

# OMBUDSMAN INSTITUTIONS AND ARTICLE 33(2) OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES\*

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## INTRODUCTION

It is estimated that over one billion persons around the world live with some form of disability.<sup>1</sup> Persons with disabilities (PWDs) are often discriminated against and subjected to more egregious treatment by state and non-state actors. Women and girls with disabilities are often maltreated, suffering violence, exploitation, and forced sterilization.<sup>2</sup> Most of the children with disabilities who live in developing countries have no access to education.<sup>3</sup> The elderly often live with disabilities, either longstanding or appearing with the aging process.<sup>4</sup> In industrialized countries, increasing numbers of prisoners are PWDs due to the percentage of inmates with mental health needs and the growth in the geriatric inmate population.<sup>5</sup> Furthermore, the majority of PWDs live in poverty.<sup>6</sup>

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<sup>1</sup> WHO & World Bank, *World Report on Disability* (2011) at 29; Save the Children, *See Me, Hear Me: A Guide to Using the UN Convention on the Rights of Persons with Disabilities to Promote the Rights of Children* (London: The Save the Children Fund, 2009) at 1 [*See Me, Hear Me*]; UNICEF Innocenti Research Centre, *Promoting the Rights of Children with Disabilities* (New York: UNICEF, 2007).

<sup>2</sup> UN Human Rights Council, *Thematic study on the issue of violence against women and girls and disability*, UNOHCHR, 20th Sess, UN Doc A/HRC/20/5 (2012) [*Violence against women and girls and disability*].

<sup>3</sup> *See Me, Hear Me*, *supra* note 1 at 106 (close to 90% have no formal education); Rangita de Silva de Alwis, "Mining the Intersections: Advancing the Rights of Women and Children with Disabilities within an Interrelated Web of Human Rights" (2009) 18 *Pacific Rim L & Pol'y J* 293.

<sup>4</sup> See Arlene S Kanter, "The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Rights of Elderly People under International Law" (2008-2009) 25 *Georgia State U L Rev* 527 [*CRPD and Rights of Elderly*]; *Violence against women and girls and disability*, *supra* note 2 at para 20 (women more likely to have age-related disabilities given their life spans).

<sup>5</sup> Howard Sapers, "The Office of the Correctional Investigator and Human Rights: Aging, Disordered and Aboriginal Offenders in Canadian Federal Corrections", (Paper delivered at the International Ombudsman Institute 10th World Conference, 12-16 November 2012); "In it for life: Old prisoners are suffering from poor care—and putting a strain on jails, too", *The Economist* (2 March 2013), online: The Economist <[www.theeconomist.com](http://www.theeconomist.com)>; New Zealand Human Rights Commission, *Making Disability Rights Real: Annual Report of the Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities* (2011-2012) at 42-44, online: New Zealand Human Rights Commission <[www.hrc.co.nz](http://www.hrc.co.nz)> [*New Zealand 2011-2012 Independent Monitoring Mechanism Annual Report*].

<sup>6</sup> Paul Harpur, "Time to be Heard: How Advocates Can Use the Convention on the Rights of Persons with Disabilities to Drive Change" (2011) 45 *Valparaiso U L Rev* 1271 at 1272 [*Harpur*].

In recent years, the international human rights system has paid greater attention to articulating and enforcing the human rights of PWDs. Moving from the initial use of medical or welfare models, the international community has adopted a social model of disability.<sup>7</sup> The social model is reflected in the broad spectrum of human rights enshrined in the United Nations Convention on the Rights of Persons with Disabilities (CRPD) which came into force in 2008.<sup>8</sup>

Article 33(2) of the CRPD requires states parties to establish or designate a framework of one or more independent mechanisms to protect, promote, and monitor the domestic implementation of their CRPD obligations, taking into account the United Nations (UN) Paris Principles on national human rights institutions (NHRIs).<sup>9</sup> National level human rights commissions and human rights ombudsman institutions are the predominant types of NHRIs.<sup>10</sup> However, there are other independent non-judicial public sector institutions that can also play a role in furthering domestic compliance with the state's CRPD obligations. These institutions are predominantly sub-national human rights ombudsman institutions and human rights commissions, national and sub-national classical ombudsman institutions, and thematic human rights institutions, such as equality and disability rights bodies. Some CRPD parties are establishing multi-institutional article 33(2) frameworks that include a NHRI as well as additional institutions. The Committee on the Rights of Persons with Disabilities (CRPD Committee) is the CRPD's treaty body and it

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<sup>7</sup> The medical model was based on the limitations of individuals due to disability. In contrast, the social model looks at how societal barriers circumscribe the lives of PWDs and supports rights that reduce barriers to their full participation in society. The social model accepts medical and professional *support* which is seen as promoting the independence and participation of PWDs. See Janet E Lord et al, "Lessons from the Experience of U.N. Convention on the Rights of Persons with Disabilities: Addressing the Democratic Deficit in Global Health Governance" (2010) 38 J Law, Medicine & Ethics 564 at 566 [*Lessons From CRPD Experience*]; Harpur, *supra* note 6.

<sup>8</sup> *Convention the Rights of Persons with Disabilities (CRPD)*, GA Res 61/106, UNGAOR, 61st Sess, UN Doc A/Res/61/106 (2007) [*CRPD*]. The CRPD was drafted with the participation of PWDs, their representative organizations, and NHRIs. See generally: Arlene S Kanter, "The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities" (2007) 34 Syracuse J Int'l L & Com 287; Janet E Lord & Michael Ashley Stein, "The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities" (2008) 83 Wash L Rev 449 [*"Domestic Incorporation"*]; Frédéric Mégret, "The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?" (2008) 30 Hum Rts Q 494 [*The Disabilities Convention*].

<sup>9</sup> *Principles Relating to the Status of National Institutions (The Paris Principles)*, GA Res 48/134, UNOHCHR, 20 December 1993, UN Doc A/RES/48/134 [*Paris Principles*].

<sup>10</sup> Linda C Reif, "The Shifting Boundaries of NHRI Definition in the International System" in Ryan Goodman & Thomas Pegram, eds, *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (Cambridge: Cambridge University Press, 2012) at 52 [*"Shifting Boundaries" in Assessing NHRIs*]; Linda C Reif, "Transplantation and Adaptation: The Evolution of the Human Rights Ombudsman" (2011) 31 B C Third World L J 269 [*Transplantation and Adaptation*]; Office of the United Nations High Commissioner for Human Rights, *National Human Rights Institutions: History, Principles, Roles, and Responsibilities* (New York, 2010) [*National Human Rights Institutions: History, Principles, Roles and Responsibilities*].

determines whether the frameworks established by CRPD parties comply with Article 33(2). In doing so the CRPD Committee applies the Paris Principles which have been authoritatively interpreted by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC).<sup>11</sup>

Based on the work of the CRPD Committee and ICC, when a CRPD party establishes an article 33(2) framework consisting of one institution, it must be a Paris Principles compliant national human rights ombudsman or national human rights commission. However, the CRPD Committee has not yet squarely addressed whether all of the institutions in a multiple mechanism article 33(2) framework must be Paris Principles compliant or whether inclusion of one Paris Principles compliant NHRI will suffice. This paper will demonstrate how the ICC interpretation of the Paris Principles and its accreditation process permits ICC accreditation of only one NHRI in a state and usually excludes other independent national and sub-national institutions from being classified and accredited as NHRIs. These institutions are not considered to be fully Paris Principles compliant because of their sub-national status, their thematic human rights focus, and/or their lack of an explicit human rights mandate. However, these other independent state institutions can protect and promote CRPD rights.

To enable CRPD parties to establish the multiple institutional frameworks permitted by article 33(2), I argue that a multiple institutional framework should be acceptable to the CRPD Committee as long as one of the institutions included in the framework is a Paris Principles compliant NHRI, the other institutions included in the framework meet most of the Paris Principles' essential requirements (including independence from government and adequate funding), and the multiple institutions working together can fulfill the promotion, protection, and monitoring roles required by article 33(2). The Paris Principles' essential requirement that a NHRI must have a legal mandate for the promotion and protection of all human rights should be adapted in its application to other national and sub-national statutory institutions in a CRPD article 33(2) framework to accept a legal mandate that either expressly or in practice permits them to promote and/or protect CRPD rights. In this way, classical ombudsman institutions, sub-national human rights ombudsman institutions, sub-national human rights commissions, and thematic human rights institutions can be included in a multiple body article 33(2) framework.<sup>12</sup> This approach will be applied to recommend changes to Canada's article 33(2) multiple institution framework.

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<sup>11</sup> International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), *International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC)*, online: <<http://nhri.ohchr.org>> [ICC Online]. For further details on the ICC General Observations on the *Paris Principles* and its NHRI accreditation process see *infra* text accompanying notes 41-64.

<sup>12</sup> Thematic institutions will not be examined in depth in this article.

## CATEGORIES OF OMBUDSMAN INSTITUTIONS

Ombudsman institutions can be roughly divided into classical, human rights, and thematic human rights ombudsman institutions. They are found at national, sub-national (in provinces, states, and autonomous communities), and supranational European Union (EU) levels of government. National level human rights ombudsman institutions qualify as NHRIs which is an important consideration given article 33(2) of the CRPD.

As ombudsman institutions around the world are being given a variety of new roles beyond their original function of combating maladministration, it becomes increasingly difficult to place them in clear cut categories. Some human rights ombudsman institutions have been designated by their state as a national preventive mechanism (NPM) under the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and/or a CRPD article 33(2) independent mechanism.<sup>13</sup> In a few cases, classical ombudsman institutions have been given express human rights mandates when they have been designated as OPCAT NPMs and/or CRPD article 33(2) mechanisms, giving them treaty-derived functions in furthering their state's compliance with its international human rights treaty obligations.<sup>14</sup>

### 1. Classical Ombudsman Institutions

There are still many ombudsman institutions with mandates that focus on combatting maladministration and are silent on human rights protection. The classical ombudsman is typically appointed by and reports to the legislature to oversee the conduct of the administrative branch of government.<sup>15</sup> Most classical ombudsman institutions have jurisdiction only over the public sector and have the powers to investigate government authorities on receipt of a public complaint or on their own motion, make recommendations if illegal or unfair conduct is uncovered, and submit annual and special reports to the legislature and the public.<sup>16</sup> Some classical

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<sup>13</sup> UN Office of High Commissioner for Human Rights, *OPCAT Subcommittee on Prevention of Torture*, UNOHCHR, 2002, UN Doc GA Res 57/199; *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006); Association for the Prevention of Torture, "OPCAT Database" (1 November 2013), online: Association for the Prevention of Torture <[www.apt.ch/en/opcat-database](http://www.apt.ch/en/opcat-database)> [*OPCAT Database*].

<sup>14</sup> As of 14 November 2013, classical ombudsman institutions that had been given OPCAT NPM status alone or in conjunction with other domestic institutions were Denmark, Luxembourg, Austria, and New Zealand, *OPCAT Database*. However, national ombudsman institutions with CRPD art 33(2) mechanism and/or OPCAT NPM designation and no other human rights protection and promotion mandates will not obtain the highest ICC NHRI accreditation status, see *infra* text accompanying note 41.

<sup>15</sup> For further details on the classical ombudsman see Linda C Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Leiden: Martinus Nijhoff Publishers, 2004) at 1-7, 11-19 [*The Ombudsman*].

<sup>16</sup> *Ibid.*

ombudsman institutions also have additional powers, such as undertaking inspections of facilities and suspicious death reviews. Classical ombudsman institutions are found in many common law countries and in some civil law and mixed jurisdictions.<sup>17</sup>

While the bulk of classical ombudsman work addresses domestic law and policy, even classical ombudsman institutions occasionally use international and domestic human rights law in their work given that classical ombudsman institutions apply standards of legality and fairness in their investigations.<sup>18</sup> International law obligations of the state may be domesticated which permits their application by the ombudsman. Fairness standards enable ombudsman institutions to use international law norms as examples of state obligation and good practice. The extent to which classical ombudsman institutions can and do use international and domestic human rights norms depends on a variety of factors.<sup>19</sup>

## 2. Human Rights Ombudsman Institutions

Human rights ombudsman institutions have express human rights protection mandates in their governing legal framework and some are also endowed with human rights promotion functions.<sup>20</sup> Human rights ombudsman institutions were established initially in Portugal and Spain in the 1970s and the number of these types of ombudsman institutions has increased considerably over the past four decades. Today, they represent at least fifty percent of total national level ombudsman institutions worldwide.<sup>21</sup> Human rights ombudsman institutions are found mainly in civil law nations.<sup>22</sup> They are located in most Latin American and Central/Eastern European nations, their numbers are increasing in Western Europe, and they are also scattered throughout other parts of the world.<sup>23</sup>

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<sup>17</sup> *Transplantation and Adaptation*, *supra* note 10 at 280. See also some classical ombudsman institutions with multiple mandates that do not include human rights e.g., fighting government corruption, privacy, and freedom of information oversight.

<sup>18</sup> *The Ombudsman*, *supra* note 15 at 101-112.

<sup>19</sup> *Ibid.*

<sup>20</sup> While the titles of human rights ombudsman institutions vary (e.g., defender of the people, provider of justice, public defender, ombudsman), this paper will use "human rights ombudsman" as the generic term.

<sup>21</sup> *Transplantation and Adaptation*, *supra* note 10 at 271-272, 275-279.

<sup>22</sup> *Ibid* at 277-279.

<sup>23</sup> *Ibid.* E.g., in Western Europe see human rights ombudsman institutions in Spain, Portugal, Andorra, France, Greece, Cyprus, Sweden, Norway, Finland, and Austria; Also, the Netherlands Ombudsman has a Children's Ombudsman attached to the institution and Denmark's Ombudsman has recently been given children's rights protection functions including monitoring compliance with the *UN Convention on the Rights of the Child*; European Ombudsman, *Newsletter* No 19, "The Danish Parliamentary Ombudsman's Office Creates a Children's Division" (November 2012) at 13-14 [*European Ombudsman, Newsletter No 19*].

Like the classical ombudsman, the human rights ombudsman is typically appointed by the legislature, reports to the legislature, and has the mandate to monitor public administration. A few human rights ombudsman institutions also have jurisdiction over private sector actors.<sup>24</sup> While some address purely human rights matters, others have both human rights functions and classical ombudsman administrative justice mandates.<sup>25</sup> All human rights ombudsman institutions have the power to undertake investigations against public authorities, make recommendations for redress, and report to the legislature and the public. Investigations are launched on receipt of complaints from members of the public. Many human rights ombudsman institutions also have the power to commence their own investigations. Further, many human rights ombudsman institutions have additional powers, such as inspections of facilities where persons are confined involuntarily, launching court actions before constitutional and administrative law courts to determine the constitutionality or legality of laws, making law reform proposals to government, and human rights education and research.<sup>26</sup> However, some human rights ombudsman institutions have only been given traditional ombudsman powers.<sup>27</sup>

Human rights ombudsman institutions apply international and/or domestic human rights law in their activities based on domestic constitutional and legal frameworks and the international human rights obligations of their state.<sup>28</sup> Many human rights ombudsman institutions are located in countries where ratified human rights treaties are either automatically part of the domestic legal system or have been implemented by constitutional provision and/or statute law.<sup>29</sup>

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<sup>24</sup> *Transplantation and Adaptation, ibid* at 301-302.

<sup>25</sup> Given that all human rights ombudsman institutions have components taken from both the human rights commission model and the classical ombudsman model (ombudsman: often single leader, always has power to investigate complaints; human rights commission: may have additional human rights promotional mandate, may have powers beyond recommendation and reporting, more likely to have jurisdiction over private sector), I consider that all human rights ombudsman institutions are “hybrid” institutions whether or not their mandate covers only human rights or extends to cover both human rights and classical ombudsman administrative justice matters. In contrast, the UN Office of the High Commissioner for Human Rights makes a distinction between human rights ombudsman institutions, on the one hand, and “hybrid institutions” on the other hand, on the basis that the former focuses purely on human rights while the latter has human rights and additional mandate(s): *National Human Rights Institutions: History, Principles, Roles and Responsibilities, supra* note 10 at 16-18.

<sup>26</sup> *Transplantation and Adaptation, supra* note 10 at 302-309.

<sup>27</sup> E.g., ombudsman institutions in Greece and Norway; *ibid* at 298; Norway Parliamentary Ombudsman, *The Parliamentary Ombudsman* online: Norway Parliamentary Ombudsman, <[www.sivilombudsmannen.no/?lang=en\\_GB](http://www.sivilombudsmannen.no/?lang=en_GB)>.

<sup>28</sup> *The Ombudsman, supra* note 15 at 105.

<sup>29</sup> *Ibid* at 104.

### 3. Thematic Human Rights Ombudsman Institutions

Some countries have established thematic human rights institutions. Many thematic human rights institutions have a legislative basis and they are often structured according to the ombudsman, commissioner or commission models. While some thematic institutions are appointed by the executive branch of government and may have limited jurisdiction and powers, others are legislative appointments with considerable independence from government and broader jurisdiction and functions.

Some thematic human rights institutions focus on the protection and promotion of one category of human rights. The prime example is the equality rights body.<sup>30</sup> In particular, as a result of EU directives, EU member states have created or designated equality bodies that are either stand-alone thematic human rights institutions or are part of a broad-based NHRI.<sup>31</sup> Other thematic human rights institutions have jurisdiction over one vulnerable population in the nation although the human rights protections cover a full spectrum of rights as they apply to that population. For example, there are minority rights commissioners and children's ombudsman institutions.<sup>32</sup>

Disability rights are addressed and protected by equality bodies. Children's rights institutions typically protect children with disabilities as well. A small number of countries have established disability rights thematic institutions. In the EU zone, Croatia and Malta, for example, have thematic institutions for the protection of PWDs.<sup>33</sup> Croatia established its Ombudsperson for Persons with Disabilities in 2007

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<sup>30</sup> E.g., Sweden Equality Ombudsman, *Welcome to the Equality Ombudsman*, online: Sweden Equality Ombudsman <[www.do.se](http://www.do.se)>; Equality Commission for Northern Ireland, *Equality Commission for Northern Ireland*, online: ECNI <[www.equalityni.org](http://www.equalityni.org)>.

<sup>31</sup> Equinet European Network of Equality Bodies, *Equinet European Network of Equality Bodies*, online: Equinet European Network of Equality Bodies <[www.equineteurope.org](http://www.equineteurope.org)>. See Bruno de Witte, "New Institutions for Promoting Equality in Europe: Legal Transfers, National Bricolage and European Governance" (2012) 60 *Am J Comp Law* 49 [*New Institutions for Promoting Equality in Europe*].

<sup>32</sup> E.g., Finland Ombudsman for Minorities, *Ombudsman for Minorities*, online: Ombudsman for Minorities <[www.ofm.fi](http://www.ofm.fi)>; Norwegian Children's Ombudsman (Barneombudet), *About the Ombudsman*, online: Barneombudet <[www.barneombudet.no/english/](http://www.barneombudet.no/english/)>; New Zealand Children's Commissioner, *Children's Commissioner*, online: NZ Children's Commissioner <[www.occ.org.nz](http://www.occ.org.nz)>. See generally: Vanessa Sedletzki, *Championing Children's Rights: A Global Study of Independent Human Rights Institutions for Children* (Florence: Innocenti Publications, 2012).

<sup>33</sup> EU Fundamental Rights Agency, *Fundamental rights: key legal and policy developments in 2011: Highlights 2011* (2012) at 29 [*FRA Highlights 2011*]; EU Fundamental Rights Agency, *National Human Rights Institutions in the EU Member States: Strengthening the fundamental rights architecture in the EU* (Luxemburg: Publication Office of the European Union, 2010) at 57. See also: Marianne Schulze, "Implementation of Article 33 CRPD in Austria: An Evolving Sense of Action" in Gauthier de Beco, ed, *Article 33 of the UN Convention on the Rights of Persons with Disabilities: National Structures for the Implementation and Monitoring of the Convention* (Leiden: Martinus Nijhoff Publishers, 2013) 171 at 178 [Article 33].

legislation, with the Ombudsperson appointed by and reporting to the legislature.<sup>34</sup> The Croatian Disabilities Ombudsperson has complaint-handling, law reform, human rights promotion, and facility inspection powers.<sup>35</sup> Malta's National Commission for Persons with Disabilities is appointed by and reports to the executive branch, and its statutory duties include the investigation of discrimination complaints, the promotion and monitoring of the CRPD, the review of laws, policies and public services, and disability rights awareness-raising.<sup>36</sup> New Zealand has a Health and Disability Commissioner.<sup>37</sup>

## NHRIs AND THE OMBUDSMAN INTERFACE

Over the past two decades, the UN and regional human rights systems have supported the establishment of NHRIs to protect and promote human rights at the domestic level. As discussed further below, only national level human rights commissions and human rights ombudsman institutions are classified as NHRIs.<sup>38</sup>

### 1. UN Paris Principles

The Paris Principles are the minimum international standards that states are expected to apply in establishing and strengthening their NHRIs.<sup>39</sup> The Paris Principles require *inter alia* that NHRIs have broad constitutional and/or legislative mandates that cover all human rights, independence, a pluralist representation, and adequate funding. The Paris Principles also require that NHRIs be given express human rights protection and promotion functions that include advice, proposals, and reports to government on human rights matters, promoting the harmonization of domestic law with the state's international human rights obligations, human rights public awareness raising, and involvement in human rights research and education. The

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<sup>34</sup> CRPD, *Implementation of the Convention on the Rights of Persons with Disabilities: Initial Reports Submitted by States Parties in Accordance with Article 35 of the Convention*, UNOHCHR, 2011, UN Doc CRPD/C/HRV/1 at para 235 [*Croatia's Initial CRPD Reports*]; Croatia's Disability Ombudsman, *Posi: Pravobraniteljica za osobe s invaliditetom*, online: <[www.posi.hr](http://www.posi.hr)>; Croatia ratified the CRPD in 2007.

<sup>35</sup> *Croatia's Initial CRPD Reports*, *ibid*.

<sup>36</sup> Malta's National Commission for Persons with Disabilities, *Kummissjoni Nazzjonali Persuni B'Dizabilita (KNPD)*, online: KNPD <[www.knpd.org](http://www.knpd.org)>; *Equal Opportunities (Persons with Disability) Act 2000* (Malta), ch 413; Malta ratified the CRPD in 2012.

<sup>37</sup> The Commissioner is an independent Crown entity, an executive appointment, with the duty to protect and promote the rights of health and disability services consumers, e.g., through handling public complaints; *Health and Disability Commissioner Act 1994* (NZ), 1994/88; New Zealand ratified the CRPD in 2008.

<sup>38</sup> *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, *supra* note 10 at 15-19.

<sup>39</sup> *Paris Principles*, *supra* note 9.



Paris Principles are based on an advisory human rights commission model so that states are not required to give their NHRIs investigatory powers.<sup>40</sup>

## 2. Paris Principles Interpretation: ICC General Observations and Accreditation Process

The ICC is composed of NHRI representatives who interpret and apply the Paris Principles through the drafting of General Observations that flesh out the meaning of the Paris Principles.<sup>41</sup> In May 2013, the General Observations were divided into three categories, one of which contains those pertaining to the: “[E]ssential requirements of the Paris Principles.”<sup>42</sup> The General Observations are directed to states and NHRIs for guidance in the establishment and strengthening of NHRIs and are also used by the ICC in their NHRI accreditation process. The ICC NHRI accreditation process results in applicant NHRIs receiving A-status (full compliance with the Paris Principles), B-status (partial compliance with the Paris Principles), or C-status (noncompliance with the Paris Principles).<sup>43</sup> The accreditation process aims to pressure states to reform their NHRIs to comply fully with the Paris Principles through the reputational consequences ensuing from low-level or no accreditation and use of the rankings as a gatekeeper mechanism because only A-status NHRIs are entitled to full participation in UN human rights processes.<sup>44</sup>

In the General Observations, the ICC “acknowledges and encourages the trend towards a strong national human rights protection system in a State by having one consolidated and comprehensive national human rights institution.”<sup>45</sup> Further, the General Observations provide for consideration of the accreditation of more than

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<sup>40</sup> *Ibid* at section entitled: “Additional principles concerning the status of commissions with quasi-jurisdictional competence.”

<sup>41</sup> *ICC Online*, *supra* note 11; International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), *Chart of the Status of National Institutions Accredited by the ICC* (January 28, 2014), online: <[http://www.ohchr.org/Documents/Countries/NHRI/Chart\\_Status\\_NIs.pdf](http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf)> [*Status of National Institutions*]; International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), *Report and Recommendations of the Session of the Sub-Committee on Accreditation* (November 2013), online: <<http://nhri.ohchr.org/>> [*ICC Report and Recommendations May 2013*]. Annex III of each periodic Report contains the General Observations. While it is the ICC’s Sub-Committee on Accreditation that is responsible for the accreditation process, all references in this paper will be to the ICC.

<sup>42</sup> *ICC Report and Recommendations*, May 2013, *ibid*, at paras 1, 2, 6.

<sup>43</sup> *Status of National Institutions*, *supra* note 41. As of January 28, 2014 there are 70 A-status, 25 B-status, and 10 C-status institutions.

<sup>44</sup> “*Shifting Boundaries*” in *Assessing NHRIs*, *supra* note 10 at 56-57; Chris Sidoti, “National Human Rights Institutions and the International Human Rights System” in *Assessing NHRIs*, *supra* note 10, 93 at 105-120.

<sup>45</sup> *ICC Report and Recommendations* May 2013, *supra* note 41 at General Observation 6.6.

one NHRI in a state only in “very exceptional circumstances.”<sup>46</sup> While the focus of the Paris Principles is on human rights commissions, the ICC, through its General Observations, has interpreted the Paris Principles in a manner that has enabled national level human rights ombudsman institutions to achieve A-status accreditation. Most human rights ombudsman institutions that have applied for ICC accreditation have obtained A-status, with the remainder receiving B-status.<sup>47</sup> Pursuant to ICC interpretation through General Observation 1.2, one of the essential requirements of the Paris Principles is that a NHRI should have a mandate that covers both human rights promotion and protection functions, and this mandate should be interpreted broadly to cover all human rights covered in international and domestic law.<sup>48</sup> Human rights promotion “include[s] those functions which seek to create a society where human rights are more broadly understood and respected”,<sup>49</sup> such as education, training, public outreach, and advice.<sup>50</sup> Human rights protection responsibilities are “those that address and seek to prevent actual human rights violations”,<sup>51</sup> such as monitoring, public inquiries, alternative dispute resolution, intervention in court and tribunal proceedings, and the investigation of human rights violations through individual complaints-handling and own-motion investigations.<sup>52</sup> Also, a NHRI’s mandate “should...extend to the acts and omissions of both the public and private sectors.”<sup>53</sup> As described above, some human rights ombudsman institutions only have human rights protection functions and many only have jurisdiction over the public sector. Past ICC treatment of these limitations is mixed and somewhat opaque.<sup>54</sup> Some human rights ombudsman institutions with only

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<sup>46</sup> *Ibid*; *Status of National Institutions*, *supra* note 41 at 5-6. There is inconsistency in the ICC accreditation system. The United Kingdom has a devolved system of government, but it is still considered to be one state under international law. Yet the ICC treats Scotland, Northern Ireland, and Great Britain as separate national “states” for its NHRI accreditation system so that technically there is accreditation of three NHRIs in the United Kingdom. In contrast, Canada, a federal state in which the 13 provincial/territorial jurisdictions have strong plenary legislative powers over areas of human rights and disability issues, is treated as one state for ICC accreditation purposes.

<sup>47</sup> *Ibid*. In Latin America, only the Honduras human rights commissioner has B-status, while in Europe some Central Asian and Central/Eastern European human rights ombudsman institutions have B-status. Also, since the ICC General Observations take the position that only one NHRI can represent the state, in those European countries that have both a human rights commission/institute and a human rights ombudsman (e.g., Greece and France), only the commission/institute in these countries is an accredited NHRI.

<sup>48</sup> *ICC Report and Recommendations May 2013*, *supra* note 41 at General Observation 1.2.

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid*. See also *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, *supra* note 10 at 21-22.

<sup>51</sup> *ICC Report and Recommendations May 2013*, *ibid*.

<sup>52</sup> *Ibid*. See also *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, *supra* note 10 at 22-23.

<sup>53</sup> *ICC Report and Recommendations May 2013*, *ibid*.

<sup>54</sup> Opaque in the sense that there are often multiple problematic issues raised by the ICC when NHRIs are (re)accredited and there are no express reasons given as to which or how many issues determine the choice of an A, B, or C ranking.

human rights protection mandates that engage in human rights promotion activities in practice have received ICC A-status accreditation, while others that have only protective mandates have received B-status.<sup>55</sup> Also, some human rights ombudsman institutions with jurisdiction only over public sector authorities have obtained A-status accreditation while others received B-status.<sup>56</sup>

Pursuant to the Paris Principles as interpreted by the ICC, statutory classical ombudsman institutions, thematic human rights institutions, and sub-national human rights institutions are not NHRIs but are classified as “other domestic institutions established for the promotion and protection of human rights.”<sup>57</sup> Since the ICC in almost all cases accredits only one NHRI for each state, thematic and classical ombudsman institutions can only be accredited when their country does not already have an accredited NHRI. The thematic human rights institutions that have applied have received B- or C-status accreditation.<sup>58</sup> A few classical ombudsman institutions have applied and most have received C-status accreditation.<sup>59</sup>

However, the Austrian Ombudsman Board (OB) indicated in its ICC accreditation application that it interpreted its classical mandate to incorporate human rights and was under consideration for OPCAT NPM designation.<sup>60</sup> The Austrian OB received B-status accreditation, indicating partial compliance with the Paris Principles, although the ICC stated that the OB’s “existing legislation does not make specific provision for a broad mandate to protect and promote human rights,

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<sup>55</sup> See e.g., ICC, *Report and Recommendations of the Session of the Sub-Committee on Accreditation* (November 19-23, 2012) at 22 (Poland Public Defender, A-status), 27 (Spain *Defensor del Pueblo*, A-status) [ICC Report and Recommendations November 2012]; ICC, *Report and Recommendations of the Session of the Sub-Committee on Accreditation* (March 26-30, 2012) at 23 (Peru *Defensor del Pueblo*, A-status); ICC, *Report and Recommendations of the Session of the Sub-Committee on Accreditation* (October 25-28, 2011) at 7 (Bulgaria Ombudsman, B-status), 9 (Macedonia Ombudsman, B-status) and 11 (Argentina’s National *Defensor del Pueblo*, A-status) [ICC Report and Recommendations October 2011]; ICC, *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA)* (May 23-27, 2011) at 16 (Namibia Ombudsman, A-status) [ICC Report and Recommendations May 2011].

<sup>56</sup> E.g., ICC *Report and Recommendations November 2012*, *ibid.* at 27 (Spain *Defensor del Pueblo* A-status); ICC, *Status of National Institutions*, *supra* note 41; ICC *Report and Recommendations October 2011*, *ibid.* at 7 (Bulgaria Ombudsman B-status); ICC *Report and Recommendations May 2011*, *ibid.* at 11 (Austria Ombudsman Board, B-status).

<sup>57</sup> *Paris Principles*, *supra* note 9 at a section entitled: “Methods of operation”; ICC *Report and Recommendations May 2013*, *supra* note 41 at General Observation 1.2.

<sup>58</sup> *Status of National Institutions*, *supra* note 41.

<sup>59</sup> *Ibid.* (Antigua and Barbuda, Barbados, and Puerto Rico Ombudsman institutions received C-status but have not applied for reaccreditation, Austrian Ombudsman Board received B-status).

<sup>60</sup> ICC *Report and Recommendations May 2011*, *supra* note 55 at 11; Austrian Ombudsman Board, *Prevention*, online: Austrian Ombudsman Board <[www.volksanwaltschaft.gv.at/en/human-rights](http://www.volksanwaltschaft.gv.at/en/human-rights)>. The Austrian Ombudsman Board was subsequently given OPCAT NPM and CRPD art 33(2) mechanism functions [Austrian Ombudsman Board].

and the designated NPM legislation will not, in itself, sufficiently broaden the mandate to encompass protection and promotion of human rights.”<sup>61</sup>

In May 2013, the ICC issued a new General Observation on assessing NHRIs as national preventive and national monitoring mechanisms.<sup>62</sup> General Observation 2.9 addresses the role of NHRIs as national mechanisms under human rights treaties such as OPCAT and CRPD article 33(2). It also provides criteria to assess the adequacy of the mandate, powers, and resources granted to NHRIs to fulfill these additional roles. It indicates that the ICC may consider any “guidance” issued by the “relevant treaty body.”<sup>63</sup> However, General Observation 2.9 is silent on whether the inclusion of a national level classical ombudsman and/or a thematic or sub-national institution in a multiple institution national preventive/monitoring mechanism would boost its ICC accreditation ranking. Rather, the General Observation states that the NHRI will be assessed on the Paris Principles.<sup>64</sup> Accordingly, the approach used with the Austrian OB application discussed above will likely continue to be used by the ICC. In particular, classical ombudsman institutions, thematic human rights institutions, and sub-national human rights institutions designated as CRPD article 33(2) mechanisms will still have to comply with the essential elements of the Paris Principles before they can ever hope to achieve A-status, and they will be unable to do so given the Paris Principles requirement for a broad human rights protection and promotion mandate at the national level.

Thus, unless the ICC changes its practice, only one NHRI in a state will be accredited by the ICC except in very exceptional circumstances. It will be extremely rare for additional institutions in a state to be ICC accredited and receive an authoritative determination on the level of their compliance with the Paris Principles. Further, the Paris Principles and ICC practice prevents independent national level thematic human rights institutions, independent national level classical ombudsman institutions without an express and broad human rights mandate, and all independent sub-national level human rights institutions and classical ombudsman institutions in federal or decentralized states from receiving anything other than a B- or C-status if they are permitted to apply for ICC accreditation. As a result, only one national level human rights commission or human rights ombudsman with broad human rights protection and promotion functions and other Paris Principles compliant features within each state can obtain ICC A-status accreditation.

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<sup>61</sup> *Austrian Ombudsman Board, ibid.*

<sup>62</sup> *ICC Report and Recommendations May 2013, supra* note 41 at General Observation 2.9. Art 33(2) of the *CRPD* does not make any express reference to “national” mechanisms.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

## INTERNATIONAL HUMAN RIGHTS LAW ON THE RIGHTS OF PERSONS WITH DISABILITIES

### 1. Evolution of UN Treaties and Instruments

While all of the UN human rights treaties and other instruments apply to PWDs, the reality is that prior to the CRPD, few made specific reference to them.<sup>65</sup> While human rights treaties have non-discrimination provisions, given their vintage, disability is not expressly listed as a prohibited ground of discrimination, although it falls under general terms that prohibit discrimination on any other ground. Also, the rights of PWDs had to be slotted into more broadly framed rights such as the right to health and women's equality rights.<sup>66</sup> The Convention on the Rights of the Child (CRC) was the first UN treaty to contain a specific disability right, covering matters such as care, conditions of life, health, and education of disabled children.<sup>67</sup>

### 2. Overview of Regional Human Rights Law

There is also regional international law on the rights of PWDs. For example, Europe has a multi-part regional system. The Council of Europe's (COE) European Convention on Human Rights system, the European Court of Human Rights, and the Commissioner on Human Rights play important roles in disability rights protection.<sup>68</sup> In addition, the evolving human rights protection elements of the EU are important for protecting disability rights through, for example, the non-discrimination obligations in the treaty law, the Charter of Fundamental Rights provisions, directives combating discrimination implemented through member state equality bodies, and the research and advice of the EU's Agency for Fundamental Rights (FRA).<sup>69</sup>

<sup>65</sup> See e.g., soft law instruments on the disabled, *See Me, Hear Me, supra* note 1 at 14; *Lessons from CRPD Experience, supra* note 7 at 566. I.e., most are based on a medical model.

<sup>66</sup> E.g. Paul Hunt & Judith Mesquita, "Mental Disabilities and the Human Right to the Highest Attainable Standard of Health" (2006) 28 HRQ 332; *Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)*, GA Res 34/180, UNGAOR, 1979, UN Doc A/RES/34/180; CEDAW Committee, *General Recommendation No 18 Disabled Women* (1991), online: United Nations Office of the High Commissioner of Human Rights <www.ohchr.com>.

<sup>67</sup> *Convention on the Rights of the Child*, 20 November 1989, Can TS 1992 No 3, 1577 UNTS 3 (entered into force 2 September 1990), art 23, 2(1). See also: Convention on the Rights of the Child Committee, *General Comment No 9 (2006): The Rights of Children with Disabilities*, UNOHCHR, 2007, UN Doc CRC/C/GC/9. *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UNGAOR, 2007, UN Doc A/RES/61/295, art 22.

<sup>68</sup> *European Convention on Human Rights*, 4 November 1950, Rome, 4.XI.1950 [ECHR]. The ECHR's protocols are also relevant. See also European Social Charter (Revised)(1997), 36 ILM 34, art 15; Council of Europe, Commissioner for Human Rights, *Human Rights and Disability: Equal rights for all*, CommDH/IssuePaper(2008)2 (2008); Council of Europe, Commissioner for Human Rights, *Third party intervention by the COE Commissioner for Human Rights under para 3, art 36 of the European Convention on Human Rights: Application No 47848/08—The Centre for Legal Resources on behalf of Valentin Campeanu v Romania*, CommDH(2011)37 (2011).

<sup>69</sup> EC, *Consolidated version of the Treaty on European Union*, [2010] OJ C 83/13 [TEU]; EC, *Treaty of the Functioning of the of the European Union*, [2010] OJ C 83/47 (entered into force on 1 December

In the Americas, the American Convention on Human Rights, its Protocol on Economic, Social and Cultural Rights and the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities provide some protection for PWDs.<sup>70</sup> The African counterpart is the African Charter of Human and Peoples' Rights with its remedial machinery.<sup>71</sup>

### 3. UN CRPD

The CRPD is based on a social, rights-based model for PWDs, with the view that “the full participation in society for people with disabilities will be achieved not by “fixing” people, but by breaking down the *barriers* that prevent realization of equal opportunity, full participation and respect for difference.”<sup>72</sup> By March 22, 2014, the CRPD had 143 parties. The EU is a CRPD contracting party, and all of its member states have also signed the treaty.<sup>73</sup>

The CRPD considers that 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.”<sup>74</sup> This is an inclusive and open-ended approach to the application of the CRPD.<sup>75</sup> The general principles of the CRPD are: respect for the inherent dignity, individual autonomy, and independence of PWDs, non-discrimination, equality of opportunity, gender equality, accessibility, full and effective participation and inclusion in society, and respect for difference and acceptance of PWDs as part of human diversity and humanity.

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2009) [TFEU]; EC, *Charter of Fundamental Rights of the European Union*, [2000] OJ 2000/C 364/01, arts 21 (non-discrimination), 25 (rights of the elderly), 26 (integration of persons with disabilities); *New Institutions for Promoting Equality in Europe*, *supra* note 31.

<sup>70</sup> *American Convention on Human Rights*, 18 July 1978, OASTS No 36, 1144 UNTS 123; *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, 16 November 1999, OASTS No 69, art 18; *Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities*, GA Res 1608, 19th Sess, OEA Doc OEA/Ser.AG/doc 3826/99, (1999) (entered into force 14 September 2001).

<sup>71</sup> *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 245, art 18(4) (entered into force 21 October 1986).

<sup>72</sup> *Lessons from CRPD Experience*, *supra* note 7 at 568.

<sup>73</sup> Entered into force for the EU on January 22, 2011. By March 22, 2014, 25 of the 28 EU member states had ratified the CRPD. See generally Gráinne de Búrca, “The European Union in the Negotiation of the UN Disability Convention” (2010) 35 *European L Rev* 174; FRA, *Fundamental rights: challenges and achievements in 2012* (2013) at 140 [FRA, *Fundamental Rights 2012*].

<sup>74</sup> *CRPD*, *supra* note 8, art 1.

<sup>75</sup> *See Me, Hear Me*, *supra* note 1 at 2.

Many CRPD provisions protect PWDs against discrimination in the public sector. State obligations include the adoption or repeal of laws and administrative measures, training of staff, raising public awareness, ensuring public authorities and institutions act in conformity with the CRPD, providing services and assistance, and “mainstreaming” disability rights in all programs and policies.<sup>76</sup> The CRPD also extends state obligations to take all appropriate measures to eliminate discrimination that takes place in the private sphere.<sup>77</sup> State parties are required to “closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations” in the development and implementation of legislation and policies to implement the CRPD, as well as through other decision-making processes concerning issues relating to PWDs.<sup>78</sup>

Equality and non-discrimination rights are used throughout the CRPD and the treaty contains civil, political, economic, social, and cultural rights that, while based on rights in existing human rights treaties, are sometimes adjusted or expanded to address the specific issues faced by PWDs.<sup>79</sup> For example, all discrimination on the basis of disability (both direct and indirect) is prohibited and states must “take all appropriate steps to ensure that reasonable accommodation is provided.”<sup>80</sup> There is a right to accessibility whereby states must take measures to ensure PWDs have access on an equal basis with others to the physical environment, transportation, public infrastructure, public facilities and services, and signage in public facilities in Braille, as well as easy to read and understand formats.<sup>81</sup> The right to equal recognition before the law in article 12 includes safeguards for PWDs concerning the exercise of legal capacity including using the supported decision-making approach rather than guardianship or substitute decision-making.<sup>82</sup> The right to freedom from exploitation, violence, and abuse applies inside and outside the home and also covers gender-based aspects of such behaviour.<sup>83</sup> Other rights include independent living and inclusion in the community, personal mobility, freedom of expression, and equal

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<sup>76</sup> CRPD, *supra* note 8. For an extensive listing of relevant state measures in the CRPD see *The Disabilities Convention*, *supra* note 8 at 506.

<sup>77</sup> CRPD, *ibid* art 4(1)(b), (e).

<sup>78</sup> CRPD, *ibid* art 4(3).

<sup>79</sup> CRPD, *ibid*. There is some debate about the extent to which the CRPD creates new rights: see *The Disabilities Convention*, *supra* note 8 and *Lessons from CRPD Experience*, *supra* note 7 at 569.

<sup>80</sup> CRPD, *ibid* arts 2, 5(3).

<sup>81</sup> CRPD, *ibid* art 9.

<sup>82</sup> CRPD, *ibid* art 12: “essentially creates a continuum of support, thereby acknowledging that some disabled people require no support in making decisions, while others may need intensive support”, *Lessons from CRPD Experience*, *supra* note 7 at 573. Various CRPD state parties have made reservations or interpretative declarations to art 12. See e.g., Peter Bartlett, “The UN Convention on the Rights of Persons with Disabilities and Mental Health Law” (2012) 75 *Modern Law Rev* 752.

<sup>83</sup> CRPD, *ibid* art 16.

rights with respect to fertility and child-rearing.<sup>84</sup> Economic, social, and cultural rights include the rights to education, health, habilitation, and rehabilitation.<sup>85</sup> Article 6 of the CRPD focuses on women and girls with disabilities and article 7 on children with disabilities, with the best interests of the child principle found in this and other sections of the CRPD.<sup>86</sup>

The CRPD Committee examines and makes recommendations on the periodic reports submitted by the CRPD state parties on measures they have taken to comply with the treaty. The Committee can make general recommendations that give a deeper interpretation of specific CRPD provisions.<sup>87</sup> The Optional Protocol to the CRPD, which establishes individual complaint and inquiry mechanisms using the CRPD Committee, had 80 states parties by March 22, 2014.<sup>88</sup>

## CRPD ARTICLE 33(2) FRAMEWORK OF INDEPENDENT MECHANISMS

### 1. CRPD Article 33(2)

CRPD article 33(2) states:

States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights.<sup>89</sup>

Further, article 33(3) states that civil society, in particular PWDs and their organizations, shall be involved and participate fully in the domestic monitoring process.

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<sup>84</sup> *CRPD, ibid* arts 19-23.

<sup>85</sup> *CRPD, ibid* arts 24-26. Art 4(2) states that “economic, social and cultural rights are to be progressively realized although this is without prejudice to those rights that are immediately applicable pursuant to international law.”

<sup>86</sup> *CRPD, ibid*.

<sup>87</sup> *CRPD, ibid*, arts 34-39. See Michael Ashley Stein & Janet E Lord, “Monitoring the Convention on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential” (2010) 32:3 HRQ 689.

<sup>88</sup> *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 2006, 46 ILM 463 (entered into force May 3, 2008).

<sup>89</sup> *CRPD, supra* note 8. See also *CRPD*, art 16(3) which requires parties to ensure that all facilities and programs for PWDs are effectively monitored by independent authorities to prevent violence, abuse, and exploitation.



Article 33(2) permits the designation of institutions that already exist or the establishment of new institutions, and either one body or multiple institutions can be used to constitute the framework. Article 33(2) refers to the Paris Principles by using their formal title, and states that they must be “taken into account” in establishing or designating the independent mechanism(s).<sup>90</sup> As Lord and Stein state:

NHRIs should be regarded as crucial actors in the domestic-level implementation of the Convention, given their typically broad mandates to participate in the drafting of new legislation, review existing legislation, implement education and awareness-raising campaigns, and undertake investigative and quasi-judicial functions.<sup>91</sup>

## 2. Article 33(2) Framework Variations: Single and Multiple Institution Frameworks

To date, a variety of human rights commissions/institutes have been designated as article 33(2) independent mechanisms, either alone or as one of multiple institutions. These include Australia’s Human Rights Commission, the German Institute for Human Rights, four human rights and equality commissions in the United Kingdom, Mexico’s national and state-level human rights commissions, and South Korea’s National Human Rights Commission.<sup>92</sup> Similarly, some human rights ombudsman

<sup>90</sup> *Paris Principles*, *supra* note 9. See Gauthier de Beco, “Article 33(2) of the UN Convention on the Rights of Persons with Disabilities: Another Role for National Human Rights Institutions?” (2011) 29:1 *Nethl QHR* 84 at 86 [Article 33(2)]; However, see: “*Domestic Incorporation*”, *supra* note 8 at 464 (reference to *Paris Principles* rejected by drafters).

<sup>91</sup> “*Domestic Incorporation*”, *ibid.*

<sup>92</sup> Rachel Murray & Kelley Johnson, “Implementation of Article 33 CRPD in the United Kingdom: The Need to Consolidate Civil Society Engagement” in *Article 33*, *supra* note 33, 97 at 102; Gauthier de Beco, *Study on the Implementation of Article 33 of the UN Convention on the Rights of Persons with Disabilities in Europe* (UN Office of the High Commissioner for Human Rights Europe Regional Office, 2011) [CRPD Article 33 Implementation in Europe]; ICC and Canadian Human Rights Commission, *Survey of National Human Rights Institutions on Article 33.2 of the Convention on the Rights of Persons with Disabilities* (August 2011) at 18, 53 [Survey of NHRIs]; CRPD Committee, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention: Australia*, CRPD, UN Doc CRPD/C/AUS/1 (2012) 213-214 (ICC A-status); CRPD Committee, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention: Germany*, CRPD, UN Doc CRPD/C/DEU/1 (advance, unedited version, August 3, 2011) 54 (ICC A-status); CRPD Committee, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention: Mexico*, CRPD, UN Doc CRPD/C/MEX/1 (advance, unedited version, in Spanish), at 241 (national level Commission has ICC A-status); CRPD Committee, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention: United Kingdom*, CRPD, UN Doc CRPD/C/GBR/1 (advance, unedited version, no date), at 350 (Equality and Human Rights Commission has A-status, Northern Ireland Human Rights Commission has A-status, Equality Commission of Northern Ireland has not applied for ICC accreditation, Scotland Human Rights Commission has A-status); CRPD Committee, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article*

institutions, either alone or as one of several institutions, have been designated as article 33(2) mechanisms. These include Latvia's Ombudsman, Azerbaijan's Human Rights Commissioner, Cyprus' Commissioner for Administration, France's Defender of Rights, and Croatia's human rights ombudsman.<sup>93</sup> Most of these national level human rights commissions and human rights ombudsman institutions have already obtained ICC A-status accreditation or have the capacity to achieve full compliance with the Paris Principles as they stand or with some adjustments.

However, a number of states have designated national level thematic disability rights institutions as the sole mechanism or one of a multiplicity of mechanisms for their article 33(2) framework. For example, Malta's National Commission for Persons with Disabilities has been formally designated as the country's article 33(2) mechanism.<sup>94</sup> Also, some otherwise classical national ombudsman institutions have been included as part of a multiple article 33(2) institutional framework. These include Denmark's Parliamentary Ombudsman, Senegal's Mediator, New Zealand's Ombudsmen, and Luxembourg's Mediator.<sup>95</sup> In all four cases, the ombudsman institution is used in conjunction with an ICC A-status or B-status accredited human rights commission.

In federal and decentralized states, some or all disability matters may fall within the legislative purview of the sub-national levels of government, and the sub-

35 of the Convention: Republic of Korea, CRPD, UN Doc CRPD/C/KOR/1 (advance, unedited version, June 22, 2011), at 168 (A-status).

<sup>93</sup> *Survey of NHRIs*, *ibid* (Latvia Ombudsman has not applied for ICC accreditation); CRPD Committee, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention: Azerbaijan*, CRPD, UN Doc CRPD/C/AZE/1 (advance, unedited version, January 2011) 56 (A-status); CRPD Committee, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention: Croatia*, CRPD, 2011, UN Doc CRPD/C/HRV/1, at 234-235 (A-status); FRA, *Fundamental Rights 2012*, *supra* note 73 at 148-149 (Cyprus' Commissioner and France's Defender of Rights are not ICC accredited; however, France's human rights commission was already ICC-accredited when Defender of Rights established).

<sup>94</sup> *Equal Opportunities (Persons with Disability) Act 2000* (Malta), *supra* note 36, s 22(s). However, see CRPD states that have established thematic institutions which are housed within ministries and operate with government representatives who provide more than advice. These institutions have been criticized for their lack of independence and a structure that is more fitting for a CRPD art 33(1) government focal point; Delia Ferri, "Implementation of Article 33 CRPD in Italy: *Magna Pars est Profectus Velle Proficere*" in *Article 33*, *supra* note 33, 119 at 136, 141 (National Observatory on the Situation of Persons with Disabilities); Aleksandra Tabaj & Cveto Uršič, "Implementation of Article 33 in Slovenia: A Feeling of Confusion" in *Article 33*, *supra* note 33, 149 at 158-165 (Council for Persons with Disabilities).

<sup>95</sup> Maria Ventegodt Liiberg, "Implementation of CRPD Article 33 in Denmark: The Sails Are up, but Where is the Wind?" in *Article 33*, *supra* note 33, 69 at 82 (Danish Institute for Human Rights with ICC A-status accreditation, Parliamentary Ombudsman and Danish Disability Council); *Survey of NHRIs*, *supra* note 92 at 12-14; New Zealand Ombudsman, *2010/2011 Report of the Ombudsman*, 30 June 2011, online: New Zealand Parliament <<http://www.parliament.nz/>> at 12, 48. See also Austria's Ombudsman Board, *Powers to monitor institutions and facilities where PWDs may be abused, subject to violence or inhuman treatment and deprived of their liberty*, online: <<http://www.volksanwaltschaft.gv.at/en/human-rights>>. The mediator is the Francophone version of the ombudsman institution.

national governments may have the constitutional jurisdiction to designate article 33(2) independent mechanisms. In these types of nations, multiple institution article 33(2) frameworks may be necessary to implement CRPD obligations fully. The situation is complicated given that in some of these nations, the constitutional architecture may give the NHRI overlapping jurisdiction over sub-national and national government authorities, while in a few nations the NHRI has no jurisdiction over sub-national actors.<sup>96</sup> An example of the latter is Canada, a CRPD contracting party.<sup>97</sup> If Canada uses only federal institution(s) for its article 33(2) framework, then large swaths of provincial/territorial governmental conduct will be outside the jurisdiction of the article 33(2) mechanism. The Canadian government has recognized this dilemma in its CRPD declaration/reservation:

Canada interprets Article 33(2) as accommodating the situation of federal states where the implementation of the Convention will occur at more than one level of government and through a variety of mechanisms, including existing ones.<sup>98</sup>

Thus, in a number of federal and decentralized states, sub-national institutions exist and have full or shared jurisdiction over PWD issues. These institutions play an important role in monitoring and implementing CRPD and other disability rights inside the nation. Yet, as discussed above, no sub-national statutory human rights institution or classical ombudsman can ever be deemed to fully comply with the Paris Principles.

The situation is also problematic when it comes to the EU's plural article 33(2) framework. The Commission has designated five bodies for the framework; specifically the European Parliament Petitions Committee, European Ombudsman, European Commission, FRA, and European Disability Forum.<sup>99</sup> The EU's European Ombudsman will engage in CRPD rights protection through its classical investigatory mandate to combat maladministration in EU institutions, bodies, offices, and agencies. The European Ombudsman defines maladministration to include noncompliance with EU law, which includes EU human rights obligations in

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<sup>96</sup> Andrew Wolman, "The relationship between national and sub-national human rights institutions in federal states" (2013) 17:4 *Int'l J HR* 445. It is most common to find both a NHRI and sub-national human rights institutions in federal states.

<sup>97</sup> *Constitution Act, 1982*, being Schedule B to *Canada Act 1982* (UK), 1982, c 11, s 92. Canada ratified the CRPD on March 11, 2010.

<sup>98</sup> *CRPD*, UN Treaty Collection Databases, online; United Nations Treaty Collection <<http://treaties.un.org/>>; Chantal Collin, "Canada and the Convention on the Rights of Persons with Disabilities" Library of Parliament Research Publications, Hill Note No 2012-89-E (5 December 2012); online: Parliament of Canada <<http://www.parl.gc.ca/>>. As of March 22, 2014, no other federal states had made similar declarations/reservations.

<sup>99</sup> FRA, *Fundamental Rights 2012*, *supra* note 73 at 139, 149. See FRA, *FRA reports on disability rights*, online: European Union Agency for Fundamental Rights <<http://fra.europa.eu>>. The CRPD applies to the EU administration in areas where the EU has legal competence and EU internal matters, e.g., employment.

the Charter of Fundamental Rights.<sup>100</sup> The Paris Principles were drafted to apply to states' domestic systems based on a democratic foundation where NHRI independence from the executive/administrative branch of government can be achieved through links with the legislature. In contrast, the EU is a supranational governance system where law making is shared by multiple institutions, including executive/administrative institutions.<sup>101</sup>

Also, article 33(3) states that PWD organizations must participate and be fully involved in the monitoring process. While it does not expressly state that they can be part of the article 33(2) framework, formal designation of one or more PWD organizations as article 33(2) mechanisms may be the most inclusive way to involve PWDs in the monitoring process.<sup>102</sup> A PWD organization can never comply with the Paris Principles because it is considered a private civil society organization, despite the fact that it is a body independent of government.

### **3. CRPD Article 33(2) Single and Multiple Institution Frameworks, the CRPD Committee, and the Paris Principles**

As discussed above, some CRPD parties are creating multiple mechanism article 33(2) frameworks as permitted by its terms. Article 33(2) states that the Paris Principles must be “taken into account” in structuring the mechanisms. However, based on current ICC practice, barring “very exceptional circumstances”, only one domestic institution in a nation will be accredited as a NHRI with the possibility of achieving A-status.<sup>103</sup> Does the wording of article 33(2) permit the inclusion of independent ombudsman and human rights institutions that cannot obtain ICC accreditation and/or achieve full compliance with the Paris Principles together with a Paris Principles compliant NHRI?

The views of the CRPD Committee are authoritative in the context of the interpretation and application of the CRPD. The CRPD Committee has begun to issue its concluding observations on the periodic reports submitted by CRPD states and has included comments and recommendations on article 33(2) frameworks. By March 22, 2014, a small number of CRPD contracting parties had received concluding observations on their first periodic reports. Spain was one of the first states to be reviewed by the Committee. Spain indicated that it had designated the National Disability Council as the state body responsible for the implementation of

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<sup>100</sup> TFEU, *supra* note 69, art 228; EC, *Decision of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties*, [1994] OJ, L 113, online: European Ombudsman <[www.ombudsman.europa.eu](http://www.ombudsman.europa.eu)>; see *The Ombudsman*, *supra* note 15 at 367-391 on classical ombudsman structure of European Ombudsman.

<sup>101</sup> Karen Davies, *Understanding European Union Law*, 5th ed (New York: Routledge, 2013) at 53-62.

<sup>102</sup> See e.g., New Zealand and Denmark; see text *infra* accompanying notes 142-149 and *supra* note 95.

<sup>103</sup> *ICC Report and Recommendations May 2013*, *supra* note 41 at General Observation 6.6.

the CRPD but made no mention of its national human rights ombudsman, the *Defensor del Pueblo*, which has ICC A-status accreditation.<sup>104</sup> In September 2011, *Royal Decree 1276/2011* stated that without prejudice to the powers of the *Defensor del Pueblo*, CERMI (Committee of Representatives of Persons with Disabilities) was appointed as Spain's article 33(2) mechanism.<sup>105</sup> In its Concluding Observations on Spain's report, the CRPD Committee stated that Spain's independent monitoring mechanisms were in full compliance with article 33(2), without any discussion either of the makeup of the mechanisms or of the Paris Principles.<sup>106</sup>

In contrast, the Committee has relied on the Paris Principles in their other concluding observations on article 33(2). Tunisia reported that it had designated the Higher Committee for Human Rights and Fundamental Freedoms, a broad-based NHRI that has ICC B-status accreditation.<sup>107</sup> In response, the Committee recommended that Tunisia ensure that the Higher Committee complies with the Paris Principles and establish a dedicated unit on disabilities inside the NHRI.<sup>108</sup> Some states parties had designated government agencies as their article 33(2) mechanisms. In these cases, the Committee expressed concern that the agency lacked independence or stated that it did not comply with article 33(2) and the Paris Principles, presumably due to insufficient independence.<sup>109</sup>

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<sup>104</sup> *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention: Spain*, CRPD, 6th Sess, UN Doc CRPD/C/ESP/1, (2011) 252-253; FRA, *Fundamental Rights 2012*, *supra* note 73 at 148; *Status of National Institutions*, *supra* note 41 at 6; Francisco J. Bariffi, "Implementation of Article 33 CRPD in Spain: A Rather Erratic and Improvised Experience" in *Article 33*, *supra* note 33, 193 at 203-204 [Bariffi].

<sup>105</sup> Bariffi, *ibid* at 204-205. It was reported that on Spain's appearance before the Committee, it designated the *Defensor del Pueblo* as its art 33(2) mechanism, however—while the *Defensor* does use the CRPD in its work—there is no indication that it is doing so as a result of a formal designation. See Meredith Raley, "Spain and Article 33.2 of the CRPD" (24 November 2011), online: Disability and Human Rights: <<http://disabilityandhumanrights.com>>; Spain Defensor del Pueblo, "Resumen Informe Anual" (2012), online: Spain Defensor del Pueblo <[www.defensordelpueblo.es](http://www.defensordelpueblo.es)> at 50, 60 [Resumen Informe Anual].

<sup>106</sup> CRPD Committee, *Concluding Observations of the Committee on the Rights of Persons with Disabilities: Spain*, CRPD, 6th Sess, UN Doc CRPD/C/ESP/CO/1, (2011) 6.

<sup>107</sup> *Status of National Institutions*, *supra* note 41 at 7 ("Comité Supérieur des Droits de l'Homme et des Libertés Fondamentales").

<sup>108</sup> CRPD Committee, *Concluding Observations of the Committee on the Rights of Persons with Disabilities: Tunisia*, CRPD, 5th Sess, UN Doc CRPD/C/TUN/CO/1, (2011) 41-42 [*Concluding Observations: Tunisia*]. Tunisia also used specialized institutions to protect PWDs, but the CRPD Committee was concerned with their independence and the low participation of PWDs in their activities, *ibid* at 41.

<sup>109</sup> *Ibid* at 41; CRPD Committee, *Concluding Observations on the initial report of Argentina as approved by the Committee in its eighth session*, CRPD, 8th Sess, UN Doc CRPD/C/ARG/CO/1, (2012) 51 [*Concluding Observations: Argentina*]; CRPD Committee, *Concluding Observations on the initial report of Paraguay, adopted by the Committee as its ninth session, 15-19 April 2013*, CRPD, 9th Sess, UN Doc CRPD/C/PRY/CO/1, (2013) 75 [*Concluding Observations: Paraguay*]; CRPD Committee, *Concluding Observations on the initial report of El Salvador, adopted by the Committee at its tenth session (2-13 September 2013)*, CRPD, 10th Sess, UN Doc CRPD/C/SLV/CO/1, (2013) 67-70 [*Concluding Observations: El Salvador*].

Common themes running throughout the Committee's recommendations to date on article 33(2) include: a national monitoring mechanism should be established, it *must* comply with both the Paris Principles and article 33(2) with an emphasis on the mechanism's independence, and PWDs and their representative organizations must participate fully in the mechanism and the monitoring process.<sup>110</sup> In its Concluding Observations on Austria's report, the CRPD Committee also recognized its federal structure, recommending that the sub-national "Länder create their own independent monitoring mechanisms to further coordinate disability policies and practices throughout Austria."<sup>111</sup> However, the Committee did not explicitly confirm whether any sub-national mechanisms could be included in the country's article 33(2) framework and it did not refer to the Paris Principles in relation to the independence of sub-national institutions.

The CRPD Committee has not issued a clear statement concerning whether all the mechanisms in a multiple mechanism article 33(2) framework have to comply fully with the Paris Principles as interpreted by the ICC, or whether one Paris Principles compliant NHRI in a multiple mechanism framework will suffice. Also the Committee has not issued a General Comment on article 33(2).<sup>112</sup> The ICC's General Observation 2.9 is of no assistance to the Committee. General Observation 2.9 on national preventive/monitoring mechanisms focuses only on NHRIs that *have* been designated as or as part of a national monitoring mechanism.<sup>113</sup> General Observation 2.9 recognizes that it is for the relevant treaty body (i.e., the CRPD Committee) to assess a particular framework mechanism within its treaty context.<sup>114</sup>

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<sup>110</sup> *Concluding Observations: Tunisia*, *ibid* at 42; *Concluding Observations: El Salvador*, *ibid*, at 70; CRPD Committee, *Concluding Observations of the Committee on the Rights of Persons with Disabilities: Peru*, CRPD, 7th Sess, UN Doc CRPD/C/PER/CO/1, (2012) 49; *Concluding Observations: Argentina*, *ibid*, at 52; CRPD Committee, *Concluding Observations on the initial report of China, adopted by the Committee at its eighth session (17-28 September 2012)*, CRPD, 8th Sess, UN Doc CRPD/C/CHN/CO/1, (2012) 50, 84; CRPD Committee, *Concluding Observations on the initial periodic report of Hungary, adopted by the Committee at its eighth session (17-28 September 2012)*, CRPD, 8th Sess, UN Doc CRPD/C/HUN/CO/1 (2012) 51-52; *Concluding Observations: Paraguay*, *ibid*. at 76; CRPD Committee, *Concluding Observations on the initial report of Australia, adopted by the Committee at its tenth session (2-13 September 2013)*, CRPD, 10th Sess, UN Doc CRPD/C/AUS/CO/1, (2013) 57-58. Australia lacks a participatory and responsive CRPD monitoring and implementing structure; CRPD Committee, *Concluding observations on the initial report of Austria, adopted by the Committee at its tenth session*, CRPD, 10th Sess, UN Doc CRPD/C/AUT/CO/1, (2013) 52-54. The federal Independent Monitoring Committee designated by Austria lacks both the independence required by the *Paris Principles* and its own budget; *Article 33*, *supra* note 33 at 177-187.

<sup>111</sup> *Concluding Observations: Austria*, *ibid* at 53.

<sup>112</sup> United Nations Office of the High Commissioner for Human Rights, *General Comments*, online: <<http://www.ohchr.org>>.

<sup>113</sup> *ICC Report and Recommendations May 2013*, *supra* note 41 at General Observation 2.9.

<sup>114</sup> *Ibid*.

The CRPD Committee may provide some clarification on multiple mechanism article 33(2) frameworks in their upcoming concluding observations. Several countries that have included a classical ombudsman along with an A-status human rights commission in their article 33(2) multiple mechanism framework will soon be reviewed by the CRPD Committee. These include New Zealand and Denmark.<sup>115</sup> Also, the reports of a few countries that have included thematic equality or disability rights institutions in their framework will soon be examined by the Committee. These include Croatia (relying on its Human Rights Ombudsman with ICC A-status accreditation and its thematic Disabilities Ombudsman), Sweden (relying tentatively on its Equality Ombudsman), and Lithuania (Equal Opportunities Ombudsperson and the ministerial Council for the Affairs of the Disabled).<sup>116</sup> As a federal state, Mexico has designated its A-status National Human Rights Commission and its 32 state level human rights commissions as its article 33(2) framework.<sup>117</sup>

#### **4. Article 33(2) Framework, Ombudsman Institutions, and the Protection and Promotion of CRPD Rights**

Ombudsman institutions can play full or partial roles in article 33(2) frameworks for the protection, promotion, and monitoring of the implementation of CRPD rights. This section will address the mandates and activities of a selection of national human rights ombudsman institutions to illustrate how they are strong NHRI candidates for single or multiple institution article 33(2) frameworks. The mandates and activities of a selection of national and sub-national classical ombudsman institutions will also be surveyed to indicate how they can play CRPD protection and monitoring roles and could be included in a multiple institution article 33(2) framework along with a Paris Principles compliant NHRI.

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<sup>115</sup> CRPD Committee, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention: New Zealand*, CRPD, UN Doc CRPD/C/NZL/1 (advance, unedited version, March 2011) 57-58; CRPD Committee, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention: Denmark*, CRPD, UN Doc CRPD/C/DNK/1 (advance, unedited version) 44-45; FRA, *Fundamental Rights 2012*, *supra* note 73 at 148.

<sup>116</sup> CRPD Committee, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention: Croatia*, CRPD, UN Doc CRPD/C/HRV/1 (2013) 234-235 (Croatia's Ombudsperson for Persons with Disabilities has not applied for ICC accreditation); CRPD Committee, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention: Sweden*, CRPD, UN Doc CRPD/C/SWE/1, (2012) 351-353 (Sweden's Equality Ombudsman has ICC B-status accreditation); CRPD Committee, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention: Lithuania*, CRPD, UN Doc CRPD/C/LTU/1 (advanced, unedited version) 320 (Lithuania's Equal Opportunities Ombudsperson has not applied for ICC accreditation); FRA, *Fundamental Rights 2012*, *supra* note 73 at 149.

<sup>117</sup> CRPD Committee, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties in accordance with article 35 of the Convention: Mexico*, CRPD, UN Doc CRPD/C/MEX/1, (2013) 241.

### (A) National Level Human Rights Ombudsman Institutions

A national level human rights ombudsman institution will be an acceptable article 33(2) framework mechanism as long as it is fully Paris Principles compliant or capable of moving from partial to full compliance. Also, the human rights ombudsman should have a unit dedicated to disability rights.

National level human rights ombudsman institutions can protect CRPD rights through complaints-driven and own-motion investigations. For example, Spain's *Defensor del Pueblo* has complaint-handling and other human rights protection powers in relation to the public authorities at all levels of governance.<sup>118</sup> Complaints concerning PWDs investigated by the *Defensor* in 2012 covered issues such as budget cuts that reduced teachers and staff for special needs students contrary to Spain's CRPD obligations, the rights of patients in mental health care facilities, and inadequate social services for PWDs.<sup>119</sup> Poland's Public Defender has a similar broad range of powers and was also designated as an EU equality body in 2011.<sup>120</sup> In 2011, the Public Defender investigated complaints addressing disability rights in areas such as the rights to education and privacy and the rights of patients in mental health facilities.<sup>121</sup> Argentina's *Defensor del Pueblo* has investigated complaints and made recommendations for improvement in the protection of PWD rights relying on Argentina's CRPD obligations in cases involving discriminatory treatment and inaccessible seating.<sup>122</sup> Portugal's Provider of Justice statute emphasizes that its own-motion investigation power is especially important for the protection and promotion of the rights of vulnerable persons, including PWDs.<sup>123</sup> Other examples of own-motion investigations are those conducted by Poland's

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<sup>118</sup> *The Ombudsman*, *supra* note 15 at 145-149.

<sup>119</sup> *Resumen Informe Anual*, *supra* note 105 at 50, 59-61.

<sup>120</sup> *The Ombudsman*, *supra* note 15 at 160-163; Human Rights Defender of the Republic of Poland, *Summary of the Report on the Activity of the Human Rights Defender (Ombudsman of the Republic of Poland) in 2011*, (2011), online: International Ombudsman Institute <[www.theioi.org](http://www.theioi.org)> [*Poland Human Rights Defender 2011 Report*].

<sup>121</sup> *Poland Human Rights Defender 2011 Report*, *ibid* at 19-20, 50, 55-56.

<sup>122</sup> Argentina's National *Defensor del Pueblo*, *Recommendation 126/12 on abolition of legal requirement for PWDs to book tickets 48 hours in advance (CRPD art 3 general principles, art 5 equality before the law and reasonable accommodation)*, online: Argentina's National *Defensor del Pueblo* <[www.dpn.gob.ar/areas.php?id=04&cl=25&act=view](http://www.dpn.gob.ar/areas.php?id=04&cl=25&act=view)>; Argentina's National *Defensor del Pueblo*, *Recommendation 45/11 on inaccessible seats for PWDs in motor carriers (American Convention on Human Rights, Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities, CRPD art 9 accessibility)*, online: Argentina's National *Defensor del Pueblo* <[www.dpn.gob.ar/areas.php?id=19&cl=25&act=view](http://www.dpn.gob.ar/areas.php?id=19&cl=25&act=view)>.

<sup>123</sup> International Ombudsman Institute, "PORTUGAL: Third amendment to the Statute of the Portuguese Ombudsman" (26 February 2013), online: International Ombudsman Institute News <[www.theioi.org/news/](http://www.theioi.org/news/)>.



Public Defender<sup>124</sup> and Argentina's *Defensor del Pueblo*.<sup>125</sup> Some human rights ombudsman institutions can also inspect facilities where PWDs are involuntarily confined, such as prisons and psychiatric health facilities, thereby protecting and monitoring CRPD rights. Also, other public facilities should be inspected to ensure that they are accessible to PWDs. For example, in advance of parliamentary elections, personnel from Poland's Public Defender institution inspected voting stations that were supposed to be accessible to PWDs, finding problems with most of the facilities.<sup>126</sup>

Many human rights ombudsman institutions are given human rights protection powers to launch actions in constitutional and other courts.<sup>127</sup> These actions protect CRPD rights. For example, in 2011, Poland's Public Defender brought a case before the Constitutional Court to challenge a provision in mental health legislation that stated that only minors aged sixteen and older needed to consent to psychiatric treatment when Polish civil law conferred limited legal capacity on children starting at the age of thirteen.<sup>128</sup> In another 2011 Constitutional Court application by the Public Defender, the pension authority's conduct in launching proceedings to re-examine existing entitlements to disability pensions was found to be unconstitutional.<sup>129</sup> In addition to bringing actions arguing that laws are unconstitutional, Hungary's Commissioner for Fundamental Rights can also bring Constitutional Court actions on the grounds that domestic law does not comply with the country's treaty obligations, including the CRPD.<sup>130</sup>

Human rights ombudsman institutions often have additional powers that can be employed to promote and monitor CRPD rights, such as engagement in law reform initiatives, advice on human rights treaty ratification, and human rights

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<sup>124</sup> *European Ombudsman, Newsletter No 19, supra* note 23 at 15. This section is entitled: "The Polish Ombudsman publishes reports on equal treatment and public facilities for persons with disabilities".

<sup>125</sup> Argentina's National *Defensor del Pueblo*, "Defensor del Pueblo's Own Motion Investigation on Protection of the Rights of Persons with Reduced Vision (Bastón Verde)" (3 September 2012), online: <[www.dpn.gob.ar/areas.php?id=07&cl=25&act=view](http://www.dpn.gob.ar/areas.php?id=07&cl=25&act=view)>; Argentina's National *Defensor del Pueblo*, "Special Report on Agropoisons and Discapacity" (25 January 2012), online: Argentina's National *Defensor del Pueblo* <[www.dpn.gob.ar/areas.php?id=19&cl=25&act=view](http://www.dpn.gob.ar/areas.php?id=19&cl=25&act=view)>.

<sup>126</sup> *Poland Human Rights Defender 2011 Report, supra* note 120 at 55.

<sup>127</sup> *Transplantation and Adaptation, supra* note 10 at 304-7; Gabriele Kucsko-Stadlmayer, ed. *European Ombudsman Institutions* (New York: Springer, 2008) at 51-6, 354-5, 515-20.

<sup>128</sup> FRA, "Fundamental rights: challenges and achievements in 2011" (2012), online: European Union Agency for Fundamental Rights <[fra.europa.eu](http://fra.europa.eu)> at 116; Judgment in the Name of the Republic of Poland, (11 October 2011) K 16/10, 80/8/A/2011. The Court held that the law did not violate the Constitution or the CRC.

<sup>129</sup> *Poland Human Rights Defender 2011 Report, supra* note 120 at 33-34.

<sup>130</sup> Maté Szabó, "Changes in the Institutional Context of the Ombudsman System in the Republic of Hungary in 2012" (2012) 3:3 Beijing L Rev 112 at 118. But see international concerns over changes to the Constitutional Court in FRA, *Fundamental Rights 2012, supra* note 73 at 234.

awareness raising, research, and education.<sup>131</sup> Many also collaborate with the UN and regional human rights systems.

### **(B) Classical Ombudsman Institutions Included in Multiple Institution Frameworks**

Classical ombudsman institutions have more limited exposure to human rights issues and more circumscribed responsibilities. However, they still play a role in protecting CRPD rights through their core functions of complaints-based and own-motion investigations, recommendations, and reporting. While classical ombudsman institutions rely predominantly on domestic law in their work, they also occasionally rely expressly on international human rights law such as the CRPD.

For example, the Irish Ombudsman publishes formal reports on the conclusion of serious investigations. In recent years a material number have involved complaints brought by or on behalf of PWDs, including seniors with disabilities.<sup>132</sup> Similarly, the United Kingdom's Parliamentary and Health Service Ombudsman has undertaken a number of investigations on PWDs, particularly under the health services component of the mandate.<sup>133</sup> In Canada, in 2011-2012 the British Columbia (BC) Ombudsperson investigated numerous cases concerning PWDs in the seniors, children and youth, driving, health, home support, and income and community support areas.<sup>134</sup> The Ombudsperson has also conducted a number of

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<sup>131</sup> See e.g., *Poland Human Rights Defender 2011 Report*, *supra* note 120 at 55. Poland's Public Defender lobbied the government to ratify the CRPD and amend its domestic laws to comply with the CRPD. Poland consequently ratified the CRPD on 25 September 2012; *Resumen Informe Anual*, *supra* note 105 at 58. Spain's national and autonomous community defensores engaged in collaborative workshops on mental health rights; Bolivia's *Defensor del Pueblo, Las Personas con Discapacidad tienen una ley*, online: Bolivia's *Defensor del Pueblo* <[www.defensoria.gob.bo/files/material/flinfFOLLETO.pdf](http://www.defensoria.gob.bo/files/material/flinfFOLLETO.pdf)>. This is the May 2006 publication created for the general public regarding PWD rights. There are more publications created by Bolivia's *Defensor del Pueblo* in this vein.

<sup>132</sup> See Ireland's Office of the Ombudsman, *Too Old to Be Equal?* (April 2011, October 2012), online: Office of the Ombudsman <<https://www.ombudsman.gov.ie/en/Publications/Investigation-Reports/government-departments-other-public-bodies/Too-Old-to-be-Equal/>>. This publication discusses the Government's refusal of mobility allowances to persons over 66 years of age through reliance on CRPD art 20, the EU *Charter of Fundamental Rights* arts 21, 25, and the UN's Principles for Older Persons; Ireland's Office of the Ombudsman, *Publications*, online: <<https://www.ombudsman.gov.ie/en/Publications/>>. Examples of publications include: *Passengers with Disabilities* (2001), *Report on the Provision of School Transport for a Child with Disabilities* (February 1998), and various reports on treatment of seniors with disabilities.

<sup>133</sup> The United Kingdom's Parliamentary and Health Services Ombudsman, online: Parliamentary and Health Service Ombudsman <<http://www.ombudsman.org.uk/>>. Examples of relevant reports include: *A report by the Health Service Ombudsman and the Local Government Ombudsman about the care and support provided to a person with Down's Syndrome* (November 2011); *Report by the Parliamentary and Health Service Ombudsman on Complaints About Disability Issues* (October 2011); *Care and Compassion?* (February 2011); *Six lives: The provision of public services to people with learning disabilities* (March 2009).

<sup>134</sup> British Columbia, Canada Office of the Ombudsperson, *Annual Report 2011-12* (British Columbia: Ombudsperson, 2012) at 21-24, 29, 35-36, 39, 44, 46-47, 51-53.

systemic investigations over the years that pertain to PWDs, including on seniors involuntarily detained in residential care and on the province's Public Guardian system that relied on the CRPD.<sup>135</sup> The Quebec *Protecteur du citoyen* has issued special reports on improving government services for persons with pervasive development disorders and accessibility of home support services for PWDs.<sup>136</sup> The Ontario Ombudsman has conducted systemic investigations on issues such as parents having to give up custody of their severely disabled children to get residential treatment services for them, nine year waits for disabled support payments, inadequate mental health services for children of military personnel, and the use of excessive force against prisoners, including those with disabilities.<sup>137</sup> In late 2012, the Ontario Ombudsman received numerous complaints concerning the province's inadequate services for young adults with developmental disabilities and launched a special investigation.<sup>138</sup>

Some classical ombudsman institutions have additional powers such as inspections of closed facilities and the review of deaths of persons in care which further the protection and monitoring of CRPD rights. For example, the BC Ombudsperson has inspection powers.<sup>139</sup> In addition to investigations and inquiries, the New South Wales (NSW) Ombudsman reviews the deaths of PWDs living in residential care or licensed boarding houses, coordinates official community visitors' work in visiting and monitoring licensed homes for PWDs, and monitors, reviews,

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<sup>135</sup> British Columbia, Canada Office of the Ombudsperson, *No Longer Your Decision: British Columbia's Process for Appointing the Public Guardian and Trustee to Manage the Financial Affairs of Incapable Adults*, Public Report No 49 (British Columbia: Legislative Assembly of British Columbia, 2013) at 20, 115 [*BC Ombudsperson Public Guardian Report*]; British Columbia, Canada The Office of the Ombudsperson, *The Best of Care: Getting it Right for Seniors in British Columbia*, Public Report 47 (Part 2) (British Columbia: Legislative Assembly of British Columbia, 2012); The Office of the Ombudsperson, *The Best of Care: Getting it Right for Seniors in British Columbia*, Public Report 46 (Part 1) (British Columbia: Legislative Assembly of British Columbia, 2009). See also the following British Columbia Office of the Ombudsperson public reports: *Abuse of Deaf Students at Jericho Hill School*, Public Report No 32 (British Columbia: Legislative Assembly of British Columbia, 1993); *Listening: A Review of Riverview Hospital*, Public Report No 33 (British Columbia: Legislative Assembly of British Columbia, 1993). Please note that this report pertained to the hospital treatment of psychiatric patients; *Public Services for Adult Dependent Persons*, Public Report No 25 (British Columbia: Legislative Assembly of British Columbia, 1991).

<sup>136</sup> See e.g., Quebec Le Protecteur du Citoyen, *Is Home Support Always the Option of Choice? Accessibility of home support services for people with significant and persistent disabilities* (Quebec City: Quebec Ombudsman, 2012); Quebec Le Protecteur du Citoyen, *Services Provided to Young People and Adults with a Pervasive Development Disorder: From Government Commitment to Cold Hard Facts: Special Ombudsman's Report* (Quebec City: Quebec Ombudsman, 2012).

<sup>137</sup> Ontario Ombudsman, *Investigation: Adults with developmental disabilities in crisis* (Ottawa: Ministry of Community and Social Services, 2012), online: Ombudsman Ontario <[www.ombudsman.on.ca/](http://www.ombudsman.on.ca/)>.

<sup>138</sup> Ontario Ombudsman, "New Investigation Draws Hundreds of Complaints: Ontario's Services for Adults with Developmental Disabilities" *The Watchdog* (Ontario Ombudsman, February 2013). For instance, services end when youth reach 18 years of age.

<sup>139</sup> *Ombudsperson Act*, RSBC 1996, c 340, s 15(2)(a).

and establishes standards for the provision of services for PWDs.<sup>140</sup> In work supporting PWDs, the NSW Ombudsman has relied on the CRPD.<sup>141</sup>

As noted earlier, some classical ombudsman institutions are being designated alongside a Paris Principles compliant NHRI in a multiple institution article 33(2) framework. One example is the New Zealand multi-body article 33(2) framework, composed of the New Zealand Human Rights Commission, the New Zealand Ombudsmen, and the Convention Coalition of PWD organizations. The three bodies work together to protect, promote, and monitor the implementation of the CRPD. The New Zealand Human Rights Commission engages in a range of CRPD promotion and monitoring functions and can uphold CRPD anti-discrimination/harassment obligations.<sup>142</sup> The New Zealand Ombudsmen carry out broad CRPD protection functions through their investigations on receipt of a complaint and on their own-motion against New Zealand government authorities.<sup>143</sup> Their investigations have included those on health ministry home modification reimbursement policies, examination policies and procedures for students with disabilities, reasonable accommodation of and health care for prisoners with disabilities, and difficulties for PWDs in communicating with government entities.<sup>144</sup> The Ombudsmen and Human Rights Commission were also designated as OPCAT NPM mechanisms. This function can also assist in protecting CRPD rights. In fulfilling their OPCAT NPM duties, the New Zealand Ombudsmen monitor and inspect facilities where PWDs may be confined and make recommendations for protection of human rights.<sup>145</sup> Problematic treatment in psychiatric and intellectual disability units have been the subject of inspection reports containing findings and recommendations, and have led to changes in government procedures.<sup>146</sup>

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<sup>140</sup> See New South Wales Ombudsman Community Services, *Disability Services, Reviewable Deaths Services & Coordinating Responsibilities of Official Community Visitors*, online: New South Wales Ombudsman Community Services <[www.ombo.nsw.gov.au/](http://www.ombo.nsw.gov.au/)>. Please note that the “Official Community Visitors” include PWDs and relatives of PWDs. Furthermore, the Ombudsman submits a biennial report to the legislature on reviewable disability deaths.

<sup>141</sup> *Ibid.*

<sup>142</sup> New Zealand Human Rights Commission, online: Human Rights Commission <[www.hrc.co.nz/](http://www.hrc.co.nz/)>.

<sup>143</sup> New Zealand Ombudsman, *2010/2011 Report of the Ombudsman* (Wellington: Office of the Ombudsman, 2012) at 12, 48 [*New Zealand Ombudsman 2010/2011 Report*].

<sup>144</sup> *Ibid* at 48-51; *New Zealand 2011-2012 Independent Monitoring Mechanism Annual Report*, *supra* note 5 at 14, 36-37, 40-47, 57-59, 68-75.

<sup>145</sup> New Zealand Ombudsman, *2009/2010 Report of the Ombudsman* (Wellington: Office of the Ombudsman, 2010) at 17.

<sup>146</sup> *Ibid* at 41, 44-45. This reference pertains to seclusion in intellectual disabilities units for unreasonably long periods of time; *New Zealand Ombudsman 2010/2011 Report*, *supra* note 143 at 44-46. This reference pertains to the improper classification and detention of persons with intellectual disabilities under mental health legislation. It further discusses the inadequate record-keeping for persons subject to court orders for concurrent prison and hospital detention. This reference also talks about the poor treatment of prison inmates with psychosocial disabilities.

The three bodies in the New Zealand framework are also working together to *inter alia* monitor, advise, and report on the domestic implementation of the CRPD, address legislation, policy, and practice affecting PWDs and report annually to Parliament.<sup>147</sup> The framework also collaborates with the UN human rights system. The framework will report periodically to the CRPD Committee on domestic implementation of the CRPD.<sup>148</sup> In its first annual report to Parliament, the framework stated that some of its recommendations “reinforce recommendations previously made to New Zealand by international committees.”<sup>149</sup>

### 5. Article 33(2) Multiple Institution Frameworks and Paris Principles Compliance

The CRPD Committee has not yet taken a clear position on whether all the institutions in a multiple institution article 33(2) framework must comply with the Paris Principles. If the Committee does take this position, then it will not be possible for CRPD states, including federal states such as Canada, to include multiple institutions in its article 33(2) framework.

Gauthier de Beco has addressed the application of the Paris Principles to multiple mechanism article 33(2) frameworks. He argues that:

By referring to the *Paris Principles*, the drafters of CRPD applied the guidelines for NHRIs to actors other than NHRIs [since disability rights bodies will likely be involved, so that] the Paris Principles will have to be read in light of the specific mandate of these mechanisms.<sup>150</sup>

Further, de Beco has taken a favourable position on multiple independent mechanisms in an article 33(2) framework (e.g., a NHRI and a thematic equality body). He takes this position because “[i]t both increases the chances of covering the full mandate of independent mechanisms and ensures the participation of persons

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<sup>147</sup> *New Zealand 2011-2012 Independent Monitoring Mechanism Annual Report*, *supra* note 5 at 13; New Zealand Ombudsman, *Making disability rights real* (Wellington: Office of the Ombudsman, 2010), online: New Zealand Ombudsman <[www.Ombudsman.parliament.nz](http://www.Ombudsman.parliament.nz)>.

<sup>148</sup> *Ibid* at 10. This is likely in late 2014 or thereafter. Further, the Ombudsman investigations and inspections inform these reports.

<sup>149</sup> *Ibid*.

<sup>150</sup> *Article 33(2)*, *supra* note 90 at 93; See also Gauthier de Beco & Alexander Hoefmans, “National Structures for the Implementation and Monitoring of the UN Convention on the Rights of Persons with Disabilities” in *Article 33*, *supra* note 33, 9 at 38 [*National Structures*]. Regarding children with disabilities see UNICEF Innocenti Research Centre’s (now Office of Research) recommendation: “[d]evelop independent monitoring mechanisms, such as an Ombudsperson or Children’s Commissioner, and ensure that children and families are aware of and fully supported in gaining access to such mechanisms,” *Promoting the Rights of Children with Disabilities*, *supra* note 1 at v.

with disabilities.”<sup>151</sup> Yet, de Beco also argues that when multiple institutions are appointed to an article 33(2) framework all of them should be fully compliant with the Paris Principles.<sup>152</sup> However, in later work de Beco and Hoefmans focus more on the independence and pluralism of institutions as criteria for inclusion in the framework.<sup>153</sup> They therefore appear to accept that the Paris Principles must be adapted so they can be applied to a broader array of domestic institutions as long as the institutions satisfy core standards of the Paris Principles, such as independence and pluralism.

The Mental Disability Advocacy Centre (MDAC) also argues that all of the institutions in a multiple mechanism article 33(2) framework should comply fully with the Paris Principles.<sup>154</sup> However, MDAC’s prime concern in taking this position is that all of the bodies must be independent from government so that they can operate impartially and without government interference.<sup>155</sup> Furthermore, MDAC’s focus on independence and its call for “adaptation” of the Paris Principles in the application of the CRPD results in MDAC suggesting that thematic human rights institutions, ombudsman institutions, non-governmental organizations (NGOs), trade unions, and universities could be included along with a NHRI in a multiple-mechanism article 33(2) framework.<sup>156</sup> MDAC does not take ICC interpretation of the Paris Principles into account and appears to equate the Principles simply with independence from the executive/administrative branch of government. However, the Paris Principles do not apply, and cannot be adapted to apply, to NGOs, trade unions, and universities.

State internal structures can be complex. For example, federal states, states with advisory human rights commissions, and states with thematic institutions such as disability rights institutions are countries where multiple institutions are necessary or may be necessary to cover the article 33(2) framework requirements of protecting, promoting, and monitoring CRPD rights. These domestic realities, the text of article 33(2), and scholarly views on article 33(2) support the argument in favour of permitting flexibility in the CRPD Committee’s application of the Paris Principles to multiple institution article 33(2) frameworks.

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<sup>151</sup> *CRPD Article 33 Implementation in Europe*, *supra* note 92 at 53, 6-7; *National Structures*, *ibid* at 44-45, 53-54.

<sup>152</sup> *Article 33(2)*, *supra* note 90 at 94.

<sup>153</sup> *National Structures*, *supra* note 150 at 38-39.

<sup>154</sup> Mental Disability Advocacy Center, *Building the Architecture for Change: Guidelines on Article 33 of the UN Convention on the Rights of Persons With Disabilities*, 1st ed (Budapest, Hungary: Mental Disability Advocacy Center, 2011), online: Mental Disability Advocacy Center <[www.mdac.info/en/about](http://www.mdac.info/en/about)> at 39. The Mental Disability Advocacy Center (“MDAC”) is an international non-governmental human rights organization headquartered in Budapest, Hungary.

<sup>155</sup> *Ibid* at 39-40.

<sup>156</sup> *Ibid* at 41, 47.

It is my view that the CRPD Committee should permit multiple institutional frameworks under article 33(2) as long as one of the institutions is a NHRI that fully complies with the Paris Principles or is easily capable of upgrading from partial to full compliance. The NHRI must be a national level human rights commission or human rights ombudsman. Additional statutory institutions such as classical ombudsman institutions, thematic human rights institutions, and sub-national human rights commissions should also be acceptable mechanisms for inclusion as long as they comply with most of the ICC-designated essential requirements of the Paris Principles.<sup>157</sup> These are: independence from government, adequate resources to enable the institution to carry out its mandate effectively, the ability to interact with the international human rights system and cooperate with other human rights bodies in the execution of its CRPD article 33(2) responsibilities, the ability to issue annual, special, and thematic reports that include recommendations to the public authorities on improving respect for CRPD rights, pluralism in the makeup of the leadership and staff of the institution, and pluralism and transparency in the selection and appointment of the institutional leadership.<sup>158</sup> The essential requirement of the Paris Principles that an institution must have a legal mandate that includes the promotion and protection of all human rights should be adapted to permit the inclusion in a multiple institution framework of other national and sub-national statutory institutions whose legal mandate expressly or in practice permits the institution to promote and/or protect CRPD disability rights. Also, the institutions included in a multiple institution framework must in combination fulfill all of the article 33(2) promotion, protection, and oversight roles.

Given the supranational nature of the EU, the essential requirements of the Paris Principles will also have to be applied flexibly or other criteria applied when the EU's article 33(2) framework is evaluated.<sup>159</sup> Since PWD organizations are typically private actors the Paris Principles do not apply to them. However, the formal inclusion of PWD organizations by state parties in their article 33(2) frameworks is an important development that upholds the core principles of the CRPD in general and article 33(3) in particular so the CRPD Committee should welcome their inclusion in an article 33(2) framework as long as they are independent of government.

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<sup>157</sup> See *National Structures*, *supra* note 150 at 38-39, 44-45, 52-55. Authors de Beco and Hoefmans have also taken the position that, in addition to a NHRI, other independent mechanisms can be part of an art 33(2) framework. However, their analysis does not address the ICC General Observations and accreditation process and they appear to equate independence and pluralism of an institution with Paris Principles full compliance.

<sup>158</sup> *Supra* notes 41-42 and accompanying text.

<sup>159</sup> See *supra* notes 99-101 and accompanying text.

## 6. Canada and Article 33(2)

Canada published its first report to the CRPD Committee on February 18, 2014.<sup>160</sup> The report stated that:

Canada's framework pursuant to Article 33(2) is comprised of several elements, including government reporting and promotional activities, and the work of... [federal, provincial, and territorial] human rights commissions and tribunals, the courts, public guardians and ombudspersons and civil society organizations across Canada. Combined, these mechanisms play a role in promoting, protecting and monitoring the rights set out in the Convention. After giving careful consideration to the offer by the Canadian Human Rights Commission to be designated to carry out monitoring functions in respect of the Convention, Canada determined that it could maintain and rely on existing mechanisms to fulfill its obligations under Article 33(2).<sup>161</sup>

As discussed earlier, Canada's federal system is such that an article 33(2) multiple institution framework with federal and provincial/territorial institutional mechanisms must be established since disability rights fall under both federal and provincial heads of power.<sup>162</sup> Article 33(2) does permit a CRPD state party to "maintain ... designate or establish" a multiple institutional framework, although it also states that the mechanism(s) included in the framework shall be "designated or established" taking the Paris Principles into account. The inconsistent wording makes it difficult to determine whether the CRPD Committee will find Canada's *laissez faire* approach acceptable under article 33(2) or will call for Canada to make a formal designation of the institutional mechanisms included in its framework. Canada's constitutional division of powers limits the federal government's freedom of action. The federal government can designate federal institutions as article 33(2) mechanisms. However, only the provincial/territorial governments can consent to the designation of their institutions as article 33(2) mechanisms. There is no indication in Canada's report that they were asked or have done so.

In any event, based on the concluding observations of the CRPD Committee and the Paris Principles, government activities will not be considered to be sufficiently independent to meet the requirements of article 33(2) and the courts/tribunals are not considered NHRIs or other statutory institutions for the

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<sup>160</sup> Government of Canada, *Convention on the Rights of Persons with Disabilities: First Report of Canada* (Ottawa: Ministry of Heritage and Official Languages, 2014) [*First Report of Canada*].

<sup>161</sup> *Ibid* at para 44.

<sup>162</sup> See *supra* notes 97-98 and accompanying text; *First Report of Canada*, *supra* note 160 at para 3. The *First Report of Canada* notes that based on 2006 statistics, 14.3% of Canadians had disabilities and about 43% of seniors had disabilities, *ibid* at paras 6-7.



protection of human rights.<sup>163</sup> Public guardians are typically sufficiently connected to government administration that it is likely that they would not satisfy the independence requirement in article 33(2) and the Paris Principles.<sup>164</sup>

The Canadian Human Rights Commission has ICC A-status NHRI accreditation and should have been formally designated as the NHRI in Canada's framework.<sup>165</sup> Also, based on my argument above, in addition to the Canadian Human Rights Commission, provincial/territorial ombudsman institutions and human rights commissions can be included as important components of Canada's multiple institutional framework as long as they meet most of the Paris Principles' essential requirements. The one essential requirement that should be relaxed is the mandate to protect and promote all human rights. The ombudsman institutions should be able to meet this test. As officers of the legislature, Canadian provincial/territorial ombudsman institutions are independent, enjoy adequate resources and, as demonstrated above, they already engage in investigations against public authorities that protect CRPD rights.<sup>166</sup> They issue public reports with recommendations to government, they are capable of interacting with international human rights actors and other human rights bodies, they are pluralistic in their leadership and staff, and there is transparency and pluralism in the appointment of the ombudsman pursuant to ICC interpretation of the Paris Principles.<sup>167</sup> Provincial and territorial human rights commissions have jurisdiction over the public and private sectors and they can protect, promote, and monitor primarily CRPD non-discrimination rights<sup>168</sup> However, provincial and territorial governments need to consent to any formal designation of their institutions and provide any additional resources and legislative reforms necessary to fulfil the article 33(2) mandate. Working together, the Canadian Human Rights Commission and the sub-national ombudsman institutions and human rights commissions should fulfil the CRPD article 33(2) protect, promote, and monitor obligations. Canada should also consider designating one or more independent disability rights organizations as part of its

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<sup>163</sup> See e.g., *ICC Report and Recommendations May 2013*, *supra* note 41 at General Observation 2.10; *supra* note 110 and accompanying text. The courts/tribunals are important, albeit different, sites for the implementation of CRPD rights protection.

<sup>164</sup> See BC Ombudsperson investigation into the BC Public Guardian in *BC Ombudsperson Public Guardian Report*, *supra* note 135.

<sup>165</sup> *Status of National Institutions*, *supra* note 41; *Canadian Human Rights Act*, RSC 1985, c H-6. The Canadian Human Rights Commission has A-status even though focus of Commission is on non-discrimination and equality. Also, while Commission members appointed by Governor in Council they are removable only on address of Senate and House of Commons.

<sup>166</sup> See *supra* notes 134-139, 164 and accompanying text.

<sup>167</sup> See *ICC Report and Recommendations May 2013*, *supra* note 41 at General Observations 1.4-1.10.

<sup>168</sup> *First Report of Canada*, *supra* note 160 at 11-12. Many sub-national human rights commissions are appointed by and report to their governments; but see *Status of National Institutions*, *supra* note 41 (ICC A-status Canadian Human Rights Commission appointed by federal executive). The differences in jurisdiction, independence, and other powers of Canadian sub-national human rights commissions are beyond the scope of this paper.

article 33(2) framework following New Zealand's example. Further, inclusion of the federal Correctional Investigator in Canada's article 33(2) framework should be considered, for example if its independence from government is enhanced.<sup>169</sup>

## CONCLUSION

Classical, human rights, and thematic ombudsman institutions exist at supranational, national, and sub-national levels of government. Article 33(2) of the CRPD requires that a framework of one or more independent domestic mechanisms be used to protect, promote, and monitor the implementation of the treaty, taking into account the Paris Principles that contain the minimum standards for the legal and financial architecture of NHRIs. Human rights, classical, and thematic ombudsman institutions are being appointed as CRPD article 33(2) mechanisms.

Article 33(2) is being interpreted by the CRPD Committee through application of the Paris Principles. Based on CRPD Committee recommendations, the Paris Principles, and the ICC's General Observations when a state designates one institution for an article 33(2) framework, only a national level human rights commission or national level human rights ombudsman institution that complies with the Paris Principles and has an internal unit dedicated to disability rights will be acceptable. National level classical ombudsman or thematic human rights institutions standing alone will not comply with the Paris Principles and will not satisfy the requirements of article 33(2).

This article argues that the CRPD Committee should accept multiple institutional frameworks under article 33(2) as long as one of the institutions in the framework is a NHRI that fully complies with or is easily capable of fully complying with the Paris Principles. Additional independent institutions such as national classical ombudsman institutions, national thematic rights institutions, and sub-national human rights institutions and classical ombudsman institutions in federal/decentralized states should also be acceptable mechanisms for inclusion in an article 33(2) multiple body framework as long as they comply with most of the essential requirements of the Paris Principles. These are: independence from government, adequate resources to enable the institution to carry out its mandate effectively, the ability to interact with international human rights system actors and cooperate with other human rights bodies in the execution of CRPD article 33(2) responsibilities, the ability to issue public reports that include recommendations to the authorities on improving respect for CRPD rights, pluralism in the makeup of the institution's leadership and staff, and pluralism and transparency in the selection and

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<sup>169</sup> Assisting prisoners with disabilities is already a priority area for the Correctional Investigator. The institution is enshrined in legislation, but is appointed by, and can be removed for cause at any time by, the Governor in Council. Transparency and pluralism in the appointment process could also be an issue, *Corrections and Conditional Release Act*, SC 1992, c 20, Part III, ss 158, 160(1); *supra* note 5; Canada, <Office of the Correctional Investigator, online: [www.oci-bec.gc.ca](http://www.oci-bec.gc.ca)>.

appointment of the institution's leadership. The Paris Principles requirement that the institution have a legal mandate that includes the promotion and protection of all human rights should be adapted to permit the inclusion of national and sub-national institutions whose legal mandate expressly or in practice permits the institution to promote and/or protect CRPD disability rights. Also, the institutions working together in an article 33(2) framework must fulfill all of the article 33(2) promotion, protection, and oversight roles. Accordingly, Canada's article 33(2) multiple institution framework should consist of the Canadian Human Rights Commission as the ICC A-status NHRI, provincial/territorial ombudsman institutions and human rights commissions as long as they comply with or are capable of complying with most of the essential requirements of the Paris Principles as adapted for these types of sub-national institutions, and possibly also the federal Correctional Investigator and one or more PWD civil society organizations.

**APPENDIX: ACRONYMS**

BC	British Columbia
CERMI	Spain's Committee of Representatives of Persons with Disabilities
COE	Council of Europe
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRPD Committee	Committee on the Rights of Persons with Disabilities
EU	European Union
FRA	EU Agency for Fundamental Rights
ICC	International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights
MDAC	Mental Disability Advocacy Centre
NGO	non-governmental organization
NHRIs	national human rights institutions
NPM	national preventive mechanism
NSW	New South Wales
OB	Austrian Ombudsman Board
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
PWDs	persons with disabilities
UN	United Nations