A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law

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Abstract

National human rights institutions (NHRIs) are routinely described as a bridge between the international and domestic systems of human rights protection. But little attention has been paid to how NHRIs actually apply treaty standards at the national level. This article argues that recent innovations in human rights treaties—whereby national-level institutions are assigned an explicit role in treaty implementation—crystallise developments in the practice of NHRIs and treaty bodies over the past 15 years or so. NHRIs invoke international standards in their monitoring and case-handling, they audit legislation for compliance with international law and, after an initial period of unclarity, they have become increasingly involved in independent reporting to treaty monitoring bodies. An analysis of 69 founding statutes of NHRIs shows a growing trend to assign these institutions mandates derived from international standards. Despite some marginal differences in the practice of NHRIs in ‘monist’ and ‘dualist’ jurisdictions, traditional doctrinal distinctions in the incorporation of international law appear to have little impact on the role that these institutions play.

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1. Introduction

Discussions of national human rights institutions (NHRIs), whether among academics or practitioners, routinely refer to the role that these bodies play as a bridge between international human rights standards and their implementation at the national level.1 Within the United Nations system, this bridging role has been so axiomatic and self-evident that the Office of the High Commissioner for Human Rights has invested a large portion of its resources in the creation and sustenance of NHRIs—leading to the legitimate observation that they have become less national institutions and more an international project.2 Yet, at the same time, surprisingly little attention has been paid to the question of how exactly NHRIs carry out this function as agents of international law within the domestic governmental system.

The 1991 Principles relating to the status and functioning of national institutions (’Paris Principles’),3 the most authoritative international statement on the role and structure of NHRIs, envisaged a role for these institutions in promoting human rights treaties at a national level and contributing to states’ reporting obligations. However, they gave little practical guidance on how this might occur. Nevertheless, the period since the Paris Principles has seen a very rich development of the practice of NHRIs in applying international human rights standards at the municipal level. Many NHRIs now routinely apply international standards in their monitoring and case-handling activities, while most promote human rights treaties and monitor national legislation for compliance with these standards. After an initial lack of clarity about the role of NHRIs in reporting to treaty bodies, they are now seen as an important source of independent information in the process of considering country reports. Those NHRIs that are accredited by the International Coordinating Committee of National Human Rights Institutions (ICC) are seated at the UN Human Rights Council and have speaking rights on all agenda items, with national institution representatives increasingly involved in the development of international law, including by involvement in drafting treaties.4

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4 Many of the examples of recent NHRI practice are drawn from 10 country case studies: Australia, Costa Rica, Georgia, India, Malaysia, Mexico, Moldova, Northern Ireland, Senegal and South Africa. They were selected to reflect all five UN geographical regions, as well as including states from both the monist and dualist traditions of incorporating international
This wealth of new practice raises some questions that bear upon traditional debates on the relationship between international and municipal law. Does the mode of incorporating treaties into municipal law have any bearing on how NHRIs function in their new role as ‘agents’ of international law? For example, if ratified treaties are automatically incorporated into the domestic legal order, does this facilitate the use of international standards by NHRIs? While international law is necessarily agnostic on the relative merits of the automatic and legislative approaches to domesticating treaties—‘monism’ and ‘dualism’—it might be supposed that national institutions attempting to apply treaty standards would have differing experiences depending upon whether these were directly enforceable within the domestic legal order.5

In this article, I argue that there has been an important shift in recent years in the way that human rights treaties themselves have been drafted to incorporate the role of NHRIs in their implementation. Both the Optional Protocol to the Convention Against Torture (OPCAT)6 and the Convention on the Rights of Persons with Disabilities (CRPD)7 explicitly assign a role to national-level institutions in their implementation or monitoring. This development has been crystallising an evolution in the practice of both NHRIs and international treaty bodies over the past 15 years or so. Increasingly there is an expectation that NHRIs will act as links to the international human rights regime. Interestingly, this is a reprise of an idea conceived in the earliest years of the United Nations—that national human rights committees should be established to monitor state compliance with the norms contained in the Universal Declaration of Human Rights.8

5 The focus of this study is on the domestic implementation of human rights treaty obligations, largely because to address customary and peremptory norms would be impossible in the space available. One consequence of this focus is that there is only the briefest of references to the position of NHRIs in the Human Rights Council and their relationship to Charter-based UN human rights mechanisms. However, the distinction between treaty and custom cannot be hard and fast. Not only may elements of treaties be evidence of a broader and pre-existing custom but also national institutions may sidestep the limitations of their mandate to implement treaty obligations by reference to customary human rights standards.
2. The Development of NHRIs and Their Relationship to International Law

The term ‘national human rights institutions’ is a relatively recent one, which only acquired broad currency after the enunciation of the Paris Principles in 1991. NHRIs vary enormously in structure and function. What they have in common is that they are autonomous bodies within the state structure, mandated to promote and protect human rights. The Paris Principles require that NHRIs be established by a ‘constitutional or legislative text’. NHRIs that have quasi-jurisdictional competence—that is, almost all in practice—usually have powers to compel the appearance of witnesses and the production of evidence. They can often refer cases to prosecutorial authorities, bring suits before a court, or be party to existing suits. In some instances, they even have their own human rights tribunal. A few NHRIs enjoy legislative initiative, while the Paris Principles require at a minimum that an institution have the power to review existing and proposed legislation for its compliance with ‘fundamental principles of human rights’.


10 Article 2 Paris Principles.

11 93 per cent of the statutes in my database.

12 See, for example, Article 18 Law on the Public Defender of Georgia 1996; Article 13(1) The Protection of Human Rights Act 1993 (India); Article 14 Human Rights Commission of Malaysia Act 1999; Article 24 The Law of the Republic of Moldova on Parliamentary Advocates 1997; Article 21 Human Rights and Equal Opportunity Act 1986 (Cth, Australia); Article 9(c) Human Rights Commission Act 1994 (South Africa); Article 24 Ley de la Defensoría de los Habitantes No 7319 of 1992 (Costa Rica); and Article 39 Ley de la Comisión Nacional de los Derechos Humanos amended 2006 (Mexico).

13 For example, Article 21 Law on the Public Defender of Georgia 1996; and Article 229 Constitution of the Republic of Ghana.


15 For example, Article 10 The People’s Ombudsman Act 1992 (Croatia); and Article 282 Constitución de Colombia 1991.

16 Article 3(i) Paris Principles.
Although NHRIs now have an internationally assigned role in the system of human rights protection, for decades they evolved purely at a national level.\textsuperscript{17} The precursor of all modern NHRIs was the Swedish Ombudsman, dating from 1809. In the latter half of the twentieth century, many countries adopted the ombudsman model, but these institutions generally addressed complaints about procedural irregularities in the public administration, rather than human rights.\textsuperscript{18} From the 1960s, notably in several Commonwealth countries, anti-discrimination legislation created commissions with the authority to deal with substantive human rights issues, although without addressing the full range of human rights.\textsuperscript{19} In a few countries, such as Tanzania and Zambia, NHRIs had broader mandates, functioning as a grievance system within the framework of a one-party state.\textsuperscript{20} France, in 1947, pioneered the model of the advisory commission.\textsuperscript{21} Spain, in 1981, offered the first defensor del pueblo or ombudsman with a full human rights mandate.\textsuperscript{22} Australia, where the commission was conceived in the manner of a Commonwealth anti-discrimination body, provided an early example of an NHRI mandated to monitor the implementation of treaty standards.\textsuperscript{23} Elsewhere, commissions were established in the transition from dictatorship (Philippines) or to pre-empt international criticism (Togo).\textsuperscript{24}

From these examples, it is apparent that the early NHRIs followed no particular mandate or organisational model. In parallel, however, the notion that international human rights standards might be enforced by specially formed committees at the national level emerged very early. In 1946, the Economic and Social Council adopted a resolution urging UN member states to ‘...consider the desirability of establishing information groups or local human rights committees within their respective countries to collaborate with them in furthering the work of the Commission on Human Rights’.\textsuperscript{25} However, this appears not to have been popular with the UN Commission on Human Rights. The idea surfaced again, in a more ambitious form, in the 1960s, with the suggestion for national committees that would advise governments on human rights policy, monitor adherence to human rights, and assist in preparing

\begin{footnotes}
17 Reif, supra n. 9.
18 Ibid.
19 Pohjolaine, supra n. 8 at 45.
21 Décret n. 84-72 du 30 janvier 1984 relatif à la commission consultative des droits de l’homme.
\end{footnotes}
periodic reports. Again the Commission rejected the idea, removing all 
mentions of this mandate from the operational clauses of its subsequent 
resolution.26

It was only in 1978 that the idea of NHRIs began to move forward at the 
international level. A conference in Geneva developed the first set of standards 
for the creation of such institutions—although the net was still cast very 
wide in the definition of NHRIs.27 In the following years, NHRIs were a regular 
agenda item on UN bodies. The adoption of the Paris Principles in 1991 not 
only marked the point at which clear standards for the creation of NHRIs 
were articulated; it was also a turning point after which the formation of 
such institutions proceeded apace.28

3. NHRI Founding Legislation: Providing a Mandate for 
Domesticating International Law

The existing literature classifies NHRIs in terms of their structure and func-
tion, creating typologies based upon such characteristics as whether they are 
Ombudsman institutions or commissions and whether they handle individual 
petitions or not.29 Yet a different approach is required to address the issue of 
how far such institutions act as an implementing mechanism for international 
law. If NHRIs play a role in domesticating international human rights law, 
one would expect to see this is reflected in their founding legislation, with 
institutions increasingly assigned a mandate that is derived from international 
rather than national standards.

To address these issues, I assembled a database of the founding legislation 
of NHRIs from 69 different countries, covering all geopolitical regions30 and 
with a time span from 1981 (Spain) to 2007 (France—although this was a 
revised legislation for a pre-existing institution). The overwhelming majority 
of the statutes (88 per cent) date from 1992 or later, after the Paris Principles 
and coinciding with the period when the OHCHR actively promoted NHRIs. A 
substantial majority of the NHRIs in the database, 70 per cent, are accredited 
by the ICC as A status institutions in full compliance with the Paris Principles.

Of the statutes surveyed, 45 per cent give the institution an explicit mandate 
to apply international human rights treaty law (treaty mandate). Only 10 per 
cent confine the institution’s mandate to promoting or protecting rights that 
are explicitly contained in national law (national mandate). The remaining 45

26 Pohjolaine, supra n. 8, at 37.
27 Ibid. at 45.
28 Cardenas, supra n. 2.
29 For example, Reif, supra n. 9; and Carver, supra n. 9.
30 Africa, Asia, Eastern Europe, Latin America and the Caribbean, Western Europe and Other.
per cent mandate the institution to defend human rights generically (unspecified mandate).

In addition, I recorded whether the statute also explicitly authorises the NHRI to promote international law, usually by identifying treaties for ratification or making recommendations for legislative changes to bring municipal law into conformity with international law. Out of the total number of statutes, 45 per cent contain such a provision. In just eight per cent of statutes that include this promotional role, this accompanies a mandate restricted to rights in national law. Of the remainder, 67 per cent of ‘promotional’ remits are for institutions that have an explicit treaty mandate, while the other 25 per cent of the mandates provide the institution with a brief to protect ‘unspecified’ human rights.

In those statutes that provide an ‘unspecified’ mandate, the wording is usually a generic reference to ‘human rights’ or ‘fundamental rights’ although, as indicated, in some instances this is accompanied by a requirement to promote international law.

Those statutes with a restricted national mandate generally refer to a constitutional bill of rights, or other laws, as for example: ‘individual and collective rights, safeguarded by the Political Constitution of the State and the Laws.’

Where there is a treaty mandate, the reference is generally to those conventions that the state has ratified, although the formulation in the Indian statute suggests, given the dualist nature of the system, that these should already have been incorporated: ‘the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.’ The Northern Ireland and United Kingdom institutions both have mandates derived from ‘Convention rights’—that is, those parts of the European Convention on Human Rights incorporated into UK law by the 1998 Human Rights Act.33 Australia, with a doctrinally similar approach to the domestication of international law, has given its Human Rights and Equal Opportunity Commission a more expansive mandate, defining human rights as ‘the rights and freedoms recognised in the Covenant [on Civil and Political Rights], declared by the Declarations or recognised or declared by any relevant international instrument.’

A number of statutes make an explicit reference to the Universal Declaration of Human Rights 1948.35 Others, especially more recent statutes, go a step

31 Article 1, “[D]erechos individuales y colectivos, tutelados por la Constitución Política del Estado y las Leyes”, Ley del Defensor del Pueblo No 1818 de 22 de Diciembre de 1997 (Bolivia).
32 Article 2 The Protection of Human Rights Act 1993 (emphasis added).
33 Human Rights Act 1998 (c 42).
35 For example, Article 9 Ley Orgánica del Comisionado Nacional de los Derechos Humanos 1995 (Honduras).
further. Korea refers to rights ‘protected under international customary law’, Montenegro to ‘generally recognised rules of international law’ and Kosovo to ‘international human rights standards’.

The Moldovan statute also provides interpretative guidance:

In the event of any inconsistencies between international treaties and agreements on basic human rights to which the Republic of Moldova is a party and its domestic laws, the international laws shall prevail.

I grouped the statutes into three time categories: pre-1992, 1992–99, and 2000–07. The significance of 1992 lies in the adoption of the Paris Principles the previous year. I divided the post-1992 period at the halfway point to test the hypothesis that more recent laws would be more likely to contain an explicit international law mandate. Ten per cent of the total number of statutes dated from before 1992, 59 per cent from 1992–1999, and 31 per cent from 2000–07.

Fifty-seven per cent of pre-1992 statutes contain an explicit reference to human rights treaties in the mandate of the NHRI. In the 1992–1999 period, 31 per cent of statutes give a treaty mandate, 13 per cent refer only to national law, and 56 per cent do not specify. By 2000–2007, however, 70 per cent have a treaty mandate, only five per cent confine the NHRI to enforcing national laws, while the remaining 25 per cent do not specify. This supports the hypothesis that there is an increasing tendency to assign powers to NHRIs to enforce international law at the municipal level.

Analysing the statutes by geopolitical region reveals distinct variations. Asia displays the highest proportion with a treaty mandate: 73 per cent. This may reflect the strong role of a regional coordinating mechanism, the Asia-Pacific Forum of National Human Rights Institutions, in promoting NHRIs and imposing strict standards of compliance with international law.

Eastern Europe also shows a substantial proportion of treaty mandates (53 per cent), but the striking point is that none of the East European institutions has a mandate that is confined to national law. The Americas exhibit the highest proportion of mandates confined to national law, 20 per cent, which is identical to the proportion with treaty mandates. African NHRIs are probably the most organisationally diverse, which is reflected in the breakdown of mandates: 13 per cent national, 26 per cent treaty, and 71 per cent unspecified. The Western Europe and other regions have 14 per cent national, 43 per cent treaty and 43 per cent unspecified.

40 Carver, supra n. 9 at 101.
In summary, there is a trend, especially marked since the turn of the century, to give NHRIs an explicit mandate to protect and promote internationally guaranteed human rights, both conventional and sometimes customary. The tendency is a global one, but is most marked in Asia and Eastern Europe. Equally, however, it is apparent that even where the legal mandate of NHRIs is unspecified or confined to nationally guaranteed rights, institutions may have an additional remit to promote the ratification of treaties or the incorporation of treaty rights in national law. In addition, NHRIs may refer to interpretative principles that privilege international law.

A. Monism, Dualism and the Mandates of NHRIs

One possible explanation for the distribution of these mandates might be the different doctrines on incorporation of international law into the domestic legal order. How far does the occurrence of such international law mandates correlate with the traditional distinction between monist and dualist approaches to domestication? It might perhaps have been expected that countries with a monist approach to domesticating international law would be more likely to assign NHRIs a mandate that specifically refers to human rights deriving from treaties rather than constitutions or other municipal sources. Or it could be argued, on the contrary, that NHRIs in states with monist systems do not need to have an explicit treaty mandate since treaties are already automatically incorporated into municipal law. Hence, there may be no significance in the fact that Bolivia, say, confines the mandate of its Defensor del pueblo to municipal law, given that treaties to which Bolivia is party are already part of that law.41 Conversely, it might be that states with dualist systems would need such an explicit provision precisely because a legislative act is required to give effect to ratified treaties. Such is indeed the case with Australia, where there has been a disjuncture between the relationship of the HREOC and the judiciary to treaties that have not been incorporated by legislative act.

However, neither explanation appears to work consistently. On the one hand, strongly monist Eastern Europe shows a substantial proportion of treaty mandates and none that are confined to national law.42 But the strongly monist Americas have the highest proportion of national mandates. The reality is that monist doctrine often fails to find a reflection in the practical approach to incorporation of international law. A recent example is the decision of the

41 Ley del Defensor del Pueblo No 1818 de 22 de Diciembre de 1997.
42 Soviet legal doctrine was strictly dualist and only two states within the Soviet sphere, Poland and Hungary, took a monist position. Poland’s monism was, in any case, the interpretation offered by legal scholars rather than that of the Polish courts, which espoused a socialist dualism in practice. Schweisfurth and Alleweldt, ‘The Position of International Law in the Domestic Legal Orders of Central and Eastern European Countries’, (1997) 40 German Yearbook of International Law 164.
Senegalese Court of Cassation in the case of the former Chadian President Hissène Habré. The Court declined to exercise universal jurisdiction under the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT) on the ground that Article 4 of CAT requires prior legislative measures that had not been taken.

Hence, in the impeccably monist Netherlands, where international law is regarded as a superior part of national law, the mandate of the Dutch Equal Treatment Commission refers only to national law. The Commission explains that it ‘cannot directly base its opinions on other relevant (international) non-discrimination provisions’. However, it also ‘has the opportunity and the duty to interpret Dutch equal treatment law in a way consistent with relevant treaties’. The latter explanation is no stronger than the doctrine of consistent interpretation of municipal and international law that is applied in many dualist common law jurisdictions.

Conversely, the Human Rights Commission in dualist South Africa, despite having no explicit statutory mandate to apply international law, has in practice played a leading role in determining how the state’s treaty obligations under the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR) should be applied at the municipal level. It is difficult to establish the point with precision, since states do not always fall easily into either monist or dualist categories, but there is no evidence of any correlation between the doctrinal approach to domesticating treaties and the mandate given to NHRIs. The 10 case studies that I investigated illustrate this. The table below shows how the different types of mandate in national statutes are spread without distinction between monist and dualist countries.

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<th>National</th>
<th>Treaty</th>
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43 1465 UNTS 85.
45 See: http://www.cgb.nl/artikel [last accessed 30 November 2009].
46 993 UNTS 3.
The significance of this point is that the use of NHRIs as a means of domestica-
ticating international human rights law is unrelated to the two traditional doc-
trines. Although the institutional form of NHRIs varies according to political
traditions, in other respects NHRIs resemble each other much more than they
differ.

B. Harmonising Domestic Practice with International Law—A Review of
   Recent NHRI Developments

The Paris Principles set out seven core ‘competences and responsibilities’ of
national human rights institutions. Four of these explicitly relate to harmoni-
sation of domestic practice with international human rights standards, or
cooperation with international mechanisms:

- Promoting and ensuring harmonisation of national law with international
  human rights instruments to which the State is party;
- Encouraging ratification of international instruments;
- Contributing to reports to treaty bodies and ‘to express an opinion on the
  subject, with due respect for their independence’;
- Cooperating with UN and regional bodies and other national human rights
  institutions.48

Beyond these, all NHRIs are to be engaged in monitoring respect for human
rights and some may receive individual complaints of rights violations. Monitoring and complaints-handling may also make reference to international
standards.

The drafters of the Paris Principles clearly saw a major role for NHRIs at the
interface between the treaty bodies and the national human rights protection
system.49 Yet this vision was not, in the initial years, widely shared beyond
the small number working within the UN system to promote NHRIs. Anne
Gallagher, an OHCHR official, wrote as recently as 2000 that ‘national human
rights institutions and the international human rights treaty system have had
very little direct contact with each other’.50 However, this picture has changed
substantially in recent years. NHRIs increasingly refer to international treaty
standards in various aspects of their work, while UN treaty bodies often pro-
mote the work of national institutions and regard them as partners in monitor-
ing and implementation. Gallagher’s observation that ‘national institutions are
not yet recognized as separate players in the international human rights

48 Article 3(b)–(e) Paris Principles.
49 Burdekin and Naum, supra n. 9 at chapter 2.
50 Gallagher, ‘Making Human Rights Treaty Obligations a Reality: Working with New Actors and
Partners’, in Alston and Crawford (eds), The Future of UN Human Rights Treaty Monitoring
arena,’ is no longer accurate. NHRIs report with increasing frequency to treaty bodies, participate in their own right at the Human Rights Council and have even been involved in drafting treaties.

(i) International standards in monitoring and complaints-handling

The Paris Principles do not require that NHRIs address individual petitions from those who allege that their rights have been violated—so-called ‘quasi-jurisdictional competence’. However, most NHRIs do have such a mandate, while all have the responsibility to report upon general or specific human rights issues.

As described above, some founding statutes of NHRIs explicitly provide that the human rights in their mandate are those derived from international sources, whether from treaties ratified by the state and incorporated into domestic law (for example, India and Northern Ireland), treaties incorporated into domestic law or otherwise (Australia), or conventional or customary international law (Moldova). In most instances, the NHRI appears to have gone to the limits of its mandate—perhaps even beyond—in order to find applicable standards to address the human rights issues that it confronts. The Indian National Human Rights Commission’s (NHRC) approach to economic, social and cultural (ESC) rights is a case in point, while the Malaysian commission, whose mandate is confined to national human rights sources, nevertheless frequently invokes international law. However, in one example studied, Mexico, the opposite process was at work, with the National Human Rights Commission (CNDH) failing to use the full extent of its international mandate.

Several of the NHRIs examined invoke international standards in their reporting of complaints. For example, the Moldovan Parliamentary Advocates have found that discrimination alleged in individual petitions breaches not only the rights guaranteed in the national constitution, but also ‘the Universal Declaration of Human Rights, the European Convention for Protection of Human Rights and Fundamental Freedoms and other international and regional instruments.’

The Georgian Public Defender’s Office (PDO) frequently invokes international standards. For example, in the case of an individual prisoner who was not released on completion of his sentence, the PDO’s report referred to ratified

51 Ibid. at 207.
53 Section D Paris Principles. The meeting that drafted the principles was hosted by the French Commission, which has no complaints handling function.
treaties (the ECHR and ICCPR) and the Universal Declaration of Human Rights. In the case of a journalist compelled to reveal a confidential source of information, the PDO referred to the jurisprudence of the European Court of Human Rights in Goodwin v United Kingdom.

Both Georgia and Moldova take a monist approach, with ratified treaties automatically incorporated into municipal law. By referring to human rights treaties and related jurisprudence, the NHRIs are enforcing treaty provisions to an extent that might not otherwise occur. In Australia, which is strongly dualist, the Human Rights and Equal Opportunity Commission (HREOC) goes a step further. Its founding statute mandates the HREOC to promote and protect human rights contained in a schedule of human rights treaties, not all of which Australia has ratified and none of which is incorporated into municipal law. In its reporting of human rights complaints handled, the HREOC makes specific reference to the treaty provision that the alleged action is said to have breached, rather than any equivalent provision of Australian municipal law.

Norway was another dualist jurisdiction where the NHRI referred to ratified treaties prior to their enactment in statute in 1999. The Ombudsman reported that, in investigating individual cases, he would verify that the public administration had taken account of international human rights obligations. The Norwegian Ombudsman invoked international law with reference to torture and ill-treatment, freedom of expression, freedom of association, the right to receive a decision within reasonable time, respect for family life, and children's rights.

When it comes to a broader monitoring function, the readiness to apply international standards becomes even more apparent. For example, many NHRIs have powers to inspect prisons and other places of detention and make frequent reference to international standards in their reports on such visits. This is true not only of Moldova and Georgia, for example—monist countries where the NHRI has an international mandate—but also Malaysia, which is dualist and confines the mandate of its national commission to enforcing rights protected in the national constitution. The Malaysian NHRI, known as SUHAKAM, reports that it monitors the treatment of prisoners in order to ensure compliance with the UN Standard Minimum Rules on the Treatment of Prisoners.

57 Ibid. at 76–7.
58 1996-II; 22 EHRR 90.
62 Reif, supra n. 9 at 109.
Malaysia is a particularly interesting example. There was controversy when SUHAKAM was established over the limitation of its mandate to national law.\(^{64}\) However, SUHAKAM appears to make considerable use of the one international reference that was inserted into the Human Rights Commission of Malaysia Act: ‘For the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution.’\(^{65}\) Hence, for example, when reporting on the fulfilment of ‘basic needs’, SUHAKAM uses Article 25 of the UDHR as the relevant standard.\(^{66}\)

Monitoring treatment of refugees, SUHAKAM has noted that Malaysia has not ratified the 1951 UN Convention, but states that it nevertheless has relevant obligations under the two human rights treaties that it has ratified, as well as the non-discrimination provisions of the UDHR and customary international law (such as the principle of non-refoulement).\(^{67}\) The Commission clearly regards this as a sufficient mandate for its own action on refugee issues, which has included securing access to places of detention for the United Nations High Commission for Refugees.\(^{68}\)

In India, the NHRC has a mandate related to those rights ‘enforceable by courts in India’.\(^{69}\) This would appear to be particularly damaging to the possibility of the NHRC protecting ESC rights, which are not protected in the constitutional Bill of Rights, but have a secondary status as non-enforceable ‘directive principles of state policy’. However, the NHRC has followed the Supreme Court in taking an expansive approach to both the use of treaties as sources of law at the municipal level and in developing the application of ESC rights.\(^{70}\) The Commission reports that it is ‘daily relying on treaties and other international instruments’.\(^{71}\)

The South African Human Right Commission (SAHRC) works under a founding mandate that is not specific as to the source of the ‘fundamental rights’ that it exists to promote and protect. South Africa takes a dualist approach to the incorporation of treaties into municipal law, while regarding international customary law as part of the common law. The SAHRC has made particular reference to international law in promoting ESC rights, as it has been required to elaborate the content of the extensive constitutional protection now accorded to these rights. Hence, for example, in its public inquiry on the right to basic education, the SAHRC defined the content of the right in

\(^{64}\) See: http://www.asiapacificforum.net/about/annual-meetings/7th-india-2002 [last accessed 18 October 2008].
\(^{67}\) Human Rights Commission of Malaysia, Annual Report 2007, at 76.
\(^{68}\) Ibid. at 104–5.
\(^{70}\) Kumar, supra n. 47 at 765.
terms articulated by the UN Special Rapporteur on the Right to Education, requiring education to be available, accessible, affordable and adaptable. It also cited General Comment 13 of the Committee on Economic, Social and Cultural Rights. However, the SAHRC also indicated that the South African Constitution, unlike the ICESCR and General Comment 13, does not subject the right to education to progressive realisation. Hence, while it takes international standards as guidance on the content of the right, the SAHRC promotes the stronger domestic standard.

As might be expected, the attempt to expand the scope of applicable international law is most marked in those countries in the dualist tradition such as Australia (where the founding statute gives it an explicit mandate to do so) and Malaysia or South Africa (where the NHRI s themselves use international instruments to give interpretative guidance in their monitoring work). Yet the application of international law by NHRI s in monist systems is still important—a point perhaps underlined by what happens when an NHRI fails to apply the full extent of human rights in their mandate. The Mexican CNDH does not apply the full extent of human rights protected in international law, arguing that it is only mandated to protect those rights ‘protected by the Mexican legal system’. For instance, when defining torture, the CNDH has held that: ‘Given the public nature of the National Human Rights Commission and that it can only do what the laws of our country allow, we [define torture using] the elements of the crime, as established in the Federal Law to Prevent and Sanction Torture.’ Yet, according to monist doctrine, municipal law is not confined to statutes and the constitution but includes treaties ratified by Mexico. The Mexican Supreme Court has ruled that the provisions of ratified treaties take precedence over statute law—a doctrine that the CNDH seems to ignore.

It might be objected that the practical significance of NHRI s referring to international law rather than domestic standards in their monitoring is minimal—that it is a distinction without a difference. In most instances, international and constitutional rights will be indistinguishable. Yet the preceding brief review of their practice shows that there are two important ways in which using international standards does enhance the impact of NHRI s.

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73 Ibid. at 8–9.
76 Mexican Supreme Court, Pleno, Tesis LXXVII/99, Novena Época, Semanario Judicial de la Federación y su Gaceta, tomo X, November 1999 at 46; and Mexican Supreme Court, Pleno, Tesis P. IX/2007, Novena Época, Semanario Judicial de la Federación y su Gaceta XXV, April 2007, at 6.
First, referring to international standards elucidates the *content* of applicable rights. This may vary from the apparently banal—humane treatment of prisoners requires that they have a blanket in their cell—to the relatively complex, as in the question of whether Mexico should apply municipal definitions of torture or those contained in international instruments. In South Africa, where there is a strong constitutional commitment to the realisation of ESC rights, reference to international standards invests these rights with specific content that may then provide a direction for future government policy.

Second, NHRIs use international standards as a means of extending the *scope* of rights that are applicable at the municipal level. This is the approach used by SUHAKAM in Malaysia, for example, on refugee rights, as well as by many institutions that do not have ESC rights in their mandate but nevertheless use international obligations as a basis for monitoring and promoting respect for these rights.

In general, it appears that NHRIs in states with monist systems are likely to use international standards primarily to elucidate content, whereas those in dualist systems are more likely to refer to internationally guaranteed rights as a way of extending this mandate.

(ii) Reviewing legislation for compliance with international law

A large proportion of NHRIs have in their mandate a dual requirement: to make recommendations to the executive or legislature on treaties that should be ratified and to monitor legislation for compliance with international human rights law. As indicated above, both these functions are an explicit requirement of the Paris Principles.

The first function is the more straightforward since it is almost invariably carried out in the same manner, with the NHRI making recommendations on treaties to be ratified. Inevitably, NHRIs in countries with a low ratification record—Malaysia being a clear example—have this as a more central aspect of their work.

Even where states have a stronger ratification record, however, there may still be a role for NHRIs. The Northern Ireland Human Rights Commission (NIHRC), for example, has urged the UK government to ratify Protocols 4, 7 and 12 to the European Convention on Human Rights, the Revised European Social Charter and the UN Convention on Migrant Workers and their Families. It also campaigned for the government to make declarations accepting the right of individual petition under the Conventions against Torture and Racial Discrimination. The NIHRC, in the anomalous position of being the only accredited NHRI in the UK, despite its limited geographical scope, has

78 Dickson, supra n. 52 at 276.
also commented on the government’s derogations from various treaty obligations.79

The second function, monitoring legislation to ensure consistency with international obligations, has both a positive and a negative aspect: to propose laws that will give substance to the state’s human rights treaty obligations, and to identify existing provisions that are inconsistent with those obligations. The former is generally easier to effect than the latter, which would require a thorough audit of existing legislation that may stretch the capacity of NHRIs. (Sri Lanka, however, provides a recent example of an NHRI undertaking a full legislative review for conformity with international obligations.80)

In proposing legislation, occasionally NHRIs are assigned a specific brief. The NIHRC, for example, has as part of its mandate the drafting of a Bill of Rights in consultation with civil society. In doing so, the Commission has underlined the importance of international law as a source of the rights to be contained in the new document, which is to ‘reflect the particular circumstances of Northern Ireland drawing as appropriate on international instruments and experience’.81

More than one NHRI has been in the position of the Northern Ireland Commission, which tried for a long time to persuade the government to expand its own powers—in that case a struggle that was finally successful.82 The Indian NHRC, for instance, is attempting to expand its mandate in international law. In Vishaka, the Indian Supreme Court stated that all international conventions should be read into municipal law where they are not inconsistent with it.83 By the same reasoning, the NHRC argues that the definition of ‘International Covenants’ in the Act should be expanded to include ‘any other Covenant or Convention which has been, or may hereafter be, adopted by the General Assembly of the United Nations’.84

A minority of NHRIs have powers to propose and amend legislation that go beyond recommendations and may be highly effective. Several institutions in Latin America, for example, have the power of legislative initiative, including Colombia and Peru.85 That is, they are able to submit draft statutes directly to the legislature, which is obliged to consider it according to its normal procedures. Examples of the use of legislative initiative vary from the amendment of Article 93 of Colombia’s Constitution to recognise the jurisdiction of the

79 Ibid. at 3.
80 Concluding Observations of the Human Rights Committee regarding Sri Lanka, 1 December 2003, CCPR/CO/79/LKA.
81 Northern Ireland Human Rights Commission, Submission to the Round Table on a Bill of Rights for Northern Ireland, May 2006.
85 Article 282 Constitución de Colombia 1991; and Article 9.4 Ley Orgánica de la Defensoría del Pueblo No 26520 de 1995.
International Criminal Court\(^86\) to the Peruvian Defensor del Pueblo’s amendment of a law extending pension rights.\(^87\) Several Ombudsman institutions in Central and Eastern Europe enjoy what may be described as a power of ‘soft’ legislative initiative. That is to say, they may draft proposals for laws or amendments to existing legislation and present them to sympathetic parliamentarians—such as members of the committee responsible for human rights—who will then formally present them. Although these options lack the formality and certainty of the power of legislative initiative proper, they generally appear to have been used effectively and with discretion.\(^88\)

The other aspect of this legislative work is to identify elements of existing law that are deemed incompatible with international obligations. Again India provides some clear examples. In 2000, the NHRC opposed the Prevention of Terrorism Bill on the grounds that it ‘did not conform with international human rights standards’.\(^89\) Subsequently, it reacted to the 2001 Prevention of Terrorism Ordinance by invoking the words of General Assembly Resolution 56/160, which specified that counter-terrorism measures adopted by Member States should be ‘in accordance with relevant provisions of international law, including international human rights standards’.\(^90\)

In responding to existing and draft legislation, as with proposing new statutes, some NHRI s have more than recommendatory powers. The first such institution to be established in Central and Eastern Europe was the Polish Commissioner for Citizens’ Rights Protection, established in 1987 (before the fall of Communism) as part of a package of reform that included a Constitutional Court, empowered to conduct abstract and centralised review of the constitutionality of legislation.\(^91\) The two institutions—the Ombudsman and the Court—were largely seen as symbiotic and have been emulated throughout the region. The Moldovan Parliamentary Advocates, for example, may apply to the Constitutional Court seeking a ruling on the constitutionality of any laws, decisions of Parliament, Decrees of the President of the Republic of Moldova, decisions and orders of the Government, and their consistency with generally accepted human rights principles and international law.\(^92\)

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\(^86\) Volio, supra n. 9 at 243.
\(^87\) Available at: http://www.portalfio.org [last accessed 13 September 2008].
\(^88\) Carver, ‘Central and Eastern Europe: The Ombudsman as Agent of International Law’, in Goodman and Pegram (eds), Multi-disciplinary Perspectives in National Human Rights Institutions, State Compliance and Social Change (Cambridge University Press, forthcoming 2010). The NHRI of Uzbekistan—the Authorised Person of the Oliy Majlis on Human Rights—has the formal power of legislative initiative by virtue of being a deputy in the legislature.
\(^90\) Ibid. at 25.
A decision of the Constitutional Court on such an application would have a binding effect.93 Between 1999 and 2006, the Parliamentary Advocates made 51 such applications. As of 2007, the Court had ruled on 20 of these, finding wholly or partially in favour of the applicants on 12 occasions.94 The Costa Rican Defensoría de los Habitantes has an additional power: it can intervene in the legislative process to suspend consideration of a proposed law and refer it to the Constitutional Court.95

The power that NHRIs have to propose legislation, whether or not they enjoy legislative initiative, is in practice a way of involving other actors. National institutions regularly consult not only with civil society, but also with international organisations. Hence, the Costa Rican Defensoría, in consultation with UNICEF, promoted legislation that gave further substance to the state’s obligations under the Convention on the Rights of the Child. It also worked with UNHCR and IOM on migrants’ rights and with the ILO on child labour, in both instances proposing legislation to enshrine Costa Rica’s international obligations.96

Recommending ratification of international instruments and legal reform to ensure compliance is one of the most widely practised functions of NHRIs, as well as one of the most valuable. The reality is that, in both dualist and nominally monist systems, legislative action is often required to give effect to treaty obligations. When the executive or legislature fails to take the necessary initiative, the usual safety net is litigation, resulting in a judicial ruling that recommends or requires government action. This is a ponderous process that delays implementation of human rights obligations for a long period. Yet, few states carry out a systematic audit of existing legislation to ensure human rights compliance or identify gaps in protection. NHRIs are ideally suited to perform this function. Their regular monitoring and contact with a public clientele equip them to identify the shortcomings in municipal law, while their relationship with the UN and the treaty bodies informs them about the requirements of international law.

(iii) NHRIs and UN treaty reporting obligations

The relationship between NHRIs and treaty monitoring bodies is clearly crucial if the former are to play an effective role in implementing and monitoring

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93 Article 140 Constitution of the Republic of Moldova.
94 Author’s interviews, Chisinau, April 2007.
96 Ibid. at 305.
treaty obligations. Yet the relationship is, in reality, a triangular one—treaty body-state-NHRI—the exact nature of which has never been very precisely articulated. The Paris Principles stated the role of the NHRI thus:

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.97

This is poorly drafted. Since the process of contributing to States’ reports would, of necessity, involve some expression of opinion, this principle is presumably intended to refer to two separate roles that NHRIs might play: first, contributing to States’ reports and, second, expressing an opinion directly to the treaty body separate from that contribution. It is also unclear whether the final qualifier, ‘with due respect for their independence’ is intended to refer to the expression of opinion or to the totality of the NHRI’s role in the reporting process. Although syntactically the former appears more likely, this is tautological, since the only purpose of expressing a separate opinion would be when this differed from the position of the state. So, the intention was presumably that the overall role of NHRIs in treaty reporting was to be conducted in a manner that does not compromise their independence.

Given both the lack of clarity in the Paris Principles and the inherent complexity of the issue, it is not surprising that both NHRIs and treaty bodies have taken varying approaches. Three UN treaty bodies—the CESC, CERD and the CRC—have adopted general comments on the role of NHRIs in implementing their respective treaties. A fourth treaty body, CEDAW, has issued a statement on its relationship with NHRIs. While there is consensus on the importance of NHRIs’ role, the specific issue of reporting on the treaty bodies have been widely at variance. The CESC surprisingly makes no mention of the role of NHRIs in reporting, although it details several other functions in monitoring and implementing ESC rights.98 The CERD recommends that NHRIs 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.99 The CRC takes a diametrically opposite position: ‘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’.100 The positive guidance offered by the CRC

97 Article 3(d) Paris Principles.
provides a clearer indication than do the Paris Principles about the meaning of the phrase ‘with due respect for their independence’. The CRC’s General Comment 2 states that NHRIs ‘should contribute independently’ to the reporting process and ‘monitor the integrity of government reports to international treaty bodies’ including ‘through dialogue with the Committee on the Rights of the Child’ and ‘other relevant treaty bodies’. The Committee says that ‘it is appropriate’ for States to consult with NHRIs in preparing reports, but that they must respect the role of national institutions in providing information independently. The most recent statement, by CEDAW at its 2008 session, is less specific than the CRC’s General Comment but appears to follow similar lines. NHRIs may ‘provide comments and suggestions on a State party’s report in any way they see fit’. CEDAW suggests that NHRIs provide information to the Committee in pre-session working group meetings, or by attending sessions of its meetings.

The practice of the NHRIs studied suggests that the approach in the more recent comments of CRC and CEDAW is becoming the prevalent model. The former chief commissioner of the NIHRC has suggested that NHRIs can contribute to the reporting process by submitting reports which critique the state periodic reports examined by those bodies. The commissions can also, depending on the rules of procedure of the body in question, attend the hearings of the body and provide additional information to supplement what the state officials are saying. Not all of the committees are yet comfortable with official state commissions contributing in this way, but gradually they are realising how invaluable such an input can be in the objective assessment of the state report.

The NIHRC has submitted its own independent reports or comments to a variety of treaty bodies, including the Human Rights Committee (HRC), the CESC and the CRC. Brice Dickson comments: ‘In each case we feel that the Concluding Observations of the committee were influenced by the points we made.’

Other NHRIs have shown varying degrees of engagement with the reporting process. The PDO in Georgia has had little involvement beyond responding to requests for information from the Ministry of Foreign Affairs. The Indian NHRC has chosen to opt for neither participation in drafting the state report, nor preparing NGO-style shadow reports because the first course would tie us

101 Ibid. at para. 21.
103 Dickson, supra n. 52 at 276–7.
104 Ibid.
105 Author’s interviews, Tbilisi, June 2007.
too closely to the official report and, frankly, the second course would be too time-consuming.\footnote{Reif, supra n. 9 at 123.}

Australia’s HREOC has participated in drafting reports with varying degrees of engagement. The Aboriginal Social Justice Commissioner, who is a member of the HREOC, provided comments on a draft of Australia’s third report to the HRC.\footnote{Heyns and Viljoen, The Impact of the United Nations Human Rights Treaties on the Domestic Level (The Hague/London: Kluwer Law International, 2002) at 73.} These comments were said to have been taken into account in the preparation of the final report, a practice that seems not to be at variance with the approach outlined in the CRC and CEDAW statements cited above. When it came to the ninth report to CERD, however, the Aboriginal Social Justice Commissioner was a member of the government delegation that attended the Committee\footnote{Ibid. at 76.}—consistent with CERD’s own guidelines in its General Recommendation, but arguably not offering ‘due respect’ to HREOC’s independence.

In Senegal, the role of the \textit{Comité Sénégalaiss des Droits de l’Homme} (CSDH) is to review periodic reports to treaty bodies after they have been drafted by an inter-ministerial committee. This suggests that the CSDH does not take a position that is independent of the government, an impression reinforced by the suggestion in one annual report that the nation needs to speak ‘with one voice’ in its relations with treaty bodies.\footnote{Rapport Annuel du Comité Sénégalaiss des Droits de l’Homme 2001, at 6.}

The experience of the Mexican CNDH with the issue of ‘disappearances’ indicates the dangers of blurring the difference between the functions of government and NHRI. In this instance, the UN body was the Working Group on Enforced and Involuntary Disappearances, a Charter rather than treaty body, but the principles involved are identical. The CNDH became the main Mexican state interlocutor with the Working Group, responding to its inquiries and conducting investigations into alleged disappearances. The Working Group reportedly welcomed the CNDH role, presumably because the quality of its reports was superior to those from other government departments.\footnote{Carver, supra n. 9 at 48–9.} The problem, however, was twofold. First, the obligation to investigate allegations of serious human rights violations rests with the executive, not with a quasi-autonomous institution. Second, the independence of the CNDH was compromised. The public could have no confidence that a complaint of disappearance would be dealt with impartially when the CNDH was responsible for presenting the government’s position on disappearances to an intergovernmental body.

The lack of clarity in the Paris Principles led to initial uncertainty for both treaty bodies and NHRI on the role of national institutions in the reporting
process. There is still a diversity of practice among national institutions, although a common approach seems to be emerging among the treaty bodies. CERD’s recommendation that NHRIs participate in government delegations to treaty bodies now appears to be an isolated view.111 The unresolved question, however, is whether reform of the treaty body system—with the proposed creation of a Unified Standing Treaty Body—will lead along the same trajectory of increased involvement of NHRIs as independent players in the reporting process.112 It seems unlikely that the process of involving NHRIs in treaty monitoring will be reversed. However, it is now very unlikely that a unified body will be established.

General Comment 10 of the CESCR identifies the particular importance of NHRIs as institutions that have been established ‘in States with widely differing legal cultures and regardless of their economic situation’. One of the useful functions that they can fulfil, beyond promoting ESC rights, scrutinising laws and monitoring specific rights, is to identify ‘national-level obligations against which the realization of Covenant obligations can be measured’.113 Given the difficulty of generalising on the exact steps required of States within the framework of progressive realisation of ESC rights, NHRIs have a particularly important role to play in establishing concrete targets for national implementation.114 The main obstacle lies in the fact that some NHRIs, particularly some of the longer standing ones, do not have a specific mandate for the implementation of ESC rights, or only insofar as this is an application of the principle of non-discrimination. The General Comment calls upon States parties to include ESC rights in the mandates of national institutions.115

General Comment 2 of the CRC goes into far greater detail and represents the fullest expression by any international body of the role of NHRIs as a mechanism for domesticking international human rights law. The CRC considers NHRIs to be more than one means among many whereby States implement their treaty obligations. Rather, ‘the establishment of such bodies...falls within the commitment made by States parties upon ratification to ensure the implementation of the Convention...’116

The CRC’s remarks are, of course, aimed at the protection and promotion of children’s rights. The General Comment notes that ‘children’s developmental state makes them particularly vulnerable to human rights violations’ and

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112 Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body—Report by the Secretariat, 14 March 2006, HRI/MC/2006/CRP.1; and Murray, supra n. 9 at 42. However, it is now very unlikely that a unified body will be established.
113 CESCR, supra n. 98.
114 The South African Human Rights Commission provides a very clear example of this process of establishing national-level benchmarks: see Kumar, supra n. 47.
115 CESCR, supra n. 98.
116 CRC, supra n. 100 at 1.
appears to assume that a specialist institution is required for protecting children's rights or, failing that, an identifiable commissioner or department responsible for children within a broader NHRI.\textsuperscript{117} However, the CRC's observations on the mandate and functioning of NHRIs, taking the Paris Principles as a starting point, can be read as having a more general application. The Comment addresses the mandate and powers of NHRIs, the establishment process, the allocation of adequate resources to the institution, the pluralistic representation of society, accessibility, and a long list of recommended activities.\textsuperscript{118} Where the Paris Principles leave 'quasi-jurisdictional' powers as an optional extra for NHRIs, the CRC states unequivocally that 'NHRIs must have the power to consider individual complaints and petitions and carry out investigations.' This is seen as part of the provision of adequate remedies for breaches of children's rights.\textsuperscript{119}

More striking than these general statements, however, has been the increasingly frequent references to the role of NHRIs in the concluding observations of each treaty body on consideration of country reports. This has been equally reflected in the practice of those treaty bodies—the HRC and the Committee Against Torture—that have not issued general comments on NHRIs. The HRC was slower in acknowledging the potential of NHRIs than the CESCR, for example, yet in concluding observations between January 2000 and November 2007 it made comments or recommendations on the functioning of NHRIs in relation to 30 different country reports.

It might be objected that NHRIs do no more than monitor state adherence to treaty obligations and that, in this respect, their function differs little from that of non-governmental organisations.\textsuperscript{120} However, treaty reporting obligations are not merely monitoring—they represent an integral part of the implementation of human rights treaties.\textsuperscript{121} They are a new system that was developed with the human rights instruments and reflect the \textit{erga omnes} character of the obligations that states undertake when they become party to these treaties.

Beyond this, other functions such as review of legislation for conformity with treaties, partially discharges states' obligations. Here the objection might be that most NHRIs lack binding powers. In some jurisdictions, as discussed, NHRIs do have the power to refer existing laws to a court for constitutional review or to introduce proposals directly to the legislature. Elsewhere their powers to refer to the legislature are purely recommendatory—but so too are the powers of judges in many jurisdictions, where the judiciary may find

\textsuperscript{117} Ibid. at 5.
\textsuperscript{118} Ibid. at 8–24.
\textsuperscript{119} Ibid. at 13.
\textsuperscript{120} Murray, supra n. 9 at 59.
\textsuperscript{121} Nowak, \textit{Introduction to the International Human Rights Regime} (Leiden/Boston: Martinus Nijhoff Publishers, 2003) at 28.
statutes to be in contradiction with a treaty obligation but may not itself strike down legislation.

In relation to alleged human rights violations, the frequent lack of binding powers is similarly seen as falling short of fully implementing treaty standards. (For example, in the jurisprudence of both the European and Inter-American regional human rights courts NHRI s are not regarded as necessary remedies to have been exhausted before recourse to the regional mechanism.\(^{122}\)) A small minority of NHRI s have direct powers to enforce a judgment against the state,\(^ {123}\) but few are able to enforce their recommendations directly, primarily because in most systems this would be regarded as a breach of the principle of \textit{nemo iudex in sua causa}. Many others, however, have a quasi-prosecutorial power that allows them to refer cases either directly to the courts or procuracy.\(^ {124}\) In most instances the authority alleged to have committed a breach of human rights is required, at a minimum, to respond to the recommendation of the NHRI. These various powers clearly constitute a direct application of treaty standards and, arguably, an implementation of the state’s obligations.

\section*{C. Formalising the Role of NHRI s: Implementation and Monitoring under \textit{OPCAT} and the \textit{CRPD}}

If the tendency since the early 1990s has been to increase the role of NHRI s in treaty monitoring and implementation, two UN human rights instruments drafted since the turn of the century take a significant step further. Both the \textit{OPCAT} and the \textit{CRPD} formally require national institutions to play a role in monitoring or implementing the State’s treaty obligations. In one sense, this represents a full circle—returning to the idea floated in the 1940s whereby national committees would monitor adherence to human rights norms. Yet it goes further, since the new role for NHRI s is in relation to treaties rather than customary obligations alone, with States Parties to these two instruments required to give the relevant national institutions the necessary powers to carry out various functions specified in the treaty itself. This is a radical new method of implementing treaties.

\textit{OPCAT}’s aim is the prevention of torture, primarily by establishing mechanisms for visiting places of detention. The Sub-committee on the Prevention of Torture (SPT) occupies a position analogous to (and modelled upon) the

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\begin{itemize}
  \item \(^{122}\) Reif, supra n. 9 at 129–33.
  \item \(^{123}\) Uganda Human Rights Commission Act 1997.
\end{itemize}
Committee for the Prevention of Torture under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT). Its principal function is to conduct visits to places of detention in States Parties.

In parallel with the SPT, OPCAT also requires States Parties to establish a national preventive mechanism (NPM) within a year of ratification. States shall guarantee the functional independence and necessary resources for the NPM to function. While there is nothing to say that an NPM is coterminous with an existing NHRI, in practice this has generally been the case (see below), a situation clearly envisaged by OPCAT, which makes reference to the Paris Principles. The powers assigned to NRMs are to include access to information about persons deprived of their liberty, access to all places of detention, the opportunity to hold private interviews with those detained, and the liberty to choose the places they want to visit and persons they want to interview.

One of the functions of the SPT is to provide support to NPMs. States are obliged to allow the NPM contact with the SPT. No one may be penalised for communicating with the NPM, whose information is privileged. The NPM will make recommendations to the relevant authorities on treatment of prisoners or existing or draft legislation, which the latter are obliged to consider. States Parties also undertake to publish and disseminate the reports of the NPMs.

The CRPD is a very different type of instrument from OPCAT. While the latter has the limited and specific aim of preventing torture, largely through visiting places of detention, the former is a treaty of very wide scope. It does not aim to create new rights, but to provide a mechanism for guaranteeing the existing range of human rights to people with disabilities. Hence, the role assigned to national institutions is broader than in OPCAT and is not prescribed in any detail. Article 33(2) simply requires States Parties to 'designate or establish' independent mechanisms to 'promote, protect and monitor

126 Article 17 OPCAT.
127 Article 18 OPCAT.
128 Article 18(4) OPCAT.
129 Article 20 OPCAT.
130 Article 11(b) OPCAT.
131 Article 20(f) OPCAT.
132 Article 21 OPCAT.
133 Article 19 OPCAT.
134 Article 22 OPCAT.
135 Article 23 OPCAT.
implementation’ of the Convention. As in OPCAT, reference is made to the Paris Principles for guidance on the status and functioning of national institutions.\footnote{Article 33(2) CPRD.}

Article 33(1) is also innovative in requiring the establishment of ‘focal points’ within government to coordinate implementation of the CRPD.\footnote{Article 33(1) CPRD.} It appears that a distinction is being made between implementation by government and monitoring, which is the function of the independent mechanism.

(i) NPMs under OPCAT

For clarification of how such mechanisms might work in practice, relevant experience is derived entirely from OPCAT, since the CRPD only entered into force in May 2008. OPCAT entered into force in June 2006 and, of the 48 States Parties, 29 had completed the process of designating NPMs by October 2009.\footnote{Association for the Prevention of Torture, National Preventive Mechanisms Country-by-Country Status, October 2009, available at: http://www/apt.ch/component/option,com_docman/task,doc_download/gid,124/Itemid,59/lang,en/ [last accessed 11 November 2009].} A number of others have made a decision about the form that the NPM will take, but have not enacted the necessary legislation.

Although OPCAT refers to the Paris Principles to provide guidance on the formation of NPMs, there is clearly no requirement that a pre-existing NHRI, whether or not accredited to the ICC, must play this role. More frequently, however, an existing NHRI will either assume the functions of the NPM or at least form its core, as has happened in 21 of the 29 instances where an NPM has been designated.\footnote{Ibid.}

In Mexico, for example, the CNDH was simply designated as the NPM, although extensive public consultation had indicated widespread support for a ‘mixed’ model that would involve civil society. The CNDH has not had much success in attracting civil society collaborators because of a lack of confidence in its independence.\footnote{CNDH, Mecanismo Nacional de Prevención de la Tortura y Otros Tratos o Penas Crueles, Inhumanos o Degradantes: Informe de Actividades 2007.}

In Costa Rica, where the existing NHRI has also been designated, the reservation has not been about the independence of the Defensoría de los Habitantes, but about the lack of additional resources and powers that it would need to fulfil the NPM mandate. The Defensoría does not have the legal powers to visit all the types of detention sites envisaged in OPCAT and will be hard pressed to carry out these additional functions without an increase in budget or staff.\footnote{Defensoría de los Habitantes, La Defensoría de los Habitantes como Mecanismo Nacional de Prevención de la Tortura 2008.}
The Costa Rican experience highlights a potential problem with the NPM process: a risk that NHRIs may actually be weakened because of the additional burden placed upon them. Elsewhere, as in Moldova, it seems likely that designating the existing NHRI as NPM may have a beneficial extent on that institution. Moldova adopted a mixed model, with the Parliamentary Advocates at the core of an NPM that also comprises a new Consultative Council. This has provided a framework for cooperation with civil society that was previously lacking, while the profile and prestige of the Parliamentary Advocates have been heightened and the institution has acquired new detention monitoring skills. Most importantly, perhaps, amendments to the founding statute of the Parliamentary Advocates expanded the institution’s legal powers to carry out visits to places of detention.

The relationship between pre-existing NHRIs and the NPM varies, even among the small number that have so far been designated. This is unsurprising, given that part of the purpose of national preventive mechanisms is that they should be fashioned in a manner that suits local circumstances and traditions. Two points are important to underline.

First, the fact that these are national mechanisms means that there is no requirement that they keep their findings confidential, as the SPT must. Indeed, the State is obliged to disseminate the NPM’s findings. This is one of the respects in which the operations of NPM and SPT are complementary. The SPT has technical expertise and international leverage, but little knowledge of local conditions and limited time or opportunity to visit places of detention. The NPMs are permanently present with local knowledge and powers conferred by national law.

Second, designating an NHRI as NPM usually entails an expansion of powers, albeit mainly in the narrow area of visiting closed institutions. While many NHRIs have such a visiting role as part of their normal functions, they seldom have such well-defined powers, such as the ability to hold confidential interviews with inmates.

Many practical issues remain unresolved in the creation of NPMs, especially when these are pre-existing NHRIs. For example, do OPCAT powers attach to NHRIs only when they are carrying out visits for the purposes of prevention, or at all times, for example during investigative visits that discharge another part of the institution’s mandate? Conversely, is every visit to a closed institution an OPCAT visit, whatever its purpose?

These are details, however, and do not affect the underlying significance of the approach adopted in OPCAT and the CRPD. Although the exact form of

144 Ibid.
145 Article 23 OPCAT.
the institution is a matter of national preference, its functions and powers are clearly delineated in the treaty, regardless of national specificities (such as the approach taken to domestication of international law). Ratification obliges states to take the necessary steps to create these institutions that will in turn enforce the state’s further obligations.

4. CONCLUSION

The emergence of NHRIs does not supersede the requirement to apply ‘legislative or other measures’ to implement human rights obligations. Rather NHRIs cut across existing doctrines about the domestic implementation of human rights by applying those treaty obligations in a direct fashion: proposing new statutes and amendments to existing law to give effect to treaty obligations; using treaty standards rather than domestic ones as a basis for monitoring and complaints handling; and participating in the treaty reporting process. Although this has occurred across the board, and NHRIs in monist and dualist countries do not necessarily differ in their mandates and modes of operation, this is of greater significance in dualist states, where treaty obligations could not otherwise be applied directly. Of course this has taken place unevenly, as the wide variety of founding statutes of NHRIs suggests. Yet practice often moves in advance of hard law. Where the founding statute restricts an NHRI to a mandate grounded solely in domestic law, the institution may take it upon itself to apply international standards. This has been the case in one of the dualist states studied, Malaysia, where the NHRI has no international law mandate but nevertheless refers to customary international law and makes creative use of the obligations to be found in the only two human rights treaties that have been ratified. The NHRI also makes recommendations on legislative incorporation of those treaty obligations.

Similarly in dualist India, where the international law mandate of the NHRI is confined to those treaties that are enforceable in national courts, the institution has taken advantage of progressive jurisprudence and worked in practice to a far broader mandate. It also makes recommendations on existing laws that are inconsistent with treaty obligations.

Perhaps the most striking example comes from Australia, where the NHRI is empowered to apply certain treaty rights directly, whether or not these are incorporated into municipal law. In South Africa, although the NHRI’s mandate derives from the Constitution, it has authority to use international law to determine the precise content of these constitutional rights, particularly in relation to ESC rights. In Northern Ireland, the NHRI is using international law in developing the content of a Bill of Rights.

In monist states the NHRI, as might be expected, can use international law as the basis for its complaints and monitoring activities (as in Georgia). Also,
the fact that international law is automatically incorporated does not avoid the problem of inconsistency between treaty obligations and pre-existing statutes. In these states, NHRIs typically perform an auditing function, identifying existing law for repeal or amendment (for example, Moldova and Costa Rica), as well as proposing new legislation to lend detail and give greater force to treaty obligations.

It would be impossible to determine whether NHRIs were more effective in monist or dualist states, but their impact is more radical in states (predominantly dualist) where they are applying international law that has not been incorporated by other means. The significance of this approach can perhaps also be understood by referring to those states that either do not have NHRIs or do not give them appropriate powers to apply international law. The United States and China, both dualist in their approach to incorporating treaties, are strict in their insistence that human rights obligations will be determined domestically. Mexico provides an interesting example where an NHRI (in a monist state) actually lags behind the judiciary in its readiness to apply international treaty law directly.

Two of the most recent UN human rights treaties—CRPD and OPCAT—formalise the role of NHRIs by requiring States Parties to designate national institutions to perform certain specified functions and to afford them powers to do so. NHRIs’ role has expanded in other respects too. They are expected to participate formally in Universal Periodic Review by the Human Rights Council, for example, and are seated separately in the Council with a right to speak on all agenda items. NHRIs have, to some extent, assumed a separate identity in international law.

The view of the Office of the High Commissioner for Human Rights is that NHRIs are an answer to the old question of the implementation gap—the inconsistency between formal treaty obligations and actual respect for human rights on the ground. However, this development is not without its problems.

One set of problems is of a doctrinal nature, deriving from the innovative and hybrid character of NHRIs. First, the requirement that States establish these mechanisms as part of their obligations under a treaty creates a certain circularity, given that one of the functions of such mechanisms is to monitor compliance with the treaty. In principle, this is perhaps no different from the presumed role of an independent judiciary or the requirement that States offer an effective remedy for violations of rights, but the role of NHRIs under OPCAT and the CRPD is more explicitly defined in relation to the treaty itself than, for example, the role of the judiciary under the ICCPR.

146 See: http://www2.ohchr.org/english/bodies/hrcouncil/nhri.htm [last accessed 19 October 2008].
A second and related issue concerns the character of NHRIs at the international level. It is generally assumed that the expansion of the international role of NHRIs is a positive development—foreshadowed in the Paris Principles—and that it should occur with due regard for their independence. Yet it raises certain unforeseen issues. For example, is it possible for NHRIs to use international mechanisms against their own state? The Inter-American Commission of Human Rights decided in the case of Espinoza Feria that a complaint lodged by the Peruvian Defensor del Pueblo was admissible.\textsuperscript{148} The Defensor had exhausted domestic remedies on behalf of an individual claimant before bringing the case to the regional mechanism. There are drawbacks to this approach, however. One is the danger that essentially internal disputes between state organs will be aired in an international forum. Another is that the individual petition mechanisms will be monopolised by NHRIs. The consequence of this may be that when NHRIs are insufficiently independent, complaints that should be lodged with international mechanisms will not be.\textsuperscript{149}

Another set of problems relates more to the practical deficiencies of NHRIs. It is argued that too much emphasis is placed on these often highly imperfect institutions, perhaps to the detriment of non-governmental organisations that are more highly motivated and effective in monitoring human rights.\textsuperscript{150} It is certain that many NHRIs do not perform effectively, but this is more symptomatic of state failure to meet human rights obligations than an inherent problem with NHRIs—many judiciaries are insufficiently independent, for example, but this does not invalidate the role of the judiciary in enforcing human rights. The criticism derives from a perception, not without substance, that NHRIs in the post-Cold War period became a must-have accessory for transitional and post-conflict societies. Now, however, the criticism is more often the opposite one: that NHRIs are overregulated by international gatekeepers such as the ICC.\textsuperscript{151} In reality, I would argue, the ICC and the regional coordinating mechanisms such as the Asia-Pacific Forum of NHRIs, have been important in ensuring a consistency of approach and the primacy of international law among national institutions.

This increased role of NHRIs has been formally acknowledged in the enhanced status accorded to them in international forums. In parallel with the increasing engagement with treaty bodies, has been an expansion of the role of NHRIs in the UN Human Rights Commission and its successor, the Human Rights Council. Formally, this has revolved around the participation

\textsuperscript{148} Case 12.404, Janet Espinoza Feria and others v Peru Report No. 51/02 (2002).
\textsuperscript{151} Murray, supra n. 9 at 13.
of NHRIs in meetings. Up to 2005, representatives of NHRIs could be seated in the Commission’s meetings and speak to one agenda item, 18(b), which related specifically to NHRIs.\textsuperscript{152} At the sixty-first session in 2005, it was agreed that NHRIs could henceforth participate with a new status and speak to all agenda items.\textsuperscript{153} However, this was conditional upon their being accredited by the ICC. Unaccredited institutions would still be able to attend, but on the same basis as previously, with speaking rights on agenda item 18(b).\textsuperscript{154}

This newly acquired status has been carried over to the Human Rights Council, with ICC-accredited NHRIs fully integrated into the work of the Council. One striking innovation is that under the new system of Universal Periodic Review of member states of the Council, separate information from NHRIs is actively sought.\textsuperscript{155}

The participation of NHRIs in international forums is moving to a qualitatively new level. Where previously they would meet to talk about themselves—under the auspices of the ICC, at regional or international meetings and under agenda item 18(b) at the Human Rights Commission—now their opinion is sought on other issues. On occasions this even extends beyond providing alternative information on their own country situation. NHRIs themselves were involved in drafting both OPCAT and the CRPD.\textsuperscript{156}

The paradox of international human rights law has long been that standards are generated at a universal level but depend for their implementation upon institutions at the grass roots. For the past 60 years, there has been a search for the institutional form that best bridges the gap between international standards and domestic implementation. NHRIs are the solution that has been arrived at. They are new and hybrid institutions whose status is often unclear at a national level, let alone internationally, yet it is apparent that these are now seen as one of the key instruments for the implementation of international human rights.

\textsuperscript{152} Ibid. at 31.
\textsuperscript{153} HRC Resolution 2005/74, 20 April 2005.
\textsuperscript{155} See OHCHR, Information Note for NHRIs regarding the Universal Periodic Review Mechanism, available at: http://www.ohchr.org/EN/HRBodies/UPR/Pages/NoteNHRIS.aspx [last accessed 30 November 2009].
\textsuperscript{156} Dickson, supra n. 52 at 276.