplifies the selectiveness with which the action plan was drafted. As part of the third-party submissions, the AHRC (then called the Human Rights and Equal Opportunity Commission, or HREOC) focused on the issue of mandatory

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[172] Australian Government, 'Australia's National Human Rights Action Plan' (2004), 85, available at <www.ohchr.org/EN/Issues/PlansActions/Pages/PlansofActionIndex.aspx>.
[173] Ibid.
[174] Azadeh Chalabi, 'Australia's National Human Rights Action Plans: traditional or modern model of planning?' 20(7) *The International Journal of Human Rights* (2016) 997.
[175] B. Barker, 'Protecting, Promoting and Fulfilling Human Rights in Australia: A National Human Rights Action' (2011), 6.
[176] Chalabi (n 174).
[177] Australian Government, 'Australia's National Human Rights Action Plan' (2004), 85, available at www.ohchr.org/EN/Issues/PlansActions/Pages/PlansofActionIndex.aspx.

detention of children. In its report, HREOC stated that children in long-term detention in Australia had suffered from:

> anxiety, distress, bed-wetting, suicidal ideation and self-destructive behaviour including attempted and actual self-harm. The methods used by children to self-harm have included, attempted hanging, slashing, swallowing shampoo or detergents and lip-sewing.[178]

Although this constituted a clear breach of the CRC, in the main text of the plan no reference was made to children in detention, or to the rights of refugees and asylum seekers overall. In "Annexure A" the 2004 plan reiterated that "under the Act [the Migration Act 1958 (Cth)], immigration detention of all unlawful non-citizens in mainland Australia is mandatory by operation of law."[179] It is due to instances such as this that commentators regarded it "likely" that "the main purpose [the 2004 NHRAP] was once again of a political nature, setting out a robust defence of Australia's human rights credentials and not human rights improvements in Australia."[180]

The third and latest NHRAP was released in 2012 following Australia's inaugural UPR, and incorporated all accepted recommendations.[181] It represented Australia's most comprehensive and inclusive action plan, but it has now been discontinued, as was made clear by the newly elected Tornbull government during the second UPR cycle in 2016.[182]

Nonetheless, the 2012 NHRAP represented a major shift from a traditional to a so-called "modern" model of planning.[183] Two main, interconnected features improved its quality, namely a top-down bottom-up strategy and extensive community participation. The 2012 NHRAP was preceded by wide consultation initiatives with the Australian public, including almost fifty submissions from CSOs and the AHRC. Awareness-raising initiatives

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[178] Human Rights and Equal Opportunity Commission, 'A Last Resort? National Inquiry into Children in Immigration Detention', Commonwealth of Australia (2004), available at <www.hreoc.gov.au/human_rights/children_detention_report/index.html>.
[179] Australian Government, 'Australia's National Human Rights Action Plan' (2004), 85, available at <www.ohchr.org/EN/Issues/PlansActions/Pages/PlansofActionIndex.aspx>.
[180] Chalabi (n 1743) 997.
[181] Australian Government, 'National Human Rights Action Plan' (2012), archived link: <http://web.archive.org/web/20130328074804/http://www.ag.gov.au/Consultations/Pages/NationalHumanRightsActionPlan.aspx>.
[182] Australia's response to (inter alia) UPR recommendation 70, UPR 2nd cycle (February 2016), available at <www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/upr-recommendations/Pages/Recommendations/70.aspx>.
[183] Chalabi (n 174).

complemented the consultation phase, with both public and media attention, all of which contributed to the government's understanding of the human rights concerns of the community in Australia. A clear finding of a recently developed expert survey on the effectiveness of this NHRAP was that the most effective parts were related to women's and children's rights.[184] Of specific interest to our analysis is its recommendation to introduce a commissioner for children and young people to the AHCR pool of commissioners, who is today responsible for AHRC reporting to the CRC.

It is no coincidence that community participation featured most prominently in these two specific fields, which can be exemplified by consultations related to the National Plan to Reduce Violence against Women and their Children (2010–2022). In that instance, more than two thousand individual citizens and residents were involved, from every state and territory, through expert roundtable discussions and interviews of victims and perpetrators of violence; and more than 350 written submissions were received. Indeed, the planned actions related to women and children's rights within the NHRAP seem based on that plan and the National Framework for Protecting Australia's Children (2009–2020), both led by COAG. As discussed, such "national plans" are strongly reliant on community participation and apply a so-called "integrated governance approach," which distinguishes them from government action on the rights of refugees and asylum seekers, which has relied on a strategy of "hierarchical government." This more participatory approach "combines the advantages of expert knowledge from the top down and local wisdom from the bottom up."[185]

What this brief analysis of Australian NHRAPs shows is clear. The Australian NHRS, and consequently the AHRC activity within it, seems more effective when relying on community participation and an integrated governance approach. However, in fields which the government has a firm policy stance, the NHRS is at the behest of governmental decision-making. As the scholars Joseph and Fletcher argue: "Strong and robust [the comments] may be, but even formal recommendations by the Parliamentary Committees or the AHRC are at best persuasive, and can be ignored if the Government of the day declines to accept them. This should be acknowledged as a significant protection gap."[186]

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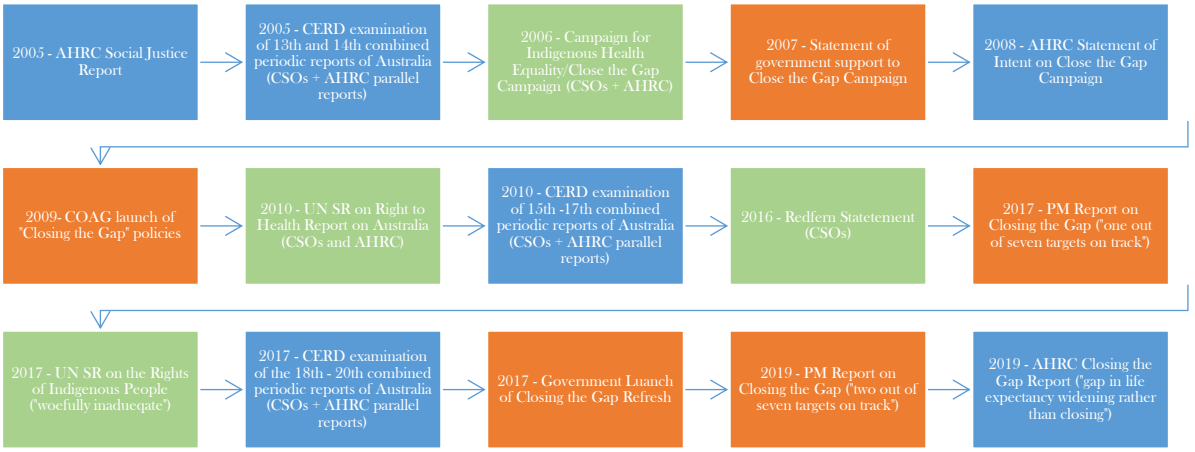
[184] Ibid. 1006.
[185] Ibid. 1013.
[186] S. Joseph and A. Fletcher, *Castan Centre For Human Rights Law: National Human Rights Action Plan: Draft Baseline Study* (2012) 9, available at <www.law.monash.edu.au/castancentre/policywork/national-hr-action-plan-sub.pdf>.

4. A Selection of Impact Evaluations of AHRC – Treaty Body engagement

The following two sub-sections offer examples of complementary AHRC-TB initiatives that have had the effect of facilitating implementation of UN human rights treaties. Through AHRC-TB engagement, partially positive outcomes have been achieved in the fields of Aboriginal and Torres Strait Islander equality and children in immigration detention. Case selection in both cases stems from a collation of views from interviewed stakeholders who qualified both as typical and accessible scenarios of recent AHRC-TB engagement.[187] Furthermore, this selection guarantees variance in terms of NHRI functions as well as TB of reference. I start each analysis with a roadmap of AHRC-TB engagement, to guide the in-depth analysis that follows.

4.1. Example 1 – The Closing the Gap Campaign

Figure 9.3. The Closing the Gap Campaign (TB-AHRC Engagement Roadmap)



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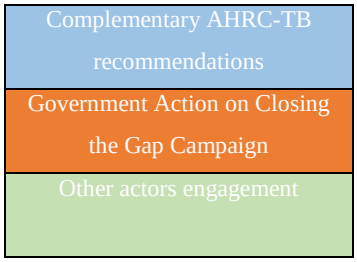

[187] Collation of views from interviewees.

In November 2005, the AHRC[188] submitted to the AGD its yearly Social Justice Report.[189] In accordance with the functions set out in section 46C(1) (a) of the Human Rights Commission Act 1986 (Cth),[190] the Social Justice Report contains yearly analyses of the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders, including recommendations as to the action that should be taken to ensure such exercise and enjoyment. In the 2005 Social Justice Report, the AHRC noted that two decades of commitments to overcome disadvantage had achieved limited gains due to an absence of specific targets or goals to be achieved over a short, medium, and long term. Funding and policies had not been designed to achieve progress by reducing the existing inequalities experienced by Aboriginal and Torres Strait Islander peoples. In sum, health equality initiatives in Australia had not been planned following a human rights approach. The recommendations for achieving health equality in the 2005 Report had a stated aim:

> A commitment to achieve Aboriginal and Torres Strait Islander health equality: that the governments of Australia commit to achieving equality of health status and life expectation between Aboriginal and Torres Strait Islander and non-Indigenous people within 25 years.[191]

Supporting commitments and processes included "that benchmarks and targets for achieving equality of health status and life expectation be negotiated, with the full participation of Aboriginal and Torres Strait Islander peoples, and committed to by all Australian governments" and that "they should be made at the national, state/territory and regional levels and account for regional variations in health status."[192] The report also recommended endorsement of this commitment by all Australian Parliaments and that bi-partisan support for this commitment be sought in federal Parliament and in all state and territory parliaments."[193]

[188] Then acting under the former name of Human Rights and Equal Opportunities Commission (HREOC).
[189] HREOC, Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report (2005) available at <www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport05/pdf/SocialJustice2005.pdf>.
[190] Then called the Human Rights and Equal Opportunity Commission Act 1986 (Cth).
[191] HREOC (n 178) foreword.
[192] Ibid.
[193] Ibid.

Earlier that year, Australia had submitted its 13th and 14th combined State Reports to the CERD Committee.[194] The ensuing COBs included the following recommendation:

> 19. While noting the improvement in the enjoyment by the indigenous peoples of their economic, social and cultural rights, the Committee is concerned over the wide gap that still exists between the indigenous peoples and others, in particular in the areas of employment, housing, health, education and income (art. 5).
>
> The Committee recommends that the State party intensify its efforts to achieve equality in the enjoyment of rights and allocate adequate resources to programmes aimed at the eradication of disparities. It recommends in particular that decisive steps be taken to ensure that a sufficient number of health professionals provide services to indigenous peoples, and that the State party set up benchmarks for monitoring progress in key areas of indigenous disadvantage.[195]

While it is difficult to ascertain the exact causal link between the 2005 report and this COB, it is clear that during that same year both the CERD Committee and the AHRC focused their monitoring functions on equality of health status for the Aboriginal and Torres Strait Islander communities in Australia.

The Campaign for Indigenous Health Equality (the Close the Gap Campaign) was launched in 2006, led by Aboriginal and Torres Strait Islander organizations and supported by mainstream health and human rights organizations from around the country, including the AHRC.[196] In August 2007, the Australian Labor Party signaled support for the Close the Gap Campaign's approach to Indigenous health in its Indigenous Affairs Election Platform. As a result "closing the gap" entered the policy lexicon and has since been used to tag many different Indigenous policy initiatives by the Australian Government.[197]

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[194] Australian Government, *Thirteenth and Fourteenth Periodic Reports of Australia to CERD*, *CERD/C/428/Add.2* (March 2005).
[195] CERD, *Concluding Observations, CERD/C/AUS/CO/1414* (April 2005).
[196] For more information, see <https://www.humanrights.gov.au/our-work/closing-gap-national-indigenous-health-equality-targets-2008>.
[197] For example, the "National Partnership Agreement to Closing the Gap on Indigenous Health Outcomes" or to the renaming of aspects of the Northern Territory Emergency Response (The Intervention) as "Closing the Gap in the Northern Territory."

In July 2009, COAG agreed to implement a National Integrated Strategy for Closing the Gap in Indigenous Disadvantage, bringing together several National Partnership Agreements (the Closing the Gap policies).[198] The Australian Government, the states of Victoria, Queensland, Western Australia, and the Australian Capital Territory signed the Close the Gap Statement of Intent. In doing so, they committed to develop a comprehensive, long-term plan of action to achieve equality of health status and life expectancy between Aboriginal and Torres Strait Islander peoples and nonindigenous Australians by 2030.

The Closing the Gap policies commit the federal, state, and territory governments to six targets:

> (a) closing the gap in life expectancy within a generation;
>
> (b) halving the gap in mortality rates for Aboriginal children under five within a decade;
>
> (c) halving the gap for Aboriginal students in reading, writing, and numeracy within a decade;
>
> (d) at least halving the gap for Aboriginal students in year 12 attainment or equivalent attainment rates by 2020;
>
> (e) halving the gap in employment outcomes between Aboriginal peoples and other Australians within a decade; and
>
> (f) ensuring all four-year olds, including those in remote communities, have access to early childhood education within five years.[199]

Following up on both the AHRC and the CERD Committee's recommendations, the Closing the Gap policies also included a commitment to establish performance benchmarks, identify further areas for activity (including food security, welfare reform, and infrastructure improvement) and develop case studies for best-practice programs.[200] Nevertheless, the AHRC soon thereafter expressed concern that despite having made commitments to partnerships, there

[198] HREOC, *Close the Gap: Indigenous Health Equality Summit, Statement of Intent* (2008).
[199] Council of Australian Governments National Agreements and National Partnership Agreements, available at www.coag.gov.au/.
[200] Council of Australian Governments, *COAG Communiqué* (2 July 2009).

were "few signs that the Australian Government is otherwise embracing a partnership approach."[201]

According to a 2010 NGO coalition's report, the Closing the Gap policies "do not currently constitute a rights-based approach. Further, targets have not been integrated by the Government into all the relevant policy settings."[202] That same year, the UN special rapporteur on the right to health noted the need for a comprehensive national plan to achieve the Close the Gap Campaign targets.[203] Following his mission to Australia, he observed that:

> Undivided support and implementation of the Close the Gap Campaign is crucial to ensuring capacity building and empowerment of [I]ndigenous communities to take a leadership role in realising the right to health for all Australians. Barriers at the institutional level, including those influencing policy, allocation of finances and the level of human rights protections currently impede the achievement of equality and non-discrimination, and require action.[204]

Due to these continuing limits to implementation, Australian civil society recommended that:

> the Australian Government establish a comprehensive national plan to achieve equality of health status and life expectancy between Aboriginal and Torres Strait Islander Peoples and other Australians by 2030 in consultation with Aboriginal and Torres Strait Islander peoples, which includes mechanisms for self-determination, partnership and consultation.[205]

In 2010, the AHRC reported on progress made by the Closing the Gap campaign, welcoming "the substantial financial commitments for Indigenous health made under […] the COAG National Integrated Strategy for Closing the Gap in Indigenous Disadvantage" and its inclusive

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[201] AHRC, *Indigenous Peoples Organisations Network of Australia, Submission to the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People: Australian Mission* (August 2009) para 42.

[202] NGO Submission to the UN Committee on the Elimination of Racial Discrimination, 'Freedom Respect Equality Dignity: Action (June 2010) available at <https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/AUS/INT_CERD_NGO_AUS_77_8046_E.pdf>.

[203] Anand Grover, *United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Addendum: Mission to Australia, UN Doc A/HRC/14/20/ADD.4* (3 June 2010) para. 47.

[204] Anand Grover, *United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Preliminary Observations and Recommendations* (4 December 2009).

[205] NGO Submission to the UN Committee on the Elimination of Racial Discrimination (n 221).

road map allowing "for Governments and Aboriginal controlled health community organisations to work together as part of the long term vision of Closing the Gap."[206] The AHRC also noted "the Government's positive progress towards the COAG target of halving the gap in mortality rates for Indigenous children under five years, within a decade."[207]

However, the AHRC noted with concern "the rising level of low birth weight babies which is clearly associated with under-five mortality and does not bode well for the future" and that "the Integrated Strategy for Closing the Gap in Indigenous Disadvantage does not constitute a comprehensive national action plan on health."[208] As such, the AHRC recommended:

> That the Australian Government develop a comprehensive, long-term plan of action, that is targeted to need, evidence based and capable of addressing the existing inequities in health services, in order to achieve equality of health status and life expectancy between Aboriginal and Torres Strait Islander peoples and non-indigenous Australians by 2030.[209]

In response, the CERD Committee welcomed "the commitment of the Government to address indigenous disadvantage as set out in the six 'Closing the Gap' targets" but reiterated "its serious concern about the continued discrimination faced by indigenous Australians in the enjoyment of their economic, social and cultural rights (art. 5)."[210] As such, the CERD Committee reiterated its 2005 COBs:

> That the State party ensure that resources allocated to eradicate socio-economic disparities are sufficient and sustainable. It recommends that all initiatives and programmes in this regard ensure the cultural appropriateness of public service delivery and that they seek to reduce indigenous socio-economic disadvantage while advancing indigenous self-empowerment.[211]

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[206] AHRC, *Submission to the ICERD Committee* (8 July 2010), para 30, available at https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/AUS/INT_CERD_NGO_AUS_77_8048_E.pdf.
[207] Ibid.
[208] Australian Bureau of Statistics, Labour Force Characteristics of Aboriginal and Torres Strait Islander Australians, Estimates from the Labour Force Survey 2009, available at www.abs.gov.au/ausstats/abs@.nsf/Products/6287.0~2009~Chapter~Unemployment.
[209] AHRC, *Submission to the ICERD Committee* (8 July 2010), para 30, available at <https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/AUS/INT_CERD_NGO_AUS_77_8048_E.pdf>.
[210] CERD, Concluding Observations to Australia, CERD/C/AUS/CO/15-17 (13 September 2010) available at http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsoFZxvnsZjtq1Xnb4bcEJClA0kmqJQeV0zdR93%2ffv7%2fBSAkon8Nc2CMTKCBgv25nw5etVi%2bkUMR9abtAFqi1lgW095I%2btkhuhVTozo2kfkhQV78slhAW5U9xPBqn413aeA%3d%3d.
[211] Ibid. para. 22.

Following this flurry of recommendations from various actors, both domestic and international, some important gains were made in areas of Indigenous health and education.[212] Yet the 2017 prime minister's report on Closing the Gap showed that just one of the seven targets was on track.[213] That same year, the special rapporteur on the rights of Indigenous peoples commented on this lack of progress. In her report to the Human Rights Council, she considered it "woefully inadequate that, despite having enjoyed over two decades of economic growth, Australia has not been able to improve the social disadvantage of its indigenous population."[214]

CSOs have since continued to be very active in monitoring the Closing the Gap campaign. Aboriginal and Torres Strait Islander CSOs have voiced deep concern and called on the Government, through what came to be known as the Redfern Statement, to "take swift action to refocus and work in partnership with Aboriginal and Torres Strait Islander people to address the lack of progress in meeting Closing the Gap targets."[215] As such, an Australian NGO Coalition parallel report to the 2017 examination of Australia under CERD asked the government to "work closely with the National Congress of Australia's First Peoples and Aboriginal and Torres Strait Islander communities and organisations to revise the Closing the Gap targets, including imprisonment, violence reduction targets and housing targets." It further recommended the development and funding of Aboriginal and Torres Strait Islander community-based strategies to address the revised Closing the Gap targets.[216]

At the same time, the AHRC commended "the Australian Government's commitment to the Implementation Plan for the National Aboriginal and Torres Strait Islander Health Plan 2013–2023[217], a human rights-based approach to improving the health of Indigenous peoples

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[212] Amnesty International, Submission to the United Nations Committee on the Elimination of Racial Discrimination (2017), available at <https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/AUS/INT_CERD_NGO_AUS_29290_E.pdf>.

[213] Commonwealth of Australia, Department of the Prime Minister and Cabinet (2007), 'Closing the Gap Prime Minister's Report 2017,' available at <http://closingthegap.pmc.gov.au/sites/default/files/ctg-report-2017.pdf>.

[214] Victoria Tauli Corpuz, UN Human Rights Council, Report of the Special Rapporteur on the rights on indigenous peoples on her visit to Australia, UN Doc A/HRC/36/46/Add.2 (8 August 2017), 4746-47 available at <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/36/46/Add.2>.

[215] National Congress of Australia's First Peoples, Election 2016-Aboriginal Peak and Torres Strait Islander Organisations Unite – Thursday June 9 2016 – The Redfern Statement (2016).

[216] Australian NGO Coalition Submission to the UN Committee on the Elimination of Racial Discrimination NGO Coalition, Australia's Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination (October 2017), available at <https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/AUS/INT_CERD_NGO_AUS_29334_E.pdf>.

[217] Department of Health, Implementation Plan for the National Aboriginal and Torres Strait Islander Health Plan 2013–2023, available at <www.health.gov.au/internet/main/publishing.nsf/Content/AC51639D3C8CD4ECCA257E8B00007AC5/$File/DOH_ImplementationPlan_v3.pdf>; Australian Human Rights Commission, Close the Gap Federal Budget Position Paper 2016 available at www.humanrights.gov.au/sites/default/files/2016%20CTG%20Federal%20Budget%20position%20paper.pdf

developed in partnership with Indigenous peak bodies." In this regard, the AHRC stated that "future federal Budgets must adequately resource its application and operation to ensure that rights are progressively realized."[218] However, and in line with CSO submissions, the AHRC noted that only one target was on track - to halve the gap in Year 12 attainment rates - and that "the other six targets were either not on track or stalled."[219] As such, the AHRC recommended that all Australian governments increase their efforts to achieve the Closing the Gap targets.[220]

In response to these joint efforts by the AHRC and CSOs, the CERD Committee reiterated its recommendations of the past two reporting cycles, but also strengthened its language within its 2017 COBs[221]:

As four of the seven targets were due to expire in 2018, the Australian Government partially implemented the 2017 CERD recommendation, working with Aboriginal and Torres Strait Islander people and state and territory governments to develop Closing the Gap Refresh.[222] This new framework, which builds on the original Closing the Gap targets, represented "a continued commitment in effort and accountability from all governments for a further ten years."[223] According to the 2019 PMC Closing the Gap Report, there are now seven new Closing the Gap targets. Only two—early childhood enrollment in education and Year 12 attainment—are on track.

Regardless of such "woefully inadequate" results, it is clear that TB-NHRI engagement in the field of health inequalities for Aboriginal and Torres Straight Islanders has led to high levels of domestic mobilization in Australia. In addition to the above initiatives by government, the

(viewed 30 October 2017); Australian Human Rights Commission, Close the Gap Progress and priorities report 2016, available at <www.humanrights.gov.au/our-work/aboriginal-andtorres-strait-islander-socialjustice/publications/close-gap-progress>.

[218] AHRC, Submission to the CERD (30 October 2017), available at <www.humanrights.gov.au/our-work/legal/submission/submission-cerd-2017>.

[219] Department of Prime Minister and Cabinet, Closing the Gap: Prime Ministers Report 2017, 6–7: child mortality, life expectancy, school attendance, reading and numeracy, employment. Available at <http://closingthegap.pmc.gov.au/>.

[220] AHRC, Submission to CERD (30 October 2017), Recommendation 28.

[221] "Recalling its general recommendation No. 23 (1997) on the rights of indigenous peoples, the Committee calls upon the State party to urgently introduce a paradigm shift in its dealing with indigenous peoples and to demonstrate the necessary political will to ensure that aspirational plans and programmes become a reality" in CERD, Concluding Observations to Australia, CERD/C/AUS/CO/18-20 (26 December 2017), available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsoFZxvnsZjtq1Xnb4bcEJCnFr38KNAbQS4Wbo8ymPQlFChRxcy5ofJz1G8JFjK1bdyDX25yS7L3siqW9qXwhJKIdcm6zXGQBJ1f8ZRZVqHgifBVG3vHfK57pgHNUhbreCQ%3d%3d>.

[222] Australian Government, Department of Prime Minister and Cabinet, Closing the Gap Report 2019, available at <https://ctgreport.niaa.gov.au/sites/default/files/ctg-report-20193872.pdf?a=1>.

[223] Ibid. 2.

AHRC, and CSOs, "Closing the Gap has also maintained a hold on the Australian media's attention."[224] The results of a word search on the Factiva global news database are remarkable. Using the keywords "close the gap" and "Closing the Gap" within a frame of daily Australian national and state/capital city-based print newspapers and their websites, more than 1,500 articles appear published between 2008 and 2018. Considering the breadth of initiatives, this high number is perhaps not surprising.

In sum, by tracing the impact of that first 2005 AHRC report, and the way that it developed into a full-fledged, COAG-approved nationwide governmental strategy, we can say that this example of AHRC-TB interaction has at least had *narrow intermediate impact* in terms of institutionalization processes. This is due to the identifiable use of complementary AHRC-TB recommendations by 'compliance actors' within the Australian NHRS.

However, the use of CERD-AHRC recommendations also expanded beyond compliance partners to encompass a broader range of actors, including health organizations, international and civil society groups, and Indigenous representative organizations. All these actors joined the Closing the Gap Campaign after 2005, when both the report issued by the Aboriginal and Torres Strait Islander commissioner and the CERD Committee first acted on health inequality. Also due to the vast presence in Australian media of news concerning the Closing the Gap Campaign during the last decade, AHRC-CERD engagement reached levels pertaining to what I defined as *extensive intermediate impact*.

Unfortunately, this has not meant that the inequalities faced by Indigenous Australians in health provision have diminished. To the bafflement of many, the opposite is the case, as the Foreword of the 2019 AHRC Closing the Gap Report warns:

> It is of great concern to us, the Close the Gap Campaign—as indeed it should be to the Australian nation—that the target to close the gap in life expectancy between Aboriginal and Torres Strait Islander people and non-Indigenous people by 2031 is, in 2019, widening rather than closing.[225]

We must thus differentiate between the impact TB-NHRI engagement has on domestic human rights institutionalization processes/mobilization and the policy impact this engagement may have on the target population. Although the Closing the Gap Campaign mobilized the whole

[224] Troy A. Heffernan and Jacinta Maxwell, *The media's coverage of 'Closing the Gap' in Australian education* (Discourse: Studies in the Cultural Politics of Education 2019).
[225] AHRC, Close the Gap report – "Our Choices, Our Voices" (2019), Foreword.

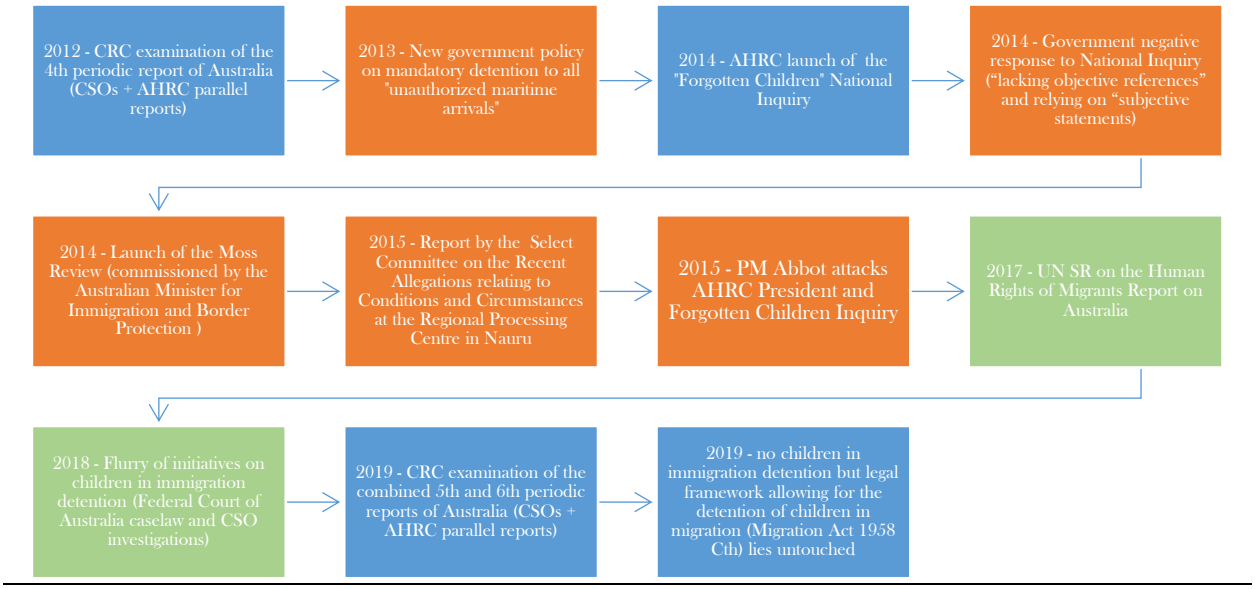
panoply of available actors within Australia, including victims' organizations and the media, it had little effect in actually diminishing inequality of Aboriginal and Torres Strait Islanders. As stated by a former AHCR official, "the AHRC can be seen as a launching pad for national human rights initiatives. Its neutral force and use of soft power allows for years and years of debates and policy making."[226] According to former AHRC President Triggs, "aspects of Indigenous health that are now better recognized are the social and cultural determinants."[227] Areas of disadvantage such as poverty, disability, a child's removal from their family, incarceration and violence are now recognized at the highest level of government decision-making as having strong impacts on health, which in turn influence a person's ability to learn and to work.

However, as described in the NHRS section above, if political will does not match such initiatives, little to no action may tie decision-makers at government level to implement those planned policies fully. The lack of a federal bill of rights, coupled with a strict dualist approach to international law, seems to be the cornerstone of Australia's implementation gap. Although the RDA is considered to be transposing the CERD into Australian law, it does not comprehend the totality of rights and the definition of discrimination adopted by CERD. As former Aboriginal and Torres Strait Islander Social Justice Commissioner June Oscar stated in response to the 2018 Closing the Gap progress report, "there has been a failure of accountability and good governance" regarding a strategy that has been only "partially and incoherently implemented."[228]

[226] Gargett, interview.
[227] Triggs (n 58) 128
[228] June Oscar, 'Aboriginal and Torres Strait Islander Social Justice Commissioner' in Triggs (n 74) 129.

4.2. Example 2 – The Forgotten Children Inquiry

Figure 9.4. Children in Immigration Detention (TB-AHRC Engagement Roadmap)



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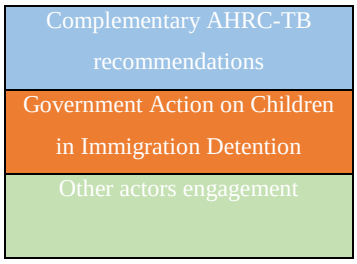

In 2014, the AHRC conducted a National Inquiry into Children in Immigration Detention (the "Forgotten Children Inquiry"). Under the functions and powers conferred to the AHRC president by sections 11(1) and 13 of the Australian Human Rights Commission Act 1986 (Cth), Triggs established the inquiry due to the ongoing gravity of human rights violations in offshore detention facilities. According to Triggs, "of all the human rights concerns in contemporary Australia, the inhumane and illegal treatment of asylum seekers has been the most egregious, and the single most controversial and challenging issue throughout my time with the Commission."[229]

[229] Triggs (n 58) 171.

There is nothing new in the finding that mandatory immigration detention is contrary to Australia's international obligations. It is perhaps superfluous to underline that the CRC, which Australia ratified in 1992,[230] requires that:

> No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.[231]

Furthermore, a Joint General Comment from the CMW and CRC states that detaining children as a measure of last resort is not applicable in immigration proceedings as it would conflict with the principle of the best interests of the child and the right to development. It further states that any kind of child immigration detention should be forbidden by law and that prohibition fully implemented in practice.[232]

The AHRC and respective presidents and commissioners over the last 25 years have been unanimous in reporting that such detention, especially of children, breaches the right not to be detained arbitrarily.[233] Although AHRC reports play a valuable role in documenting human rights breaches and mobilizing further policy initiatives, as seen by the value of the AHCR Social Justice Report which led to the Closing the Gap Campaign, "the power of the president to conduct an inquiry of their own volition has proved especially effective."[234]

National inquiries are investigations into widespread or systemic human rights violations.[235] When undergoing a national inquiry, the AHRC draws on the full range of its formal powers and functions, enabling the president to compel witnesses to give evidence under oath; to require the production of documents that would not otherwise be forthcoming; to hold public

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[230] Australia ratified CRC on 17 December 1990, with reservations on Art. 37.
[231] Convention on the Rights of the Child, Article 37(b).
[232] Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child, *Joint general comment on state obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, UN Doc CMW/C/GC/4-CRC/C/GC/23 (16 November 2017) [5]. At <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=7&DocTypeID=11>.
[233] AHRC, *The Forgotten Children: National Inquiry into Children in Immigration Detention Report* (2014), 10.
[234] Triggs (n 58) 182.
[235] Meg Brodie, *Not Something Our Nation Can Ignore: Addressing Systemic Human Rights Violations: The Impact of National Inquiries Conducted by National Human Rights Institutions in the Asia Pacific*, (RWI and APF 2016) 24.

hearings; to receive submissions from the community; to question witnesses, including government ministers; and to regularly brief the media and engage with the wider public.

The AHRC has a long-standing tradition of developing national inquiries, ever since the first human rights commissioner, Brian Burdekin, employed inquiry powers to examine the plight of homeless children. Representing the first national inquiry conducted by a NHRI, its findings were released in 1989 as *Our Homeless Children* Report,[236] the impact of which was found to have "bound a nation together". [237]Since then, the AHRC has utilized its powers under the national inquiry procedure in many fields, ranging from human rights violations against people suffering mental illness, to government use of wrist X-rays to determine the age of children suspected of being people smugglers, to the stolen generations.[238] This last national inquiry, which resulted in the Bringing them Home Report in 1997, has been acclaimed as "the most influential commission inquiry" to date. [239]

Just like the yearly reports by AHRC commissioners, reports under the AHRC inquiry procedure are tabled in Parliament and available to the public, "hopefully stimulating an interest in the outcomes and policy changes"[240] recommended therein.

The Foreword of the Forgotten Children Inquiry Report succinctly describes the peculiarly Australian "reluctance about rights" in relation to asylum seekers and their children:

> Australia is unique in its treatment of asylum seeker children. No other country mandates the closed and indefinite detention of children when they arrive on our shores. Unlike all other common law countries, Australia has no constitutional or legislative Bill of Rights to enable our courts to protect children. The Convention on the Rights of the Child is not part of Australian law, although Australia is a party. The Convention is, however, part of the mandate of the Australian Human Rights Commission to hold the Government to account for compliance with human rights. This Convention accordingly informs the findings and recommendations made by the Inquiry.[241]

[236] Human Rights and Equal Opportunity Commission (Australia), *Our Homeless Children: Report of the National Inquiry into Homeless Children* (1989) ('Our Homeless Children Report') 43.
[237] Meg Brodie (n 235) 13.
[238] Ibid.
[239] Triggs (n 58) 183.
[240] Triggs (n 58) 182.
[241] AHRC, *The Forgotten Children: National Inquiry into Children in Immigration Detention Report* (2014), Foreword.

The build-up to Triggs' decision to embark on an inquiry into children in immigration detention represents evidence of the inadequacy of the Australian NHRS and of Australian governments' bipartisan neglect for asylum seekers' most basic rights.

First, Australia's legal regime for asylum seekers and refugees is, in and of itself, a "patchwork" of laws and processes "patched together hastily over many years and constantly amended, even retrospectively, to respond to political priorities."[242] The Migration Act 1958 (Cth) grants extensive ministerial discretions that are essentially not reviewable by the courts, thus threatening the principle of separation of powers between Parliament and the judiciary. It also affirms that, as a general principle, children shall only be detained as a measure of last resort.[243] Yet under the same act, immigration detention remains mandatory for all unlawful non-citizens, including children.[244] Australian courts do not have jurisdiction to remove a person from detention on the basis that their detention is arbitrary under international law, and there is no legislative time limit on detention.

This system of mandatory immigration detention was first introduced by a Labor government in 1992, according to which all "unlawful non-citizens" who arrive in Australia without a valid visa must be detained. The AHRC has since received individual complaints from asylum seekers and refugees concerning the arbitrariness of their detention contrary to ICCPR Article 9. In many of such instances, immigration ministers and departmental officials refused to consider alternatives to indefinite detention, such as community detention or bridging visas, even in cases of physical or mental illness. Under the AHRC Act 1986, reports on such complaints are tabled to Parliament, through the attorney-general, allowing parliamentarians to discuss the AHRC-led investigations and attempted conciliations in cases of alleged arbitrary detention of asylum seekers and refugees. These reports "have had little impact on government policy because detention is a mandatory obligation under the Migration Act" coupled with "the failure of elected representatives to read or comment on the reports."[245] National inquiries are more difficult to ignore, as will be shown in the following pages.

The Forgotten Children inquiry was shortly preceded by CRC's 2012 consideration of Australia's 4th periodic report. In the State Report, the government made clear to the CRC that:

[242] Ibid. 177.
[243] *Migration Act 1958* (Cth) s 4AA.
[244] *Migration Act 1958* (Cth) ss 189, 196.
[245] Triggs (n 58) 181.

> Since June 2005, the Migration Act has provided that "the Parliament affirms as a principle that a minor child shall only be detained as a measure of last resort" to ensure that families with children in detention will be placed in the community, under Community Detention arrangements, with conditions set to meet their individual circumstances. As of March 2008, there are no longer any children in Immigration Detention Centres. As part of the July 2008 announcement of a new, risk-based detention policy, the Minister for Immigration and Citizenship has stated unequivocally that children will no longer be detained in these centres.[246]

In the subsequent COBs, while the CRC committee noted Australia's efforts "to move children and vulnerable families in immigration detention facilities to alternative forms of detention, including community-based detention arrangements and immigration transit accommodation,"[247] it nonetheless presented its "deep concerns" for asylum seeking and refugee children in Australia. Two main problems concerned the CRC committee: firstly, Australia's Migration Act stipulating the mandatory detention of children who are asylum seeking, refugees or in an irregular migration situation, without time limits and judicial review; secondly, the best interests of the child not being the primary consideration in asylum and refugee determinations and when considered, not consistently undertaken by professionals with adequate training on determination of best interests.[248]

As such, the CRC urged Australia to bring its immigration and asylum laws into full conformity with the convention and other relevant international standards; reconsider its policy of detaining children who are asylum seekers, refugees, and/or irregular migrants; and ensure that, if immigration detention is imposed, it is subject to time limits and judicial review.[249]

These recommendations did not have the desired effects. The following year, in 2013, yet another Labor government introduced a policy that no "unauthorized maritime arrival" would ever be able to settle permanently in Australia. What this means in practice is that all asylum seekers who arrive by boat are to be detained in regional processing countries, either in Papua New Guinea (Manus Island), Nauru, or in the Australian external territory of Christmas Island.

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[246] Australian Government, State Report to the Committee on the Rights of the Child, CRC/C/AUS/4 (14 June 2011), para 246.
[247] CRC Committee, Concluding Observations, CRC/C/AUS/CO/4 (28 August 2012), para. 80.
[248] Ibid.
[249] Ibid. para. 81

By July 2013, 1992 children were in mandatory detention in community detention facilities in the mainland Australia, Nauru, and Christmas Island.

In September 2013, Australia held its federal elections, by which time the number of children in detention had fallen to 1100. With the start of the Liberal Abbot Government, the status of these children remained unchanged, with average periods of detention amounting to 213 days by 2014.[250] The AHRC gave the new government about six months to release the 1100 children and their families, a request the government ignored, prompting the decisive moment for the AHRC to act. In early 2014, Triggs decided to use her presidential powers to call for a national inquiry into the physical and mental impacts of prolonged detention of asylum seeker's children.

The Forgotten Children Inquiry, conducted over eight months from February to October 2014, adopted a mixed methodology, both qualitative and quantitative, including visits to 11 detention centers, including two to Christmas Island. Commission teams included the president, the children's commissioner and the commissioner for human rights. A standard questionnaire about the health impacts of detention was prepared, to which approximately 1200 children and their families responded. Five public hearings were held, with 41 witnesses, including the Hon Chris Bowen MP and the Hon Scott Morrison MP. More than 200 submissions were received from schools, medical service providers, and NGOs. Focus groups were held with young adults who were detained as children and could attest to the continuing impact of their detention. In sum, the national inquiry excelled in terms of participatory levels, including governmental actors, independent state actors, non-state actors, and the general community.

The overarching finding of the inquiry was that the prolonged, mandatory detention of asylum-seeker children resulted in significant mental and physical illness and developmental delays to these children, in breach of Australia's international obligations. The AHRC found that Australia's detention law, policy and practice did not address the particular vulnerabilities of asylum seeker children, nor do they afford them special assistance and protection. The blanket policy of mandatory detention did not consider the individual circumstances of children or address the child's best interests as a primary consideration. The inquiry also found that prolonged detention had a profoundly negative impact on children's mental and emotional

[250] Triggs (n 58) 184.

health and development. Being deprived of liberty and exposed to many mentally unwell adults were found to cause emotional and developmental disorders.[251] The commission expressed concern that delays in transferring unwell children to Australia for treatment may compromise their health and potentially put their lives at risk. [252]

As response, the federal government dismissed the inquiry as biased, with the Home Department questioning its methodology ("lacking objective references" and relying on "subjective statements") and challenging its legal findings.[253] The Australian Government has in fact frequently sought to evade its legal responsibility through its policy of third-country processing, which transfers asylum seekers arriving by boat (including children) to the independent State of Nauru and Manus Island, Papua New Guinea, for processing their asylum claims. In doing so, the Australian Government claimed that it only provided "support" for arrangements that essentially took place under a foreign nation's sovereignty.[254] On this specific point, several TBs, parliamentary committees, and courts have found that the government maintained effective control over both the Manus and Nauru arrangements.[255] According to a prominent Australian NGO, "the Australian Government remains legally responsible for the children it has sent to Nauru and the harm they endure while being held there under arrangements the Australian Government designed, funds and controls."[256]

It makes sense then that the AHRC has not been the only Australian NHRS actor to decide to focus on children in detention immigration. The findings of the Forgotten Children Inquiry were substantiated by a further inquiry commissioned by the Australian Minister for Immigration and Border Protection in 2014. Led by former Integrity Commissioner of the

[251] AHRC (n 241) 75–76.
[252] AHRC (n 241) 74.
[253] Australian Government, Department of Home Affairs, Response to the Australian Human Rights Commission Report on 'The Forgotten Children: National Inquiry into Children in Immigration Detention 2014' (10 November 2014) available at <www.homeaffairs.gov.au/reports-and-pubs/files/department-response-ahrc-inquiry.pdf>.
[254] See, for example, Committee on the Elimination of All Forms of Discrimination against Women, List of issues and questions in relation to the eighth periodic report of Australia: Replies of Australia (Advance Unedited Version) 70th sess (CEDAW/C/AUS/Q/8/Add.1) (16 March 2018), 162.
[255] See, for example, Human Rights Committee, Concluding observations on the sixth periodic report of Australia, UN Doc CCPR/C/AUS/CO/6 (1 December 2017), 35; Committee on the Elimination of Racial Discrimination, Concluding observations on the eighteenth to twentieth periodic reports of Australia, UN Doc CERD/C/AUS/CO/18-20 (26 December 2017), 30; Committee on Economic, Social and Cultural Rights, Concluding observations on the fifth periodic report of Australia, UN Doc E/C.12/AUS/CO/5 (11 July 2017), 18; Committee on the Elimination of Discrimination against Women, Concluding Observations on the eight periodic report of Australia, UN Doc CEDAW/C/AUS/CO/8 (20 July 2018), 54; Human Rights Council, Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru, A/HRC/35/25/Add.3, (24 April 2017), 72–73; Parliament of Australia, Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru (2015).
[256] Human Rights Law Centre, Justice for Children – 2018 CRC shadow report (1 November 2018), 11.

Australian Commission for Law Enforcement Integrity Philip Moss, the resulting report (also known as the "Moss Review"[257]) investigated allegations of sexual abuse and other physical assaults of "transferees" in the Regional Processing Centre in Nauru. The main focus was on the need for the Australian Department of Immigration and Border Protection and the Nauruan Government to better guarantee the personal safety of "transferees" and child protection.

Prodded by the AHRC and the Moss Review, the Australian Senate decided to determine the responsibilities of the Commonwealth Government in connection with the management and operation of the Regional Processing Centre in Nauru and established a Select Committee on the issue. The Senate Committee report, released in mid-2015, produced 15 recommendations, including: that Nauru and Australia commit to a model timeframe for refugee status determination; that the Australian Immigration Ombudsman undertake an independent review of all complaints involving the conduct of Australian-funded staff; that information be provided to asylum seekers on their rights to lodge complaints with independent bodies such as the Ombudsman, the AHRC, and the International Committee of the Red Cross; and that the government "extend" its policy of removing children from detention on the mainland to Nauru.[258]

In addition, a consortium of actors that make up the heat of what can be labelled as the Australian NHRS have since documented serious human rights concerns relating to third-country processing by Australia, particularly with regard to the impact of these arrangements on the mental health of children.[259]

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[257] Philip Moss, *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru* (Department of Immigration and Border Protection, 6 February 2015) www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-conditions-circumstances-nauru.pdf.

[258] Parliament of Australia, "Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru, Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru," 31 August 2015 available at <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Final_Report>.

[259] E.g. FRX17 as litigation representative for *FRM17 v Minister for Immigration and Border Protection* (2018) FCA 63; *AYX18 v Minister for Home Affairs* (2018) FCA 283; BAF18 as litigation representative for *BAG18 v Minister for Home Affairs* (2018) FCA 1060; DJA18 as litigation representative for *DIZ18 v Minister for Home Affairs* (2018) FCA 1050; DWE18 as litigation representative for *DWD18 v Minister for Home Affairs* (2018) FCA 1121; Chris Johnson, AMA Demands Urgent Fix to Humanitarian Emergency on Nauru (20 September 2018) Australian Medical Association, available at <https://ama.com.au/ausmed/ama-demands-urgent-fix-humanitarian-emergency-nauru>; Médecins Sans Frontières, *MSF Calls for the Immediate Evacuation of All Asylum Seekers and Refugees from Nauru* (11 October 2018); François Crépeau, Report of the Special Rapporteur on the Human Rights of Migrants on His Mission to Australia and the Regional Processing Centres in Nauru, UN Doc A/HRC/35/25/Add.3 (24 April 2017), 76–80.

Notwithstanding the full display of the Australian NHRS actors mobilized since the Forgotten Children Report, executive disregard was made evident by direct attacks on the AHRC upon release of the report. During a Prime Minister's Question Time in 2015, then Prime Minister Abbot described the inquiry as "a blatantly partisan, politicised exercise." Infringing on the very basic tenet of NHRI independence, Abbot referred to the AHRC Inquiry as a "political stitch-up" and confirmed that due to its methodology and damning findings "this Government has lost confidence in the president of the Human Rights Commission."[260] These statements were made shortly after the secretary of Attorney-General Brandis's department, as discussed above, asked for Triggs' resignation in return for another government position. Triggs' answer was firm: "I have a five-year statutory position, which is designed for the president of the Human Rights Commission specifically to avoid political interference in the exercise of my tasks under the Human Rights Commission Act."[261]

This public display of tension between the Australian Government and the AHRC did not impede the decrease in numbers of children in immigration detention occurring after the inquiry, however. Specifically with regards to detention in Nauru, AHRC-TB engagement has been relatively fruitful. According to the 2018 AHRC submission to the CRC Committee:

> On 31 May 2018, there were 137 children in Nauru subject to third country processing arrangements, the majority of whom were aged 12 or under, and had been there for at least four years.[262] On 22 October 2018, 52 children remained on Nauru.[263]

These findings clash with the statistics provided by the Department of Home Affairs, which provided a more positive picture of the changes occurred since the inquiry:

> The number of children in immigration detention has decreased markedly since 2012, and community-based alternatives to detention are used for the majority

[260] Eliza Borrello and James Glenday, 'Gillian Triggs: Tony Abbott says Government has lost confidence in Human Rights Commission' president' *ABC News* (24 February 2014), available at <www.abc.net.au/news/2015-02-24/gillian-triggs-says-brandis-wants-her-to-quit-rights-commission/6247520>.
[261] Ibid.
[262] Evidence to Senate Standing Legal and Constitutional Affairs, Budget Estimates, Answer to Question taken On Notice BE18/243, Canberra, 12 June 2018 (provided 5 July 2018) <www.aph.gov.au/Parliamentary_Business/Senate_Estimates/legcon>.
[263] AHRC, Submission to the Committee on the Rights of the Child (1 November 2018) Evidence to Senate Standing Legal and Constitutional Affairs, Supplementary Budget Estimates, Canberra, 22 October 2018, 99 (Mandy Newton, Deputy Commissioner, Operations, Australian Border Force) <www.aph.gov.au/Parliamentary_Business/Hansard/Estimates_Transcript_Schedule>.

> of children. As at 30 June 2018, there were four children being held in closed immigration detention facilities, with a further 168 living under community-based detention arrangements.[264]

During the latest reporting cycle for Australia under the CRC Committee, the AHRC and CSO parallel reports jointly recommended the resettlement of all children and their families held on Nauru "as a matter of urgency."[265] As stated by the CRC Committee, "since 28 February 2019 there are no asylum-seeking, refugee and migrant children in regional processing countries."[266]

Despite Australian Government attacks on the work of the AHRC and the clashing data provided, it seems that the Forgotten Children Inquiry has had effects in terms of diminishing numbers of children in immigration detention. Concerted efforts by independent state actors, domestic courts, and parliamentary committees, as well as international pressure from the TB system and Special Procedures mandate holders, merged into a transnational force of change that effectively emptied Nauru of children in detention.

It cannot be ascertained with precision whether the 2014 national inquiry was the leading causal factor behind the resolution of the decade-long practice. What is clear, however, is that the methodology typical of a national inquiry includes wide consultative powers to hold public hearings, receive submissions from the community, question witnesses including government ministers, and regularly brief the media and engage with the wider public. A word search on the Factiva database produced over 50 news items specifically dedicated to the inquiry between 2015, its year of publication, and 2018. Since the report, a flurry of inquiries and reports have been published on the issue, showing at the very least the mobilization power that the AHRC has deployed for yet another crucial human rights issue in Australia.

While this is a sign that AHRC-TB engagement, set within the broader context of the Australian NHRS, provided for an effective change of policy in the short term, the legal framework that allows for detaining children in migration is untouched. The AHRC submission to the latest CRC examination of Australia (2019) noted that under the Migration Act 1958 (Cth),

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[264] Department of Home Affairs, *Immigration Detention and Community Statistics Summary* (30 June 2018) <www.homeaffairs.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-june-18.pdf>.

[265] AHRC, Submission to the Committee on the Rights of the Child (1 November 2018) ; Human Rights Law Centre, Justice for Children – 2018 CRC shadow report (1 November 2018), Recommendation 12, inter alia.

[266] CRC Committee, Concluding Observations, CRC/C/AUS/CO/5-6 (30 September 2019), para. 44.

"immigration detention remains mandatory for all unlawful non-citizens, including children." It recommended that:

> The Australian Government amends the *Migration Act 1958* (Cth) to forbid placing children in closed immigration detention other than for preliminary medical, security and identity assessments.[267]

Echoing the AHRC's submission, in its latest COBs the CRC Committee remained "seriously concerned" that:

> (b) The Migration Act 1958 still prescribes mandatory detention for irregular migration, including children, and that the State party "is not currently considering prohibiting the detention of children in all circumstances";
>
> (d) The policy of utilizing regional processing countries and detention of children has not been revoked;
>
> (h) Inadequate mechanisms for monitoring the wellbeing of children involved in asylum, refugee and migration processes exist.[268]

As such, the committee urged the state party to immediately "Amend the Migration Act (Cth) to prohibit the detention of asylum seekers, refugee and migrant children; enact legislation prohibiting the detention of children and their families in regional processing countries; ensure that the best interests of the child are a primary consideration in all decisions and agreements in relation to the reallocation of asylum-seeking, refugee or migrant children within Australia or to other countries and introduce adequate mechanisms for monitoring the wellbeing of children involved in asylum, refugee and migration processes.[269]

In sum, the 2014 National Inquiry into Children in Immigration Detention found that children on Nauru suffered extreme levels of physical, emotional, psychological, and developmental distress, and that the conditions in which children were detained were in breach of Australia's obligations under the CRC.[270] It recommended that all children and their families on Nauru be released into the Australian community as soon as practicable, and that no child be sent offshore for processing unless it is clear that their human rights will be respected.[271] As was

[267] AHRC, *Submission to the Committee on the Rights of the Child* (1 November 2018), recommendation 40.
[268] CRC Committee, Concluding Observations, CRC/C/AUS/CO/5-6 (30 September 2019), para 44(b), (d) and (h).
[269] Ibid. para. 45(b), (d), (e), and (i).
[270] AHRC (n 241) 36.
[271] Ibid. 37–38.

the case for the Closing the Gap Campaign, the AHRC has had *extensive intermediate impact*, through the use that other actors of the Australian NHRS made of its Forgotten Children Report. This galvanized nationwide and international mobilization for the immediate removal of children from immigration detention centres. It remains to be seen whether, following the latest recommendations by the CRC Committee, relevant sections of the Migration Act will be amended or new legislation will be enacted to prohibit the detention of asylum-seeking, refugee, and migrant children. After all, the great value of a transnational system of human rights protection is that where cyclical nature of monitoring reviews and multi-actor engagement bring constant pressure on states to abide by their international human rights obligations.

5. Conclusion

This chapter has analyzed how the various actors of the Australian NHRS act in relation to TB reporting cycles and interact specifically with the AHRC in the implementation of UN human rights treaties. In so doing, it assessed AHRC-TB engagement in light of the strengths and weaknesses of available interactions and frameworks, according to the NHRS model

In order to draw informed conclusions on the impact of AHRC-TB engagement, it first useful to return to the findings of the comparative content analysis of NHRI parallel reports and ensuing TB recommendations outlined in Chapter 6. Australia was selected as one of ten countries for this exercise, and at the time of writing its latest dialogues have been with the CRC (2019), CRPD (2019), CEDAW (2018), CERD (2017), HRC (2017), and CESCR (2017) Committees.

Mirroring the more general conclusions of the exercise, the findings show that the institutional framework for TB - NHRI engagement allowed for systematic and fruitful engagement by the AHRC across the six TBs' reporting cycles in focus. Out of a total of 661 recommendations issued by the six TBs in focus for Australia, 213 contain concerns from AHRC parallel reports, amounting to 32.3% likely influence. Also indicative of the positive influence the AHRC has had on TB recommendations' formulation, the same exercise shows that out of a total of 432 AHCR recommendations submitted to the six TBs in focus, 148 appear to have been directly included with little change in TB recommendations: 34.3%. Table 10.4 and Table 10.5 show, in detail, the findings of the comparative content analysis in relation to Australia.

Table 9.2. TB Recommendations Influenced by AHRC Recommendations

Australia	CRC	CRPD	CEDAW	CERD	CESCR	HRC	ToT
LOIs	38.5%	■	45.4%	■	51.7%	■	22.6%
COBs	29.5%	50%	19.3%	56.5%	32.3%	64.4%	42%
Total per TB	34%	25%	32.4%	28.3%	42%	32.2%	32.3%

Table 9.3. Extent of AHCR Recommendations Included in TB Recommendations

Australia	CRC	CRPD	CEDAW	CERD	CESCR	HRC	ToT
LOIs	25%	■	36.7%	■	25%	■	14.5%
COBs	55.8%	69%	50%	53.4%	57.7%	37.9%	54%
Total per TB	40.4%	34.5%	43.35%	26.7%	41.4%	19%	34.3%

These findings suggest that the institutional framework for TB - NHRI engagement has allowed for sustained mutual interaction between the TB system and the AHRC. To be sure, notable distinctions appear between the two analyzed stages of the State Reporting procedure, with the AHRC omitting or choosing not to submit parallel reports to recent PSWGs of either the CRPD, CERD, or the HRCtee. Even then, however, out of a total of 208 of LOIs issued by the six TBs altogether, 47 contain recommendations found in AHRC parallel reports (22.6% of influence), while out of a total of 140 of AHRC recommendations toward LOIs, 20 eventually featured in issued LOIs (14.5% of influence). As for COBs, out of 453 recommendations, 190 contain recommendations flagged by the AHRC (an impressive 42% of influence) and out of 292 AHRC recommendations, 158 have been included in issued COBs (an even more impressive 54% of influence).

If the analysis were to stop at the mere act of engagement, it would not be farfetched to qualify AHRC-TB engagement as a successful endeavor. After all, both the consistency of AHRC submissions toward the latest six TB reviews and the complementarity between AHRC parallel reports and issued TB recommendations outline promising patterns in their mutual interaction. However, if we turn the analysis toward the "post-Geneva" implementation phase, including an assessment of the contextual factors and the relevant actors, interactions, and frameworks that make up the Australian NHRS, noticeable limitations appear to taint these findings.

As evidence of the divide between formal design and resulting domestic outcomes, this chapter has traced the progress of two specific instances of TB-AHRC engagement. Although relating to disparate kinds of engagement (one stemming from an annual AHRC Commissioner Report, the other from an AHRC National Inquiry), they allow for the identification of certain common features. Both the 2005 AHRC Social Justice Report and 2014 Forgotten Children Inquiry, in conjunction with periodic examinations of Australia by the CERD and CRC Committees, have led to notable developments in terms of domestic mobilization and human rights institutionalization. While it is difficult to pinpoint the precise extent that such combined efforts have had on Australian government policy, it is clear that both AHRC and TB initiatives have fuelled a drive for change and sparked further stakeholder involvement. The cyclical practice of cross-referencing complementary recommendations among the arrayed actors of the Australian NHRS has shown, at the very least, a concerted effort toward policy and legal change in both fields.

Concerning the first example, recommendations from the 2005 AHRC Social Justice Report, COBs from periodic CERD Committee examinations, and parallel AHRC reports submitted toward such examinations applied pressure on the COAG to launch the Closing the Gap policies. It is significant that COAG is the peak intergovernmental forum in Australia, chaired by the prime minister, tasked with managing matters of national significance or matters that need coordinated action by all Australian governments. This is crucial in understanding the value of concerted AHRC-CERD efforts, as both institutions recommendations reached the highest levels of federal decision-making that, in turn, adopted a suite of policies directed at tackling those initiatives proposed by both the AHRC and the CERD Committee. In addition, other actors within the Australian NHRS worked toward bridging the health inequality divide for Indigenous Australians during the same period. CSOs have undeniably had a role in pressuring the government, most notably through the adoption of the Campaign for Indigenous Health Equality (in conjunction with the AHRC) and the issuance of the Redfern Statement. Furthermore, reports from UN special rapporteurs also brought the issue of health inequality to the forefront of Australian domestic policy. However, due to the iterative nature of the State Reporting procedure and steady AHRC input throughout three consecutive cycles of review by the CERD Committee, we cannot but acknowledge the value of TB-NHRI engagement in this specific instance. Be that as it may, although the Closing the Gap Campaign mobilized the whole panoply of available actors within Australia, including victims' organizations and the

media, so far it has had little effect in diminishing inequality for Aboriginal and Torres Strait Islanders in practice.

In relation to the second example, the immediate effects are even more evident. In and of itself, the Forgotten Children Inquiry enabled vast mobilization among victims, CSOs, ministerial representatives, and others. The particular methodology specific to NHRI national inquires is after all aimed at extensive domestic mobilization. This methodology includes wide consultative powers to hold public hearings, receive community submissions, question witnesses including government ministers, and regularly brief the media and engage with the wider public. The findings of the Forgotten Children Inquiry were subject to fierce attacks by the government but were substantiated by the Moss Review, which called for a better guarantee of the personal safety of "transferees" and for increased child protection. As highlighted in the first example, a flurry of CSO initiatives and visits by UN special rapporteurs added weight to the AHRC findings. The reiteration by the CRC Committee of recommendations to the same effect during the two latest periodic reviews added pressure on the Australian Government to halt the practice of child immigration detention. Although it took more than five years from launch of the Forgotten Children Inquiry and the CRC Committee's first recommendations on the matter, no children appear to be in immigration detention in 2019. This is a sign that AHRC-TB engagement, set within the broader context of the Australian NHRS, has indeed provided for an effective change of policy, but the legal framework that allows for the detention of children in migration remains untouched.

It seems then that in terms of intermediate impact (defined as the manner in which complementary AHRC and TB recommendations been referred to, used, and discussed at domestic level) both examples provide relatively positive findings. Both the Closing the Gap Campaign and the Forgotten Children Inquiry maintained a strong hold on Australian's NHRS, including widespread media attention. Accordingly, AHRC-CERD/CRC engagement amounted to what I defined as the highest level of intermediate impact, that is, *extensive intermediate impact*. However, the analysis has also shown the limits of NHRI-TB engagement when placed in the national context. Although the Closing the Gap Campaign mobilized all available actors in Australia, it had little effect in actually diminishing inequality for Aboriginal and Torres Strait Islanders. The same applies to the Forgotten Children Inquiry. In that instance, AHRC-TB engagement within the broader context of the Australian NHRS did prompt an effective short-term change of policy, as in 2019 no children are left in immigration detention,

but the legal framework that allows for their detention, namely the Migration Act 1958 (Cth), lies untouched.[272]

There seems to be a clear distinction between the impact TB-NHRI engagement has on domestic human rights institutionalization and mobilization processes, the immediate effects of such mobilization, and the long-lasting policy impact that engagement may have on the legal framework and target population.

This chapter has shown that executive discretion in Australia seems inattentive to scrutiny based on international legal obligations. The Australian NHRS relies on a patchwork of international, Commonwealth, and state laws and institutional arrangements that do not coexist smoothly, evidence being the clear disconnect between Australia's legal obligations under ratified human rights treaties and national laws. Within this disconnect, the AHRC performs its functions in a constant state of dilemma: while a number of practices represent violations of ratified conventional provisions, they do not necessarily have an equivalent in Australian law.

The fact that a multitude of actors unanimously call for certain government policies is not enough for systemic change, save for the immediate effects domestic mobilization has in specific cases. If political will does not match such scrutiny initiatives, there are few or no ways to obligate decision-makers at government level to implement recommended legal reforms, whether from international (TBs) or domestic (AHRC) monitoring mechanisms.

In the words of former AHRC Director Gillian Triggs:

> International human rights treaties to which Australia is a party are not part of domestic law, except those with respect to race, sex and disability. They do form part of the jurisdiction of the AHRC creating a confusing situation where the Government is not bound by the treaties while the Commission has a statutory obligation to monitor the Government's laws and policies by reference to these very treaty obligations.[273]

More specifically, even though the RDA, SDA, and DDA are considered to be transposing the CERD, CEDAW, and CRPD into Australian law, they do not comprehend the totality of rights

[272] Migration Act 1958, Act No. 62 of 1958 as amended, taking into account amendments up to Timor Sea Maritime Boundaries Treaty Consequential Amendments Act 2019 (01 September 2019), Section 4AA(1):Detention of minors a last resort: The Parliament affirms as a principle that a minor shall only be detained as a measure of last resort.
[273] Triggs (n 58).

and the definition of discrimination adopted in those three international conventions. Compounding Australia's isolation from the language of international human rights is the fact that its Constitution protects very few rights, including only the right to judicial review, freedom of religion, and the right to compensation if property is taken. Australia's Constitution makes no mention of various fundamental rights covered in detail in the UN human rights treaties that the country has ratified over the last half a century. Among others, prohibitions on torture, slavery, arbitrary detention, and racial and sexual discrimination all lack a constitutional provision.

What's more, Australian skepticism for constitutional rights protection may be linked to ongoing trust in the doctrines of responsible government and parliamentary sovereignty, persistent reliance on the common law tradition and current political attitudes toward human rights. Throughout this chapter, I have referred to these factors, cognizant of the fact that Australian skepticism has led commentators to characterize the current constitutional setup as "frozen"[274] or even suited to the age of "horse and buggy."[275] We can say with relative certainty that such characterizations have been offered for decades now, as Australia's existing NHRS has not come to terms with recent social and political developments, above all the growing dominance of the executive over Parliament, with a consequent rise in the power of governmental actors. This has led commentators to argue that "the limitations that exist within and among these institutional arenas means that they provide, at best, a patchy net of protection through which many minorities slip."[276] The many facets of the arena for human rights protection has often led to controversy and conflict among the actors involved, potentially at the detriment of rights holders and the institutions set up to protect them.

In the last decade, two institutional reforms had the potential to foster compliance with UN human rights conventions. Firstly, the establishment of the JCHR was meant to allow for sustained scrutiny of legislation for compliance with Australia's international human rights obligations. Secondly, the requirement that a statement of compatibility accompany each new bill introduced to Parliament was also meant to assess new pieces of legislation with Australia's

[274] H. P. Lee and Peter Gerangelos, *Constitutional Advancement in a Frozen Continent Essays in Honour of George Winterton* (Federation Press 2009).
[275] Antony Mason "The Australian Constitution in Retrospect and Prospect" in Robert French, *Reflections on the Australian Constitution* (Federation Press 2003) 7.
[276] Chappell, Chesterman, and Hill (n 9) 27.

international human rights obligations. Such reforms would have implicitly increased the role of the AHRC in monitoring human rights implementation measures.

In one of the most recent analyses of Australia's human rights scrutiny regime, Fletcher asks whether such suite of reforms resulted in "a democratic masterstroke or mere window dressing."[277] According to interviews in his study, public servants have the impression that ministers prioritize other aspects of the legislative development process over statements of compatibility. After all, governments need to implement their legislative agendas swiftly and such review processes have the potential to delay implementation. Furthermore, public servants also sense that ministers are not very receptive to JCHR concerns. These findings are hardly surprising, because there is an evident contradiction between the nature of the JCHR "as a creature of politics" and its mandate to provide an objective assessment of human rights compatibility. As we have seen, the AHRC has nonetheless had little to no interaction with this novel form of parliamentary scrutiny of human rights legislation. In the current format, however, it seems that strengthened interaction between AHRC and Parliament would anyway bring little change. According to Fletcher, "the findings in JCHR reports, even when damning and based on un-biased legal advice, have little chance of affecting the agreed party-political positions."[278]

In this sense, even the most recent reforms raise once again the paradox of a strongly political human rights scrutiny regime in which the nature of parliamentary processes militates against effective review. Although there are procedures in place to ensure that the human rights impact of laws is fully considered, the federal Parliament may still enact laws that breach human rights. Amid these faulty procedures, AHRC engagement with parliamentary committees is particularly problematic. The fact that the AHRC had "little to no engagement" with PJCHR since its establishment represent a clear evidence of such flaws. Recent clashes at the expense of AHRC representatives during Estimates Committee sessions are particularly worrying. As Estimate hearings are public, parliamentarians can use them to further their political motives against the AHRC. Evidence from the recent past show ideological objection to the AHRC from numerous parliamentarians, who have repeatedly called for its abolition. What's more, it is during such hearings that the AHRC budget is discussed, thus potentially undermining its independence.

[277] Fletcher (n 12).
[278] Ibid. 316.

In summary, without a requisite will on the part of the executive, Parliament is severely limited in its ability to ensure rights are protected in Australia, despite theoretically strong review powers and processes. In turn, this detrimentally affects the potential for actual TB-AHRC effectiveness as the two provided examples testify.

As current AHRC President Rosalind Croucher recently stated:

> Our legislation is not comprehensive in its protection. Our discrimination law is complex and does not protect everyone in our community. And while our discrimination laws are important, as they directly reflect our international commitments and can achieve many positive systemic outcomes, but they're framed in the negative of what you can't do, and rely on a dispute before offering a solution.[279]

Notwithstanding my selection fell on a "most-likely" case study, the above analysis has found significant limitations in the power of the Australian NHRS and TB – NHRI effectiveness in such context. Compared to the human rights standards Australia has agreed to internationally, there are gaps in protection under Australian laws and these negatively impact the otherwise functioning engagement between AHRC and the TB system.

[279] Rosalind Croucher, Presentation to the Castan Centre Human Rights Conference (Melbourne, 26 July 2019) available at <www.themandarin.com.au/112761-we-need-to-have-some-hard-conversations-rosalind-croucher-on-human-rights-reform/>.

Chapter 10. Overall Conclusions

This study set out to unpack the multi-level setting of TB – NHRI engagement, in the context of State Reporting, and assess its effectiveness and impact in facilitating human rights implementation. In doing so, three main challenges characterized the operationalization of this project: the broadness of the goals implied by TB – NHRI engagement, the task of quantifying public goods resulting from their activity, and the contextual contingency of their performance. With this thesis, I have tried to devise a methodology that, on the one hand, addresses these inherent measurement difficulties and, on the other hand, is sufficiently applicable to examining the cooperation between two institutions in the "transmission belt" between the international and domestic levels of human rights protection.

By first situating TBs and NHRIs within a TLO setting, I have underlined how TB – NHRI engagement is far from being a simple binary inter-institutional relationship. To the contrary, it represents a form of adaptive, open-ended, participatory, and information-rich cooperation in which the local and the transnational interact.[1] After all, the deep pluralism typical of the international human rights system, through its complex interdependence amongst relevant international, state and non-state actors, has led to issues of authority and policy-making being increasingly "overlapping, contested and fluid".[2] A focus on TB – NHRI cooperation underlines this growing participatory dimension of the human rights treaty system and the effort towards a more effective internalization of global human rights standards. Throughout my analysis, I argue that such a multi-layered system is not an accidental result of the growing complexity of the human rights regime, which states and international organizations have to learn to regulate and adapt. To the contrary, it is a constructive and institutionalized development, "establishing relationships of legitimate authority by keeping the circle of decision making open to new participants […] and generating possibilities for effective and satisfactory problem solving in a non-hierarchical fashion."[3]

Cognizant of the influence that both formal design features and context have on the effectiveness and impact of public organizations, I have split the analytical approach according to this binary understanding.

[1] Terence C. Halliday and Gregory Shaffer, *Transnational Legal Orders* (Cambridge University Press 2015).
[2] Grainne De Burca, Human Rights Experimentalism (2017) 11 (2) American Journal of International Law 33
[3] Grainne de Búrca, Robert O. Keohane, & Charles F. Sabel, New Modes of Pluralist Global Governance (2013) 45(15) New York University Journal of International Law and Politics, 5.

Throughout Part B, I have adapted one specific strand of organisational effectiveness theory to explain the specifics of TB – NHRI cooperation. In other words, I assessed the institutional framework of TB – NHRI engagement through an adapted goal-based approach to organizational effectiveness. As such, a clear, step-by-step methodology allowed me to systematically cover both structural and procedural characteristics of TBs and NHRIs when acting under the State Reporting procedure. Due to the complications in measuring chains of causation between the operation of TB – NHRI engagement and changes in state conduct, I substituted outcome assessment with proxies through the evaluation of structural and procedural indicators. By doing so, I have been able to assess *whether the institutional framework for TB - NHRI engagement is adequately set for goal-attainment.*

Resting an effectiveness analysis solely on a GBA approach carries, however, some important limitations. Two main criticisms concern its overly formalistic nature: first, the assumption that performance is tied to the quality of the initial structure and mandate of the assessed institutions; second, a sole focus on mandates renders the analysis oblivious to factors of a contextual nature.

For this reason, I have added an additional layer to the study through Part C, providing an impact analysis of TB – NHRI engagement in light of the context in which these institutions operate. By looking at the specific structure and dynamics of TB and NHRI cooperation in the Australian context, I sectioned the case study into three investigative lines, namely *preconditions for impact*, *intermediate impact* and *policy impact*. For *preconditions for impact*, I considered how the formal institutional framework for TB – NHRI engagement is affected by institution-specific characteristics of the Australian Human Rights Commission (AHRC), of relevant Australian state and non-state constituencies as well as of the Australian political milieu, which embed such cooperation. In order to do so comprehensively, I have set up the analysis according to the National Human Rights Systems framework, juxtaposing TB – AHRC engagement with the actors, interactions and frameworks that make the Australian NHRS. I have then selected two specific instances of TB – AHRC engagement, namely in relation to the Closing the Gap campaign and the Forgotten Children Inquiry. For both, I assessed *intermediate impact* through the use of complementary AHRC and TB recommendations made by those actors identified through the NHRS analysis. Finally, I assessed *policy impact* by tracing progress of complementary AHRC and TB recommendations and identifying to which extent legislative, policy or other measures were taken as a result

With these concluding remarks, I wish to provide a summary of the findings and set out the conclusions on the extent to which engagement between TBs and NHRIs is effective in facilitating human rights implementation. In light of these, and guided largely by a sense of pragmatism, I finally offer a number of recommendations for strengthening TB – NHRI engagement.

1. The Effectiveness of the Institutional Framework for Treaty Body – NHRI Engagement

Through a GBA to effectiveness analysis of the current institutional framework for TB - NHRI engagement, my findings suggest moderate optimism.

Concerning the attainment of the first two ultimate goals, that is monitoring implementation of UN human rights conventions (goal 1) and regime support (goal 2), my analysis shows that NHRIs are well embedded in the current TB framework. Whether it is through explicit reference or by evolutive interpretation, UN human rights treaties provide guidance for comprehensive NHRI engagement in relevant Preambles and General Measures of Implementation. TB members have also expanded on their cooperation with NHRIs through a wide variety of other instruments, including General Comments, Rules of Procedure, Working Methods, Statements, Guidelines, Papers and session-specific Information Notes. Recent Annual Meetings of TB Chairpersons have further pushed for harmonization of TB – NHRI engagement. A number of OHCHR Secretariat initiatives have strengthened these efforts, together with strong political support by UN Member States. Human Rights Council Res. 39/17 and General Assembly Res. 74/156 represent the most updated indications that NHRIs are seen as important players in monitoring implementation efforts as well as integrating actors of the transnational human rights regime that supports such monitoring efforts. My analysis also shows a strong embeddedness of TB engagement in the NHRI framework, as both the Paris Principles and SCA General Observations are clear on the role that NHRIs can and should play when engaging with the TB system. The document content analysis further strengthens this mild optimism, as TB recommendations are often found to include issues raised by NHRI parallel reports (18.9% of analyzed LOIs/LOIPR and COBs contain issues raised in NHRI parallel reports). Also significant is the finding that NHRI submissions are taken into serious consideration by TB members (28.7% of NHRI recommendations in analyzed parallel reports are integrated within issued TB recommendations).

At the same time, this thesis also highlights two clear obstacles to the attainment of an effective monitoring of UN human rights treaties implementation and the support for a dedicated transnational human rights regime. From a structural perspective, limited personnel capacity and resources are at risk of overloading the system, especially when considering the simultaneous increase in ratifying States, NHRI establishment and UN budget cuts. Without adequate resources, the institutional framework for TB - NHRI engagement risks not keeping up with its growing expectations and requirements. From a procedural perspective, the vast array of TB-specific instruments available on NHRI engagement, and the different modalities of NHRI access that these provide, are another obstacle to effective monitoring. Notwithstanding the numerous calls for harmonization, NHRIs still have to face different procedures for their cooperation depending on which TB they are called to submit information to. Such state of affairs arguably hampers the effectiveness of NHRI contribution, especially when considering the preparatory work that each NHRI goes through before engaging with the TB system.

In light of these findings, I offer two recommendations that would arguably increase the effectiveness of TB – NHRI engagement,

1. Concerning personnel capacity and resources, it is important that UN member states initiate discussions on how to reverse the trend of reduced regular budget allocation for the OHCHR. By paying their assessed contributions without delay, UN member states need to assure that the TB system is not disproportionately affected by the over-all cuts to the UN budget. Without securing such adequate funding, a strengthened institutional framework for TB – NHRI engagement is at risk of becoming a mere paper-pushing exercise.
2. Concerning accessibility, it is important for the TBs to align its working methods on NHRI engagement across the system. A harmonized set of guidelines would streamline TB – NHRI engagement, instead of relying on the somewhat confusing and multi-faceted framework currently in place. Towards this aim, a first useful step would be to improve communication among TBs on domestic stakeholder participation, by sharing information between committees and, more directly, holding joint meetings with different TB members and NHRI representatives on how to maximize collaboration between them. The lack of clarity and homogeneity risks discouraging the potential flow of useful input from NHRIs toward human rights implementation efforts. A

harmonized set of rules would arguably improve the overall accessibility and predictability of the institutional framework for TB – NHRI engagement.

Turning to the attainment of the third ultimate goal, which purports to legitimize the institutional framework necessary to support a regime dedicated to the implementation of UN human rights conventions, a few stronger obstacles arise. From a structural perspective, only the CRPD explicitly takes into consideration the existence and relevant role of NHRIs in the implementation of its provisions.[4] In addition to this, only the CERD, CESCR and CRC Committees have authoritatively interpreted their conventions in light of NHRI expansion, by issuing NHRI-specific General Comments. All other TBs have considered NHRI cooperation, albeit with significant detail, in internal and exclusively procedural instruments such as Rules of Procedure, Working Methods, Statements, etc. The mere development of instruments of this nature does not provide NHRIs with a fully legitimate recognition as monitoring partners of the TB bodies when assessing the implementation of conventional provisions.

In addition to this, the lack of transparency in both TB membership election and NHRI appointment processes are significant hurdles to the attainment of the third ultimate goal. Informal processes of selection, at times directly linked to diplomatic and political interests, taint the legitimacy of the whole framework. The risk of political bias is underscored by both institutions' election procedures, whether it is during a Meeting of States Parties in the case of TBs or, at best, national Parliaments in the case of NHRIs. Negotiations around TB and NHRI membership risk falling within an optic of 'exchange of votes' that little has to do with the actual expertise of the nominee in question, once again impinging on the legitimacy of the framework as a whole. In sum, states are left with extensive leeway to influence both institutions' membership. While we cannot discard the many instances of appointment due to recognized knowledge of human rights and independence from the state, the current lack of transparency may lead to the appointment of representatives closely related to the government of the day. This is a serious concern, especially due to the inextricable bond that links both TBs and NHRIs' effectiveness to their independent standing. Institutions who lack the power to issue binding decisions rely on their authority and independent expertise for the effective implementation of their recommendations. Political bias in both TB election and NHRI appointment processes is a risk which has the potential to diminish the overall effectiveness of TB – NHRI engagement.

[4] CRPD, art. 33(2)

To obviate these current obstacles to the legitimization of TB – NHRI engagement, I offer two further recommendations:

3. Concerning the heterogeneity with which TBs have embedded NHRIs in their authoritative interpretation of UN human rights conventions, one proposal is to initiate a process for the introduction of one *Joint General Comment on the Role of NHRIs in the Promotion and Protection of International Human Rights*. Modeled according to the recent practices of Joint General Comments[5], a TB system-wide General Comment specifically dedicated to the role and functions of NHRIs in facilitating the implementation of all UN human rights treaties would arguably strengthen the legitimacy of this inter-institutional cooperation. Such initiative would firstly imply a call for submissions and the establishment of a zero draft. This would be followed by consultations to ensure that the perspectives of States, UN agencies, NHRIs, CSOs and other stakeholders with respect to this cooperation are raised, discussed and reflected in the draft for further consideration by all Committees. Such a process would also strengthen the few horizontal ties that currently exist among committees, with joint meetings improving communication and coordination and the sharing of experience and practices among committees.
4. Concerning structural independence and impartiality, a reform of both institutions' appointment procedures would significantly strengthen the overall legitimacy of the institutional framework for TB - NHRI engagement. This is perhaps the most crucial reform needed, as it relates to all identified goals of the framework. In order to ensure the independence and expertise of both TB and NHRI members, more transparent and politically unbiased appointment procedures are required. For TB members, one proposal could be the creation of an independent assessment body, specifically established to review candidates' records and competencies and to evaluate whether they meet the independence and expertise standards. Other criteria might be taken into account, for example to ensure diversity and balanced geographic representation. Such a procedure would assist States parties to make informed decisions when selecting candidates. Possible models include the Coalition for the International Criminal Court

[5] E.g. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child, *Joint general comment on state obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, UN Doc CMW/C/GC/4-CRC/C/GC/23 (16 November 2017)

and the UN process for selecting Special Procedures mandate-holders.[6] Both states parties and the OHCHR could make greater efforts at publicizing the nominations, with civil society and NHRI inputs collected centrally. An independent assessment of candidate qualifications would ensure greater objectivity and transparency to the process thus providing for an added layer of legitimacy to the system. For NHRI members, one proposal could be for the GANHRI SCA to establish more strict rules on the allocation of A-status to NHRIs depending on models of appointment. The appointment process provides a clear signal to the public about a NHRI independence. An appointment process that includes the legislature and civil society is likely to be independent, and to be perceived as such. Appointments made purely by the executive have the potential to undermine efforts to establish an independent over-sight body. A stronger focus should be paid by GANHRI's SCA to appointment and dismissal procedures as the Paris Principles do not pay sufficient attention to this critical area that affects the independence of the NHRI. Such recommendation is strengthened by the theoretical model on NHRI effectiveness developed by Katerina Linos and Tom Pegram, which focuses on "formal institutional safeguards" as effectiveness indicators.[7] They term these features "safeguards" because "they can help protect an active NHRI from efforts to change its leadership or structure, as well as from allegations that it exceeded its mandate".[8]

Be as it may, such institution-specific reforms risk facing further structural and procedural complications without an adequate and receptive domestic human rights dimension. It is thus important to follow up these conclusions relating to the international system with those stemming from the more contextualized analysis of TB – NHRI engagement.

2. The Impact of Treaty Body – NHRI Engagement in Facilitating Human Rights Implementation in Australia

To frame the context-driven chapter within the broader frame of the thesis, it is useful to reiterate the underlying assumption of the domestic turn of my methodology: UN-level

[6] Geneva Academy, Report on the regional consultation for Asia, p. 5; Geneva Academy, Report on the regional consultation for Latin America and the Spanish-Speaking Caribbean, p. 7.
[7] Katerina Linos & Tom Pegram (2017), "What Works in Human Rights Institutions", *American Journal of International Law*, vol. 112 (3).
[8] Ibid., p.4.

initiatives toward a more effective system of human rights monitoring risk facing structural and procedural complications without an adequate and receptive domestic human rights dimension.

In the specifics of the Australian case study, the AHRC benefits from an increasingly harmonized and comprehensive framework for engagement throughout the various stages of the TB State Reporting procedure. This is reflected in the positive results that come from the document content analysis of both AHRC and TB recommendations. Out of the analyzed TB recommendations, 32.3% contain issues raised by AHRC parallel reporting whilst the various committees have taken up 34.3% of submitted AHRC recommendations. This is considerably above the total average.

However, by placing the focus of AHRC-TB engagement within the specifics of the Australian NHRS, I have identified the actors, interactions, and frameworks that support and curtail such cooperation. I have furthermore looked at two specific instances of cooperation, between the Commission, the CERD Committee and the CRC Committee. For both cases, I offered an assessment of the strengths and weaknesses of this interaction through time, focusing on the use of both institutions' complementary recommendations as well as the resulting policy impact.

As addressed in earlier chapters, any well-functioning NHRS must be multidimensional and provide for all its actors, interactions, and frameworks to effectively tackle gaps in implementation. It should be clear that the NHRS concept is not a fix-all solution to the compliance gap. Resources, political will, and the overall capacity of each state will all continue to affect human rights implementation efforts. What is crucial in this respect is, however, that a NHRS is a prerequisite for impact, in that "when all actors, framework and procedures are in place at domestic level, the state will be in a better position to comply with all its human rights obligations."[9] There is no single action that can fully protect human rights or remedy a breach. A variety of actors must be mobilized, interactions among them must be fostered, and the iterative cooperation between the international and domestic human rights monitoring frameworks must be designed and safeguarded. Because human rights aim to protect people's essential dignity and ensure fairness of treatment, it is especially important to ensure a strong focus on prevention. The Australian NHRS as it currently stands, however, is dispute-focused and remedial rather than system-focused and proactive. The case study suggests that Australia

[9] Stéphanie Lagoutte, The Role of State Actors Within the National Human Rights System, 37 (3) *Nordic Journal of Human Rights* (2019), 184.

has adopted a Janus-faced approach to protecting human rights. One face looks to the international sphere and champions human rights principles, the other looks inward, resisting the full application of these principles domestically.[10]

Within this intricate patchwork of laws and policies, AHRC interaction with the various NHRS actors does not provide for a smooth operationalization and monitoring of TB recommendations. Even in the event of comprehensive reforms and concerted plans of action, as was the case with the Parliamentary Scrutiny Act 2011, the adoption of three NHRAPs, and the establishment of the SNHRM, there is little that may counter express executive power. Party domination of the legislative branch of government is further strengthened by the fact that if Parliament has clearly expressed its intention to breach human rights through legislation, the courts have very limited ability to interpret the law in a manner that protects human rights. Australia's essentially parliamentary approach to human rights protection, the failure of the courts system to protect against executive overreach, and the intricate NHRS patchwork jointly work to the detriment of TB-NHRI engagement in Australia. Although some Commonwealth, state, and territory laws protect some human rights, no single document articulates these rights in a coherent and accessible way.

As former UN Secretary-General General Kofi Annan has said, "without implementation, our declarations ring hollow. Without action, our promises are meaningless."[11] For the Australian Government, agreeing that all people in Australia must be provided with the protections of human rights treaties creates legal commitments. For the TB system, providing adequate frameworks for engaging with domestic stakeholders is only the first step in following up on such commitments. And for the AHRC, reliance on Australia's legal commitments and on an adequate TB framework for NHRI engagement is clearly not enough to ensure human rights implementation through legal reforms.

In light of the above, I offer two main recommendations:

5. One useful reform to strengthen TB – AHRC engagement would be that of consolidating the current coordination mechanisms available through the Standing National Human Rights Mechanism (SNHRM). As it currently stands, such a

[10] Hilary Charlesworth and Gillian Triggs, 'Australia and the Protection of Human Rights' *Australian Institute of International Affairs* (29 May 2017), available at www.internationalaffairs.org.au/australianoutlook/australia-international-protection-human-rights/.
[11] Kofi Annan, *In Larger Freedom: towards development, security and human rights for all* (UN Doc. A/59/2005, 21 March 2005).

coordinative mechanism consists of a Commonwealth Inter-Departmental Committee involving departments responsible for UN human rights reporting and domestic human rights policies, with an ill-defined process for consultation with the AHRC and civil society. Interactions among different stakeholders currently take the form of occasional meetings and email exchanges via the Standing Parliamentary Committee on Treaties, which currently hosts the SNHRM under its auspices. It is furthermore surprising that the principal Australian body purposefully established to examine bills, acts, and legislative instruments for compatibility with human rights, the Parliamentary Joint Committee on Human Rights (PJCHR), does not fall within the current SNHRM structure. A new, consolidated national coordination mechanism following the NMRF model, with more structured and formalized avenues for AHRC and PJCHR input, would be an important step forward towards a more effective implementation of ratified UN human rights conventions. This recommendation falls squarely within NMRF-prone attitudes leading to the 2020 Treaty Body Review, expressed by recent annual meetings of TB chairpersons. The opinion of TB representatives is essentially consistent in this regard. The 28th and 29th annual meetings "recommended that treaty bodies consider recommending to States that they establish national mechanisms for reporting and follow-up, considering that the States that have established such national mechanisms have increased their ability to report and engage with the international and regional human rights systems."[12] The following year, the chairs "reiterated that treaty bodies should consider recommending to States that they establish a national mechanism for reporting and follow-up,"[13] welcoming "the efforts already undertaken to develop the capacities of States to implement the treaties, including by supporting national mechanisms for reporting and follow-up."[14]

6. Lastly, and perhaps most importantly, I wish to add my call to the long list of scholars who have supported the introduction of a charter of rights for Australia. A charter of rights would give the courts, Parliament, the AHRC, and Australia's NHRS as whole human rights benchmarks against which to assess compliance of Australia's laws and policies with its international obligations under UN human rights conventions.

[12] 28th meeting of Chairpersons (30 May–3 June 2016, New York), para 81 Information available at www.ohchr.org/EN/HRBodies/AnnualMeeting/Pages/Meetingchairpersons.aspx.
[13] 29th meeting of Chairpersons (26–30 June 2017, New York), para 9. Information available at www.ohchr.org/EN/HRBodies/AnnualMeeting/Pages/Meetingchairpersons.aspx.
[14] ibid para 32.

> Although not representing a panacea, a charter of rights for Australia could moderate the almost unrestricted executive powers that can be granted by Parliament. A charter of rights, even a simply legislated one, would provide the missing check against growing abuse of executive power and lay the foundations for more effective AHRC-TB engagement.

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Finally, a musical reference sums up my overarching conclusion. Like a bridge over troubled waters, TB – NHRI engagement appears to benefit from a relatively strong institutional framework, defined as *the system of formal rules specific to NHRI engagement with the State Reporting procedure*. However, the effectiveness of TB – NHRI cooperation cannot simply rely on its formally devised architecture. The mutually dependent designs of both international human rights monitoring systems and their domestic equivalents constitute only two factors influencing the dynamics of implementation. In order to fully grasp the *extent to which engagement between TBs and NHRIs are effective in facilitating human rights implementation,* it is essential to give due consideration to the context in which TB – NHRI engagement operates. Within the confines of this study, I have focused on the contextual features of one specific country study, with the Australian NHRS offering a rich platform on which to evaluate international human rights implementation. Whilst acknowledging the value of a single study analysis, I also recognize the inherent limitations of such methodological choice. As such, it seems appropriate to end with one last suggestion: a future research agenda dedicated to comparative analyses of multiple NHRSs might lead to the identification of different institutional trends, as well as strengths and weaknesses of each NHRS model under analysis. Said research agenda might inform further domestic institutionalization initiatives and assist further efforts towards strengthening existing UN human rights mechanisms. After all, without a systemic analysis of the intricate and "often messy"[15] domestic ecology, an effectiveness analysis of the transmission belt between the global and domestic human rights arenas would not be complete.

[15] Victoria Nourse and Gregory Shaffer, *Empiricism, Experimentalism and Conditional Theory* (2014) 67 SMU L. Rev. 141.

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Annexes

Annex 1. Interview Checklist

1. Introductory questions

- Please describe your background and past/current functions related to Treaty Body procedures.
- At what stage of the different Treaty Body procedures has your engagement been directed toward?:

    - **State Reporting** (e.g. State Report, information for list of issues/list of issues prior to reporting, information for the session, follow-up)
    - **Individual Complaints** (complaint submission, amicus briefs, follow-up)
    - **Inquiries** (country visit, inquiry report, follow-up)

2. Impact of NHRI engagement on UN Human Rights Treaty Bodies recommendations

- How do you qualify the overall impact of your engagement with Treaty Body experts and resulting recommendations?
- At what stage of Treaty Body procedures do you consider NHRI engagement to have more impact on Treaty Body experts and resulting recommendations?
- Which Treaty Bodies do you consider the most and least responsive to your engagement?
- Do you have any concrete examples of NHRI engagement that have influenced Treaty Body recommendations? What factors and reasons determined that NHRI engagement had an impact?

3. Impact of NHRI engagement with the UN Human Rights Treaty Bodies on domestic human rights implementation

- How do you qualify the overall impact or influence of your engagement with Treaty Body procedures on domestic human rights implementation (the use of Treaty Body recommendations in your domestic work)?
- At what stage of Treaty Body procedures do you consider NHRI engagement to have the most and least impact on domestic human rights implementation?
- In the context of Treaty Body procedures, how would you describe the relationship/interaction between your NHRI and other domestic actors (government, Parliament, national courts, civil society, other national specialized human rights institutions, the media)?
- Do you have concrete examples of NHRI engagement that have been (partly) effective and have, for example, led to new or additional policy and/or legislative measures? What factors and reasons determined that NHRI engagement had an impact?

Additional questions on the role of UN Human Rights Treaty Bodies in Australia

- What role do Treaty Body recommendations play in policymaking and legislative processes in Australia?
- How do you characterize the knowledge of Treaty Bodies among domestic actors?
- What is your opinion on the work and contextual knowledge of Treaty Bodies experts and Treaty Bodies secretariat staff (Office of the High Commissioner for Human Rights)?
- Are there notable differences among Treaty Bodies with respect to the latter issues? Or differences with other international supervisory organs you engage with?

Annex 2. List of Interviewees

AUSTRALIA			
Meeting date	**Interviewee**	**Institution**	**Role**
18/01/19	Chris Sidoti	Australian Human Rights Commission (AHRC)	Former Human Rights Commissioner
29/01/19	Adam Fletcher	RMIT University, Melbourne	Lecturer in Law
29/01/19	Sarah Joseph	Monash University, Castan Centre for Human Rights Law	Professor of Law, Director of the Castan Centre for Human Rights Law
30/01/19	Andrew Gargett	Department of Prime Minister and Cabinet	Director, Strategy, Engagement & Communications, Aboriginal Victoria.
30/01/19	Gillian Triggs	AHCR, University of Melbourne, United Nations High Commissioner for Human Rights (UNHCR)	Emeritus Professor of Law, former President of the AHCR, Assistant High Commissioner UNHCR
06/02/19	Andrew Byrnes	UNSW and Joint Parliamentary Committee on Human Rights	Professor of Law, and former Legal Advisor to the Joint Parliamentary Committee on Human Rights
07/02/19	Andrea Durbach	UNSW, Australian Human Rights Institute (AHRI)	Professor of Law, UNSW, former director of the AHRI
07/02/19	Brian Burdekin	AHRI, OHCHR	Former AHCR Federal Huma Rights Commission and Special Advisor on National Institutions to the first three OHCHR
13/02/19	Simon Rice	University of Sydney	Professor of Law
13/02/19	Jaqueline Mowbray	University of Sydney and Joint Parliamentary Committee on Human Rights	Professor of Law, and former Legal Advisor to the Joint Parliamentary

			Committee on Human Rights
13/02/19	Ron McCallum	OHCHR, Committee on the Rights of Persons with Disabilities (CRPD)	Former CRPD member
14/02/19	Jaqueline Maley	The Sydney Morning Herald	Senior Journalist
21/02/19	Maria Nawaz	Kingsford Legal Centre	Legal Officer
15/02/19	Ivan Shearer	OHCHR, Human Rights Committee (HRCtee)	Former HCRtee member
22/02/19	Renee Arian	Australian Mission to the United Nations (UN) and AHCR	Former Human Rights Advisor for the Australian Mission at UN Geneva and AHCH International engagement Officer
26/02/19	Greame Innes	CRPD	Former Disability Discrimination Commissioner and CRPD member
26/02/19	Tim Soutphommasane	AHRC	Former AHRC Discrimination Commissioner
27/02/19	Tim Reddel	University of Queensland and Federal Department of Social Sciences	Professor of Social Sciences, and Group Manager at the Federal Department of Social Sciences
28/02/19	Ciaran Chestnutt	Australian Department for Foreign Affairs and Trade	Assistant Director of the Department for Foreign Affairs and Trade
28/02/19	Andrew Walter	Australian Attorney General's Department	First Assistant Secretary
01/03/19	Zoe Hutchinson	Joint Parliamentary Committee on Human Rights	Secretary of the Joint Parliamentary Committee on Human Rights
01/03/19	Kate Mitchell	Joint Parliamentary Committee on Human Rights	Officer of the Joint Parliamentary Committee on Human Rights
01/03/19	Pip Dargan	Asia Pacific Forum	Deputy Director Asia Pacific Forum
04/03/19	Rosemary Kayess	UNSW and CRPD	Professor of Law and CRPD member
07/03/19	Ben Saul	University of Sydney	Professor of Law University of Sydney
07/03/19	David Kinsley	University of Sydney	Professor of Law University of Sydney
08/03/19	Ed Santow	AHRC	AHRC Human Rights Commissioner
08/03/19	Darren Dick	AHRC	AHRC Senior Policy Exectuive

14/03/19	Peter Woolcott	Australian Public Service Commission, UN and Australian Prime Minister Office	Australian Public Service Commissioner, former Australian Ambassador to the UN in Geneva, former Chief of Staff to Ausralian Prime Minister Malcolm Turnbull
29/04/19	Elizabeth Broderick	AHRC	Former AHRC Sex Discriminationation Commissioner

SWITZERLAND		
Interviewee	**Institution**	**Role**
Paul David	OHCHR	Chief of the Indigenous Peoples and Minorities Section
Carla Edelenbos	OHCHR	Senior Human Rights Officer
Simon Walker	OHCHR	Chief of Section in the Human Rights Treaty branch
Allegra Frenchetti	OHCHR	Secretary of the Committee on the Rights of the Child
Bradford Smith	OHCHR	Secretary of the Committee on the Rights of Migrant Workers
Orest Nowosad	OHCHR	Chief of Section in the Human Rights Treaty branch
Gabriella Habtom	OHCHR	Secretary of the Human Rights Committee
Jakob Schneider	OHCHR	Secretary of the Committee on the Elimination of all Forms of Discriminations Against Women
Jorge Araya	OHCHR	Secretary of the Committee on the Rights of Persons with Disabilities
Kate Fox	OHCHR	Former Secretary of the Human Rights Committee
Maja Andrijasevic-Boko	OHCHR	Secretary of the Committee on Economic, Social and Cultural Rights
Patrice Gillibert	OHCHR	Secretary of the Committee Against Torture
Joao Nataf	OHCHR	Secretary of the Sub-committee on the Prevention of Torture

Maria Vivar Aguiree	OHCHR	Human Rights Officer, National Institutions and Regional Mechanisms Section
Vladen Stefanov	OHCHR	Chief of the National Institutions and Regional Mechanisms Section
Sulini Suragaser	OHCHR	Human Rights Officer, Human Rights Treaty Branch
Nahla Haidar	OHCHR	Member of the Committee on the Elimination of all Forms of Discriminations Against Women
Christof Heyns	OHCHR	Member of the Human Rights Committee
Beate Rudolf	Global Alliance of National Human Rights Institutions (GANHRI), and German Institute for Human Rights	Chairperson of GANHRI and Director of the German Institute for Human Rights
Magali Lafoucarde	Commission Nationale Consultative des Droits de l'Homme (CNCDH), France	Secretary General of the CNCDH
David Langtry	Canadian Human Rights Commission	Deputy Chief Commissioner

Annex 3. Tables of Acronyms

Acronym	Signification
AHRC	Australia Human Rights Commission
AHRC-TB engagement	Engagement between the Australian Human Rights Commission and Treaty Bodies
CAT	Convention against Torture
CED	Convention or Committee on Enforced Disappearances
CEDAW	Convention or Committee on the Elimination of Discrimination Against Women
CERD	Convention or Committee on the Elimination of Racial Discrimination
CESCR	Committee on the Economic, Social and Cultural Rights
CHRC	Canadian Human Rights Commission
CMW	Committee on the Rights of Migrant Workers
COBs	Concluding Observations
CRC	Convention or Committee on the Rights of the Child
CRC-OP	Optional Protocol to the Convention on the Rights of the Child
CRPD	Convention or Committee on the Rights of Persons with Disabilities
CSO	Civil Society Organisations
DIHR	Danish Institute for Human Rights
DPD	Defensoria del Pueblo of Colombia

FU	Follow-ups
GANHRI	Global Alliance of National Human Rights Institutions
GBA	Goal-Based Approach
GC	General Comments (
HRCB	Human Rights Council Branch
HRCtee	Human Rights Committee
HRTB	Human Rights Treaties Branch
ICCPR	International Convention on Civil and Political Rights
ICCPR-OP	Optional Protocol to the ICCPR
ICERD	International Convention on the Elimination of Racial Discrimination
ICESCR	International Convention on Economic, Social and Cultural Rights
CMW	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICRC	International Committee of the Red Cross
ICRMW	International Convention of the Rights of Migrant Workers
ILA	International Law Association
KHRC	Kenyan Human Rights Commission
LOIPR	List of Issues Prior to Reporting
LOIs	List of Issues
NGOs	Non-Governmental Organisations
NHRAPs	National Human Rights Action Plans
NHRIs	National Human Rights Institution
NHRS	National Human Rights System
NIRMS	National Institutions and Regional Mechanisms Section
NLR	New Legal Realism
NMMs	National Monitoring Mechanisms
NMRF	National Mechanisms for Reporting and Follow-up
NPMs	National Preventive Mechanisms
OHCHR	Office of the High Commissioner for Human Rights
OPCAT	Optional Protocol to the Convention against Torture
PSWG	Pre-Session Working Group
RoPS	Rules of Procedure
SCA	Sub-Committee on Accreditation
SNRCM	Standing National Reporting and Coordination Mechanism
SPT	Subcommittee on Prevention of Torture
TB	Treaty Bodies
TB-NHRI engagement	Engagement between Treaty Bodies and National Human Rights Institutions
TLO	Transnational Legal Order
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA or GA	United Nations General Assembly
UPR	Universal Periodic Review
UPRB	Universal Periodic Review Branch

USD	United States Dollars ($)
VCLT	Vienna Convention on the Law of Treaties
WMs	Working Methods

List of Acronyms specific to Australia (Chapter 9).

Acronym	Signification
ACT	Australian Capital Territory
AGD	Attorney-General's Department
AHRC	Australian Human Rights Commission
APF	Asia-Pacific Forum
Cht	Commonwealth of Australia
COAG	Council of Australian Governments
DDA	Disability Discrimination Act 1984
DFAT	Department on Foreign Affairs and Trade
DSS	Department of Social Services
HRLC	Human Rights Law Centre
PJCHR	Parliamentary Joint Committee on Human Rights
OfW	Office for Women
OIL	Office of International Law
PMC	Department of the Prime Minister and Cabinet
RDA	Racial Discrimination Act 1975
SCOT	Standing Parliamentary Committee on Treaties
SDA	Sex Discrimination Act 1992
SNHRM	Standing National Human Rights Mechanisms
SoC	Statement of Compatibility