

## **The Optional Protocol to the UN Torture Convention and the UN Convention on the Rights of People with Disabilities: some common issues**

The Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)<sup>1</sup> came into force on 26 June 2006. Two years later, it was followed by the ‘newest’ addition to the family of the UN treaties, the Convention on the Rights of People with Disabilities (Disabilities Convention)<sup>2</sup> which came into force on 3 May 2008.

Although the two instruments deal with different subject-matters, there is a rather striking similarity if the monitoring mechanisms of the two are compared: both instruments set out a two-tier monitoring system, with one layer being that of an international treaty body and the other consisting of a national body or bodies. Thus the Subcommittee on Prevention of Torture (SPT) has been created pursuant to the provisions of the OPCAT<sup>3</sup> and the Committee on the Rights of Persons with Disabilities (CRPD) has been established in accordance with the stipulations of the Disabilities Convention.<sup>4</sup> Turning to the national level of monitoring that the two treaties provide for, there is a direct role allocated to national institutions. The most important common aspect of this role is that states parties to OPCAT and states parties to the Disabilities Convention are to ‘give due consideration to’<sup>5</sup> and ‘take into account’<sup>6</sup> respectively the principles relating to the status and functioning of national institutions for protection and promotion of human rights (Paris Principles) when selecting the national bodies that are to have a role in the implementation at national level of the respective treaties.<sup>7</sup>

Such a double-tier system is a relatively new way of monitoring states parties’ compliance with their obligations pursuant to the provisions of the international human rights treaties. In fact, the OPCAT and the Disabilities Convention are the only two of the core international human rights instruments which provide for such a system. Unique aspect is the layer of national institutions that are to play a role in the implementation of the international treaty and the fact that this is provided for directly in the text of treaty as opposed to being developed as a result of the recommendations of treaty bodies.<sup>8</sup> Therefore such issues as how to ensure that states parties designate

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<sup>1</sup> GA Res. 57/199 on the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (hereinafter: OPCAT) UN Doc. A/RES/57/199, 18 Dec. 2003, adopted by 127 votes to 4, with 42 abstentions.

<sup>2</sup> The Convention was adopted was adopted on 13 December 2006 during the sixty-first session of the General Assembly by GA res. A/RES/61/ 611

<sup>3</sup> Article 2 of the OPCAT

<sup>4</sup> Article 34 of the Disabilities Convention

<sup>5</sup> Article 18 (4) of the OPCAT

<sup>6</sup> Article 33 (2) of the Disabilities Convention

<sup>7</sup> Paris Principles relating to the Status and functioning of National Institutions for Protection and Promotion of Human Rights, G.A.Res. 134, UN GAOR, 48<sup>th</sup> Sess., UN Doc. A/RES/48/134 (1993).

<sup>8</sup> For example, the Committee on Racial Discrimination has recommended that State parties establish national institutions and that existent national institutions “be associated with the preparation of reports

appropriate bodies at national levels, how to properly interact with these bodies and how to achieve synergy between the national and international levels is a matter of common interest to the SPT and the CRPD. These issues are the focus of the present paper.

## **1. The National Preventive Mechanisms under the OPCAT**

Article 3 of the OPCAT requires states parties to ‘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’ which are referred to in the instrument as national preventive mechanisms (NPMs). This is to be done at the latest one year after the ratification.<sup>9</sup> However, there is little prescription as to how these NPMs are to look like: Article 18 of the OPCAT does not go beyond requiring states parties to guarantee their functional independence and independence of their personnel; to ensure that the members have the required expertise, that the membership of the NPM is representative of ethnic and minority groups in the country and in selection process states are to strive towards gender balance; the NPM must be provided with the necessary resources and ‘due consideration’ is to be given to the Paris Principles when an NPM is selected.

The OPCAT provides more guidance in respect of the functions and powers of the NPMs. Thus the NPMs are to have, as a minimum, the necessary powers to examine regularly the treatment of the persons deprived of their liberty in places of detention, make recommendations to the relevant authorities<sup>10</sup> and submit proposals and observations concerning existing or draft legislation.<sup>11</sup> In order to be able to carry out these functions, the NPMs are to be guaranteed access to all information concerning the number of persons deprived of their liberty, the numbers and locations of places of detention; access all information referring to the treatment of those persons as well as their conditions of detention and access to all places of detention and their installations and facilities; the NPMs must have the right to conduct private interviews with those deprived of their liberty as well as anyone else the NPMs believe may supply relevant information; and the NPMs are to be free to choose the places they want to visit and the persons they want to interview and to have contacts with the SPT.<sup>12</sup>

The OPCAT also puts in place a special relationship between the SPT and the NPMs. Firstly, the work of these two layers is complementary in that both are to engage in a preventive work with the aim of eliminating torture and other forms of ill treatment. Thus, for example, both are to carry out visits to places of deprivation of liberty which are in the jurisdiction and control of states parties to OPCAT.<sup>13</sup>

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and possibly included in government delegations in order to intensify the dialogue between the Committee and the State party concerned”. See: CERD, General Recommendation No. 17: Establishment of National Institutions to Facilitate Implementation of the Convention: 25/03/93

<sup>9</sup> Article 17 of the OPCAT unless the state has chosen to delay the implementation in accordance with Article 24 of the OPCAT

<sup>10</sup> Article 22 contains a corresponding obligation upon the authorities to examine the recommendations of the NPMs and enter into a dialogue with it on possible implementation measures

<sup>11</sup> Article 19 of the OPCAT

<sup>12</sup> Article 20 of the OPCAT

<sup>13</sup> Article 4 of the OPCAT

Secondly, the SPT is mandated to advise and assist states parties, when necessary, in the establishment of the NPMs<sup>14</sup> as well as to make recommendations to states parties with a view to strengthening the capacity and mandate of the NPMs.<sup>15</sup>

Thirdly, the SPT is to maintain direct, if necessary confidential, contact with the NPMs<sup>16</sup> and states parties may not prevent their respective NPMs from having such direct contacts.<sup>17</sup>

Fourthly and finally, the SPT is to offer NPMs training and technical assistance with the view of strengthening their capacities<sup>18</sup> as well as advise and assist them in evaluation of their needs and means necessary to strengthen the protection of persons deprived of liberty against torture and other ill-treatment.<sup>19</sup>

In the view of this, it should be noted that the SPT has issued its Preliminary Guidelines for the on-going development of NPMs (Preliminary Guidelines),<sup>20</sup> the closer examination of which reveal that these are relevant both to the states parties and then NPMs themselves.

The research from the Bristol University project clearly indicates that the procedures which states are following and the pertinent issues with respect to their appointment and operation are central to the system of OPCAT. The SPT itself has noted that:

‘Unless the mechanisms [the NPMs] are able to fulfil their role as the on-the-spot visiting mechanisms for the prevention of ill-treatment, the work of the Subcommittee will be seriously limited and adversely affected.’<sup>21</sup>

Thus the system of preventive visiting that OPCAT puts in place has the potential of addressing one of the biggest criticisms that has been levied on the various existing international visiting mechanisms: such a double-tier system can potentially guarantee frequent oversight over the places of deprivation of liberty in states parties, ensuring the true regularity of systematic visiting, and frequency of engagement with the states that the current international and regional mechanisms have not been able to ensure.<sup>22</sup> Therefore the NPMs are very much at the heart of the OPCAT system and consequently such issues as which bodies states choose to designate as their NPMs and how to engage with them is a crucial matter for the SPT and effectiveness of the system put in place by the OPCAT.

## **2. Article 33 of the Disabilities Convention**

Initially it should be observed that during the negotiations leading to the drafting of the Disabilities Convention, the OPCAT model of complementarity of

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<sup>14</sup> Article 11 (b) (i) of the OPCAT

<sup>15</sup> Article 11 (b) (iv) of the OPCAT

<sup>16</sup> Article 11 (b) (ii) of the OPCAT

<sup>17</sup> Article 20 (f) of the OPCAT

<sup>18</sup> Article 11 (b) (ii) of the OPCAT

<sup>19</sup> Article 11 (b) (iii) of the OPCAT

<sup>20</sup> First Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; CAT/C/40/2; 14 May 2008; Section II, Part B

<sup>21</sup> Ibid; para 29

<sup>22</sup> M D Evans *The place of the Optional Protocol in the scheme of international approaches to torture and torture prevention and resulting issues* in H C Scheu & S Hybnerova (eds) *International and National Mechanisms against Torture* (2004) University Karlova (Prague) Law School Publication; p. 32

national and international monitoring was used as a template in the discussions on the monitoring mechanisms to be included in the Disabilities Convention.<sup>23</sup>

In a way, Article 33 of the Disabilities Convention takes a more nuanced approach to the national level of implementation than OPCAT. Thus states parties are to designate ‘one or more focal points within governments’,<sup>24</sup> (Focal Points) and to ‘maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms’,<sup>25</sup> (National Frameworks) to promote, protect and monitor the implementation of the Convention. Moreover, a role for the civil society is envisaged, in particular persons with disabilities and their representative organisations, as these ‘shall be involved and participate fully in the monitoring process.’<sup>26</sup>

Thus Article 33 draws a distinction between those institutions that are responsible for the ‘implementation’ and those who are charged with the mandate to ‘monitor’ the implementation: the Focal Points within the government are responsible for the former, while the National Frameworks and civil society are responsible for the latter. Article 33(1) also envisages a possibility, albeit not a strict requirement, of a coordinating body at the government level, which could be ‘an inter-ministerial group’.<sup>27</sup> Such a body may become particularly important for federal jurisdictions or devolved administrations as additional coordination among the various Focal Points may be required.

The role of the National Frameworks is divided into three cohorts: promotion, protection and monitoring of the implementation of the Disabilities Convention. The Asia Pacific Forum’s Disability Issues Paper suggests that these elements include<sup>28</sup>:

Promotion of implementation:

- providing information, but moving away from purely informative role and providing some strategic direction;
- detailed analysis of the obligations set out in the Convention, consideration of how these can be best implemented in the national circumstances and ‘tools available to government and other agencies with potential roles in the implementation’;
- ‘determination of strategies for promoting action by these agencies’.

Promotion of monitoring:

- data collection and reporting;
- identifying the social structures that need to be transformed and monitoring the transformation processes of these;

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<sup>23</sup> See for example the Chair's Draft Elements of a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities of December 2003 prepared by the Chair of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons, available at <http://www.un.org/esa/socdev/enable/rights/wgcontrib-chair1.htm> (last visited on 18 December 2009).

<sup>24</sup> Article 33 (1) of the Disabilities Convention

<sup>25</sup> Article 33 (2) of the Disabilities Convention

<sup>26</sup> Article 33 (3) of the Disabilities Convention

<sup>27</sup> OHCHR, *Informal Summary of Discussions. Open-Ended Consultation on Key Legal Measures for the Ratification and Implementation of the Convention on the Rights of Persons with Disabilities*, Geneva, 24 October 2008, p.15.

<sup>28</sup> Asia Pacific Forum, *Disability Issues Paper*, 12<sup>th</sup> Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, Sydney, Australia, 24-27 September 2007, pp.9-11.

- engagement with other bodies, like governmental bodies and other agencies, who work in this area.

#### Promotion of protection:

- work with the legislative framework so as to ensure better level of protection afforded;
- examine the needs and possibilities for any additional measures in the relevant areas, like development of guidelines and strategies regarding disabilities issues in law enforcement and the administration of justice.

This list of tasks, similar to those that some members of the Working Group in charge of drafting the Convention thought would be appropriate,<sup>29</sup> makes it clear that as with the NPMs in the system of OPCAT, the National Frameworks occupy a central and very important role in the Disabilities Convention. It thus becomes of paramount importance what type of entities comprises these National Frameworks.

However, in terms of the requirements for the National Frameworks, Article 33 (2) contains even less prescription about how these ought to look like than the OPCAT gives in respect to the NPMs. It is only stipulated that the National Frameworks are to be independent and states parties ‘shall take into account’ the Paris Principles when appointing institutions to this role. This latter reference clearly points to a potential role for national human rights institutions (NHRIs) and it has been argued that ‘it would look strange- to say the least- if a core component of the “framework” lacked fidelity to the [Paris] Principles or if they were ignored altogether.’<sup>30</sup> Nevertheless, it must be noted that the Disabilities Convention, just as the OPCAT, does not prescribe that the NHRIs *must* be the National Frameworks and a considerable degree of flexibility is afforded to states parties, similar to that afforded by the OPCAT to states parties in respect of the NPMs.

The role of the CRPD in relation to the National Frameworks is also by far less clear than the role of the SPT in relation to the NPMs. The remit for the CRPD’s engagement is imprecise and given the fact that the CRPD came together for its first session only in February 2009, the practice is yet to develop.

Arguably, Article 35 provides a remit for the CRPD to engage with the issue of National Frameworks as this provision sets out the reporting obligations of the states parties. Certainly the measures taken for the implementation of Article 33 will form part of the state parties’ reports and the CRPD will in turn have the possibility to engage into dialogue with the states parties on the matter as well as make suggestions

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<sup>29</sup> The functions these members thought that the National Framework might perform were: promoting awareness of the provisions of the Convention to persons with disabilities and to the general population; monitoring national legislation, policies and programmes to ensure consistency with the Convention; undertaking or facilitating research on the impact of the Convention or of national legislation; developing a system for assessing that impact on persons with disabilities; and hearing complaints about failure to observe the Convention. See *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*, UN Doc. A/AC.265/2004/WG.1 (27 January 2004), p. 32, footnote 114.

<sup>30</sup> Gerard Quinn, *The UN Convention on the Rights of Persons With Disabilities. National Institutions as Key Catalysis of Change*’ in Panel on the National Monitoring Mechanisms of the Convention on the Rights of Persons with Disabilities *National Monitoring Mechanisms of the Convention on the Rights of Persons with Disabilities VI Ordinary General Assembly of the Network*, held in Mexico City, 24-26 October 2007; Publication of the Mexican National Human Rights Commission, 2008; p. 130

and recommendations in respect to measures taken.<sup>31</sup> Moreover, the CRPD is to decide on the guidelines applicable to the content of reports<sup>32</sup> which presents an opportunity for the treaty body to set out clear requirements to the states parties their reporting obligations under Article 33.

Nevertheless, the reporting process does not provide for the CRPD to engage directly with the National Frameworks themselves. Article 37(2) could provide such basis, however, as it states:

‘In its relations with States Parties, the Committee shall give due consideration to ways and means of enhancing national capacities for the implementation of the present Convention, including through international cooperation’.

Finally, it should be noted that, as evidenced by the agenda of its first session, the CRPD is willing to engage separately with NHRIs directly irrespective of whether they are designated as National Frameworks.<sup>33</sup> There was interest by a small group of NHRIs at this first session to engage directly with the Committee.

Consequently, if compared to the provisions of OPCAT in relation to the NPMs, on the one hand the Disabilities Convention takes a more detailed approach on the various elements that are to be in place on the national level for the implementation of the Convention. On the other hand, it contains less prescription about the characteristics of National Frameworks, their constitution and powers. However both the system of National Frameworks and NPMs form an integral part of the implementation mechanism envisaged by these two instruments and therefore the issue of who takes up these roles at the national level and how to engage with them is a matter of common interest to the two treaty bodies.

### **3. Engagement with the national level of the implementation**

It has already been argued that the SPT’s mandate includes direct engagement with the NPMs in various ways, which are rooted in the text of the OPCAT itself. Although similar provisions in respect of the engagement of the CRPD with the National Frameworks are absent in the Disabilities Convention, this does not mean that there is no room for such engagement. However in spite of the SPT’s clearer mandate with regard to NPM engagement, the SPT has found it difficult to formulate an initial strategy as to how to deal with NPMs, in part for budgetary reasons,<sup>34</sup> but also in part for fear of appearing to give a ‘seal of approval’ to NPMs which may not fully comply with the OPCAT’s requirements. This means that there was no official source of information which could provide guidance to the relevant stakeholders as to what is to be expected of an NPM. Nonetheless, the SPT’s second annual report suggests that the SPT is gradually stepping up its engagement efforts, noting that the SPT has held bilateral and multilateral contacts with NPMs and NGOs involved in the

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<sup>31</sup> As provided for in Article 36 of the Disabilities Convention

<sup>32</sup> Article 35 (3) of the Disabilities Convention

<sup>33</sup> Committee on the Rights of Persons with Disabilities, Programme of Work, First session, Geneva, 23-27 February 2009, <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session1.aspx> (last visited on 18 December 2009)

<sup>34</sup> See Supra note 20; paras 24 -25

development of NPMs. In addition, correspondence with the states parties on the issue of NPM designation has been now made public.<sup>35</sup>

As it now stands, the SPT's engagement with issue of the NPMs is taking place in the following ways:

- The exchange of correspondence and information about the NPMs;<sup>36</sup>
- Engagement with NPMs through meetings in Geneva;<sup>37</sup>
- Engagement with NPMs through meetings during official SPT visits;<sup>38</sup>
- Engagement through third party stake holders or facilitators such as the OPCAT Contact Group.<sup>39</sup>
- Engagement through advise, assistance and training for NPMs.<sup>40</sup>

As observed above, the CRPD has already showed signs of willingness to engage with NHRIs, some of which may be designated as the National Frameworks under the Disabilities Convention in their respective countries. This is an encouraging development, signifying that the CRPD is attaching importance to the issue. The practice of the SPT in respect to the NHRIs has been more cautious however: while recognising that some NHRIs may indeed be charged with the NPM mandate, the SPT has kept the two separate. While it has met with the National Institutions Unit (NI Unit)<sup>41</sup> of the OHCHR<sup>42</sup>, it has not invited the NHRIs for a separate meeting as the CRPD has. This difference of emphasis is significant since both treaties refer directly to the Paris Principles.

The Paris Principles provide guidance to states when they create NHRIs such as national human rights commissions and/or ombudsperson institutions. The

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<sup>35</sup> Second Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; CAT/C/42/2; 7 April 2009; Section IV, paras 34 and 36.

<sup>36</sup> The SPT has a website especially dedicated to this correspondence. See <http://www2.ohchr.org/english/bodies/cat/opcat/mechanisms.htm> (last visited 18 December 2009).

<sup>37</sup> In its First Annual Report, the SPT mentions that it met with the Mexican NPM, the National Human Rights Commission of Mexico at the latter's request. See Supra note 20, para. 26.

<sup>38</sup> Thus, the SPT delegation visiting Sweden in the course of its preventive mandate had a meeting with the designated NPMs, the Parliamentary Ombudsman and the Chancellor of Justice. See Report on the Visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Sweden, Subcommittee on Prevention of Torture, UN Doc CAT/OP/SWE/1 (10 September 2008), para. 10.

<sup>39</sup> Members of the SPT have had the opportunity to attend seminars and conferences organized by individual organizations of the OPCAT Contact Group in that capacity. Thus, two members of the SPT attended a conference organized by Bristol University and the Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE on the implementation of the OPCAT in the OSCE region in November 2008, which included the participation of several designated or potential NPMs. See <http://bristol.ac.uk/law/research/centres-themes/opcat/pragueseminar.html> (last visited on 18 December 2009).

<sup>40</sup> Article 11 (b) ii and iii of the OPCAT provides the SPT with the possibility to do so. In fact, the SPT has announced an in-country engagement with the Estonian NPM in 2009. See: Available at: UN Press Release 'UN Sub-Committee on Prevention of Torture Concludes Seventh Session, Announces Programme of Work in Field for 2009' (17 February 2009) <http://www.unhchr.ch/huricane/hurricane.nsf/view01/ED82F22C0A81BF2FC125756000472C68?opendocument> (last visited on 18 December 2009)

<sup>41</sup> This Unit is the secretariat of the International Coordinating Committee of National Human Rights Institutions (ICC), which in turn is the representative body of national human rights institutions (NHRIs) and has established a Subcommittee on Accreditation from among its members which then accredits NHRIs as being in compliance with the Paris Principles.

<sup>42</sup> Supra note 35, para 49

reference to the Paris Principles in both the OPCAT and the Disabilities Convention appear at first sight to suggest that national human rights commissions and/or ombudsmen could fulfil the role of NPM or National Framework respectively. Indeed, in respect of torture issues, it has been argued that:

‘The field of activities and scope of responsibilities of the NHRIs and NPMs are inherently and unavoidably overlapping. Most NHRIs are involved in monitoring places of detention, torture prevention and investigation. For many of them it is a central area of their activity.’<sup>43</sup>

Similarly, in respect to the Disabilities Convention, it has been argued that some NHRIs possess ‘a wealth of experience’<sup>44</sup> on disabilities issues. Indeed, there are a number of elements of the Paris Principles that have emerged as crucial in the processes of NPM establishment around the world and are also likely to be important for the designation of National Frameworks under the Disabilities Convention. The central elements are those dealing with independence (both functional and financial), as well as the composition of the bodies.<sup>45</sup> Nevertheless, the OPCAT practice indicates that some caution needs to be exercised: NHRIs are often actively seeking their inclusion in the NPMs and there have been only a very few cases where a NHRI has been reticent or unwilling to be named as the designated body.<sup>46</sup> Similarly states have chosen to designate the existing human rights commissions or ombudsperson offices with little consideration of whether the entities are really suited for the rather specific mandate of the NPMs. While certainly in some countries the existing NHRIs, whether those would be national human rights commissions or ombudsperson offices, are indeed suited for the role of the NPM, this is not always the case and the suitability of a NHRI for the NPM role must be assessed on a country-by-country basis.<sup>47</sup>

Accreditation of the NHRIs carried out by the International Coordinating Committee (ICC),<sup>48</sup> has been used as an argument in favour of designating NHRIs as NPMs under the OPCAT,<sup>49</sup> particularly when a NHRI has been accorded ‘A’ status. However research indicates that the accreditation of NHRIs does not automatically and necessarily mean that the institution is well suited for the role; and state practice shows that states parties who have ‘A’ status NHRIs have not necessarily chosen these

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<sup>43</sup> Richard Carver & Alexey Korotaev, *Assessing the Effectiveness of National Human Rights Institutions* (2007) Report on the behalf of the UNDP Regional centre in Bratislava; Part 3.6

<sup>44</sup> Supra note 30

<sup>45</sup> See Principle B in particular

<sup>46</sup> For example, in Sweden the officially designated NPMs, the Parliamentary Ombudsman and the Chancellor of Justice, have expressed misgivings as to their designation. They are of the opinion that designation impinged on their independence since it would be akin as to receiving instructions from the government, and on top of that they are supposed to carry out additional duties without extra budgetary means. Interview with Mr. Kjell Swanström, Head of Staff, Riksdagens Ombudsmän (Parliamentary Ombudsman) (interviewed on 6 November 2007) (on file with authors). See also Supra note 38

<sup>47</sup> On this issue, see further *The Relationship between Accreditation by the International Coordinating Committee of National Human Rights Institutions and the Optional Protocol to the UN Convention Against Torture*, policy paper prepared by the OPCAT Research Team at Bristol University. Available at <http://www.bristol.ac.uk/law/research/centres-themes/opcat/opcatdocs/iccaccreditationandnpps.pdf> (last visited on 18 December 2009).

<sup>48</sup> See supra note 41

<sup>49</sup> See, for example, The Nairobi Declaration of the Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights, Nairobi, Kenya, 21-24 October 2008

to be their NPMs.<sup>50</sup> Given the fact that many NHRIs possess extensive experience in dealing with disabilities issues, the situation may well differ from that of the OPCAT. Nevertheless the CRPD should proceed carefully so as to ensure that the entities most suited for the role of the National Frameworks of the specific jurisdictions are designated and avoid adopting a blanket approach in which NHRIs are automatically accepted as appropriate National Frameworks.

OPCAT practice clearly indicates that NHRIs, irrespective of whether these are designated as NPMs or no, are important partners to the SPT and may play an important role in facilitating the effective implementation of the OPCAT and support the work of both the SPT and NPMs. The CRPD should acknowledge the role that these entities play in domestic implementation of human rights and use these vital partners on the ground to facilitate the implementation of the Disabilities Convention.

The initial practice of the SPT in relation to the NPMs reveals another challenge: following the establishment of the SPT in early 2007, states parties to the OPCAT, potential NPMs and other visiting bodies as well as international and civil society organizations turned to the SPT for guidance on the question of designating and/or establishing NPMs.<sup>51</sup> However, the SPT's initial reluctance to engage with NPMs, coupled with a lack of official information about NPMs meant that stakeholders were left with little guidance as to how to proceed. This has been rectified following the publication of the first<sup>52</sup> and second<sup>53</sup> annual reports of the SPT. In addition, the SPT's official website now contains information about NPMs, their legislation etc.<sup>54</sup> It is to be expected that states parties, national institutions, potential National Frameworks, and civil society organizations will also look up to the CRPD in a similar way for guidance in respect of how the National Frameworks can be set up, which bodies would be appropriate for such a role and how these ought to be constituted. The CRPD should be prepared for such requests and engage with the various stakeholders in an open and transparent manner, at the same time making it clear that such engagement does not mean that it is providing a 'seal of approval' for those institutions as the National Frameworks.

Given the lack of official guidance to stakeholders regarding the NPMs following the OPCAT's entry into force, there were calls for NPM models or model legislative frameworks for the NPMs. The practice so far indicates that the crucial aspect of each NPM designation is the suitability of a particular entity to the specifics of the particular jurisdiction. There is no one model institution that is necessarily better suited for the NPM mandate.<sup>55</sup> The CRPD should be prepared for similar calls and be ready to address such.

Moreover, as noted in the previous section, engagement between the CRPD and the National Framework bodies could also take place through the reporting procedure of Article 35, either through the direct participation of the National Framework in the drafting of its own state's periodic report, or through the

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<sup>50</sup> For example, in Denmark, it is the Ombudsman who has been designated as an NPM despite the fact that the Danish Institute for Human Rights achieved 'A' status while in the UK, the Equality and Human Rights Commission, also an 'A' status NHRI, is not part of the UK's NPM at all.

<sup>51</sup> Rachel Murray, 'National Preventive Mechanisms under the Optional Protocol to the Torture Convention: One Size does not fit all', *Netherlands Quarterly of Human Rights* (2009); p. 487

<sup>52</sup> See supra note 20

<sup>53</sup> See Supra note 35, paras 33-42

<sup>54</sup> See: <http://www2.ohchr.org/english/bodies/cat/opcat/mechanisms.htm> (last visited on 18 December 2009)

<sup>55</sup> Rachel Murray, 'National Preventive Mechanisms under the Optional Protocol to the Torture Convention: One Size does not fit all', *Netherlands Quarterly of Human Rights* (2009)

presentation of a ‘shadow’, alternative report to the Committee. In addition, Article 37 (2) seems to provide the CRPD with some leverage to engage with the National Frameworks in terms of providing advisory services, assistance, or possibly even training in a similar fashion as the SPT in respect of the NPMs.

It is worth noting in this regard, that the SPT, together with the support of the Council of Europe and the Association for the Prevention of Torture, is exploring the possibility of setting up a pilot program of assistance to NPMs.<sup>56</sup> The success of this initiative will however depend to a great extent on the availability of sufficient resources and funding. If the CRPD were to follow this approach it would be advisable for the CRPD to formalize this type of engagement with the (potential) bodies fulfilling the role of National Frameworks. Although the rules of procedure of the CRPD are not yet public, it can be argued, that similar to the practice of other treaty bodies, the Committee could set up the rules, parameters and terms of reference for engaging with the National Frameworks envisaged in the Disabilities Convention. These may include rules dealing with the provision of assistance to enhance the national capacities in pursuance of Article 37 (2) of the Disabilities Convention. However, given the rapid pace of ratification of the Disabilities Convention (almost 80n ratifications within two years of its adoption),<sup>57</sup> the CRPD has to be mindful of its need to engage with a large number of National Frameworks many of which may be requesting the necessary assistance from the Committee. The availability of resources to help it with this task will be, of course, crucial.

Another relevant aspect of engagement may come about under the Optional Protocol to the Disabilities Convention. Under the individual complaints procedure established by Article 1 of the Optional Protocol, it is possible that the CRPD will receive a communication from a National Framework on behalf of a victim seeking redress.<sup>58</sup> It is also possible that the CRPD itself may seek information from the National Framework bodies in dealing with a communication/complaint. Similarly, Article 6 of the Optional Protocol, dealing with the investigation of systematic violations of the rights of the Disabilities Convention, provides that the CRPD may receive information about the violations from the National Framework.

Finally, an important aspect of engagement which the CRPD and the National Frameworks will have to take into consideration is the relationship with other relevant actors. Given the multitude of stakeholders and actors at the international, regional and national level, both the CRPD and the National Frameworks will have various interlocutors with which they will have to engage. These may include the various mandates and special procedures under the UN Human Rights Council (Special Rapporteurs and Working Groups), regional human rights bodies such as the African Commission on Human and Peoples’ Rights, the bodies and procedures under the Inter-American system of Human Rights, and Council of Europe, as well as NGOs. This has already been addressed within Article 38, but the CRPD should think

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<sup>56</sup> See Supra note 35, para. 37.

<sup>57</sup> See Status of Ratification of the Convention on the Rights of Persons with Disabilities available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en) (last visited on 18 December 2009).

<sup>58</sup> Under Article 1 of the Optional Protocol states parties recognize the CRPD’s competence to “[...] receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.”

strategically as to how this type of engagement should take place. The SPT, for example is formalizing its links with other UN and regional bodies.<sup>59</sup>

In sum, there are various potential avenues for engagement between the CRPD and the National Frameworks within the context of the Disabilities Convention. Some of these will need to be further clarified by the Committee itself, either through its rules of procedure or perhaps through issuing a general comment interpreting the content and scope of the relevant provisions. The most important ‘lesson’ that stems from the practice of the SPT in relation to NPMs, is that the national element of the OPCAT is crucial for the effectiveness of the system that OPCAT puts in place and that the engagement with the NPMs as well as their development is an ongoing process.<sup>60</sup> This is something that the CRPD ought to be mindful of.

#### 4. Conclusion

The SPT has been operational for over two years prior to the CRPD commencing its work and some of the ‘lessons learned’ from the SPT’s early practice are of relevance for the CRPD.

It was evident early on that states parties to the OPCAT, as well as other stakeholders, such as international and national civil society groups, prospective NPMs and statutory visiting bodies, were looking at the SPT for guidance as to which bodies could constitute an NPM.<sup>61</sup> Initially, the SPT showed some hesitation in engaging with the issue of NPMs, partially due to severe budgetary constraints, but also because it did not wish to see its engagement with certain NPMs to be taken as a ‘mark of approval’ that a certain designated NPM was necessarily OPCAT-compliant. This however meant that there was no official source of information on the designation of NPMs<sup>62</sup> which posed a variety of questions for the stakeholders. It is thus more than likely that the CRPD will face similar issues of stakeholders looking to the Committee for some official guidance on the appropriate National Frameworks. The CRPD should make it clear that its engagement with the National Frameworks does not amount to an official ‘seal of approval’, accreditation or otherwise of the designated National Frameworks.

Moreover, the initial years of the OPCAT’s implementation also showed that given the lack of detail in the OPCAT on how the NPMs ought to be, there were calls for NPM models or model legislative frameworks for the NPMs to be devised. Practice so far indicates that there is no one model institution that is necessarily better

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<sup>59</sup> In its Second Annual Report, the Subcommittee observes that it attends the Inter Committee meetings of the UN’s human rights treaty bodies. It has also met with the Special Rapporteur on Torture, and with the National Institutions Unit of the UN’s Office of the High Commissioner of Human Rights to discuss accreditation of NHRIs (see next section). It also has met with representatives of the Inter-American Commission on Human Rights to discuss guidelines for coordination of activities. See Supra note 35, paras. 43 – 56.

For more analysis of this aspect, see: *Relationship between the Optional Protocol to the UN Convention against Torture (OPCAT) and other international and regional visiting mechanisms* Policy Paper prepared by the Bristol University OPCAT team (August 2009), available <http://www.bris.ac.uk/law/research/centres-themes/opcat/opcatdocs/relationshipopcatandothervisitingmechanisms.pdf> (last visited on 18 December 2009)

<sup>60</sup> See Supra note 20; para 28 (xiv).

<sup>61</sup> Supra note 51; 487

<sup>62</sup> It should be noted that such official information now is provided on the web site of the SPT; see supra note 54

suited than others to fulfil the NPM mandate. The crucial aspect in each case appears to be the suitability of a particular entity to the geo-political, legal, social and cultural specifics of each jurisdiction. The SPT has not advocated in favour of any particular type of NPM. Instead it has provided some generic advice: the Preliminary Guidelines.<sup>63</sup> It is likely that the CRPD will face similar calls and the treaty body should consider how it will address these.

Both the OPCAT and the Disabilities Convention, when dealing with the national mechanisms, refer to Paris Principles as a source of guidance for states parties. In view of the OPCAT practice, some caution needs to be exercised as not all NHRIs are suited for the role of the NPM and their suitability for this role must be assessed on a country-by-country basis. The fact that NHRIs are accredited by a peer review mechanism through the ICC does not automatically and necessarily mean that an NHRI is suited for the role of the NPM<sup>64</sup> or National Framework. Although many NHRIs already have extensive experience in dealing with disabilities issues, the CRPD has to be careful and ensure that the entities best suited for the role of the National Framework *in a particular jurisdiction* are designated for this role. It should send a clear message to states parties to avoid the ‘temptation’ of automatically designating NHRIs as a National Frameworks without further consideration of the relevant provisions of the Disabilities Convention and the specifics of the jurisdiction.

Nevertheless, the SPT has recognized the important role of the NHRIs in concerned torture prevention and their potential contribution to the effective functioning of the OPCAT. Similarly, the experience of these entities on disabilities issues should be recognized by the CRPD and the Committee ought to make use of these as well as of experience of such OHCHR bodies as the NI Unit and the ICC.

The Disabilities Convention does not provide for a detailed description of the engagement of the CRPD with the National Frameworks, and thus the Committee needs to make it clear how it sees its relationships with these bodies and what its remit to engage with them is. States parties’ reports under Article 35 and the reporting guidelines certainly provide for such a possibility, but arguably Article 37(2) could be used for a direct engagement with National Frameworks. It is clear that engagement between the treaty body and the national mechanisms is crucial in order to achieve a synergy in their work and ensure complementarity, as evidenced by the OPCAT practice this far.

The Disabilities Convention makes distinction between ‘monitoring’ and ‘implementation’ and thus Quinn notes that the designation of focal points ‘for “monitoring” must not be misunderstood by governments as amounting to “implementation” itself. While it is a necessary check to, and spur on, implementation, it does not constitute a substitute for it’.<sup>65</sup>

Despite the fact that the OPCAT does not draw such a distinction as the Disabilities Convention, a tendency for the states parties to take hands-off approach once the NPM has been designated, has surfaced. The CRPD should be aware of this and ensure that governments assert a positive role in their approach to compliance with the Convention.

Finally, there is also a scope for cooperation between the SPT and the CRPD not only on the matter of national monitoring mechanisms of their respective

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<sup>63</sup> See supra note 20; Section II, Part B

<sup>64</sup> For more on OPCAT and ICC accreditation, see supra note 47

<sup>65</sup> G. Quinn, *NHRIs and Next Steps under the UN Convention on the Human Rights of Persons with Disabilities*, Nineteenth Session of the Annual Meeting of the International Coordinating Committee (ICC), Geneva, 23 March 2007, agenda item 13, p.5

instruments, but also on the substantive matters: the protection of persons with disabilities who are deprived of liberty.

The OPCAT and Disabilities Convention are very different international human rights instruments in that they envisage a direct role for national mechanisms in the implementation of an international human rights treaty. The two instruments set out a triangular relationship between the UN treaty body, state party and national mechanisms. This latter element is very unique and it sets apart the mandates of the SPT and the CRPD from those of other UN treaty bodies. The national element of the two treaties clearly holds the potential of making the instruments truly effective and therefore the way these national mechanisms are constituted, their independence and requisite powers become of paramount importance. The SPT has already had over two years of practice and undeniably some lessons of that practice are of utmost relevance to the CRPD. It is thus crucial that the two treaty bodies share their experiences and best practices on how to engage with the national mechanisms.

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