



Belgian Presidency of the Council of the European Union

**The UN Convention on the Rights of Persons
with Disabilities:
an Integral and Integrated Approach
to the Implementation of Disability Rights**

**Background document prepared for the international
conference 'Work Forum for the Implementation
of the UN Convention on the Rights of People
with Disabilities'**

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Boulevard du Jardin Botanique 50, box 100
B-1000 Brussels

Responsible editor: Tom Auwers
www.socialsecurity.fgov.be/eu/en
Teampresidency2010@minsoc.fed.be

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This document was written by Alexander Hoefmans and Gauthier de Beco.

Alexander Hoefmans is Legal Advisor at the Human Rights Unit of the Belgian Ministry of Justice. In this capacity he has taken part in the negotiations of the CRPD in the UN Ad Hoc Committee. He is also Associate Researcher for the Research Group on Fundamental Rights and Constitutionalism of the Free University of Brussels (VUB).

Gauthier de Beco is Legal Advisor at the Human Rights Unit of the Belgian Ministry of Justice and Associate Researcher at the Centre for Philosophy of Law of the Catholic University of Louvain, where he obtained a Ph.D. in Law (published by Bruylant) which among others dealt with national human rights institutions in Europe. He also worked as a consultant for both the OHCHR and several international NGOs.



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Context and warning

This background document was commissioned by the Belgian Presidency of the Council of the European Union (EU) during the second semester of 2010. It does not necessarily represent the views of the Government of Belgium. All the contributors have written in a strictly personal capacity, not as the representative of any Government or official body.

The purpose of this document is to feed into the conference discussions. please do not quote these draft chapters without written permission from the authors.

Introduction

On December 13th 2006 the General Assembly of the United Nations (UN) adopted its first human rights treaty of the 21st century, the UN Convention on the Rights of Persons with Disabilities (CRPD). The significance of this Convention for the visibility and reinforcement of disability rights can hardly be overestimated. The dynamism which was generated during the negotiations and the swiftness of adoption of this human rights instrument both reflect the pressing need and awareness for disability rights to figure more prominently on international and national agendas.

Although disability has consistently been on the UN agenda since its foundation, studies commissioned by the organisation showed that this attention at international level had generated only a limited effect at national level. Resolutions, recommendations and international standards not being legally enforceable, the attention shifted towards the negotiation of a comprehensive international convention. In doing so not only would this category of particularly vulnerable persons obtain equal status within the UN system with other vulnerable groups. It would at the same time ensure that State authorities be conduced to setting a national agenda dealing, at best, with the challenges society faces with regards to persons with disabilities or, at least, with some of the most pressing issues the largest minority in the world is confronted with. The classic mixture of legally enforceable rights combined with the establishment of implementation mechanisms would be the ultimate catalysis to advancing the human rights agenda of persons with disabilities.

In 2001, the Mexican government put forward a proposal to the UN General Assembly to start the process of elaborating a « comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities ». Subsequently, the UN General Assembly mandated an Ad Hoc Committee to elaborate a draft text of such a convention¹. By 2004, a working group of the Ad Hoc Committee had developed this draft text, which was thereafter negotiated twice a year until August 2006. Considering the complexity and sensitivity of some of the issues discussed, the negotiation and adoption of the CRPD in a little over two years time is an unprecedented achievement. This was also partially driven by the ambition of the Chair of the Ad Hoc Committee, Ambassador Don McKay, to have the Convention ready by the symbolic date of the 60th anniversary of the UN. The Convention was indeed adopted on 13 December 2006.²

Equally unprecedented in this process was the participation of persons with disabilities from across the globe and their representative associations. Numerous position papers and side events were aimed at raising awareness and lobbying delegations. Even though not always uncontested, the negotiations themselves were open and transparent. Civil society was present throughout the discussions and was granted speaking time. National human rights institutions (NHRIs) also actively participated. The significant contribution to and inclusion in the elaboration of the CRPD has granted disability organisations co-ownership of the Convention.

¹ GA Res. 56/168, 19 December 2001, A/56/583/Add.2.

² For a more detailed description of the process of negotiation and adoption see R. KAYESS and P. FRENCH, « Out of the Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities » (2008) 8 (1) Human Rights Law Review 1-34.



That same dynamism continues to be a driver and is at present spilling over into the ratification and implementation process.

If the swiftness of negotiation and adoption of the CRPD has turned out to be a success story, the implementation of the Convention is of course the only indicator for measuring true progress in achieving its objectives. Making human rights a reality is turning commitment into action. Disability policies and measures, however, will remain in vain if State structures are not adapted to their transversal development and implementation. Creating a structural framework as a bearer and driver for the rights of persons with disabilities is subsequently a prerequisite to enable the objectives of the CRPD to trickle down into one's everyday life. This document therefore focuses on the structural dimensions of the implementation of the CRPD captured in its Article 33. Implementation of human rights treaties remain a major challenge and require continuous reflection and adaptation. In this regard, the CRPD poses new challenges and offers new opportunities.

This document is divided into four parts. The first part examines how the CRPD succeeded in transcending the legalistic barriers of a human rights treaty. After discussing the personification of human rights, it deals with both the conceptual and structural paradigm shifts introduced by the Convention. The second part analyses the national structures provided for in Article 33 of the Convention. It first discusses the role of the focal points and coordination mechanism. It then turns to the independent mechanisms to promote, protect and monitor the implementation of the Convention. After a discussion on the Paris Principles and on NHRIs, it examines the functions of the independent mechanisms and framework. The third part deals with civil society. It discusses both the rationale of its participation and its multi-level involvement. The fourth part examines transversal issues relating to the implementation of the CRPD. It focuses on the interaction between focal points and independent mechanisms as well as the challenges with regard to the ratification of the Convention by the European Union (EU).



Part I

Transcending the Legalistic Approach of Human Rights Treaties

The implementation of a human rights treaty requires understanding the nature of the treaty and the significance of some of its innovative provisions. In particular the text of the CRPD is pervaded with a human rights mindset towards disability and codifies certain paradigm shifts which, when implemented, will be of particular importance to the fulfilment of the rights of persons with disabilities. It is therefore paramount that all key actors are guided by these 'genetic characteristics' of the CRPD when translating commitments into concrete policy measures or when monitoring the convention. Without this dimension we would not be able to speak of an integral and integrated approach to the implementation of the CRPD.

This part intends to show that since the conception of the basic human rights framework a legalistic approach to human rights has been supplemented with a more pragmatic and functional approach. The existence of a right does not necessarily lead to its full enjoyment. It also requires concrete implementation, in this case of the treaty obligations. The CRPD has been construed exactly to achieve this supplementary dimension of human rights protection. It guides States in the manner to proceed with the concrete realisation of the fundamental rights of persons with disabilities.

Chapter I

Advancing the Personification of Human Rights

Human rights may be universal and indivisible in their objectives; they are by no means sterile and rigid in their means but rather functional and adaptable. The evolution which international human rights standards have experienced since their global codification in 1966 through the International Covenant on Civil and Political Rights (hereafter « the ICCPR ») and the International Covenant on Economic, Social and Cultural Rights (hereafter « the ICESCR ») has to a large extent been one of refinement and enforcement. Parallel to the classic categorisation of human rights into 'generations of rights' – starting with civil and political, economic, social and cultural rights – there has been a less noticed evolution towards the 'personification of human rights'³. Whereas the former is much about the development of new human rights and keeping pace with the challenges our evolving societies face, the latter is more concerned about a reality based application or adaptation of those human rights.

The starting point is either a particular thematic phenomenon or problem (such as racial discrimination, torture or forced disappearances)⁴ or the wish to address the barriers certain vulnerable groups in society face in the enjoyment of their fundamental rights (such as women, children, migrants and their families and persons with disabilities)⁵. Treaties of this nature aim to generate public and political goodwill which was lacking before to advance the implementation of existing human rights and aim to deal with the specific challenges those categories of vulnerable people are facing in their daily lives.

The CRPD takes this evolution even a step further. The Convention not only explicitly recognises persons with disabilities as being the holder of human rights in an equal manner to others, hence making a person with disabilities a subject to which enforceable rights apply. It also contends that the full enjoyment of human rights by persons with disabilities cannot be achieved if society as a whole does not embrace them as equal members. The CRPD therefore does not classically address State authorities as the sole bearers of the responsibility to realise the objectives of the Convention. With this holistic approach, the CRPD actually shifts that weight onto the whole of society even though the State authorities are the only actors which can be held accountable within the treaty system.

³ Other terminologies for this category of treaties are 'implementation conventions' or 'the pluralisation of human rights'. See for example F. MEGRET, « The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights? » (2008) 30 Human Rights Quarterly 494-516 and R. KAYESS and P. FRENCH, *op. cit.*, at 20.

⁴ Which lead to the adoption of the International Convention on the Elimination of all Forms of Racial Discrimination (1965), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (1984) and the International Convention for the Protection of all Persons from Enforced Disappearance (2006).

⁵ Which lead to the adoption of the Convention on the Elimination of all Forms of Discrimination against Women (1979), the Convention on the Rights of the Child (1989), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) and the Convention on the Rights of Persons with Disabilities (2006). Discussions are currently ongoing on the possibility of elaborating a convention on the rights of elderly.

The CRPD, however, has found a solution for this legalistic barrier through a burden sharing approach. Because society should adapt itself to the needs of its vulnerable members, civil society should itself take up an important role in helping to achieve that goal. Representative associations of persons with disabilities do not only have a counterbalancing role to State authorities' action or inaction, they are endowed with their own mission of promotion, protection and monitoring. The structural dimension of the implementation of the CRPD, as envisaged by Article 33, therefore has a twofold objective: alleviating the deficiencies of monitoring the full implementation of the Convention on the one hand⁶ and extending co-ownership of the convention across society on the other hand.⁷

Both the empowerment of persons with disabilities and the attribution of a prominent place to the larger disability movement in the CRPD are a clear demonstration of the personification of human rights. It is symptomatic of the functional approach of this particular kind of human rights treaties. The CRPD is to a large extent a manual and toolkit to advance the quality of life of persons with disabilities whenever and wherever it is needed. It can almost be considered as an action plan that is, what is more, legally enforceable.


Regardless of the noble ambitions of these treaties, there is however a discussion on the usefulness of the personification of human rights⁸. For scholars and practitioners pleading against this evolution the basic human rights framework represented by the category of generational rights should suffice. Rather than inciting a proliferation of human rights treaties inspired by contextual barriers, our scarce time and resources should go into making sure that the house resembles the foundations it was built upon.

There is something to be said for this hesitation. With a proliferation of human rights treaties comes a proliferation of UN treaty bodies. This amounts to a massive international monitoring mechanism which increasingly has to struggle with questions concerning its sustainability and efficiency.

⁶ On the UN treaty monitoring system see, amongst others, G. ALFREDSSON, J. GRIMHEDEN, B.G. RAMCHARAN and A. ZAYAS (eds.), *International Human Rights Monitoring Mechanisms. Essays in Honour of Jakob Th. Möller* (Leiden/Boston: Martinus Nijhoff Publishers, 2009) 725; C. HEYNS and F. VIJOEN, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (The Hague: Kluwer Law International, 2002) 648; A. BAYEFISKY (ed.), *The UN Human Rights Treaty System in the 21st Century* (The Hague: Kluwer Law International, 2000) 1116; P. ALSTON and J. CRAWFORD (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: University Press, 2000) 563.

⁷ A. BRUCE, « Negotiating the Monitoring Mechanism for the Convention on the Rights of Persons with Disabilities: Two Steps Forward, One Step Back », in G. ALFREDSSON, J. GRIMHEDEN, B.G. RAMCHARAN and A. ZAYAS (eds.), *op. cit.*, at 133-148.

⁸ F. MEGRET, *op. cit.*, at 495-498.



Even with all the goodwill in the world, it is a challenge for State authorities to live up to the vast amount of recommendations of the treaty bodies, besides the regular implementation efforts, and the reporting process for each of them is a cumbersome burden. On the other hand, this category of treaties seems to achieve in most cases exactly what they aim for. These treaties give visibility to the vulnerable groups whose human rights agenda they seek to advance, put the rights of these persons on the political agenda and are seized by legislators and the judiciary to make fundamental rights work in practice.

At a first glance, it might be questionable whether this discussion actually serves a purpose considering that both visions pursue the same objectives, i.e. the strengthening of the impact and the effectiveness of the human rights treaty system. In any case, where these discussions may accelerate concerted efforts to streamline and merger the treaty monitoring systems both visions may end up achieving their common goal.⁹

This dichotomy of visions and its impact on the UN treaty bodies are also not without significance for the nature and intensity of national implementation and monitoring¹⁰. At the national level, the proliferation of human rights treaties pushes States to similar efforts in relation to their human rights obligations. The mounting burden of the monitoring process and the increasing cooperation between UN treaty bodies should at best instigate State structures to rationalise their implementation and reporting efforts. Coordination mechanisms should increasingly act as the nerve centre of human rights implementation. Likewise, the concerted UN treaty efforts should in time and through the necessary capacity building lead to a similar effect at the national level. Independent mechanisms, representative associations and rights movements may be stimulated to reinforce their respective actions through either ad hoc or permanent consortia across the board.

⁹ The CRPD reflects in its Articles 36 (5) and 38 the need for concerted efforts between the UN treaty bodies to ensure an efficient implementation of the Convention. See A. BRUCE, *op. cit.*, at 138-139.

¹⁰ On the impact of the distinction within the classic categorisation of human rights on their implementation, see B.G. FLOVENZ, 'The Implementation of the UN Convention and the Development of Economic and Social Rights as Human Rights' in O. ARNARDOTTIR and G. QUINN (eds.), *The UN Convention on the Rights of Persons with Disabilities. European and Scandinavian Perspectives* (London/Boston: Martinus Nijhoff Publishers 2009) 257-277 at 267-271.



Chapter II

Introducing Paradigm Shifts

*Human rights treaties of the abovementioned category are particularly prone to incorporate innovative mechanisms or concepts in relation to the theme or vulnerable group they address. Political support for the elaboration of these treaties is often as a *conditio sine qua non* linked to the understanding that they will not add anything to the basket of existing human rights. Indeed, their negotiation is sometimes a copy and paste exercise from other human rights treaties in order to remain coherent. However, this precondition eventually does not prevent these treaties from contributing to the refinement of existing human rights. The mere adaptation or interpretation of existing human rights and the introduction of new concepts certainly affects their nature and scope and can therefore be seen as a constructive dimension of the development of the human rights framework.*

The CRPD has managed to incorporate a variety of conceptual and structural shifts which are very likely to determine its degree of success in its implementation. Because these shifts are often of a fundamental nature, State authorities will need the necessary flexibility to translate them into concrete action. Strategically, treaty negotiators will therefore shy away from the radical abandonment of old concepts or mechanisms and will allow for the gradual implementation of the innovative dimensions of rights and duties. Some, however, are so defining and overarching that implementation of any treaty provision requires policymakers from the start to have accepted and applied the conceptual shifts. This naturally influences the adoption process of the CRPD. Some States will prefer to let adoption be preceded by a comprehensive legislative review followed by modifications where necessary in order to be in conformity with the treaty before being bound by it. Other States will prefer to seize the dynamic momentum generated by the CRPD to obtain the necessary public and political consent for adoption and only thereafter initiate the process of achieving conformity.

The paradigm shifts highlighted hereafter are by no means exhaustive but they are particularly indicative for seismic impact the CRPD will have. Any implementation of the CRPD is therefore inextricably linked to these conceptual and structural innovations.

1. Conceptual Shifts

a) From a medical to a social model: the human rights approach to disability issues

Probably the most comprehensive and significant conceptual shift towards persons with disabilities is the introduction by the CRPD of the social model of disability rather than the medical model. For years persons with disabilities were perceived as human beings on the fringes of society requiring treatment, pity and institutionalisation. The prevailing view was that their impairment inhibited them from participating as equal members in a community life which at times did not even acknowledge their existence or basic rights. Treatment was focused on the medical condition of the person, resulting in persons with disabilities being seen as objects of welfare, social security or health programmes.¹¹

The alternative model that has been professed by the disability rights movement for several decades now is the social approach to disability¹². Rather than focusing on the impairment and trying to alleviate the limitations it causes, the social model revolves around society itself and its relationship with persons with disabilities. Disability is considered as a social construction of a society which should be capable of correcting its defaults. In short, it is the environment which is disabled when it fails to provide for equal and adapted treatment for persons with impairments. Its philosophy is the equal participation of persons with impairments in community life and its agenda the struggle to eliminate physical, attitudinal and environmental barriers limiting these persons in the enjoyment of their human rights.

Other than previous UN instruments¹³, the CRPD has entirely adopted the social model of disability¹⁴. Because of the comprehensive, universal and legally binding nature of the CRPD the social model is from now on the centrifugal force of disability policies. More generally, this is recognised to be the shift towards a human rights approach to disability¹⁵. Whereas previously persons with disabilities were denied the enjoyment of some of their most fundamental rights, the social model implies that they are human beings equally entitled to respect and dignity. It is a rights-based approach to ensuring that human rights are also working for this particular vulnerable group of persons.

¹¹ See R. KAYESS and P. FRENCH, *op. cit.*, at 14; F. MEGRET, *op. cit.*, at 500.

¹² C. BARNES and G. MERCER, *Exploring Disability* (Cambridge: Polity Press, 2010) at 29-36; V. FINKELSTEIN, *The 'Social Model of Disability' and the Disability Movement*, March 2007, published on <http://www.leeds.ac.uk/disability-studies/>; A.E. DELL ORTO and P.W. POWER (eds.), *The Psychological and Social Impact of Illness and Disability* (New York: Springer, 2007) 736; K. DAVIS, *The Social Model of Disability - Setting the terms of a new debate* (Derbyshire Coalition of Disabled People, September 1996) revised.

¹³ For example the 1982 United Nations World Programme of Action concerning Disabled Persons (WPA), the 1991 Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care adopted by the General Assembly and the 1993 United Nations Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (GA resolution 48/96).

¹⁴ According to KAYESS and FRENCH, however, the CRPD has failed to clearly distinguish between disability and impairment and has subsequently limited the scope of the social model (R. KAYESS and P. FRENCH, *op. cit.*, at 21-22).

¹⁵ G. QUINN and T. DEGENER, *Droits de l'homme et invalidité. L'utilisation actuelle et l'usage potentiel des instruments des Nations Unies relatifs aux droits de l'homme dans la perspective de l'invalidité* (New York/Genève: Nations Unies, 2002) at 22-24.



The social model is reflected in the preamble and in Article 1 CRPD:

(e) “Recognizing that disability is an evolving concept and that disability results from interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”

Article 1 states: “The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”

Particularly noteworthy in relation to implementation in conformity with the spirit of the CRPD is that the shift towards the social or human rights approach has not only taken place on the international and governmental level but also in non-governmental organisations (NGOs), both national and international, dedicated to the rights of persons with disabilities. These organisations have equally started to approach their advocacy work from a human rights angle and are still in the process of that shift. Where the social model is an appeal to society to redirect social constructions, its success equally depends on the active participation and inclusion of persons with disabilities themselves as well as their representative associations. Connecting a mental shift in their advocacy work to a structural shift when it comes to their inclusion in an open and constructive process of implementation is part of the answer to the appeal of the social model.

Whilst disability as such has not been defined in the CRPD, the shift from the medical to a social or human rights model of disability is an incredible achievement considering the diversity of cultural backgrounds and attitudes towards disability and persons with disabilities across the world. However, overcoming cultural and attitudinal barriers may remain to be one of the major challenges in ensuring the concrete implementation of the CRPD.¹⁶

Examples of previous treaties aiming for the personification of human rights have shown that the ratification of legally binding conventions is only a first and minor step towards the strengthening of the rights of vulnerable groups. Shaping society in conformity with human rights standards is a commitment of a different calibre. Notwithstanding the enormous progress made, overcoming racial discrimination, for example, demands continuous efforts from society.

¹⁶ Sociologists refer in general to the incompatibility of social structures with human rights standards. This is to be distinguished, however, from the doctrinal discussion on universalism v. cultural relativism. See M. FREEMAN, *Human Rights: an Interdisciplinary Approach* (Cambridge: Polity Press, 2002) at 83-90. Also, J. ALMQVIST, *Human Rights, Culture, and the Rule of Law* (Oxford: Hart Publishers, 2005) 242.

Likewise, women and children in some regions of the world continue to be exploited, mistreated and generally disregarded as equal human beings¹⁷. In light of this, the innovative approach of the CRPD to put the burden of realising the human rights of persons with disabilities on the whole of society is crucial.

b) Legal capacity: from a substitute mechanism towards a support mechanism

The CRPD may endorse the social model of disability, as long as persons with disabilities are not entitled nor enabled to exercise their fundamental rights themselves, society will always remain disabled. The participatory nature and the respect for dignity and individual autonomy which underscore the CRPD finds its strongest advocate in Article 12 which relates to the legal capacity of persons with disabilities¹⁸. Article 12 (2) CRPD reads:

“States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.”

This provision is the legal embodiment of the principle that persons with disabilities are equal members of community life and that they are entitled to shape their lives as they see fit¹⁹. Moreover, it transcends the legal value in its practical implications. The CRPD actually empowers persons with disabilities to claim their right to act and decide for themselves. Where necessary, society should be reasonably accommodated to support them in doing so. This is a fundamental paradigm shift away from the widespread substitute or guardianship mechanism which has been established so far and which is guided by the (partial) lack of legal capacity or the restriction on the exercise of that capacity by persons with disabilities²⁰. Article 12 (3) CRPD reads:


“States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”

¹⁷ See for example M. ENSALACO and L.C. MAJKA (eds.), *Children's Human Rights. Progress and Challenges for Children Worldwide* (Oxford: Rowman & Littlefield, 2005) 278 and M. GUZMAN BOUVARD (ed.), *Women Reshaping Human Rights. How Extraordinary Activists Are Changing the World* (Wilmington: Scholarly Resources Inc., 1996) 319.

¹⁸ For MEGRET this is borderline to the establishment of a right to autonomy, a debate which is recurrent in this category of treaties which acknowledge vulnerable groups such as women and children as autonomous subjects entitled to shape their own lives. Of course, restrictions remain especially with regards to children and persons with disabilities so that the aim is rather to maximise their autonomy (F. MEGRET, *op. cit.*, at 511-514).

¹⁹ *Human Rights and Disability: Equal Rights for All*, Council of Europe's Commissioner for Human Rights Issue Paper, 20 October 2008, CommDH/IssuePaper(2008)2, 10-11.

²⁰ For a more profound analysis on this topic, see amongst others P. BARTLETT, O. LEWIS, O. THOROLD, *Mental Disability and the European Convention on Human Rights* (Leiden: Martinus Nijhoff Publishers, 2007) at 149-176; M. JONES and L.A. BASSER MARKS (eds.), *Disability, Diversity and Legal Change* (The Hague: Kluwer Law International, 1999) 400 and R.L. BURGDORF, *The Legal Rights of Handicapped Persons: Cases, Materials and Text* (Baltimore: P.H. Brookes Publishers, 1980) 1127.



The CRPD thus endorses the supported decision-making mechanism which takes into account the degree of disability and the extent to which a person needs to be assisted in certain acts or decisions. The CRPD does not mention the substitute or guardianship mechanism explicitly nor does it abolish it at once. Article 12 (4) CRPD does state, however, that any measures taken relating to the exercise of legal capacity should be accompanied with the necessary safeguards. This also applies to the substitute or guardianship mechanisms. An explicit prohibition of these existing mechanisms would probably have had a chilling effect on the ratification of the CRPD by a large number of States. The message remains clear though that States should shift towards the adoption of a supportive decision-making mechanism, thereby rendering the current mechanisms obsolete.

²¹ Article 2 (1) and (2), ICCPR.

²² Article 2 (1), ICESCR.

²³ World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993, A/Conf.157/23, Part I, at para. 1 in fine.

²⁴ J. DONNELLY, 'Post-cold War Reflections on the Study of International Human Rights' (1994) 8 *Ethics and International Affairs* 97-117 at 117.

2. Structural Shifts

The CRPD introduces structural shifts in international human rights law. Human rights treaties traditionally do not determine how States should implement human rights. The ICCPR obliges a State 'to respect and to ensure to all individuals' and 'to take the necessary steps ... to give effect to the rights recognised' in the Covenant²¹, whereas the ICESCR requires it to 'take steps [...] to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised' in the Covenant²². What measures exactly the State should take to do so, however, is not provided for by these treaties. The latter create therefore only obligations of result.

In contrast, Article 33 CRPD provides that States should create national structures for the implementation of the Convention. As we will see in the next sections, it requires both the creation of focal points in the public administration and the designation or establishment of independent mechanisms outside of it, while guaranteeing the participation of civil society. By defining which structures States have to create under their jurisdiction, the CRPD provides for procedural requirements in the implementation of disability rights. The Convention, therefore, creates obligations of conduct, which define how States should reach certain goals. Traditional human rights treaties, like the ICCPR and the ICESCR, do not do this.

The focus on States in the CRPD is in conformity with the principle of subsidiarity, which considers that States have a primary role in the implementation of human rights. While it is a truism that international law regulates human rights, their specific nature requires that more attention be paid to the State. Considering these rights principally as an issue relating to foreign affairs ignores also the fact that they are first and foremost an internal matter. It also creates the feeling that human rights are the sole concern of remote treaty bodies. Human rights implementation ultimately depends on States. As stated in the Vienna Declaration and Programme of Action, 'their protection and promotion is the first responsibility of governments'²³. In the words of Jack DONNELLY, 'the struggle for human rights will be won or lost at the national level'²⁴.


In view of this, human rights bodies only have a subsidiary role in the implementation of human rights. While treaty bodies should serve as a backup when national human rights systems prove ineffective, they are to a large extent insufficiently resourced and have difficulties to get in touch with local realities. In other words, the national structures for the implementation of the CRPD fill the gap between the international and national levels.

²¹ Article 2 (1) and (2), ICCPR.

²² Article 2 (1), ICESCR.

²³ World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993, A/Conf.157/23, Part I, at para. 1 in fine.

²⁴ J. DONNELLY, 'Post-cold War Reflections on the Study of International Human Rights' (1994) 8 *Ethics and International Affairs* 97-117 at 117.



It is not a matter of fashion that national structures found their way to the CRPD. In many States, there is no comprehensive approach to disability issues at the national level, while policies are fragmented between public departments, with a main role given to the health ministry, taking isolated measures. In addition, the human rights dimension of disability issues has for a long time been ignored in policy-making. There are also no independent bodies that focus on disability rights, in contrast to what exists for children's rights or the rights of women. Disability rights, however, require the transformation of social structures and not just the adoption of isolated measures. In addition, policymakers should regard disabled persons as right-holders and not as people in need of assistance. This requires an overall and permanent verification of the human rights compliance of policies relating to persons with disabilities.

Two other factors could explain why the obligation to create national structures is provided for in the CRPD. The first one is that the Convention does not aim to elaborate new human rights standards but rather to increase compliance with existing ones. The focus of the discussions of the drafters of the Convention was therefore not on standard setting but on implementation. The creation of national structures was in line with these discussions, especially since national human rights institutions (hereafter « NHRIs ») actively participated. The second one is that the CRPD requires a change of mentality. The implementation of the Convention depends on the internalisation of its values, which is necessary to produce changes in behaviour²⁵. This requires that national structures be created to remind of the importance and foster the acceptance of these values. This is especially important for non-discrimination treaties²⁶, such as the Convention.

²⁵ G. QUINN, 'Resisting the 'Temptation of Elegance': Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?', in O. ARNARDOTTIR and G. QUINN (eds.), *The UN Convention on the Rights of Persons with Disabilities. European and Scandinavian Perspectives* (London/Boston: Martinus Nijhoff Publishers, 2009) 215-256 at 218-220.

²⁶ L.-A. SICILIANOS, 'The Prevention of Human Rights Violations. Utopia or Challenge?', in L.-A. SICILIANOS (ed.), *The Prevention of Human Rights Violations. Contribution on the Occasion of the Twentieth Anniversary of the Marangopoulos Foundation of Human Rights (MFHR)* (The Hague: Kluwer Law International, 2001) 279-293 at 288.

Part II

Analysis of the National Structures for the Implementation of the Convention

Chapter I

Article 33 (1): Focal Points and Coordination Mechanism

a) Focal point(s)


One of the far-reaching structural innovations introduced in the CRPD is the commitment for State authorities to organise themselves in such a way as to optimise the implementation of the Convention and, by extension, their national disability rights policies. The first part of Article 33 (1) CRPD reads:

“States Parties, in accordance with their system of organisation, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, [...]”

It is clear from the text that this is not a suggestion from the treaty negotiators nor is it an engagement which is to be realised progressively. It is a prerequisite for the implementation of the CRPD. Either before or immediately after the ratification States should proceed to the designation of one or more focal points. Although for a UN human rights treaty this is an innovative intervention into the sovereignty of a State's organisation, the concept is not new in relation to disability rights. The implementation of the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities has already led to the designation of focal points²⁷. A recurrent criticism resonated so far by international discussions and by the disability rights movement is the pro forma assignment of ministerial departments as focal points without taking into account the impact the CRPD may have on their functioning. The implementation of the CRPD may actually necessitate a revision of the mandate or resources of some of these existing focal points²⁸.

²⁷ Rule 20 of the Standard Rules encourages states to establish coordinating committees and Chapter IV concerning a monitoring mechanism is an appeal for “national coordinating committees or similar bodies to participate in implementation and monitoring. As the focal points on disability matters at the national level, they should be encouraged to establish procedures to coordinate the monitoring of the Rules. Organisations of persons with disabilities should be encouraged to be actively involved in the monitoring of the process at all levels.” The UN Standard Rules are to be found at <http://www.un.org/documents/ga/res/48/a48r096.htm>.

²⁸ See, for example, the contribution of the International Disability Alliance to an open consultation held by the Office of the High Commissioner for Human Rights in 2009 concerning the structure and role of national CRPD mechanisms, to be found at <http://www2.ohchr.org/english/issues/disability/consultation26102009.htm>.




The purpose of these focal points is double. On the one hand, it ensures a legitimate place for disability rights on the political agenda, making it visible enough to compel governments to take this issue up. A focal point with the necessary credibility will often have direct access to high-level government officials and will engage with them in both the development as well as the implementation of disability rights policies. On the other hand, the designation of one or more focal points is an administrative tool meant for rationalising and centralising all possible institutional players involved in disability rights policies. The CRPD lends itself well for that purpose considering the transversal nature of disability rights. It also requires such a sound organisation for turning the social model of disability into reality.

Although there is no fixed scheme as to the organisation of focal points, the social model of disability does implicitly give us some indications. Implementing the social model requires both a horizontal as well as a vertical approach. At the administrative level, there may be several focal points dealing transversally with disabilities rights policy within their respective competences. There may, however, be focal points covering each of the different layers of government (local, provincial, regional, national) thereby increasing the necessity of the establishment of a coordinating mechanism to steer everything in a coherent direction. This could of course be perceived as a proliferation of focal points, putting into question the efficiency of the implementation mechanism. However, focal points across and within the different governmental layers will not necessarily have the same role. Moreover, in what may become a myriad of focal points with differing degrees of involvement, each level should clearly have a lead focal point to which both citizens and other governmental departments can turn to.

Overall, where the social model of disability requires a form of mainstreaming of disability policy it is important that key policy departments be actively drawn into the implementation of disability rights. Within each of those departments a unit or person could be tasked to serve as contact to the lead focal point. This will legitimate the latter to call upon the former when necessary and will instigate intradepartmental attention for disability rights as well as facilitate interdepartmental dialogue. Besides the lead focal point there may therefore be sub-focal or contact points, casting a sense of responsibility on all actors involved but with limited implications for human resources while preserving an efficiently functioning implementation system.

Maximising the potential of a focal point, and in particular the lead focal point, also implies that it be designated at the highest possible governmental level. There are several options of which the placement of the focal points within the ministerial departments is very common. In this regard, the disability rights movement, armed with the paradigm shifts, pleads for the focal point not to be established within ministries such as those dealing with welfare, health or labour, although in practice this often turns out to be the case²⁹. This would reflect the old model of compartmentalising persons with disabilities according to their perceived inadequacies.

²⁹ This appears from the conclusions of the “Open-ended consultation on National Frameworks for the Implementation and Monitoring of the Convention on the Rights of Persons with Disabilities” organised by the Office of the UN High Commissioner for Human Rights, Geneva, October 26th 2009. The report and contributions are available at <http://www2.ohchr.org/english/issues/disability/consultation26102009.htm>.



Rather the preference is for ministries dealing with justice, human rights and possibly equal opportunities to be designated as (lead) focal point. A second option is the establishment of a particular office for persons with disabilities within the presidential or prime minister's administration. Another possibility is for the government to establish a proper ministerial or State secretary portfolio with regards to disability rights. However, this would need to be accompanied with an administrative department or office in support of the minister or State secretary. Considering the necessity for a continuous and coherent implementation process of the CRPD across parliamentary legislatures it is preferable for focal points to be designated within administrations but at a senior level. In addition to this, the set-up of focal points on the administrative level may be mirrored by an inter-ministerial set-up responsible for guidance, policy setting and decision-making thus amounting to a political coordination mechanism. Moreover, one should also keep in mind that parliament may also play an active role in the development and follow-up of a national disability rights policy through special committees or a parliamentary secretary in charge of disability rights. Although the focal point will be on the executive level it will need to liaise closely with parliament.

Strictly speaking, a designation by law is not required and the mandate of focal point may be assigned by administrative or ministerial decision. In principle, the mainstreaming of human rights requires that disability experts also acquire knowledge of human rights. Often this will also entail the attribution of additional staff and resources to existing focal points or to ministerial departments now designated as focal point. In any case, in light of the interconnecting role the focal points play between grassroots level and policymakers, it would enhance the visibility of the focal points towards persons with disabilities and their representative associations if, upon ratification of the CRPD or shortly thereafter, the public would at least be informed about their designation and the content of their mandate. It may also be advisable to employ persons with disabilities as part of the focal point team but, contrary to the wishes of some disability rights organisations, there is no rule indicating that this should absolutely be the case³⁰.


b) Coordination Mechanism

Whereas the designation of one or more focal points is a legal obligation, the decision to establish or not a coordinating mechanism is left to the State authorities. The second part of Article 33 (1) CRPD reads:

"[The States Parties] ... shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels."

State authorities may opt to organise an omnipotent focal point, thereby eliminating the necessity of an additional coordination mechanism. This may be the case where in a particular non-federal or centralised State system disability rights are largely the competence of one particular ministry. The focal point designated within that ministry will be the lead focal point and may incorporate at the same time a coordinating function.

³⁰ As, for example, stated by the International Disability Alliance in their contribution mentioned in footnote 29.




In more complex State systems, the disability rights agenda may be scattered across the political and administrative scene, which will automatically give greater weight to coordination. In general, the case for a central mechanism distinguishing itself from the role focal points have makes sense from more than one perspective. From an internal point of view, a State may want to establish one particular mechanism which would take up the role of keeping an oversight and ensuring a coherent functioning of the different focal points. Depending on where it is situated, it may be closer in touch with the overall governmental agenda and policy objectives and would act as a guardian of the disability rights agenda in the larger perspective. Moreover, in State systems where overall coordination is not attributed to a lead focal point, a distinct coordination mechanism would not take part in the actual development of disability rights policies and may therefore easily act as a neutral platform to unite the various policy-making factions. Contrary to what certain disability rights organisations advocate³¹, the coordination mechanism would not necessarily set the disability rights agenda. The distinction is subtle but important in order to safeguard a clear distinction in roles of the various CRPD mechanisms. The disability rights agenda is the fruit of the cooperation between focal points but may be negotiated within the framework of a neutral coordination mechanism. The latter may therefore facilitate the adoption of such a disability rights agenda. For the same reason, State authorities should avoid making the coordination mechanism tributary to a particular ministry not to create the impression it has a stake in the decision-making process. It is indispensable for the focal points both on horizontal but especially on vertical levels to enter into a regular dialogue, to inform and consult each other. A coordination mechanism may set up the necessary formal channels and circulate information at its own initiative or upon request. It will be attributed its own proper functions but will at the same time be at the disposal of the focal points, DPOs and the independent mechanisms.

There is also an external dimension to the implementation of the CRPD which pleads in favour of a central mechanism. The establishment of such mechanism is of importance to liaise with relevant international organisations and in particular the UN Committee on the Rights of Persons with Disabilities. This Committee will in any case need to rely upon one central point when communicating with State authorities. It will then fall upon this central point to use its networks and channels to organise the follow-up work where the Committee has addressed requests to State authorities. Moreover, as the CRPD is a living instrument, it will from time to time require guidance from the Committee. The observations of the Committee following individual complaints procedures and especially its future general comments on specific articles of the CRPD are an important source for the implementation on national level. Overall, the most substantial part of the work of the national disability mechanisms will relate to the implementation of the CRPD at the national level but it may certainly not disregard international developments. Either the lead focal point or the coordination mechanism, where it exists, should therefore be assigned the necessary resources and mandate to engage with the international level.

Especially federal or decentralised States may benefit from the establishment of a coordination mechanism. These States will share responsibility with the regional or local levels for the implementation of the CRPD and the development of disability rights policies.

³¹ *Idem*




The vertical dimension of the focal points, however, will be more complex, their role and resources may be incongruous and their priorities may differ substantially. In light of these circumstances, the establishment of a coordination mechanism can be all the more significant. From the perspective of the internal dimension different levels may wish or need to adopt measures in a concerted fashion. With regard to certain provisions of the CRPD, the federal or decentralised States may govern independently within the boundaries of its competences, whereas for others a particular policy objective may require coordinated governance. The latter may be necessary either because a certain area falls under a system of shared competence between the federal or central and the regional or local levels or it may be that a policy objective or measure requires more than one level to act. A neutral mechanism designed to facilitate interstate cooperation may be of assistance in this regard. In any case, given the dispersion of competences and degrees of competences on different levels developing a coherent national disability rights policy seems quite the challenge but it remains nevertheless desirable. The presence of a platform which, preferably, transcends and is supported by the various levels of governance can therefore at least serve to stimulate an open and transparent disability rights policy and at best act as the coordinator of a coherent national disability rights policy.

From the perspective of the external dimension a coordination mechanism is all the more necessary in federal States to act as the focal point for the international level. While the UN treaties take into account the specificities of State systems, the United Nations as an international organisation still addresses itself to only one interlocutor. Therefore one central point, often the federal level, will officially be its interlocutor even when a particular issue may concern a regional level. For example, an individual complaint before the UN Committee on the Rights of Persons with Disabilities may in substance deal with a competence belonging to a particular autonomous region. While internally the complaint will be treated by that region, its observations will be presented as the defence of the national State which will also be held responsible in case the Committee decides upon a breach of the CRPD. Federal States in general already often have mechanisms of coordination and consultation in place to deal with the representation of their different component before international organisations but they may limit themselves to gentleman's agreements ensuring a smooth handling of particular questions. The establishment of treaty-specific coordination mechanisms may seem burdensome from a national institutional perspective but it certainly guarantees added value from the perspective of the implementation of the treaty. It does not act as a superficial connection of State authorities with the international institution but rather as an individual stakeholder in the internal dimension of the national disability rights policy. In federal States, the coordination mechanism is therefore the ideal interlocutor of the treaty body.

In general, a coordination mechanism may also be the kingmaker of a 'joined-up governance' approach to the implementation of a national disability rights policy³². Decades of treaty implementation have shown that human rights cannot only be realised by a restricted circle of policymakers at the national level in an often fragmented manner. It requires a transversal and vertical approach drawing into the realm of human rights governance actors dealing with all possible dimensions related to the realisation of those rights.

³² G. QUINN, 'Resisting the 'Temptation of Elegance': Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?', *op. cit.*, at 254.



Considering that a coordination mechanism should first and foremost be composed of the different focal points, this would lead to a joined-up platform in cases where focal points have been designated on different levels of government. However, it may be advisable for a coordination mechanism to set up networks with other disability rights stakeholders, such as various governmental (research) institutions, independent mechanisms, trade unions, the private sector, universities and civil society. The extent to which all the aforementioned would have consultative or decision-making status within the coordination mechanism may possibly depend on the actual mandate given to the latter. Where the coordination mechanism is responsible for the national CRPD reporting process it will certainly need to interact not only across but also beyond governmental boundaries. The role of the national independent CRPD mechanism will of course be crucial in this regard.

Finally, as mentioned before in relation to the focal points, in some State systems a coordination mechanism may already exist on the ministerial level or may be established together with the coordination mechanism at administrative level. With the latter not having any political decision-making competence it may be efficient in more than one way for its work to be guided and acknowledged politically. The administrative coordination mechanism would at the same time serve as the secretariat of the political mechanism. This duo of mechanisms would, of course, also increase in a direct manner the visibility of disability rights on the political level.

c) Functions

Both the focal points and the coordination mechanism, where it exists, should act as a coherent governmental unit dedicated to the implementation of the CRPD. Overall, the focal points will be the drivers and executors of the national disability rights agenda, whereas the coordination mechanism will not be concerned with policy development as such. However, considering the diversity of State systems and traditions, there is no unique model describing their exact set-up and functioning, as we have already mentioned. In some cases a focal point will be bestowed with such a pivotal role and matching resources that it will de facto incorporate the mandate of a coordination mechanism. In other cases developing a coherent disability policy may involve such a large degree of (sometimes autonomous) institutional actors that the centre of gravity will lie with the challenge of coordinating all efforts in a structured fashion.

In order to guide States in their choices, the Office of the UN High Commissioner for Human Rights (OHCHR) has issued a thematic study on the structure and role of national structures³³. This should in time be complemented with guidelines from the UN Committee on the Rights of Persons with Disabilities based on the experience gained through country reports. The study points out that the overall mandate of the focal points should focus on developing and coordinating a coherent national policy on disability rights.

³³ OHCHR, Thematic study on the structure and role of national mechanisms for the implementation and monitoring of the Convention on the Rights of Persons with Disabilities, 22 December 2009, A/HRC/13/29.

This would entail:

1. acting as a promotional and expertise centre for all government actors when it comes to the CRPD and its implementation;
2. coordinating all government action in relation to the reporting, monitoring and awareness-raising activities;
3. liaising with the independent mechanisms as well as with civil society at large³⁴.

While this framework certainly covers the different dimensions of the implementation of the CRPD, it does not seem to take into account the myriad of nuances and complexities involved in the organisation by State authorities of the national structures as demonstrated in the previous sections. Good governance and efficient implementation of the CRPD most certainly require a clear distinction of the mandates and roles assigned to each of the designated mechanisms. The functions of the coordination mechanism mentioned by the OHCHR study – policy development, promotion of dialogue in the disability field and awareness raising – do not differentiate themselves from the ones it attributes to the focal points. The OHCHR study also advocates the designation of an overall focal point similar to the lead focal point mentioned in the previous sections. It is, however, not clear how it would distinguish itself from the coordination mechanism. Whereas overlap may not always be unavoidable and in some respects even not always be harmful, it should be clear where policy is set, implemented and monitored, which governmental and non-governmental actors are involved and to which extent and for what purpose. This clear outline does not only serve efficient government but it also creates transparency for the disability rights movement and civil society in general. A lead focal point may take up a coordinating role in relation to its own horizontal sub-focal points but not necessarily in relation to the vertical level. Depending on the powers attributed to the lead focal point this may even encounter constitutional objections in federal States with respect to the autonomous functioning of the regions. For these reasons, the establishment of a coordination mechanism, not attributed with policy-making powers, may be preferable to a lead focal point whereby the latter would combine policy-making powers with an overall coordinating function. Designed along the lines mentioned in the previous section, an umbrella mechanism, not tributary to one particular level but carried by all, could be construed to respond to specific challenges within the internal and external dimensions of the implementation of the CRPD. Additionally, focal points on each level should be the masterminds of a coherent national disability rights agenda and should undertake the necessary steps to fulfil their respective obligations in respect of the abovementioned OHCHR framework of functions.

In particular two tasks pertaining to the implementation of the CRPD require a coherent and coordinated functioning of the national CRPD mechanisms. In the first place, the centrepiece of the UN treaty monitoring system is the reports which a State party has to submit to the specific treaty body, in this case the UN Committee on the Rights of Persons with Disabilities³⁵. This reporting process is an exercise which is not to be underestimated in terms of energy, time and resources.

³⁴ *Idem*, 10.

³⁵ M. KJAERUM, 'State Reports', in G. ALFREDSSON, J. GRIMHEDEN, B.G. RAMCHARAN and A. ZAYAS (eds.), *op. cit.*, at 17-24.

The purpose is for the State authorities to shed light, in a concise manner, on the state of affairs of disability rights and the national situation regarding persons with disabilities³⁶. The State is to demonstrate in writing, and afterwards orally before the Committee members, that its disability rights policies are in conformity with the CRPD and how the CRPD provisions and objectives have been respectively implemented. Where the State has failed to do so, it will face recommendations by the Committee to adapt its disability rights governance. The drafting of the national report requires the mobilisation of all mechanisms assigned to take part in the implementation of the CRPD, the independent mechanism and civil society included. It represents a vast filtering exercise of gathering of information drawn from a wide range of governmental and non-governmental sources. It sets in motion several key functions of the focal points and the coordination mechanism, requiring an analysis of governmental policies based on data and indicators which they may have developed (or helped to develop), interaction with the independent CRPD mechanism, DPOs and civil society in general and coordinating all these efforts towards a single report.

Secondly, the conception and implementation of national disability action plans will lead to a similar massive and concerted mobilisation but restricted to the internal dimension of the implementation of the CRPD. As mentioned in Part I, the CRPD can be conceptualised as a disability policy manual or toolkit serving as the foundations of a national disability action plan. Whereas the CRPD does not oblige State parties to draft such an action plan, from a governance point of view it can be perceived as an efficient and comprehensive tool in the hands of governments dedicated to ensuring the fulfilment of human rights in general and realising disability rights in particular³⁷. Taken seriously it is an upgraded version of CRPD implementation, creating political objectives framed by timelines and supported with sufficient resources, giving visibility to disability rights and empowering disability rights movements as privileged partners and facilitating a clearer monitoring at both the national and international levels³⁸. Of particular importance in the framework of such an action plan are the measures for mainstreaming disability rights.

Overall, whereas the centre of gravity naturally lays with the relationship between the focal point and coordination mechanism and the various key actors within the executive power, the implementation of the CRPD should not be limited to this branch of government only. By extension the focal point and the coordination mechanism should, within the boundaries of their respective competencies, interact with the legislative and judiciary branches. This will certainly be required where government proposals for legislation are carried by the expertise of the focal point or where the executive branch is held accountable by parliament, its committees or individual deputies. But a focal point or coordination mechanism may also envisage the coordination of trainings and awareness raising of disability rights across the three branches of government.

³⁶ Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body-Report by the Secretariat, HRI/MC/2006/2, 22 March 2006, at para. 8. To be found at <http://www2.ohchr.org/english/bodies/icm-mc/docs/HRI.MC.2006.2.pdf>.

³⁷ O. DE SCHUTTER, *International Human Rights Law* (Cambridge: University Press, 2010) 967 at 472-479.

³⁸ On the key factors for a successful action plan see *Human Rights and Disability: Equal Rights for All*, Council of Europe's Commissioner for Human Rights Issue Paper, op. cit., at 12-13. More elaborate on mainstreaming and action plans see: Council of Europe, « Recommendation of the Commissioner for Human Rights on systematic work for implementing human rights at the national level », 18 February 2009, CommDH(2009)3; O. DE SCHUTTER, 'Mainstreaming Human Rights in the European Union', in P. ALSTON and O. DE SCHUTTER (eds.), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency* (Oxford: Hart Publishing, 2005) at 37-72; Office of the UN High Commissioner for Human Rights, *Professional Training Series No.10, Handbook on National Human Rights Plans of Action* (New York/Geneva: UN, 2002) 108.

d) Examples

What follows are concrete examples of the Article 33 (1) CRPD mechanisms which have already been designated in EU Member States:

Examples of mechanisms combining the task of focal point and coordination mechanism:

- The UK has designated its Office for Disability Issues both as focal point and coordination mechanism;
- Austria has designated both as focal point and coordination mechanism the Federal Ministry of Labour, Social Affairs and Consumer Protection. An Independent Monitoring Committee of the Federal Disability Advisory Board at the Ministry acts as coordination mechanism.

Most States so far have proceeded to the designation of separated mechanisms although they may to some extent be intertwined:

- In Latvia the focal point has been integrated in the Ministry of Welfare but it also acts as parent ministry to the National Council of Disability Affairs which has been designated as the coordination mechanism;
- Italy has decided to appoint the Ministry of Labour, Health and Social Policy as the focal point but the Ministry of Welfare will act as coordination mechanism;
- In Germany the Federal Ministry of Labour and Social Affairs has been designated as focal point but the Länder will at the same time fulfil an important role. The Federal Commissioner responsible for persons with disabilities will act as coordination mechanism;
- In the Netherlands the Ministry of Health, Welfare and Sport has been designated as focal point but to assume the task of coordination the creation of an inter-ministerial network has been announced.

Some States have proceeded with the designation of the focal point whereas no decision has yet been taken concerning a possible coordination mechanism.

Chapter II

Article 33 (2): Independent Mechanisms to Promote, Protect and Monitor the Implementation of the Convention³⁹

Article 33 (2) CRPD provides that:

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

This Chapter analyses the different parts of Article 33 (2) CRPD. It is divided into five sections: a) the designation or establishment of one or more independent mechanisms; b) the Paris Principles; c) NHRIs; d) the functions of independent mechanisms; e) the framework for the independent mechanisms and; (f) best practices.

a) The Designation or Establishment of one ore more Independent Mechanisms

Article 33 (2) CRPD gives States a double choice: they may ‘maintain, strengthen, designate or establish’ ‘one or more independent mechanisms’.

The first choice is that they may ‘maintain, strengthen, designate or establish’ independent mechanisms. According to the wording of Article 33 (2), there are therefore four possibilities, which can be reduced into two, as the three first possibilities are in fact only one⁴⁰. First, they may designate existing bodies, which means that they can maintain these bodies and give them the functions to promote, protect and monitor the implementation of the Convention. This option is interesting for States that already have bodies exercising some of these functions and avoids the creation of new bodies. There should be an official designation act and not a mere statement that one or more bodies are playing the role of independent mechanism. Second, States may establish independent mechanisms. They can therefore start from scratch and create new bodies that will exercise the functions provided for in Article 33 (2). This option is made for States having no bodies that can fulfil these functions.

³⁹ An article by Gauthier de Beco partly based on this Chapter with a special focus on the potential role of NHRIs under Article 33 (2) CRPD will be published in the *Netherlands Quarterly of Human Rights*.

⁴⁰ This interpretation is consistent with the second sentence of Article 33 (2) CRPD which provides that States should take the Paris Principles into account ‘[w]hen designating or establishing’ the independent mechanisms.

The second choice is that States may designate or establish 'one or more independent mechanisms'. There are therefore two possibilities. Firstly, States may designate or establish a single body to carry out the functions to promote, protect and monitor the implementation of the CRPD. This option can facilitate the coordination between different organisations and help them to establish a comprehensive approach to disability issues. Secondly, States may designate or establish a series of bodies which altogether play the functions provided for in Article 33 (2). States may therefore share these functions between several bodies, while federal or decentralised States may designate or establish regional or local bodies. As will be explained, Article 33 (2) also requires States to establish 'a framework', which means there should be some form of coordination between the independent mechanisms.

b) The Paris Principles

The 'Principles relating to the status and functioning of national institutions for the protection and promotion of human rights', commonly called the Paris Principles, provide for the responsibilities, composition and working methods of NHRIs. They were drafted at the First International Workshop of NHRIs held in Paris in 1991 and endorsed by both the Commission on Human Rights and the General Assembly of the UN⁴¹. The Paris Principles outline the different aspects of NHRIs according to the following headings: A. Competence and responsibilities; B. Composition and guarantees of independence and pluralism; C. Methods of operation; and D. Principles concerning the status of commissions with quasi-judicial competence (the latter being only optional). These principles now constitute the basic guidelines for NHRIs. They promote the establishment and strengthening of NHRIs and stress the importance of these institutions as being independent and pluralistic.

The World Conference on Human Rights, held in Vienna in 1993, affirmed in its Declaration and Programme of Action 'the important and constructive role played by [NHRIs] ...' and encouraged 'the establishment and strengthening of [NHRIs] having regard to the [Paris Principles]'⁴². Several treaty bodies also issued general comments regarding their role in the implementation of human rights⁴³. In its annual resolutions, the Commission on Human Rights (now Human Rights Council) also encouraged States to establish and strengthen NHRIs and appreciated their cooperation at both the regional and international level⁴⁴.

⁴¹ Commission Resolution 1992/54, 3 March 1992, E/CN.4/RES/1992/54; GA Resolution 48/134, 20 December 1993, A/RES/48/134.

⁴² World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993, A/Conf.157/23, Part I, at para. 36.

⁴³ Committee on the Rights of the Child, General Comment No. 2, The role of independent national human rights institutions in the promotion and protection of the rights of the child, 15 November 2002, CRC/GC/2002/2; Committee on Economic, Social and Cultural Rights, General Comment No. 10, The role of national human rights institutions in the protection of economic, social and cultural rights, 10 December 1998, HRI/GEN/Rev.7 at 59; Committee on the Elimination of Racial Discrimination, General Recommendation No. 17, Establishment of national institutions to facilitate implementation of the Convention, 25 March 1993, A/48/18.

⁴⁴ See Commission Resolution 2005/74, 20 April 2005, E/CN.4/RES/2005/74; Commission Resolution 2004/75, 21 April 2004, E/CN.4/RES/2004/75; Commission Resolution 2003/76, 25 April 2003, E/CN.4/RES/2003/76; Commission Resolution 2002/83, 26 April 2002, E/CN.4/RES/2002/83; Commission Resolution 2001/80, 25 April 2001, E/CN.4/RES/2001/80; Commission Resolution 2000/76, 26 April 2000, E/CN.4/RES/2000/76; Commission Resolution 1999/72, 28 April 1999, E/CN.4/RES/1999/72; Commission Resolution 1998/55, 17 April 1998, E/CN.4/RES/1998/55.

At the European level, the Council of Europe adopted Recommendation No. R(97) 14 on the Establishment of Independent National Institutions for the Promotion and Protection of Human Rights and Resolution (97) 11 on Cooperation Between National Human Rights Institutions of Member States and Between Them and the Council of Europe.

Two recent human rights treaties also refer to the Paris Principles. Article 33 (2) CRPD, which is the focus of this section, provides that when creating the independent mechanisms, States must take into account these Principles. The latter are thus the criteria to be met in order to comply with the Convention. The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) also requires that States designate or establish national preventive mechanisms to visit places of detention, while creating a UN Sub-Committee on Prevention with the same function. Article 18 (4) OPCAT provides that States give due consideration to the Paris Principles when designating or establishing these mechanisms.

In addition to setting out a general programme for NHRIs, the Paris Principles lay emphasis on two fundamental principles: independence and pluralism.

Independence has a triple meaning in the Paris Principles. Firstly, NHRIs should be functionally independent. This means that they should be free from governmental interference. To guarantee this, the Paris Principles require that NHRIs be established 'by a constitutional or legislative text'⁴⁵. With this requirement fulfilled, it will be impossible for government to change their powers without (special) parliamentary approval. Secondly, NHRIs should be personally independent. This means that their members should be able to act in a pressure-free environment and be appointed and, when necessary, dismissed according to a fair and clear procedure. NHRIs must also be able to choose their staff and to determine their own priorities. Thirdly, NHRIs should be financially independent. They must have sufficient resources at their disposal⁴⁶, which should be determined preferably by parliament. This should enable NHRIs to carry out their activities without being subject to governmental oversight.

Pluralism is the second fundamental principle of the Paris Principles. This principle links NHRIs with civil society. The Paris Principles provide that the composition of NHRIs should ensure 'the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights'⁴⁷.

They also mention a series of actors who should be involved:

- (a) Non-governmental organisations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organisations, for example, associations of lawyers, doctors, journalists and eminent scientists;

⁴⁵ Principle 2, A. Competence and responsibilities, Paris Principles.

⁴⁶ Principle 2, B. Composition and guarantees of independence and pluralism, Paris Principles.

⁴⁷ Principle 1, B. Composition and guarantees of independence and pluralism, Paris Principles.

- (b) Trends in philosophical or religious thought;
- (c) Universities and qualified experts;
- (d) Parliament;
- (e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity)⁴⁸.

The major actor in NHRIs is NGOs. Both NHRIs and NGOs can benefit from this relationship. On the one hand, NHRIs can help NGOs to communicate their demands to State authorities. These institutions also give NGOs the opportunity to coordinate their action by allowing them to collectively deal with human rights issues that are in the ambit of different organisations. On the other hand, NGOs can help NHRIs to get in touch with local communities and be appraised of the day-to-day problems affecting vulnerable groups. They can also support these institutions by sharing their experience and their information on human rights issues.

However, NGOs tend to be over represented in NHRIs at the expense of other human rights organisations, such as 'trade unions, concerned social and professional organisations, ... trends in philosophical or religious thought', which are mentioned in the Paris Principles⁴⁹. NGO dominance forgets that there are other organisations concerned with human rights, even if this might be incidental, and that they should also be associated in their implementation. A better balance in NHRI membership will also lead to a better understanding between both NGO and non-NGO forces.

Pluralism can be achieved in two ways: representation or cooperation⁵⁰. The Paris Principles state that NHRIs should ensure 'the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights' either 'by powers which will enable effective cooperation to be established with, or through the presence of, representatives of the aforementioned actors'⁵¹. This means that these representatives should either be member of the NHRIs or be able to effectively cooperate with these institutions.

Article 33 (2) CRPD requires that States take into account the Paris Principles when establishing or designating independent mechanisms. This reference to the Paris Principles raises three questions.

The first question is if it is possible to apply the Paris Principles to actors other than NHRIs. The Paris Principles focus on bodies that deal with all human rights and it might therefore be difficult to apply them to bodies with specific mandates. In fact, by using the Paris Principles as criteria to evaluate the independent mechanisms, the drafters of the Convention abstracted these Principles from NHRIs. This means that these Principles will probably have to be adapted. As far as independence is concerned, no changes are needed.

⁴⁸ Idem.

⁴⁹ Idem.

⁵⁰ G. DE BECO, 'National Human Rights Institutions in Europe' (2007) 7 (2) *Human Rights Law Review* 331-370 at 344.

⁵¹ Principle 1, B. Composition and guarantees of independence and pluralism, Paris Principles.

With regard to pluralism, however, it will be necessary to determine which organisations duly represent the social forces (of civilian society) involved in the promotion and protection of disability rights and to ensure their representation in or allow them to effectively cooperate with the independent mechanisms. This issue will be further discussed in the next Chapter.

The second question is whether all of the independent mechanisms designated or established to promote, protect and monitor the implementation of the CRPD must comply with the Paris Principles. At first sight, it seems that Article 33 (2), by stipulating that States should 'take into account' the Paris Principles, does not require this. This would however be against the spirit of Article 33 (2). There is no reason why some of the functions of independent mechanisms would be exercised by Paris Principles-compliant bodies and others not, as this would create a double standard. Every single body that exercises one of the functions of independent mechanisms must be independent and pluralist.

The third question is who will evaluate the compliance of independent mechanisms with the Paris Principles (in the hypothesis that they should all meet them). With regard to OPCAT, the Sub-Committee on Prevention is entrusted with advising and assisting States in the establishment and strengthening of national preventive mechanisms, thereby checking whether these mechanisms meet the Paris Principles. In contrast, nothing is foreseen in the CRPD about the relationship between the UN Committee on the Rights of Persons with Disabilities and the independent mechanisms⁵². The Committee, however, will most probably do as the Sub-Committee on Prevention. The examination of the State reports will give it the opportunity to evaluate the compliance of the independent mechanisms with the Paris Principles.

c) National Human Rights Institutions (NHRIs)

NHRIs have been created by States to implement human rights at the national level. They are a response to the gap between human rights standards and their practical application. NHRIs have mainly two functions: the monitoring and advising of State authorities and the promotion and providing of human rights education⁵³. Regarding the first function, NHRIs examine the human rights compliance of legislation and practice. They evaluate not only their conformity with human rights treaties but also their broader implications for human rights enjoyment. NHRIs may also conduct general inquiries and submit reports to State authorities on human rights issues that seem important or urgent. Regarding the second function, NHRIs aim to increase awareness of human rights. They can do so both within and outside the formal education system. Some NHRIs also focus on research in order to promote a better understanding of human rights.

⁵² Article 37 (2) CRPD, however, provides that the Committee has to « give due consideration to ways and means of enhancing national capacities for the implementation of the present Convention, including through international cooperation ».

⁵³ NHRIs have also a third function, namely to investigate alleged human rights violations, which is however optional in the Paris Principles and not the focus of NHRIs in Europe.

Composed as they are of, or cooperating with representatives of civil society organisations, experts and, in an advisory capacity, representatives of the public administration, NHRIs can boost cooperation between State and non-State actors concerned with human rights. They can serve as a platform where these actors can consult each other with regards to their human rights concerns. As mentioned earlier, the participation of NGOs is particularly important, since these organisations may increase the impact of their demands by channelling them through the NHRI. They also have a sound knowledge and deeply rooted expertise in the field of human rights.

NHRIs also help ensure that national human rights policies are consistent. Thanks to their broad mandate, they can help States to adopt coherent human rights policies. They can elaborate a general approach to human rights issues, including those issues straddling the competence of different public organs or different levels of powers in federal or decentralised States and, by so doing, ensure the mainstreaming of human rights. Furthermore, NHRIs can foster a national debate by disseminating information relating to specific human rights issues. A NHRI can also prove to be very valuable to the general public by setting up information points and special desks to direct individuals to other competent institutions.

At the international level, NHRIs created the International Coordinating Committee of NHRIs (International Coordinating Committee). The International Coordinating Committee is composed of four regional groups: Africa, Europe, the Americas, and Asia-Pacific⁵⁴. It organises international conferences, which include thematic sessions, biannually, the next one of which will be in Scotland in October 2010. The International Coordinating Committee gradually acquired an international position by increasing engagement in policy making as regards NHRIs⁵⁵. The OHCHR is closely linked to the International Coordinating Committee and created a National Institutions Unit which serves as its secretariat.

With the intention of bringing about an official 'label' for NHRIs, the International Coordinating Committee established a Sub-Committee on Accreditation⁵⁶. With the support of the OHCHR, the Sub-Committee is compiling a list of those institutions that comply, do not fully comply, or fail to comply with the Paris Principles. Those that comply are granted 'A-Status', those that do not fully comply are granted 'B-Status', and those that fail to comply are designated 'C-Status'. This peer review determines how many NHRIs are recognised as such in the world⁵⁷. Only those institutions with A-Status can become voting members in the international network of NHRIs; those with B-Status are only granted observer status.

⁵⁴ The International Coordinating Committee consists of four NHRIs per regional group, i.e. 16 NHRIs in total.

⁵⁵ See A.-M. GARRIDO and B. KOFOD OLSEN, 'Coordination of the Work of NHRIs – From Liaison to Joint Achievements', in R.F. JORGENSEN and K. SLAVENSKY (eds.), *Implementing Human Rights. Essays in Honour of Morten Kjaerum* (Copenhagen: Danish Institute for Human Rights, 2007) 190-203.

⁵⁶ The Sub-Committee on Accreditation is composed of one NHRI of each regional group, i.e. four NHRIs in total.

⁵⁷ A regularly updated list of accredited NHRIs is available at: <http://www.nhri.net>.

The UN Committee on the Rights of Persons with Disabilities will be able to take advantage of the work of the International Coordinating Committee when evaluating the compliance of independent mechanisms with the Paris Principles. It may use the International Coordinating Committee's General Observations in order to interpret these Principles⁵⁸. Regarding those independent mechanisms that are NHRIs, it will also benefit from their possible accreditation by the Sub-Committee on Accreditation, although this does not necessarily mean that these institutions are in the best place to promote, protect and monitor the implementation of the Convention.

The Member States of the European Union have currently twelve NHRIs that fully comply with the Paris Principles (and are thus granted an A-Status)⁵⁹. These institutions are part of the European Group of NHRIs, which covers the 47 Member States of the Council of Europe⁶⁰. They are (ranked by their date of creation) the French Commission nationale consultative des droits de l'homme, the Danish Institute for Human Rights, the Greek National Human Rights Commission, the Polish Commissioner for Civil Rights Protection, the Portuguese Provedor de Justiça, the Spanish Defensor del Pueblo, the Irish Human Rights Commission, the Northern Ireland Human Rights Commission, the Luxembourg National Advisory Commission for Human Rights, the German Institute for Human Rights, the UK Commission for Equality and Human Rights and the Scottish Commission for Human Rights⁶¹. The Netherlands also intend to create an NHRI (in order to comply with its obligation to create an independent mechanism according to Article 33 (2) CRPD among others) and its government introduced a draft legislation to Parliament with a view to this⁶². Steps have been taken by NGOs, governments, and academic experts to establish similar institutions in Austria, Belgium, Italy and Switzerland.

Since Article 33 (2) CRPD refers to the Paris Principles, the question is whether the role of independent mechanism should be attributed to NHRIs. There are arguments in favour and against this option.

Several arguments plead for giving the role of independent mechanism to NHRIs. There are both substantial and practical arguments. If the Paris Principles were mentioned in Article 33 (2), it is because NHRIs were the very inspiration for the drafters of the Convention. While it is possible to apply these Principles to bodies with specific mandates provided certain adaptations are made, the standard model remains NHRIs.

⁵⁸ International Coordinating Committee, General Observations, June 2009: <http://www.nhri.net/2009/General%20observations%20June%202009%20%28English%29.pdf>.

⁵⁹ See FRA, National Human Rights Institutions in the EU Member States. Strengthening the Fundamental Rights Architecture in the EU I (Vienna: FRA, 2010), to be found at www.fra.europa.eu.

⁶⁰ See G. DE BECO, 'Networks of European National Human Rights Institutions', (2008) 14 (6) European Law Journal 860-877.

⁶¹ The UK has therefore three NHRIs with A-Status which are each competent according to their own devolved powers. Together, however, they have only one voting right in the international network of NHRIs.

⁶² See <http://www.internetconsultatie.nl/collegevoormensenrechtenengelijkebehandeling>.

NHRIs are not concerned with implementation as such, which is the responsibility of government, but with promotion, protection and monitoring, like the independent mechanisms. Therefore, in the words of Gerard QUINN, 'the default setting lies in favour of [NHRIs]⁶³.

There are also practical arguments. Giving the role of independent mechanism to an NHRI will save a State from having to create new bodies in the future, because it will have residual human rights powers. In addition, NHRIs have the necessary human rights knowledge and, therefore, can integrate disability issues in the State's human rights framework⁶⁴. For many of them this is not new and they already focus on disability rights, with the support of the International Coordinating Committee. When not yet done so, a State can also create an NHRI and give it the role of independent mechanism, which allows it to 'kill two birds with one stone'.

There are also arguments against giving NHRIs the role of independent mechanism. Although there are both substantial and practical arguments, doing so without evaluating the consequences for their workload could weaken them or not allow them to play this role properly. The tasks of the independent mechanisms are considerable. NHRIs have limited capacity and may not be able to promote, protect and monitor the implementation of the CRPD. Indeed, not all of NHRIs exercise these functions on equal footing with regard to human rights. As they are allowed to do by the Paris Principles, they often give priority to certain functions. While some of them have more a monitoring and advisory role, others focus more on promotion and research. Still others principally do complaints handling. Therefore, if NHRIs were to be designated as the independent mechanism, they might not fulfil all of the functions provided for by Article 33 (2) equally.

Other bodies may be better placed to be the independent mechanism. Many organisations are acquainted with disability issues, at least more than NHRIs. It might be easier, and sometimes more efficient, to designate existing bodies that are already dealing with these issues and give them a human rights mandate or otherwise to create a new body which would focus solely on disability rights. This last option is not necessarily more expensive, as it could happen that expanding the mandate of established bodies entails more costs than creating smaller bodies with specific mandates.

The conclusion is that NHRIs should not blindly be designated as the independent mechanism, despite the reference to the Paris in Article 33 (2) CRPD. In the hypothesis that there is an NHRI in a State, the best option could be either to designate the NHRI, to designate or establish another body or to combine both. This has to be evaluated on a case-by-case basis. As will be seen in the next section, often it will be advantageous to designate NHRIs in addition to other bodies, as is allowed by Article 33 (2).

⁶³ G. QUINN, 'The UN Convention on the Rights of Persons with Disabilities. National Institutions as Key Catalyst of Change', in Comisión Nacional de los Derechos Humanos de México, Network of the National Institutions for the Promotion and Protections of Human Rights of the Americas and OHCHR, National Monitoring Mechanisms of the Convention on the rights of Persons with Disabilities (Mexico: Comisión Nacional de los Derechos Humanos, 2008) 123-132 at 130.

⁶⁴ A. MÜLLER and F. SEIDENSTICKER, The Role of National Human Rights Institutions in the United Nations Treaty Body Process (Berlin: German Institute for Human Rights, 2007) at 75.

While NHRIs are certainly able to exercise some of the functions of independent mechanisms, additional bodies are needed to fulfil the other functions, depending on their mandates. A reasonable division of labour as well as partnerships will have to be established between them. Whatever the option chosen, NHRIs should be involved in examining the advantages and disadvantages of the different options.

Another question is whether the reference to the Paris Principles in Article 33 (2) obliges States to have an NHRI⁶⁵. A strict interpretation of these Principles could lead to a positive answer. The Paris Principles provide that NHRIs should have 'as broad a mandate as possible'⁶⁶. In view of this, the independent mechanisms should address all human rights and, therefore, cannot be but NHRIs. In addition, the Paris Principles enumerate a series of functions which should be fulfilled by one single body altogether, even if that body may focus on some of them. These arguments, however, ignore that Article 33 (2) only applies the Paris Principles to bodies that promote, protect and monitor the implementation of the CRPD. Moreover, the functions of independent mechanisms can be shared between different bodies, since States are allowed to create more than one independent mechanism.

The reference to the Paris Principles nonetheless created ambiguity. While it does not oblige States to have an NHRI, a strict interpretation of the CRPD could lead to the opposite conclusion. The answer, therefore, lies probably between the two. As 'the default setting lies in favour of [NHRIs]'⁶⁷, these institutions are the best pedigree for the independent mechanisms. This means that if there is an NHRI, it should at least be one of the independent mechanisms and have a leading role in the framework. If the NHRI does not fully comply with the Paris Principles, it should be strengthened with a view to this. If there is no NHRI, Article 33 (2) could be an incitement for States to establish one. Doing so will save them from creating more independent mechanisms in case future human rights treaties would also require them to designate or establish such mechanisms in line with the Paris Principles.

d) Functions of Independent Mechanisms


Article 33 (2) CRPD provides that the independent mechanisms should have three functions: promoting, protecting and monitoring the implementation of the Convention.

The first function, promotion, is raising awareness of the CRPD, by undertaking promotional activities, such as collecting, producing and disseminating information and materials, organising public events and encouraging community initiatives. All these activities aim to increase attention for disability rights, thereby hopefully leading to a corresponding change in behaviour. The purpose is to foster an acceptance of the values underlying the Convention, which is necessary for their internalisation.

⁶⁵ Interestingly, the initial proposal was to oblige States to create NHRIs. See G. QUINN, 'Resisting the 'Temptation of Elegance': Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?', op. cit., at 245-246.

⁶⁶ Principle 2, B. Competence and responsibilities, Paris Principles.

⁶⁷ G. QUINN, 'The UN Convention on the Rights of Persons with Disabilities. National Institutions as Key Catalyst of Change', op. cit., at 130.




Promotion can also be achieved by human rights education. Training in disability rights should be offered to all people whose activities could affect persons with disabilities. The question 'What about the rights of persons with disabilities?' should come in everyone's mind before making a decision that potentially affects these persons. In this way, promotion can contribute to the mainstreaming of disability rights. Furthermore, it is necessary to raise awareness of the CRPD among the general public in order to encourage them to try and integrate persons with disabilities into society, besides adapting society to persons with disabilities. The promotional activities should also aim to inform persons with disabilities about their rights and make sure that they are aware of the protection mechanisms available. The information should be presented in a format that can easily be understood by them.

Promotion also involves the creation of a large platform of dialogue between representatives of civil society organisations and experts, on the one hand, and representatives of the public administration, on the other hand. This platform should help the independent mechanisms to define their promotional activities. It will also allow civil society organisations to address their concerns and share their expertise with the public administration. Another aspect of promotion is research. The purpose is to build knowledge and to identify the root causes of the violation of disability rights. This involves the collection of data relating to disability issues, as required by Article 35 CRPD.

Promotion is a large domain. It will therefore be impossible for independent mechanisms to exercise the promotion function alone. Furthermore, in practice, governments are already collecting, producing and disseminating information and materials, organizing public events and encouraging community initiatives, as they have to according to Article 8 of the Convention. The fact that the State is undertaking promotional activities is not a problem, provided the disseminated information is accurate. DPOs also do this. Promotion thus straddles the competences of different actors. In contrast to the protection and monitoring functions, the promotion function can be shared between these actors, because it does not require the same degree of independence as opposed to the former functions. Promotion can therefore be done by multiple actors including governmental ones.

As a result, it is not necessary to entrust the independent mechanisms with tasks that are already carried out by other actors. This would lead to duplication. It is also not necessary for the independent mechanisms to take over promotional activities that are undertaken by government. Instead, these mechanisms should help the State to coordinate these activities and to identify which issues slip through the net and take care of these issues by themselves where necessary. They could therefore be entrusted with both providing advice and expertise and elaborating a general strategy to promote the implementation of the CRPD while filling in the gaps. The role of independent mechanisms in the creation of a large platform of dialogue will be essential to achieve this.

The second function, protection, is ensuring that violations of disability rights are stopped and remedied. In practice, the protection of disability rights takes the form of complaints handlings. This also involves action in the name of victims and assistance in litigation before courts. The idea is to help persons with disabilities claim their rights when they deem they are violated through non-judicial means. Complaints handling requires quasi-judicial powers.



While the first purpose is to find an arrangement between the concerned parties, the competent body should nevertheless be able to help persons with disabilities to obtain a binding decision where necessary. They should therefore have the power to orient them to the appropriate courts and represent them where necessary.

In those States that also ratified the Optional Protocol to the CRPD - creating a communication procedure before the Committee on the Rights of Persons with Disabilities - protection includes helping persons with disabilities to introduce communications before this Committee. Although neither NGOs nor independent bodies received the mandate to introduce collective communications, Article 1 of the Optional Protocol provides that the Committee may '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'. Independent mechanisms may therefore act in the name of such individuals and introduce communications on their behalf. This, however, is no equivalent to an *actio popularis*, i.e. judicial action on behalf of the general public.

Protection also includes filling *amicus curiae* briefs to courts, i.e. giving comments or providing expertise to judges. Appearing before courts may be useful in order to acquaint them with the Convention. At the international level, independent mechanisms may explain the human rights situation of disabled persons in their country to the UN Committee on the Rights of Persons with Disabilities in relation to communications. They may also do so before the European Court of Human Rights, as sometimes done by NHRIs.

Protection entails a considerable workload and know-how. It also requires a high degree of independence, because it is mainly undertaken against State authorities. In many States, the protection function is already carried out by equality bodies or ombudsmen, which either focus on discrimination in general or on discrimination based on disability in particular. These equality bodies or ombudsmen should be able to continue their work.

On the other hand, it might be hazardous to change the mandates of bodies which have no quasi-judicial powers, as they might not have the necessary expertise to fulfil the protection function. Regarding NHRIs, it should also be mentioned that many of them do not have such powers, which are optional according to the Paris Principles. However, equality bodies and ombudsmen do not, as a rule, have human rights in their mandates. While the former combat discriminations, the latter are concerned with maladministration. They mainly refer to national legislations. If they were to have the function to protect the implementation of the CRPD, it would be necessary that they also address human rights and focus on the entire Convention.

The third function, monitoring, is assessing the human rights situation of persons with disabilities. The purpose of monitoring is both to alert States of potential human rights violations and to help them to define the measures that can prevent such violations. Thus, as far as disability rights are concerned, it is necessary not only to detect breaches of the CRPD but also to examine how social structures could be adapted in order to facilitate its implementation. Because this may involve criticism against the government, the monitoring function should be exercised independently from State authorities. Also, it is important to associate civil society, especially since Article 33 (3) CRPD provides that civil society should be 'involved and participate fully in the monitoring process'.

Monitoring implies the evaluation of the compliance of both legislation and practice with human rights. As far as legislation is concerned, it involves making recommendations and proposals to government for adopting new legislation or amending existing legislation. This requires the examination of the compatibility of legislation with the Convention. Independent mechanisms should also verify that disability rights are complied with in practice by visiting places where their violation often occurs, such as hospitals, welfare centers and care homes, and make recommendations to improve the human rights situation of persons with disabilities. The data relating to disability issues collected under the promotion function will help them to identify these places and situations.

The monitoring of disability rights also includes conducting general inquiries on disability issues, as done by NHRIs in relation to human rights. These could be issues that are urgent or less commonly dealt with. Independent mechanisms, however, should be able to obtain the necessary information. As required by the Paris Principles⁶⁸, they should have the power to obtain any information and hear any person. The general inquiries could then be presented in the form of reports addressed to State authorities.

Another aspect of monitoring is the contribution to State reports for the UN Committee on the Rights of Persons with Disabilities. The Paris Principles require that these institutions contribute 'to the reports which states are required to submit to United Nations bodies and committees ... with due respect for their independence'⁶⁹. It is, however, not advisable that they draft these reports, because this is the task of government. They could however draw separate opinions. What they could also do is to assist civil society organisations in drafting 'shadow reports'. In addition, the independent mechanisms could train public officials responsible for preparing State reports by explaining to them their reporting obligations and urging them to take these obligations seriously.

Independent mechanisms could be useful at another stage of the State reporting process. NHRIs can ensure the follow-up to the concluding observations of treaty bodies by organizing meetings in which key actors concerned with human rights are invited⁷⁰. They can act as facilitators during these meetings and urge State authorities to implement the recommendations of the treaty bodies. Likewise, independent mechanisms could invite both State and non-State actors to discuss the concluding observations of the UN Committee on the Rights of Persons with Disabilities and encourage focal points to implement its recommendations.

The monitoring function of independent mechanisms is the most innovative one and is generally not yet carried out by any independent body. As a rule, it will therefore be necessary to establish new bodies or adapt the powers of existing ones. The exception is NHRIs for which monitoring is the main activity. The Paris Principles give these institutions broad powers in this regard⁷¹.

⁶⁸ Principle b), C. Methods of operation, Paris Principles.

⁶⁹ Principle 3 (d), A. Competence and responsibilities, Paris Principles.

⁷⁰ See L. SEIDENSTICKER, *Examination of State Reporting by Human Rights Treaty Bodies. An Example of Follow-Up at the National Level by National Human Rights Institutions* (Berlin: German Institute for Human Rights, 2005).

⁷¹ See Principle 3 (a), A. Competence and Responsibilities, Paris Principles.

NHRIs evaluate compliance with human rights of both legislation and practice and conduct general inquiries on human rights issues. Many of them cover disability rights and, therefore, there is no obstacle in designating them independent mechanism to monitor the implementation of the CRPD.

Giving NHRIs the monitoring function could nonetheless create problems. It affects their independence, because this means that they will be obliged to focus on the CRPD. Since they have limited capacity, they will be less able to monitor the rights of other vulnerable groups. It is therefore important to provide those NHRIs having to carry out the monitoring function with additional funding. Even if they were to be granted such funding, it means that they will have to spend more energy on some rights than on others, which is somewhat contrary to the indivisibility of human rights. This, however, is the unavoidable consequence of the reference in Article 33 (2) CRPD to the Paris Principles, which has led to an imbalance in the mandates of NHRIs.

e) Framework of the Independent Mechanisms

Article 33 (2) CRPD provides that States must designate or establish 'a framework, including one or more independent mechanisms, as appropriate'. Although there is no clear definition for this framework, the idea is that the independent mechanisms, whatever their number or shape, should form a coherent whole. The reference to a framework has been foreseen by Article 33 (2), because different bodies operating in isolation would be counterproductive, especially if they share similar functions. There should therefore be some form of coordination, which might require the creation of an additional structure.


The flexibility of Article 33 (2) CRPD allows for different combinations⁷². This is in line with the Paris Principles, which offer a certain leeway in determining the exact form of NHRIs. In its Resolution endorsing the Paris Principles, the General Assembly emphasised that a State establishing an NHRI has 'the right [...] to choose the framework that is best suited to its particular needs at the national level'⁷³. Likewise, there is no standard model for the framework of the independent mechanisms. That this framework may be adapted to the national context is confirmed by the terms 'as appropriate' of Article 33 (2).

After having examined which existing bodies could carry out the functions to promote, protect and monitor the implementation of CRPD, States could arrive at the following three, non-exhaustive, options.

Firstly, a State might either have an NHRI or an equality body or ombudsman that is already exercising these functions. This is the easiest option. The State could simply designate the NHRI or the equality body or ombudsman. NHRIs are particularly well placed to be the independent mechanism, because they are already focusing on disability rights.

⁷² OHCHR, Thematic study on the structure and role of national mechanisms for the implementation and monitoring of the Convention on the Rights of Persons with Disabilities, 22 December 2009, A/HRC/13/29, at 12.

⁷³ GA Resolution 48/134, 20 December 1993, A/RES/48/134, at para. 12.



The designation of an NHRI or an equality body or ombudsman might however require certain adaptations, especially if the designated body has no A-Status, although this is not the factor that comes into play.

Civil society organisations could be involved by ensuring their representation in the independent mechanism or by establishing partnerships. Another possibility is to create an NHRI when the State has none. This NHRI will then exercise the functions of independent mechanisms.

In this option, the NHRI or the equality body or ombudsmen will also be the framework. It is not necessary to create an additional structure when there is only one independent mechanism. The condition, however, is that this independent mechanism meets the Paris Principles. Again, NHRIs are often well placed to be the framework, since they are already creating broad networks and running coalitions.


Secondly, a State might have both an NHRI and an equality body or ombudsman which already exercise the functions to promote, protect and monitor the implementation of the CRPD. This is the most comprehensive option. The State can designate both the NHRI and the equality body or ombudsman and give them alone or together the functions of independent mechanism⁷⁴. For instance, the NHRI might be entrusted with the monitoring function and the equality body or ombudsman with the protection function, while the promotion function might be attributed to both of them in addition to other actors. The advantage of this combination is that it benefits from the mutual expertise of both human rights and equality bodies⁷⁵. As with the first option, however, this option may require certain adaptations to be made so that the designated bodies meet the Paris Principles.

In this option, a framework will be necessary to coordinate the work of the different bodies. Especially if they exercise some of the functions of independent mechanisms together, an additional structure will be needed. The framework can take several forms and be either the NHRI or the equality body or ombudsmen. As explained earlier, the NHRI will usually be the best placed for this. It is also possible to create an organ in which both of them are represented in addition to civil society organisations.

Thirdly, a State might have neither an NHRI nor an equality body or ombudsman which already exercises the functions of independent mechanism. It might also have one that cannot exercise these functions. This is the minimum option. The State will therefore have to create a new body. It could establish an independent mechanism in which civil society organisations are duly represented, as required by the Paris Principles. The representatives of the public administration would also take part in the independent mechanism but in an advisory capacity. In other words, the State would establish an NHRI-type body with the sole mandate to protect, promote and monitor the implementation of the CRPD.

⁷⁴ See Commission nationale consultative des droits de l'homme, *Avis sur les mécanismes nationaux prévus par la Convention relative aux droits des personnes handicapées*, November 2009: http://www.cncdh.fr/IMG/pdf/Avis_mecanismes_nationaux_conv.pers.hand.191109.pdf.

⁷⁵ OHCHR, *op. cit.*, at 20-21.



As with the first option, this option will not require the creation of an additional structure, because there will be only one independent mechanism. Provided this independent mechanism meets the Paris Principles, it will also be the framework. It will therefore have both the role of the independent mechanism and of the framework.

Finally, the three options can be tailored to federal or decentralised States. It is with these States in mind that the drafters of the CRPD inserted in Article 33 (2) the possibility of designating or establishing more than one independent mechanism. A federal or decentralised State could therefore designate or establish regional or local bodies in addition to its national body or bodies. It could either appoint different NHRIs or equality bodies or ombudsmen, or both, or create several new bodies in which civil society organisations are duly represented.

While the creation of several independent mechanisms in federal or decentralised States will bring these mechanisms closer to local realities, it will be essential to create a framework to ensure their cooperation. This might either be a national body or a special structure established for this purpose. This body or special structure will also have to represent the independent mechanisms at the international level. Another possibility is to work the other way around. A federal or decentralised State may designate or establish a single independent mechanism and involve regional or local entities. This could be achieved by allowing the regional or local entities to appoint some of the members of the single independent mechanism and by creating regional or local sections in this independent mechanism which would focus on disability rights in these regional or local entities. In this way, the independent mechanism will itself be the framework in which cooperation takes place.

f) Examples


What follows are examples of the three options:

The first option is to designate an NHRI or an equality body or ombudsman or to create an NHRI:

- Germany designated its German Institute for Human Rights
- The UK designated its Equality and Human Rights Commission
- Latvia designated its Ombudsman
- The Netherlands intend to create a NHRI

The second option is to designate both an NHRI and an equality body or ombudsman:

- Northern Ireland appointed both the Northern Ireland Human Rights Commission and the Equality Commission of Northern Ireland
- France will probably designate both the Commission nationale consultative des droits de l'homme and the Haute autorité de lutte contre les discriminations et pour l'égalité



The third option is to create a new body in which civil society organisations are duly represented:

- *Spain designated the Spanish Committee of People with Disabilities Representatives*
- *Austria established the Austrian Independent Monitoring Committee*

In federal or decentralised States, regional or local bodies could be designated or established in addition to the national body or bodies:

- *The United Kingdom designated three NHRIs: the Equality and Human Rights Commission, the Scottish Human Rights Commission and the Northern Ireland Human Rights Commission (in addition to the Equality Commission of Northern Ireland).*

Chapter III

Article 33 (3): Civil Society

a) “Nothing About us Without Us’

As mentioned in the Introduction, the negotiation of the CRPD has proven to be an unprecedented exercise in transparency towards civil society and the participation of DPOs in particular. The slogan adopted by the disability rights movement during the process of negotiations, ‘Nothing About us Without Us’, did not only symbolise their presence and influence at the UN Ad Hoc Committee but also represents one of the fundamental principles which has been incorporated in the Convention. Indeed, miscellaneous articles of the CRPD make reference to the obligation of States to involve civil society and DPOs in particular in the implementation of disability rights. The involvement of civil society is therefore not limited to Article 33, which defines the contours of the independent mechanisms, but should be addressed in a transversal manner as an integral part of the implementation of the Convention.

First and foremost, it follows from the primacy of the ‘best interest principle’ that the target group should be included in the decision-making process. Article 4 (3) CRPD therefore reads:

“In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations.”

Inclusion of persons with disabilities in government policy-making is in other words part of a human rights impact assessment which should precede the executive or legislative adoption of disability policies on the one hand and which should accompany their implementation on the other hand⁷⁶. Being more easily acceptable for persons with disabilities, such policies will be marked by a greater legitimacy and a larger ownership⁷⁷. This dimension of the implementation process will undoubtedly be one of the key challenges for State authorities to put into practice and should receive the necessary attention during and after the ratification process.

The CRPD of course does not lose sight of the proper role civil society should have in the implementation of the Convention. Civil society is composed of autonomous components responsible for setting their own agenda and for pursuing their own priorities independent of government objectives.

⁷⁶ G. DE BECO, *Non-judicial Mechanisms for the Implementation of Human Rights in European States* (Brussels: Bruylant, 2009) at 257-308; T. LANDMAN, *Studying Human Rights* (London: Routledge, 2006) at 126-139.

⁷⁷ Organisation for Economic Co-operation and Development, *Open Government. Fostering Dialogue with Civil Society* (Paris: OECD Publishing, 2004) 216.

The positive obligation States have to associate representative organisations of persons with disabilities to their policy-setting in no way interferes with the classic monitoring role DPOs have with regard to the implementation of the CRPD. Overall, the CRPD therefore embodies the principle of 'Nothing About us Without Us' through an integral approach to civil society involvement in all issues concerning persons with disabilities.

Turning specifically to the monitoring dimension of civil society involvement, Article 33 (3) CRPD provides that civil society should 'be involved and participate fully in the monitoring process'. The Paris Principles also guarantee the participation of civil society in independent mechanisms (which makes Article 33 (3), to a certain extent, redundant and which means that this participation should concern all of the functions of these mechanisms).

There is no single definition for the term civil society⁷⁸. As far as the CRPD is concerned, the most concerned organisations are DPOs. These organisations are to disability rights what NGOs are to human rights in general. DPOs should therefore be involved in the working of the independent mechanisms. These organisations are, as a rule, the closest to persons with disabilities and have the greatest expertise in disability issues. As is often the case with DPOs themselves, the direct participation of persons with disabilities in independent mechanisms is also desirable.

While the large involvement of DPOs is recommended, there are obstacles. These organisations are prone to struggle and are not always representative. Regulation by States is therefore necessary to protect civil society from unequal power relationships⁷⁹. States should check that DPOs really defend the rights of those people in whose name they pretend to speak. They could establish objective criteria for their participation with a view to involving only those organisations that qualify. The system should however be flexible and allow for newly established organisations that meet the said criteria to also be included. Furthermore, provisions should be made to allow DPOs to complain if they deem to have been excluded unwarrantedly.

The Paris Principles also provide for the participation of other actors in independent mechanisms. In addition to the participation of NGOs, they recommend the involvement of 'trade unions, concerned social and professional organisations for example, associations of lawyers, doctors, journalists and eminent scientists'⁸⁰. Trade unions and social and professional organisations, such as medical associations, concerned with disability rights, should therefore be involved in the work of the independent mechanisms.

⁷⁸ Michael Edwards, for instance, defines civil society in three ways. First, it can be understood as associational life, which is distinct from states and markets. Second, civil society can be considered as the good society, which is a society based on values. Third, civil society can be regarded as the public sphere, which is an arena where deliberations take place. He concludes that civil society is at the same time the three of them. See M. EDWARDS, *Civil Society* (Cambridge/Malden: Polity Press, 2004).

⁷⁹ M. WALZER, 'The Civil Society Argument', in C. MOUFFE (ed.), *Dimensions of Radical Democracy. Pluralism, Citizenship, Community* (London/New York: Verso, 1992) 89-107 at 104.

⁸⁰ Principles 1, B. Composition and guarantees of independence and pluralism, Paris Principles.

According to the Paris Principles, trends in philosophical or religious thought, universities and qualified experts, parliament, but also, albeit in an advisory capacity, the public administration should likewise be involved⁸¹.

Making room for the participation of civil society, however, does not mean that this will work. Because it depends on resources, access to deliberations is not equal⁸². Participation also needs funding and connections. Without support, disabled people might not be able to express their opinion in deliberations. In addition, they might not be willing to invest in discussions having wider implications, in contrast to experts who will see this as an opportunity for increasing their knowledge. States should therefore ensure that persons with disabilities benefit from financial help to participate in the independent mechanism.

Financial help, however, might ensure equal opportunity to deliberate but not equal capacity. Inequalities reduce the ability to make oneself heard, with the result that deliberation, despite being equally accessible, remains affected by these inequalities⁸³. As a result, persons with disabilities might not be able to participate meaningfully in debates without capacity building. For obvious reasons, they may need special measures depending on their disability. In addition, they must be able to understand the policy issues that are being dealt with. Because such issues are nowadays increasingly complex, they should be explained in a format adapted to them. Persons with disabilities must also be familiarised with the CRPD, which they must be able use to make their claims.

b) Multi-level involvement of Civil Society

As briefly demonstrated in the previous section, the empowerment of civil society to seize ownership of the CRPD takes the shape of a two-pronged approach as to the nature of its involvement: disability rights implementation on the one hand and promotion, protection and monitoring on the other hand. While such a distinction is strictly speaking irrelevant from a formal point of view, practically the interaction between State actors and DPOs may be defined by it. The manner in which DPOs articulate this empowerment depends on numerous factors such as the nature of the activities they organise, the partnerships they create and the stakeholders they engage with. Their manifestation may be cooperative or confrontational, neutral or biased but will always be in function of their proper disability rights agenda. DPOs will need to organise themselves to be able to deal with multi-level engagement which will be defined by the objective pursued and the process of which they may be part of. In this respect, their relationship with the national mechanisms of article 33 (1) and (2) CRPD will play a crucial role.

Firstly, the CRPD empowers DPOs to engage directly with the State authorities, while at the same obliging the latter to establish a working relationship with DPOs.

⁸¹ *Idem.*

⁸² J. COHEN, 'Deliberation and Democratic Legitimacy', in A. HAMLIN and P. PETTIT (eds.), *The Good Polity. Normative Analysis of the State* (Oxford: Basil Blackwell, 1989) 17-34 at 31.


⁸³ N. FRASER, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy', in F. BARKER, P. HULME and M. IVERSEN (eds.), *Postmodernism and the Re-reading of Modernity* (Manchester/New York: Manchester University Press, 1992) 197-231 at 206.

This interaction will most likely happen through the focal points and coordination mechanism where the latter exists. Staying true to the CRPD, the focal points and coordination mechanism will at regular intervals either formally or informally consult DPOs concerning disability policy development and implementation. This may consist of a vast array of activities, for example:

- DPOs may be invited during hearings in (inter-)ministerial meetings or parliamentary committees;
- larger public consultations may be organised through permanent websites through which the government can also publicly communicate about its CRPD implementation and realisation of its disability rights policies;
- focal points may set up joint initiatives with DPOs to promote the CRPD and raise awareness on disability issues;
- focal points may organise regular training sessions for DPOs on legal and technical issues or provide guidance to civil servants on how to involve civil society in their work;
- the focal points or the coordination mechanism may set up a framework consisting of internal rules and the conclusion of gentlemen agreements with DPOs concerning the handling of complaints from persons with disabilities;
- they may set up partnerships for the development of indicators and statistics;
- specialised researched institutes and DPOs may receive government contracts to develop research which may serve as groundwork for legislative proposals;
- DPOs may be part of national delegations during international events related to disability rights or government may push for the candidacy of an independent expert in various regional or international bodies and agencies;
- particular attention should of course be paid to their involvement in the establishment of a disability rights action plan and the process of national CRPD reporting before the UN Committee.

Noteworthy is that the manifestation of civil society within the governmental sphere can take different shapes which, to some extent, will and should not always be regulated. DPOs are of course by nature at liberty to exercise their autonomous role in all issues, governmental or non-governmental, related to persons with disabilities. As such, DPOs can pro-actively engage with focal points or with the coordination mechanism outside the realm of the formal or informal networking platform which may have been created by the State. At the same time they may also choose to act outside the realm of the independent mechanisms depending on their relationship and possible agreements with the latter.


To fulfil its obligations under Article 4 (3) CRPD the State may set up platforms consisting of a « privileged consortium » of DPOs and other non-State actors towards which it is committed to regularly consult, inform and provide feedback following the consultation. This platform can take one of the two following management models. It is either State-drive which means the focal points – or the coordination mechanism – take the initiative, set the agenda and decide upon the follow-up. In this model the involvement of DPOs is reactive and determined in function of the realisation of governmental objectives. Such a model may be an off-spring of the coordination mechanism or the lead focal point.



However, the model may also be based on an egalitarian principle whereby State and non-State actors are on equal footing and jointly manage the platform. DPOs then may convoke a meeting and determine the agenda according to the established internal rules. This model leans towards an independent consultative mechanism which can be easily be confused with the independent mechanisms of Article 33 (2) CRPD but is not necessarily the same. Such a platform would exist virtually, without a staff or resources, and would act purely as a neutral meeting ground. Also, in the Article 33 (2) CRPD mechanism State actors are only involved with advisory capacity and in no way manage the mechanism. Both the Article 33 (2) CRPD mechanism and the fore mentioned consultative mechanism can exist in parallel but this depends upon the composition and mandate of the Article 33 (2) CRPD mechanism. Where the latter has a mandate to cover all three functions of the Paris Principles and its composition includes representatives of the coordination mechanism and/or the focal points - with advisory capacity - the usefulness of a parallel independent consultative mechanism diminishes to some extent. In such case the State actors can fulfil a substantial part of their Article 4 (3) CRPD commitment through the article 33 (2) CRPD mechanism. However, where a State has designated or created an independent mechanism with the bare minimum of mandate and composition, such a parallel mechanism may have an existential purpose. Nevertheless such an option does not seem preferable. Rather it is opportune that the State creates a strong Article 33 (2) CRPD mechanism, thereby giving weight to its existence and shifting part of the initiative towards representative organisations of persons with disabilities in an official and structured manner and in line with the spirit and text of the CRPD. This of course does not prevent the State from investing in DPO capacity building and from setting up its own channels of communication or consultation.

One concrete example in which all forms of civil society involvement can be brought together is the process of national CRPD reporting. This was already discussed in relation to independent mechanisms. The State has the obligation, following Articles 4 (3) and 33 (3) CRPD, to involve civil society in this exercise through the consultative platforms it may have established within the working sphere of the focal points or the coordination mechanism but certainly also with the independent mechanisms. Independent of the initiative taken by the State authorities, both the independent mechanisms as well as DPOs individually may follow their own agenda and objectives. Most likely the independent mechanisms will draft separate opinions, as suggested earlier. They will submit these opinions to the UN Committee on the Rights of Persons with Disabilities which might use them as an important source of information. The independent mechanism will therefore pursue its own coordination but not excluding in this overall process the autonomous participation of each DPO which acts according to its own mandate and objectives.

This brings us to the composition of the independent mechanism and the relationship between the latter and its constituents, in particular the DPOs. The next section then deals with the relationship between the focal points and independent mechanisms. Preliminary, the State has the obligation to include DPOs in the establishment of the independent mechanisms. While this concerns all questions related to the functioning of these mechanisms, it is of particular importance to its composition that civil society which is most concerned with issues related to persons with disabilities is represented. As mentioned in the previous section, the establishment of the independent mechanism will have to be preceded by a bottleneck process, consulting representative organisations at large but ending up with only a selection of DPOs being formally part of the independent mechanism.



Once the mechanism is established, it will need to set up working methods and networks to reach out to the larger community of DPOs and include them in the activities of the independent mechanisms. Preferably the independent mechanism will adopt a flexible approach which may be determined in function of the task at hand. Those DPOs which have been selected to be a part of the independent mechanism will of course engage in a more intense multi-level involvement. They will at times be restrained in their individual actions because they have a representative role exceeding their own constituency or because they are expressing a 'brokered position'. But they may equally build upon this, go their own way where no consensus was found within the independent mechanisms or seek alliances outside the formally established networks.

Considering that multi-level engagement will prove to be complex and given the sometimes fragile state, in terms of resources, of smaller DPOs capacity building will become a major challenge. It should not only be important as a commitment from State actors but also, and even more so, from the disability rights movement. Guidance and support on a peer-level will be required⁸⁴.

⁸⁴ In this sense the International Disability Alliance has issued a Guidance Document in May 2010 on the CRPD reporting process called 'Effective Use of International Human Rights Monitoring Mechanisms to Protect the Rights of Persons with Disabilities'. It contains recommendations for DPOs on how to participate, build national coalitions and draft parallel reports to inform and influence the UN Committee. It can be found at <http://www.internationaldisabilityalliance.org>. Likewise, Spain has organised together with the United Nations Department of Economic and Social Affairs a seminar in 2007 which led to the Madrid Declaration. This declaration formulates recommendations to Member States of the UN and to civil society aimed at ensuring the participation of civil society in the implementation and follow-up of the CRPD (to be found at <http://www.un.org/disabilities/documents/reports/egm/decmadrid.doc>).

Chapter IV

Transversal Issues relating to the Implementation of the Convention

a) Interaction between Focal Points and Independent Mechanisms

The functions of focal points will have to be articulated with that of independent mechanisms. In theory, the division of labour between both of them seems clear. While the focal points are generally in charge of implementation, the independent mechanisms are entrusted with promotion, protection and monitoring. The latter functions may be considered to be part of and contribute to the implementation of the CRPD but without the independent mechanism being responsible for this implementation as such. The focal points are part of government; the independent mechanism should be outside of it. This double creation is well-thought of, since States are primarily responsible for the implementation of human rights, while they need independent bodies that provide external surveillance.

This division of labour implies a clear distance to be established between focal points and independent mechanisms. This requires that they work separately. Besides having a different location, nobody should be appointed in the focal points and the independent mechanisms simultaneously. In practice, however, the line might not always be easy to draw, because certain activities will be exercised by both. While a strict separation is necessary for the protection and monitoring functions, the focal points and the independent mechanisms will have to collaborate in exercising the promotion function. Even with regard to protection and monitoring, cooperation will *de facto* be required, since the focal points will be the principal information providers and main recipients of the recommendations of the independent mechanisms.

Cooperation with focal points, however, creates difficulties. On the one hand, independent mechanisms have to remain independent from focal points. On the other hand, they should collaborate with these focal points. The fact is that when the independent mechanisms criticise State action, the focal points might not be willing to continue their relationship with them or, worse, try to weaken them. This is why it is important that these mechanisms be, as required by the Paris Principles, established 'by a constitutional or legislative text'⁸⁵. There is, as a result, a tension between cooperation with focal points and the ability to take position against government. The independent mechanisms will have the delicate task to navigate between independence and cooperation.

The respective role of focal points and independent mechanisms can again be illustrated with regard to State reports. As explained earlier, the independent mechanisms should preferably not draft these reports. These mechanisms have a monitoring function *vis-à-vis* the government, just like the treaty bodies to whom the State reports are addressed. They could, however, support the focal points by providing interpretation guidelines and verifying that they carry out their reporting obligations.

⁸⁵ Principle 2, A. Competence and responsibilities, Paris Principles.

Another example is human rights indicators. Article 31 (1) CRPD provides that States should 'collect appropriate information, including statistical and research data'. This information could allow them to use indicators based on the Convention to evaluate progress in the realisation of disability rights. On the one hand, focal points could gather the information to apply such indicators, since they are in the best position to acquire this information. According to Article 31 (2) of the Convention, they should disaggregate the information in order to identify discriminations. On the other hand, independent mechanisms could interpret the information and make recommendations on the measures to be taken to implement the Convention. They could also critically review and, where necessary, supplement this information. In this way, both the focal points and the independent mechanisms could cooperate while remaining in their own sphere of competence.

b) Challenges with regards to the conclusion of the Convention by the European Union

One last innovation worth mentioning is that the CRPD is the first UN human rights treaty which expressly foresees the possibility for regional integration organisations to accede to the Convention and be bound by its provisions. Article 44 (1) CRPD defines a regional integration organisation as:


“[...] an organisation constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the present Convention.”

Although applicable to other regional integration organisations this provision is specifically designed to allow the EU, being the most advanced, to accede to the CRPD. The European Community – before the entry into force of the Lisbon Treaty, now the EU – was already involved during the negotiation of the Convention and always showed a clear interest in the implementation of the CRPD by the EU institutions. It was therefore among the first signatories of the Convention on 30 March 2007. The European Commission subsequently launched its proposals for the formal conclusion of the CRPD (and its Optional Protocol) on 29 August 2008⁸⁶ and the European Parliament approved them in its report and resolution of 24 April 2009⁸⁷. The Council of the European Union then adopted, on 26 November 2009, a Decision concerning the conclusion of the CRPD⁸⁸. The deposit of the instrument of formal conclusion will be happen once the EU has adopted a Code of Conduct relating to certain aspects of the implementation of the CRPD as well as the representation of the EU before the bodies created by the CRPD.

⁸⁶ COM 2008/530-1, Proposal for a Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities and COM 2008/530-2, Proposal for a Council Decision concerning the conclusion, by the European Community, of the Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities.

⁸⁷ C 184, 8.7.2010, E/111-113.

⁸⁸ OJ L 23, 27.1.2010, 35-61.



The EU being a regional organisation which has reached an advanced degree of integration or transfer of competences from its Member States to the Union, its conclusion of the CRPD naturally adds a complex dimension to the implementation of the CRPD, both for the Union itself as well as its Member States⁸⁹.


It falls outside the scope of this contribution to analyse the full implications of this innovative development – and not all consequences can be fully appreciated at the time of writing considering that the negotiations concerning the Code of Conduct are still ongoing – but we cannot conclude without highlighting some notions of this complex but interesting matter.

The implementation of the CRPD by the EU and its Member States will need to take into account the division of competences between the former and the latter. For example, where the realisation of a disability right as foreseen by the CRPD falls, entirely or partially, upon the responsibility of both the Member States and the Union a coordinated and integrated approach will need to be established both with regard to the implementation as well as the reporting obligations. Consequently, this will add an extra level of interaction between the existing CRPD mechanisms. The European Union, as a contracting party to the CRPD, will need to establish its proper Article 33 CRPD mechanisms. Those EU focal point(s) and independent mechanism(s) will engage both in peer-to-peer as well as in diagonal interaction with the focal points, independent mechanisms and civil society organisations of the Member States. This interaction may be casual and informal or it may be regulated and formal, depending on the context, and most likely a European level of networks will be established gathering each of the mechanisms.

The near future will tell how these EU mechanisms will be structured and function but at this stage the impact of this European level on the national structures is to some extent already foreseeable and will need to be taken into account when conceptualising these national structures. They will not only act as contact point for the UN level but also for the EU level.

Firstly, on the governmental level the focal points will need to establish working methods of consultation and coordination also with the European Commission focal point(s). The process of drafting the national CRPD report will need to take into account the European dimension of the implementation of the CRPD just like the development of a national disability rights plan will need to integrate those objectives of the CRPD which will be realised as a common effort by the Union and its Member States. The representation of the EU and its Member States before the CRPD bodies (particularly the UN Committee on the Rights of Persons with Disabilities and the Conference of States Parties) will at times also necessitate a concerted approach, as will the exercise of the voting rights. Article 44 (4) CRPD, for example, shows that the EU will be able to exercise its vote in matters of EU competence only when the 27 Member States agree not to exercise theirs and to express themselves through one common EU voice. Where it concerns exclusive competences this seems relatively straightforward but the contrary may be the case when dealing with shared competences.

⁸⁹ For some concrete proposals concerning the structural implementation of the Article 33 provision of the CRPD, see the EDF input to the European Commission discussion paper setting thematic areas for the new Disability Strategy, June 2010, available at www.edf-feph.org.



Potential conflicts and stalemates between Member States or between the EU institutions and the Member States are not unrealistic and will need to be resolved swiftly through pre-established procedures.

Secondly, the scope of action of the independent mechanism becomes larger by entering into the supranational sphere of the European Union. It may engage in promotion of the CRPD on a transnational scale, join forces with other independent mechanisms to achieve certain objectives at the European level, while integrating the European dimension in its monitoring work. Given the efforts by the Member States to implement the CRPD collectively to the extent it falls within the competences of the EU, the Member States' independent mechanisms may hold their government accountable for their action at the European level.

Thirdly, the previous considerations are naturally equally valid for civil society.

Given the complexity of this innovative supranational dimension, the implementation of the CRPD by the EU and its Members States can only be realised efficiently if the impact of the level of European integration on the functioning and interaction of each of the CRPD mechanisms is channelled through well conceived, clear and transparent modes of consultation and decision-making.

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