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# *Enhancing the Status of UN Treaty Rights in Domestic Settings*

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## ABBREVIATIONS

### Human rights law instruments

CAT	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment
CEDAW	UN Convention on the Elimination of All Forms of Discrimination against Women
CERD	UN Convention on the Elimination of All Forms of Racial Discrimination
CRC	UN Convention on the Rights of the Child
CRPD	UN Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
HRA	Human Rights Act 1998
ICCPR	UN International Covenant on Civil and Political Rights
ICESCR	UN International Covenant on Economic, Social and Cultural Rights

### Organisations and processes

EHRC	Equality and Human Rights Commission (UK)
JCHR	Joint Committee on Human Rights (Westminster)
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
UN	United Nations
UPR	Universal Periodic Review

## GLOSSARY

**Adaptation** – the constitutional or statutory incorporation of a treaty with substantive modifications to the treaty text

**Civil society** – non-governmental organisations which seek to represent and manifest the will of citizens

**Concluding Observations** – conclusions and recommendations of UN Treaty bodies on states' periodic reports

**Directive principles of social policy** – requirements placed on particular bodies (e.g. on parliament in the Republic of Ireland) to consider various aspects of social justice in the making of laws

**Dualism** – a constitutional system (contrasting with monism) in which enacting legislation is required in order for international treaties to become part of domestic law

**Extra-legal** – (of an action or situation) outside the province of the law

**General comments** – a document produced by a UN treaty body which gives further explanation of a state's obligations in relation to a particular treaty right

**Implementation** – an action that gives domestic effect to an international law standard in some way

**Incorporation** – the inclusion of an international law standard within domestic law such that it is potentially enforceable in domestic courts

**Monism** – a constitutional system (contrasting with dualism) in which international treaties automatically become part of domestic law on ratification

**National Human Rights Institution** – an independent publicly-funded institution, accredited by the United Nations, with the responsibility to protect, monitor and promote human rights in a particular country

**Transformation** – the literal and direct incorporation of the text of a treaty into a country's constitution or as a statute

**UN treaty body** – a committee of independent experts responsible for monitoring implementation of a treaty (including by reviewing reports) by governments, NHRIs and civil society on a member state's performance against an international human rights treaty

## EXECUTIVE SUMMARY

### Background

UN treaties are binding in international law on the states that have ratified them, but states have significant latitude in how they implement treaties in domestic law, policy and practice. Although the process can be framed in different ways, three basic methods of implementing and enhancing UN treaty rights in domestic frameworks can be identified:

- **'Hard'** methods of legal incorporation, characterised by reliance on the possibility of legal enforcement of rights through the courts;
- **'Intermediate'** means of implementation, characterised by less forceful public sector obligations, and;
- **'Soft'** extra-legal measures, characterised by more direct involvement of civil society and the building of a societal human rights culture.

This research examines international and domestic case studies in order to identify the most effective means of enhancing the status of UN treaty rights in the UK's domestic framework. We gathered evidence through a combination of desk research and field research (questionnaires and interviews).

### Our Main Findings

**A smart mix of methods works best:** Our research<sup>1</sup> concurs with other literature,<sup>2</sup> which argues that sound implementation requires a smart mix of methods, from 'hard' legal incorporation, ensuring that rights are legally enforceable, to 'soft' means, such as human rights education and budgeting.

**Concrete cause and effect is hard to identify:** Where incorporation has taken place there is some evidence of benefits as outlined below. It is often difficult however to identify clear instances where treaty implementation has led to concrete human rights outcomes (beyond rights 'on paper'). Conversely, it is difficult to know what would have happened had the treaties not been implemented. This could be because complex interactions of legal, social, cultural and other factors means it can be difficult to establish a clear causal link. Additionally, it may take time for changes to become apparent. Nevertheless, there are some lessons to be learned from the individual instances of implementation considered in this research.

### Legal ('hard') incorporation of UN treaty rights

- **Incorporation is best:** Our research supports consensus in the literature that incorporation through domestic law remains the most effective means of ensuring compliance with human rights treaty obligations.<sup>3</sup> States may incorporate treaties, in whole or in part, into domestic law. Incorporation in full has led to strong reliance by the courts, for example on the CRC in Norway.<sup>4</sup>

- **Constitutional incorporation is the strongest approach:**

Constitutional incorporation, where possible, is preferable because of the message it sends about the position of rights in the legal hierarchy. It should be accompanied by statutory instruments that give legal effect to those rights.<sup>5</sup>

- **Socio-economic rights should be a priority for incorporation:**

The research indicates that incorporation of ICESCR rights is both possible and desirable.<sup>6</sup> Although politically challenging, there is evidence of popular support in the UK for the incorporation of socio-economic rights<sup>7</sup> and this could be developed further as occurred in New Zealand.<sup>8</sup>

- **The HRA works well:** The design of the HRA, although it constitutes partial incorporation of the ECHR, performs well compared to bills of rights in other jurisdictions in terms of striking a balance between the relative roles and powers of the courts, legislature and executive while also providing robust protection of rights.<sup>9</sup> The HRA could serve as a model for implementation of other instruments.

- **Incremental incorporation can yield success:** There are means of incorporation (for example securing legislation on a specific right) which are less holistic than incorporating an entire treaty, but can enhance the legal status of a treaty nevertheless.<sup>10</sup> Strategic litigation is an important part of these efforts.<sup>11</sup>

### Implementation of UN treaty rights through 'intermediate' measures

Intermediate measures generally seek to raise the status of rights through defined duties on the public sector, for example a duty to take a human rights treaty into account when assessing new legislation or carrying out public functions. Our research found that **due regard duties**, such as those in Wales and Scotland regarding the CRC, are yielding results in terms of enhancing knowledge about rights and bringing about concrete change particularly in terms of ensuring regard is given to rights in policy development processes.<sup>12</sup> A public sector duty can be successful, but it should be clear where the responsibility for a given duty lies, and exactly what it requires.

### 'Soft' (or 'extra-legal') measures of implementation of UN treaty rights

The research indicates that 'soft' measures are a crucial part of the picture of implementing treaty rights. They may derive from obligations enshrined in law, such as due regard duties. They can include **action plans, benchmarking exercises, impact assessments, sector-specific initiatives and human rights budgeting**. Public **human rights education** and awareness-raising campaigns can be crucial for ensuring social, cultural and political will for enhancing treaty rights.

<sup>5</sup> See Section 2.1 and *Ibid.*

<sup>6</sup> See e.g. Cases 1 and 2 regarding socio-economic rights in the courts in South Africa and in India.

<sup>7</sup> See Section 2.5.3.

<sup>8</sup> See Case 17.

<sup>9</sup> See e.g. Case 7: Incorporating civil and political rights: The UK HRA.

<sup>10</sup> See e.g. Case 4 on CRC Article 12 in Israel and Case 5 on the Irish Sign Language Act 2017.

<sup>11</sup> See e.g. Cases 3 and 17.

<sup>12</sup> See e.g. Case 13 on the duty in Wales and Case 15 on the CRC duty in Scotland.

<sup>1</sup> See for example respondents 9, 13, 17, 26, 27 and 28 (listed in the Appendix below) who emphasised the need for a mix of methods.

<sup>2</sup> See e.g. Michael Stein and Janet Lord, 'The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities' (2008) 83 *Washington University Law Review* 9.

<sup>3</sup> See Section 2.5

<sup>4</sup> See e.g. Case 3 below on Norway's incorporation of the CRC.

# 1. INTRODUCTION

## 1.1. Aims of the research

This research report examines international and domestic approaches to treaty implementation in order to fill knowledge gaps and create evidence-based policies and strategies for improving human rights law and practice.<sup>1</sup>

The principal objectives of the research were to:

- Explore the different models used (both in the UK and in other countries) to enhance the status of UN treaty rights in domestic systems, and to assess the effectiveness of these models;
- Understand the full range of opportunities for enhancing the status of treaties and treaty rights in the UK; and
- Establish best practice for enhancing the status of treaty rights and identify lessons applicable in the context of the non-devolved UK legislative framework.<sup>2</sup>

The research team was led by Dr. Aoife Daly, Senior Lecturer at the School of Law and Social Justice, University of Liverpool, working together with Dr. Joshua Curtis, Postdoctoral Research Associate at the School of Law and Social Justice, University of Liverpool, and Dr. Yvonne McDermott Rees, Associate Professor of Law at the Hillary Rodham Clinton School of Law, Swansea University.

## 1.2. Context

Human rights treaties are legally binding instruments of international law. When states become party to a human rights treaty, they agree to take all appropriate legislative, administrative, and other measures that are necessary to implement that treaty, and to ensure the rights therein are realised for all people within their jurisdictions.<sup>3</sup> With regard to economic, social and cultural rights, states parties are required to undertake such measures progressively and 'to the maximum extent of their available resources'.<sup>4</sup> Each human rights treaty establishes a treaty body, which monitors States Parties' implementation of the treaty through regular reporting cycles.<sup>5</sup> Treaty bodies also issue treaty-

specific general comments and recommendations, which provide guidance to states on the measures necessary to ensure compliance with their treaty obligations.<sup>6</sup> In addition, in a process led by the UN Human Rights Council, known as the Universal Periodic Review (UPR), the human rights context of each UN state is peer-reviewed by other member states in a four and a half yearly cycle.<sup>7</sup>

Each state party has discretion as to what measures it will take to ensure full implementation of its obligations under the human rights treaties.<sup>8</sup> How treaties are given legal effect is very much dependent on the legal and constitutional systems of specific states. In 'monist' states, such as France and Germany, once a treaty has been ratified it becomes part of national law automatically.<sup>9</sup> In 'dualist' states, such as the UK and other common law jurisdictions, however, primary legislation is necessary to give the treaty direct effect in national law.<sup>10</sup> In some jurisdictions, treaties are equivalent to national statute law, but in others they may have constitutional status, which is generally superior to national statute law.<sup>11</sup> There is also variation as to whether treaty rights can be invoked in court, and whether they will be considered enforceable in domestic courts.<sup>12</sup>

There are different ways in which one can categorise and describe these different methods of implementing international human rights law treaties.<sup>13</sup> On the basis of our findings, we have opted to categorise them as follows: legal ('hard') incorporation; intermediate measures (such as 'due regard' duties); and 'soft' (extra-legal) measures. The scope and structure of this report reflects this variety of measures, as illustrated in Fig. 1 right.

This research takes place at an important constitutional moment for the UK. It has been conducted as the exit from the European Union begins.

<sup>6</sup> See, for example, Committee on the Rights of the Child, *General Comment No. 20: On the Implementation of the Rights of the Child during Adolescence*, CRC/C/GC/20, 6 December 2016, para. 4; Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, CAT/C/GC/2/CRP/1/Rev.4, 24 January 2008, and Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations*, E/1991/23, 14 December 1990.

<sup>7</sup> UNGA Resolution 60/251, Human Rights Council, UN Doc. A/Res/60/251, 3 April 2006, para 5(e); Elvira Dominguez Redondo, 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session' (2008) 7 *Chinese Journal of International Law* 721.

<sup>8</sup> Rhona Smith, *International Human Rights Law* (8th edn, Oxford University Press, 2018), at 183-185.

<sup>9</sup> John Laws, 'Monism and Dualism' (2000) 53 *La Revue Administrative* 18.

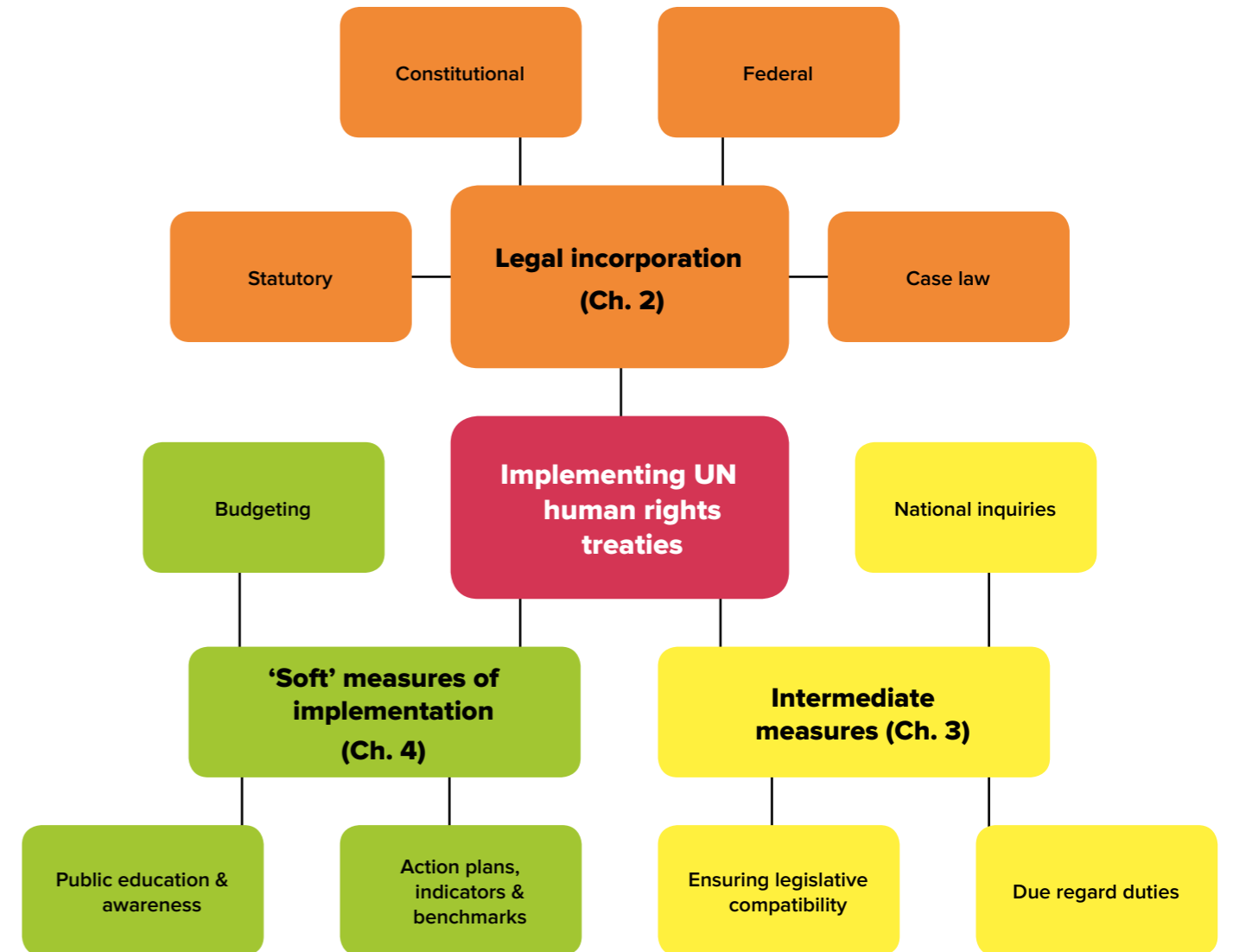
<sup>10</sup> *Ibid.*

<sup>11</sup> Argentina, Brazil, Bolivia, Colombia, Cost Rica, Mexico, Venezuela, amongst others, give constitutional status to international law treaties and some of the constitutions establish the supremacy of international human rights treaties over domestic law (European Commission for Democracy through Law, 2014). The constitutions of some states that take a monist approach may contain an incorporation clause, as with the Netherlands (Constitution of the Netherlands, Article 93) and Portugal (Article 8).

<sup>12</sup> David Sloss, 'Treaty Enforcement in Domestic Courts: A Comparative Analysis', in David Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press, 2009); Lord Mance, 'International Law in the UK Supreme Court', speech delivered at King's College, London, 13 February 2017, available at, <https://www.supremecourt.uk/docs/speech-170213.pdf>.

<sup>13</sup> For example regarding CRC implementation Byrne and Lundy categorise accordingly: 1. Full incorporation of the CRC into Domestic Law and 2. Measures of Indirect Incorporation (in which they include Child Rights Impact Assessment; Training and Awareness; Data Collection; Joined-up Working [governmental cross-sectoral coordination]; Child Budgeting; [Child] Participation; A National Strategy for Children and Young People). Bronagh Byrne and Laura Lundy, *Legal Measures for Implementing Children's Rights: Options for Northern Ireland* (Queens University Belfast, 2013).

Figure 1: Means of implementation



This period of change presents an opportunity to build public support and strengthen commitments to implementing international human rights treaties through measures that reflect international best practice.

## 1.3. Methodology

This research examined the implementation of the seven core UN human rights treaties that the UK has signed and ratified, and which are monitored by the EHR. These seven treaties are:<sup>14</sup> ICCPR, ICESCR, CERD, CEDAW, CAT, CRC, and CRPD. Our methodology comprised three strands: a desk-based literature review; identification and analysis of case studies of high relevance to the UK context; and field research (questionnaires and interviews).

<sup>14</sup> These treaties also have a number of 'Optional Protocols', which either provide for procedures in relation to the treaty or address a substantive area related to the treaty.

### Desk-based literature review

We conducted an extensive literature review of primary sources including treaties, legislation, constitutions, case law, and the general comments and concluding observations of treaty bodies. We also examined secondary sources, for example academic literature and NGO reports. This initial research provided a broad picture of the nature of implementation of human rights around the world. Particular attention was given to common law systems in order to ensure the greatest possible relevance of the information gathered to the UK context.

### Identification of case studies

We selected 21 case studies, which provided examples of the domestic implementation of human rights treaties in various states. The case studies were chosen based on:

<sup>1</sup> The EHR, which funded this research, has a mandate which extends to England, Scotland and Wales. The Scottish Human Rights Commission has responsibility for devolved human rights matters in Scotland (see information about Scottish devolution in footnote 14 below). Therefore the conclusions from this project are confined to non-devolved matters only, though the research considers developments in the devolved countries of the UK, whereby certain powers have been transferred from the UK Parliament in London to Assemblies in Cardiff and Belfast, and the Scottish Parliament in Edinburgh.

<sup>2</sup> A range of powers were transferred ('devolved') to Scotland under the Scotland Act 1998 including economic development, education, and health. The UK Government is responsible for national policy on all powers which have not been devolved ('reserved powers') which include defence and foreign policy. The area of human rights is devolved in Scotland, but the HRA is reserved.

<sup>3</sup> Article 2, ICCPR; Article 2, ICESCR; Article 2, CERD; Article 2, CAT; Article 2, CEDAW; Article 4, CRC; Article 4, CRPD. See further Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5, 27 November 2003, para. 1.

<sup>4</sup> Article 2(1), ICESCR; Article 4, CRC. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht, Netherlands, 22–26 January 1997) set out the obligation on states to 'respect, protect, and fulfill' the economic, social, and cultural rights of those within their jurisdictions.

<sup>5</sup> Some treaty bodies also have the power to hear individual complaints.

1. *Effectiveness* – we considered demonstrable success of methods and means, reasons for failure or poor performance; and gave attention to interactions between models.
2. *Relevance to UK context* – we considered the feasibility of introducing the model/practice in the UK, bearing in mind specific legal, social, cultural and institutional factors.
3. *Variety* – we considered examples across the range of human rights; reflecting national and local level methods.
4. *Efficiency of research* – we considered possible language, distance, time and other barriers.

#### Questionnaires and interviews

We sought and obtained ethics approval from the University of Liverpool Ethics Committee for our field research. We identified key stakeholders (NGO and government personnel, academics, legal professionals) from countries where various means of implementation have been adopted, to gather their insights on the effectiveness of those means in practice.

We contacted them either through our own professional contacts, publicly available email addresses or via the front desks of their respective institutions. They were invited to participate either via questionnaire or phone/Skype interview. They were provided in advance with participant information and consent forms. We sent approximately 200 email invitations. Most email invitations included a bespoke questionnaire which contained questions specific to the context of the case study under examination and to the expertise of the individual.<sup>15</sup> There was a relatively low rate of take-up of invitations to participate. We ultimately had 18 written questionnaire responses<sup>16</sup> and conducted 13 interviews.<sup>17</sup>

The semi-structured questionnaire provided scope for the respondents to provide qualitative information on their experiences and opinions in either oral or written form. We ensured confidentiality for participants and we refer to them in this report by job title and national context.

This mixed-methods approach (desk research, case study focus and field research) has revealed some distinct examples of good practice, which are included in boxes and/or within the narrative throughout the following chapters.<sup>18</sup>

We used these sources to build a picture of differing methods of implementation and their effectiveness. Our strongest conclusions were reached when the views of the respondents were corroborated by robust evidence of impact (such as a body of legal cases indicating that an incorporation mechanism has had an impact on the practical realisation of rights, or statistics on improvements in rights – particularly those that can be attributed to an implementation

measure). Other compelling evidence of effectiveness included best practice recommendations from treaty bodies, or strong conclusions from academic reports. Softer (but still relevant) findings were based on the qualitative evidence of the experiences and perspectives of respondents.

#### 1.4 Challenges of the Research

This research was conducted between December 2017 and March 2018, with ethics approval obtained January 2018. There was therefore a short timeframe in which to conduct the field research which limited the availability of participants.

It has proven difficult to identify best practice for strengthening the status of UN human rights treaties in domestic law. There is much material available on what does not work well. There are some useful advisory documents on what may work in the future. There are some examples of incorporation yielding very positive results (see e.g. cases 3 and 4 below). Yet greater consideration should be given to establishing links between legal incorporation of particular instruments and successes in progressing human rights in this way. In terms of impact, in some cases the developments are quite recent (such as CRC duties in Scotland and Wales), so time is needed to monitor progress and gather evidence of impact. Generally, we can say that complex interactions of social, legal, cultural, political and other factors are required to make human rights a reality. These interactions create difficulties in drawing a clear line between a specific implementation measure and a particular outcome. For example, Norway rates amongst the top five countries globally for gender equality,<sup>19</sup> and it has also incorporated CEDAW. However the relationship between these two facts (and whether one precipitated the other) is unclear. It is hoped that this report will go some way towards addressing this gap in the literature for future studies, and we strongly encourage that further research works to draw what are likely clear links between legal incorporation and human rights improvements over time.

<sup>15</sup> The initial response rate was poor, so in later email invitations we did not prepare a questionnaire in advance of making contact, but in the interests of efficiency instead prepared a questionnaire only where a positive response was received from the invitee.

<sup>16</sup> Some responses were too brief to be of use for the research (e.g. where only 'yes' or 'no' answers were given). They are excluded from this figure.

<sup>17</sup> See the list of case studies and respondents in the Appendix below. We distinguish between the two by indicating with a 'Q' where a response was by questionnaire rather than interview.

<sup>18</sup> The case studies identified in the desk research phase ultimately featured in this report to greater or lesser extents depending on the relevance and/or richness of the fieldwork findings.

<sup>19</sup> See World Economic Forum, *The Global Gender Gap Report 2014* (World Economic Forum, 2014).

## 2. LEGAL ('HARD') INCORPORATION OF UN TREATY RIGHTS

Given that the UK is a dualist State, formal incorporation is generally required before the State's international treaty obligations become enforceable in domestic courts. In this chapter various forms of legal incorporation into the national legal system are considered. In the process of 'transformation' the text of a treaty is literally and directly incorporated as a part of a constitution or a statute. In the process of 'adaptation', constitutional or statutory incorporation of a treaty involves substantive modifications to the treaty text. Incorporation may be done via constitutional amendment, through statute or via a bill of rights. In some jurisdictions it is also possible to incorporate individual international human rights provisions via statute or case law.<sup>1</sup>

### 2.1 Constitutional incorporation

In those domestic settings with 'written' or formal constitutions there is now a long tradition of constitutional incorporation of rights, either through transformation or adaptation. The main purpose of a written constitution is to codify the supreme laws of the domestic legal system over subordinate legislation, protecting them from abrogation or removal. In this sense they are 'entrenched' – difficult to remove or change. Constitutional incorporation sends a clear message that such rights should only be compromised in the most exceptional circumstances and so has high symbolic value.<sup>2</sup>

Systems with written constitutions still hold lessons for legal systems such as the UK, where there is no codified constitution. The special nature of human rights statutes, which affect the whole legal and political system, will still hold constitutional value.<sup>3</sup>

#### CASE 1: Constitutional incorporation of socio-economic rights in South Africa

In post-apartheid South Africa there was a strong impetus to tackle inequality and widespread support for this goal. Socio-economic rights were incorporated in 1996 directly into Articles 26-29 of its new constitution as justiciable guarantees; that is, individual entitlements enforceable by the courts, on a par with civil and political rights. These rights correspond to those in ICESCR and, like ICESCR rights, they are subject to available resources and progressive realisation, striking a balance between constitutional commitments and political and economic realities. Commentary and local reports indicate moderate success in terms of human rights protection. Early judicial enforcement of these rights (in cases such as *Khosa v Minister of*

*Social Development*)<sup>4</sup> was promising and progressive. More recent judgments indicate a more restrictive approach, however.<sup>5</sup> Arguments have been made that for greater effect, justiciability of these rights must be complemented by appropriate economic policy.<sup>6</sup> The South African experience nonetheless demonstrates that socio-economic rights certainly can be adjudicated and vindicated by the courts in a liberal democracy in practice. Constitutional incorporation of these rights has also underpinned public debates about social justice.

In Kenya too it was held in the 2011 *Garissa* case that the new (2010) Constitution had incorporated international treaties including ICESCR. This treaty was then relied on in the judgment in which it was held that where families had been summarily evicted, their socio-economic rights were violated. The government was ordered to provide compensation.<sup>7</sup> These types of cases are often the result of strategic litigation by civil society actors.<sup>8</sup> It seems that the willingness of judges to embrace socio-economic rights, and the willingness of civil society to litigate them, will dictate whether they are applied in court.

In Ireland, which has a written constitution, parliament is directed by directive principles of social policy (DPSPs)<sup>9</sup> to consider various aspects of social justice when drafting laws. These principles are however expressly non-justiciable in the courts which have in practice not given concrete recognition or protection to socio-economic rights.<sup>10</sup> India also employs DPSPs,<sup>11</sup> which are similarly not enforceable in the courts, however in contrast it seems that the judiciary have been open to relying on them, as the following case study shows.

#### CASE 2: Giving effect to socio-economic rights through judicial precedent in India

The Indian courts have given the DPSPs a positive concrete effect and have taken a progressive and creative approach, giving substance to a number of socio-economic rights as fundamental and justiciable rights.<sup>12</sup> The courts have recognised the rights to health, housing and food, for example, relying on creative interpretations of

<sup>4</sup> 2004(6) BCLR 569 (CC); 4 March 2004. This case indicates that it would be discriminatory to refrain from allowing access to education to permanent residents in South Africa who are not national citizens. See also *Government of the Republic of South Africa and Others v Grootboom* 2001 (1) SA 46 (CC) in which the court held that the state has an obligation to house families where parents are unable to provide for this.

<sup>5</sup> See e.g. *Mazibuko v Johannesburg* (CCT 39/09) [2009] ZACC 28.

<sup>6</sup> Ran Hirschl and Evan Rosevear, 'Constitutional Law Meets Comparative Politics: Socio-Economic Rights and Political Realities' in Tom Campbell, K.D. Ewing, and Adam Tomkins, (eds), *The Legal Protection of Human Rights: Skeptical Essays* (Oxford University Press, 2011).

<sup>7</sup> Constitutional Petition No. 2 of 2011 (Garissa).

<sup>8</sup> See e.g. <https://www.escri-net.org/docs/1/465879> and Commission on the Status of Women *Interactive Expert Panel: Commemorating 30 years of CEDAW, Upholding Women's Right through Litigation*, Fifty-fourth session New York, 1-12 March 2010.

<sup>9</sup> Article 45 of the Irish Constitution 1937.

<sup>10</sup> *Sinnott v Minister for Education* [2001] 2 IR 505 and *TD v Minister for Education* [2001] 4 IR 259. For commentary see, Paul O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (Routledge, 2012), at 143-150.

<sup>11</sup> Part IV of the Indian Constitution 1950.

<sup>12</sup> O'Connell, note 41, at 87-96.

civil and political rights (particularly the right to life) as read in light of the DPSPs. In practice there have been problems however with enforcement of the courts' judgments.<sup>13</sup>

It is reported that DPSPs do not appear to have contributed to broader debates on socio-economic rights in Ireland and India. In contrast, socio-economic rights in the courts have contributed to broader debates in South Africa (where DPSPs do not exist), as discussed in Case 1 above.<sup>14</sup> It is likely then that, to have concrete effect in law and culture more broadly, DPSPs should come with a clear requirement (likely constitutional/statutory) that courts explicitly consider socio-economic rights in relevant cases as is the case in South Africa.

## 2.2 Incorporation through statute and precedent

In implementing human rights treaties through domestic law, a state may decide to incorporate the text of an international treaty directly into a statute. This process of transformation is relatively common and can be seen, for example, in several states' direct incorporation of the CRC into their domestic legislation.<sup>15</sup> It has been argued that the greatest strength of direct CRC incorporation has been the heightened awareness of children's rights. It has also been shown to provide opportunities for strategic litigation.<sup>16</sup>

### 2.2.1 Direct and whole incorporation

#### CASE 3: Norway's direct incorporation of the CRC

Norway's Human Rights Act (No. 30, 21 May 1999) initially incorporated the ICCPR, ICESCR and ECHR into domestic law. Following representations from NGOs and the UN Committee on the Rights of the Child, this legislation was amended in 2003 to incorporate the CRC. In 2007, the Norwegian Government commissioned a study to examine whether Norway's legislation satisfies the requirements of the CRC in the relevant areas. This in turn led to legislation being amended in order to better conform to CRC standards. Research has shown that direct incorporation has resulted in children's rights and interests being taken into account to a greater extent in the drafting of legislation and in case law.<sup>17</sup> The CRC was the basis for example for the amended Children's Act 2005, which relates to private law arrangements for children.<sup>18</sup> Incorporation has had a notable effect on case law, with the Supreme Court applying the CRC 'almost always' in cases concerning children.<sup>19</sup> Recently the courts in Norway held for example that detention of children for 20 days during deportation proceedings was in violation of their rights. The CRC was amongst standards relied upon by the courts in their judgment.<sup>20</sup> The status of these duties as positive

<sup>13</sup> Court judgments have been described as vague, or not enforced by authorities. Respondent 3. Indian human rights non-governmental organisation staff member (Q). See also O'Connell, note 41, at 104.

<sup>14</sup> Respondents 1. Irish constitutional law academic 1 (Q) 2. Irish constitutional law academic 2 (Q) 3. Indian human rights non-governmental organisation staff member (Q)

<sup>15</sup> This is the case, for example, in Belgium, Norway, and Spain.

<sup>16</sup> Laura Lundy *et al.*, *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries* (UNICEF, 2012), at 4.

<sup>17</sup> *Ibid.*, at 60.

<sup>18</sup> *Ibid.*, at 59.

<sup>19</sup> Respondents 7. Staff member at the Norwegian Ombudsman for Children (Q) and 8. Norwegian Professor specialising in children's rights (Q). See also Lundy *et al.*, note 47, at 60.

<sup>20</sup> See Judgment dated 31 May 2017, case number LB - 2016 - 8370.

legal obligations under domestic law means that the public, media, monitoring bodies, courts, and reviewers of public services are more sharply focused upon them in holding the Government to account.<sup>21</sup>

### 2.2.2 Adaptation

In contrast to transformation, adaptation involves incorporation that modifies the text of the international treaty. Adaptation may nevertheless provide a pragmatic, albeit incremental, means of bringing specific treaty rights into national law.

#### CASE 4: CRC Article 12: Israel

Article 12 of the CRC states that children should be heard, and their views accorded due weight in line with age and maturity, in all matters affecting them, and in particular in judicial and administrative proceedings. In Israel a pilot project was introduced in 2010 whereby judges consider in every case whether children should be heard in family law proceedings affecting them.<sup>22</sup> It was considered very successful and national legislative provisions to this effect were subsequently introduced.<sup>23</sup> A review found that there had been concrete change. Children are now involved in some way in most cases and positive experiences are reported by the vast majority of children, parents and legal professionals (in spite of the fact that some of the latter group had been initially reluctant about the changes).<sup>24</sup>

Adaptation may in fact be related to treaty rights in a relatively loose way. For example, in Ireland, a new Irish Sign Language (ISL) Act was passed in December 2017,<sup>25</sup> which enshrines Article 21(e) of the CRPD (which provides that State Parties should recognise and promote the use of sign language).

#### CASE 5: Irish Sign Language Act 2017

In Ireland legislation for an Irish Sign Language (ISL) Act was adopted in 2017. The law places a duty on public bodies to provide ISL interpretation at no cost to the user when access to statutory entitlements is sought by the person. Experts in ISL matters describe practical benefits deriving from this law, such as provision for interpretation in hospitals where previously there was none<sup>26</sup> and a greater positivity amongst the general public about sign language.<sup>27</sup> Ireland had not yet ratified the CRPD at the time of this legislation, and the ISL Act does not expressly refer to that instrument, nor was it to our knowledge mentioned in the legislative procedure, although it was certainly raised in the course of campaigning around the Act accordingly to our interviewees. However the Act had the practical effect of meeting one requirement of the CRPD.

<sup>21</sup> Respondents 7, and 8.

<sup>22</sup> Tamar Morag, 'Child Participation in Family Courts' paper presented at *Conference on Child-Friendly Justice* (Stockholm, 16 - 18 May 2014).

<sup>23</sup> Tamar Morag, Dori Rivkin and Yoa Sorek, "Child Participation in the Family Courts: Lessons from the Israeli Governmental Pilot Project" (2012) 26 *International Journal of Law, Policy and the Family* 1, at 5.

<sup>24</sup> Respondent 23. An Israeli academic involved with the piloting of a CRC-related measure in the family law courts (Q). See also Aoife Daly, *Children, Autonomy and the Courts: Beyond the Right to be Heard* (Brill/Nijhoff, 2018), at 206.

<sup>25</sup> Irish Sign Language Act 2017.

<sup>26</sup> Respondent 27. A manager at a leading Irish deaf organisation.

<sup>27</sup> Respondent 28. An academic and member of the deaf community who campaigned for the Irish Sign Language Act.

### 2.2.3 Legal precedent

Judges are capable of interpreting laws in a progressive way in line with human rights principles where there is a will to do so.<sup>28</sup> It seems that this can be done without significant variation in interpretation of these standards between jurisdictions. A study of 55 countries' judicial interpretations of CEDAW demonstrated 'a remarkable absence of divergence across jurisdictions as to the substantive meaning of CEDAW'.<sup>29</sup> CRC Article 3 (the principle of the best interests of the child) and Article 12 (the right to be heard) have also been applied with some frequency and consistency by courts even in jurisdictions which have not incorporated that instrument.<sup>30</sup>

#### CASE 6: The Principle of the best interests of the child in England and Wales

Article 3 of the CRC stipulates that in all matters affecting the child, the best interests of the child will be a primary consideration. Judges in the UK have proven capable of and willing to elaborate significantly on this principle in the CRC and what it means in contexts such as immigration (see *ZH Tanzania v Secretary of State for The Home Department*<sup>31</sup>) and economic policy (*R and Others v Secretary of State for Work and Pensions*<sup>32</sup>) in the UK, significantly broadening the legal scope at national level of the right of children to have their best interests considered in matters concerning them.<sup>33</sup> In *ZH Tanzania* (para. 33), for example, the court stated that in considering whether deportation of a child's primary carer was proportionate, 'the best interests of the child must be a primary consideration. This means that they must be considered first.'

## 2.3 Bills of rights

In some states the set of civil and political rights enumerated in the ICCPR have been incorporated by statute as a 'bill of rights', as in the case of the UK HRA which effectively incorporates much of the ICCPR through adaptation of the ECHR, an instrument which protects essentially the same rights as the ICCPR (in addition to other rights). Though they involve 'adaptation' rather than 'transformation', such bills of rights provide much more extensive implementation of international human rights standards than the 'incremental' adaptation approach noted in section 2.2.2 above.

New Zealand, Canada and the UK have incorporated bills of civil and political rights utilising what is known as a 'weak form' of judicial review,<sup>34</sup> as opposed to a 'strong form' that would enable courts to strike down or invalidate legislation that is incompatible with rights.

Under the 'weak form', rights are legally protected by the judiciary against infringement by all public bodies. Ultimately authority is vested however

<sup>28</sup> Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Children's Rights Judgments: From Academic Vision to New Practice* (Hart, 2017), Chapter 2.

<sup>29</sup> Christopher McCrudden, 'Why do National Court Judges Refer to Human Rights Treaties?: A Comparative International Law Analysis of CEDAW' (2015) 109 *American Journal of International Law* 534, at 535.

<sup>30</sup> See Lundy *et al.*, note 47.

<sup>31</sup> [2011] UKSC 4, paras. 21-28.

<sup>32</sup> [2015] UKSC 16, paras. 78-83.

<sup>33</sup> See e.g. Rachel Hek, Nathan Hughes and Roberto Ozman, 'Safeguarding the Needs of Children and Young People Seeking Asylum in the UK' (2012) 21 *Child Abuse Review* 335, at 337.

<sup>34</sup> For detail on this comparison see generally, Kris Gledhill, *Human Rights Acts: The Mechanisms Compared* (Hart, 2015).

in the legislature to determine whether certain rights infringements are justifiable.<sup>35</sup> Depending on its specific design and the relevant domestic context, and despite its name, this 'weak' model can sometimes result in quite strong protection of rights in practice.<sup>36</sup> In general, legal design in Canada and the UK has resulted in robust protection.<sup>37</sup>

#### CASE 7: Incorporating civil and political rights: The UK HRA

The UK HRA states that courts must interpret all UK law, as far as possible, in a way that is compatible with rights in the ECHR, and in doing so they must take account of the decisions of the European Court of Human Rights. UK courts may make declarations of incompatibility if they find that legislation breaches rights, which does not invalidate the law but places strong expectations on Parliament to amend the legislation. Where courts have found incompatibilities in legislation with the HRA, Parliament has almost always changed the legislation in response.<sup>38</sup> Ministers in charge of parliamentary bills must make a statement of compatibility of the bill with the HRA, or they must explain why the government wishes to proceed with the bill if it is inconsistent with rights. The context of strong supra-national oversight of rights in the UK is an essential factor contributing to the relative success of the HRA. Positive results are also in part due to significant initial training given to judges and civil servants, the considerable level of cross-party support enjoyed by the HRA at its inception, and the reinforcing work of the Parliamentary Joint Committee on Human Rights (JCHR). The HRA has nevertheless been criticised for not incorporating socio-economic rights and for failing to adequately protect civil and political rights in several contexts, such as counter-terrorism policy and the rights of prisoners.<sup>39</sup>

The Canadian Charter of Rights and Freedoms incorporates a set of civil and political rights into the Canadian Constitution that are fully justiciable and binding on the Parliament and government of Canada, and is described in similar terms as being strongly enforced by the judiciary.<sup>40</sup>

The New Zealand Bill of Rights Act 1990 (NZBORA) incorporates a set of civil and political rights into the domestic order through ordinary statute. In contrast to the UK's HRA<sup>41</sup> in NZBORA there is no legislated ability for courts to make statements of incompatibility. Also, there is

<sup>35</sup> Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013); Rosalind Dixon, 'Creating Dialogue about Socioeconomic Rights: Strong-form Versus Weak-form Judicial Review Revisited' (2007) 5 *International Journal of Constitutional Law* 391.

<sup>36</sup> Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Perspective* (Princeton University Press, 2008).

<sup>37</sup> Chintan Chandrachud and Aileen Kavanagh, 'Rights-based Constitutional Review in the UK: From Form to Function', in John Bell and Marie-Luce Paris (eds), *Rights-Based Constitutional Review in Comparative Perspective* (Edward Elgar, 2015); Christopher Manfredi, 'The Unfulfilled Promise of Dialogic Constitutionalism: Judicial-Legislative Relationships under the Canadian Charter of Rights and Freedoms', in Tom Campbell *et al.* (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006).

<sup>38</sup> Note for example the Gender Recognition Act 2004, which allows trans people to apply to change their legal gender. This arose in relation to the ECHR case of *Goodwin v. UK* (application no. 28957/95), July 11, 2002

<sup>39</sup> See for example, Keith Ewing, 'Doughty Defenders of the Human Rights Act' in Nicolas Kang-Riou *et al.* (eds), *Confronting the Human Rights Act: Contemporary Themes and Perspectives* (Routledge, 2012). On the other hand, some have criticised the HRA for going 'too far' on some of these rights, leading to the impression amongst some members of the public that the Act is something of a 'Villains' Charter': see Lieve Gies, 'A Villains' Charter? The Press and the Human Rights Act' (2011) 7(2) *Crime, Media, Culture* 167.

<sup>40</sup> Irina Kolodizner, 'The Charter of Rights Debate: A Battle of the Models' (2009) 16 *Australian International Law Journal* 219.

<sup>41</sup> Respondents 4. New Zealand human rights and constitutional law academic 1 (Q) and 5. New Zealand human rights and constitutional law academic 2 (Q).

no clause stating that courts must take international jurisprudence into account. In the UK courts have gone as far as to read the wording and interpret the original legislative intention of some statutes in order to ensure compatibility with the HRA,<sup>42</sup> while New Zealand courts have been unable to do the same.<sup>43</sup>

## 2.4. Federal/municipal/devolved incorporation

International human rights treaty obligations may also be implemented at a local level, through federal or municipal structures.<sup>44</sup> It has been observed that devolved jurisdictions may be more willing to adopt rights 'language' than the UK Government.<sup>45</sup> Welsh and Scottish legislatures have for example given domestic effect to the CRC<sup>46</sup> ahead of the UK Government.

Incorporation may even begin at the city level and is indeed now becoming more common in the form of 'human rights cities' – where there is reference to UN or other human rights standards in their policies, statements, and programs.<sup>47</sup>

### CASE 8: US local city ordinances incorporating CEDAW

Many local city ordinances have adopted CEDAW in the US. In 1999 San Francisco became the first city in the US to adopt CEDAW as a city ordinance, ensuring that the underlying principles of the convention took effect as a matter of local government policy.<sup>48</sup> In 2003, the city of Los Angeles did the same and, as of January 2017, six local jurisdictions in the US had enacted similar ordinances.<sup>49</sup> Whilst we have not found information on concrete change (beyond rights 'on paper'), there is much evidence that the profile of women's rights has been raised as a result of this activity.<sup>50</sup> The US has not yet ratified CEDAW and it is believed that as the number of cities adopting CEDAW grows it will encourage the Federal Government to ratify. This is one of the long-term goals of the 'Cities for CEDAW Campaign' which was introduced in 2013.<sup>51</sup>

Local level initiatives can become beacons of good practice and may have a knock-on effect in other regions, as indicated by the CEDAW example above. They can also potentially place significant pressure on the national legislature to incorporate specific rights or treaties. Conversely, legal incorporation at the national level can have the

effect of encouraging treaty enhancement measures at municipal level as case 9 demonstrates.

### CASE 9: 'The Giant Leap': Norway's Municipal CRC Assessment Mechanism

Legal incorporation of the CRC in Norway has led to an assessment mechanism for local government. Since 2009, a project known as *Sjumilssteget* ('The Giant Leap'), based in the office of the County Governor of Troms (Norway) has provided an assessment mechanism for municipalities to examine the compatibility of their services with the CRC.<sup>52</sup> By 2016, 232 of 442 municipalities/city districts in Norway had introduced a variant of the method.<sup>53</sup> In Troms it has resulted in interdisciplinary meetings (i.e. between different government entities) on children's issues which are described as 'an internal quality control system...anchored in the [CRC].'<sup>54</sup>

## 2.5. Analysis

### 2.5.1 Incorporation is key

Academic experts in the area argue that incorporation is the single most important means of enhancing the status of UN treaty rights.<sup>55</sup> Human rights treaty bodies continually express the primary need for strong domestic law incorporation.<sup>56</sup> There are significant efforts by civil society and others to incorporate, in particular around the CRC.<sup>57</sup>

Our research strongly indicates that incorporation is crucial for optimal implementation. There was a strong sense amongst our respondents (experts from a diverse range of disciplines and organisations) that incorporation was the superior means of implementation.<sup>58</sup> Our case studies also point to this impression bearing out in practice.<sup>59</sup> This finding is unsurprising as incorporation means that treaty rights can be directly invoked and enforced in court, as highlighted in particular by cases 1, 2, 3 and 7 on incorporation through constitutions and statute.

<sup>52</sup> See further, <http://sjumilssteget.no/attachments/article/322/The%20giant%20Leap.pdf>

<sup>53</sup> *List of issues in relation to the combined fifth and sixth periodic reports of Norway, Addendum, Replies of Norway to the list of issues*, CRC/C/NOR/5-6, 28 Jul 2017.

<sup>54</sup> See <http://sjumilssteget.no/attachments/article/322/The%20giant%20Leap.pdf>

<sup>55</sup> See e.g. Shelton, note 32; Lundy *et al.*, note 47; Stein and Lord, note 2; Committee on the Rights of the Child, *General Comment No. 5*, para. 20.

<sup>56</sup> For example, Committee on the Elimination of Racial Discrimination, *Concluding Observations on Great Britain and Northern Ireland*, 79<sup>th</sup> session, 14 September 2011, para. 10. See further, Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary* (Oxford University Press, 2017), 170. See also European Commission for Democracy Through Law, *Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of the Courts* (European Commission for Democracy Through Law, Study No. 690/2012, Strasbourg, 8 December 2014);

<sup>57</sup> See e.g. Rights of the Child UK (ROCK) Coalition, *Why Incorporate? Making Rights a Reality for Every Child* (ROCK Coalition, 2011), at 14. The JCHR has emphasised the benefits of CRC incorporation (JCHR [2009], *Children's Rights: Twenty-fifth report of Session 2008-09*, at 35) and the four UK Children's Commissioners have called for CRC incorporation (Joint statement on 3 February 2010). In Norway, a governmental committee appointed to prepare for implementation of international human rights obligations recommended incorporation as the most 'suitable' form of implementation. NOU 1993:18, 97. See further Hege Skjeie, 'Policy Views on the Incorporation of Human Rights Conventions: CEDAW in Norwegian Law' (2009) 27 *Nordic Journal of Human Rights* 260.

<sup>58</sup> This was emphasised for example, by respondents 7, 8, 9, 10, 17 and 25 (see Appendix below).

<sup>59</sup> See, in particular, the examples of Norway, South Africa, UK's HRA and Canada above. The major caveat, as expressed throughout this study, is that incorporation is not sufficient on its own to guarantee compliance or the optimal status of treaty rights. See also Stein and Lord, note 2.

### 2.5.2 Transformation is best, though other means of incorporation are also valuable

The form of incorporation will likely make a difference to how successful or holistic the incorporation is in practice. Direct incorporation of the CRC under Norway's Human Rights Act demonstrates the substantial benefits of incorporating or transforming whole treaties into domestic law, as does the Kenya example (see Section 2.1 above). These benefits include more opportunities for strategic litigation, courts' application of international standards, and a positive influence on the national human rights culture.

Our research also indicates that incorporation which does not provide for full judicial enforcement of rights is unsatisfactory.<sup>60</sup> DPSPs will likely only be effective when interpreted by a highly progressive judiciary in the context of a reforming constitution.<sup>61</sup> Therefore, clear support for judges to apply international human rights standards is necessary. The HRA example (case 7) demonstrates that training of the judiciary in this regard should go hand in hand with 'transformation' incorporation.

Lobbying Government and Parliament of the need for legislative provisions that implement international treaty rights, and the introduction, in turn, of such provisions can be effective, as demonstrated by the ISL Act example (case 5). So too can the progressive interpretations by individual judges of international human rights standards (case 6). Such avenues provide partial opportunities, though not a holistic approach.

### 2.5.3 The incorporation of socio-economic rights should be sought

The South African example (case 1) proves that socio-economic rights can be adjudicated through domestic law, and their incorporation on a par with civil and political rights can be realised in accordance with a stable constitutional and democratic order. It will also likely progress a human rights culture, as seen from the South African example. There is evidence that the exclusion of socio-economic rights from the HRA has exacerbated the criticism of human rights generally in the UK.<sup>62</sup> The potential for socio-economic rights to make the case for investment in public services such as health and education systems, water, housing and labour rights will likely reinforce an understanding of rights as having the potential to uphold communal values.<sup>63</sup> Creating a positive rights culture<sup>64</sup> is clearly crucial to the successful implementation of international human rights standards.

<sup>60</sup> Compare the examples of South Africa versus Ireland for example, at 2.2.

<sup>61</sup> See examples of Ireland and India at 2.2.

<sup>62</sup> British Institute of Human Rights, *Response to the UK Government's Draft 5th Periodic Report Under the ICESCR* (BIHR, 2007), at 2.

<sup>63</sup> Alice Donald and Elizabeth Mottershaw, 'Limits and Achievements of the Human Rights Act from the Socio-economic Point of View' in Nicolas Kang-Riou *et al.* (eds), *Confronting the Human Rights Act: Contemporary Themes and Perspectives* (Routledge, 2012), at 157-158. See further, Geraldine Van Buuren, 'Including the Excluded: The Case for an Economic, Social and Cultural Human Rights Act' (2002) *Public Law* 456; Joint Committee on Human Rights, *A Bill of Rights for the UK* (JCHR, 2008), at 53-56; and Case 17 below.

<sup>64</sup> Diane Sisely, 'Inspired by the Human Rights Act: The Victorian Charter of Human Rights and Responsibilities', in Nicolas Kang-Riou (et al eds), *Confronting the Human Rights Act: Contemporary Themes and Perspectives* (Routledge, 2012) 95.

### 2.5.4 The HRA model is robust

This research indicates that, when compared to other models, the design of the HRA is robust and, in general, provides a strong framework for protection of civil and political rights. It also provides a model for future legislation incorporating UN human rights treaties. Future statutes incorporating other specific rights or treaties in the UK should therefore follow the same model by including a strong interpretational directive on courts (mandating that relevant international decisions and pronouncements, e.g. general comments of the treaty-monitoring bodies, be taken into account), the ability for courts to make declarations of incompatibility, an obligation on all public authorities to abide by human rights, and an obligation on Ministers to make statements of compatibility when advancing bills in Parliament.

Therefore, legal incorporation clearly has substantial benefits in raising the status of rights domestically. That said, the effectiveness of domestic legal instruments aimed at enhancing the status of UN treaty rights is dependent on their being complemented by a variety of means of implementation,<sup>65</sup> and it is with those softer measures that the next two chapters are concerned.

<sup>42</sup> See e.g. *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

<sup>43</sup> See e.g. *R v Hansen* [2007] 3 NZLR 1, 158. Emphasised by respondents 4. New Zealand human rights and constitutional law academic 1 (Q) and 5. New Zealand human rights and constitutional law academic 2 (Q).

<sup>44</sup> Canada has been described as a successful model of federal incorporation. See e.g. Koren Bell, 'From Laggard to Leader: Canadian Lessons on a Role for U.S. States in Making and Implementing Human Rights Treaties' (2002) 5 *Yale Human Rights and Development Law Journal* 255.

<sup>45</sup> Jane Williams, 'Incorporating Children's Rights: The Divergence in Law and Policy' (2007) 27 *Legal Studies* 261, at 263.

<sup>46</sup> Rights of Children and Young Person's (Wales) Measure 2011; Children and Young People (Scotland) Act 2014. For an assessment of the effectiveness of the Welsh Measure in practice see Simon Hoffman *et al.* 2018 report to EHRC on CRC Wales Measure.

<sup>47</sup> Barbara Oomen *et al.* (eds), *Global Urban Justice: The Rise of Human Rights Cities* (Cambridge University Press, 2016).

<sup>48</sup> Marsha Freeman *et al.* (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford University Press, 2012), at 552.

<sup>49</sup> Columbia Law School Human Rights Institute, *Gender Equity Through Human Rights: Local Efforts to Advance the Status of Women and Girls in the United States* (January 2017). On similar initiatives in Europe see Michele Griglio, 'Local Governments and Human Rights: Some Critical Reflections' (2017) 49 *Columbia Human Rights Law Review* 67.

<sup>50</sup> See <http://citiesforcedaw.org/resources/>

<sup>51</sup> See [www.citiesforcedaw.org](http://www.citiesforcedaw.org)

<sup>65</sup> These measures are important to the success of human rights 'acculturation', a process where actors adopt the beliefs, norms and behavioural patterns of a given culture. See Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 *Duke Law Journal* 62.

### 3. IMPLEMENTATION OF UN TREATY RIGHTS THROUGH 'INTERMEDIATE' MEASURES

The measures identified in this Chapter are grouped together as 'intermediate measures', because they fall somewhere on the spectrum between 'hard' incorporation (through legislation) and 'soft', non-binding, measures of implementation. Intermediate measures include statements of legislative compatibility, national inquiries by NHRIs, due regard duties and impact assessments.

#### 3.1. Statements of legislative compatibility

Treaty bodies have emphasised the need for state parties to review both existing and any proposed new legislation, to ensure it is fully compatible with their treaty obligations.<sup>1</sup> To this end, some states have created specialised human rights units or committees that scrutinise the compatibility of national legislation with the human rights conventions ratified by the state.<sup>2</sup> This is performed by the JCHR in the UK for example.

##### CASE 10: Australia's statements of compatibility

In Australia, the Human Rights (Parliamentary Scrutiny) Act 2011 introduced a requirement that all new federal legislation be assessed for compatibility with human rights. The Act defines 'human rights' as the rights contained in the ICCPR, ICESCR, CERD, CEDAW, CAT, CRC and CRPD treaties. As such, it is broader than the assessment carried out under s. 19 of the UK's Human Rights Act 1998, which is limited to Convention rights enshrined in the ECHR. Our respondent welcomed the creation of Australia's Parliamentary Joint Committee on Human Rights, and recognised the benefit of focusing legislators' minds on 'rights issues' when passing new legislation.<sup>3</sup>

The UK's HRA enshrines a strong judicial role in ensuring legislative compatibility with the ECHR, whereas Australia's Human Rights (Parliamentary Scrutiny) Act does not. However, the extension of compatibility assessments to the full range of treaty rights in the UK, combined with a judicial power to make declarations of incompatibility with treaty rights, would strengthen the status of UN treaty rights in the UK.

#### 3.2 National Inquiries

The EHRC can and does at present conduct inquiries (underpinned by statute) into particular matters in the UK into any matter that

relates to sections 8 or 9 of the Equality Act (equality and diversity or human right).<sup>4</sup> Based on the findings of such inquiries, the EHRC can make recommendations for changes in policy, practice and/or legislation to any organisation, and they must have regard to those recommendations. Our respondents in New Zealand believed strongly that national inquiries by their NHRI on specific human rights issues have resulted in concrete change in line with international human rights standards.

##### CASE 11: National inquiries on human rights issues in New Zealand

In New Zealand, there have been three statute-based human rights inquiries by the Human Rights Commission. These have been on the treatment of transgender people, accessibility for disabled people, and the payment of care workers.<sup>5</sup> Our respondents stated that these national inquiries were very effective in enhancing human rights.<sup>6</sup> Such inquiries result in a wealth of evidential material and have prompted follow-up. After the inquiry into equal pay for care workers, for example, litigation was successfully taken to the courts and a financial settlement was made. In these proceedings the body of evidence gathered in the course of the inquiry was relied upon. Our respondent also indicated that it was the NHRI inquiry which resulted in policy change and government commitments to change.<sup>7</sup>

#### 3.3. Due regard duties and impact assessments

Some jurisdictions impose a duty on public servants to pay due regard to human rights treaties in the exercise of their functions. The UK has been at the forefront of developing due regard duties.

##### CASE 12: Due regard duties in the UK

A due regard duty exists with regard to equality legislation across the UK.<sup>8</sup> The race equality duty was adapted for disability discrimination in 2006 and gender discrimination in 2007. Evidence from a UK Government review points to some concrete change. The duty has led, for example, to a better understanding of school exclusion and an increase in the provision of support for homeless women. The review also stated however that there should be clearer guidance on the

<sup>4</sup> Under the Equality Act 2006. See <https://www.equalityhumanrights.com/en/our-powers/inquiries-investigations-and-wider-powers/>.

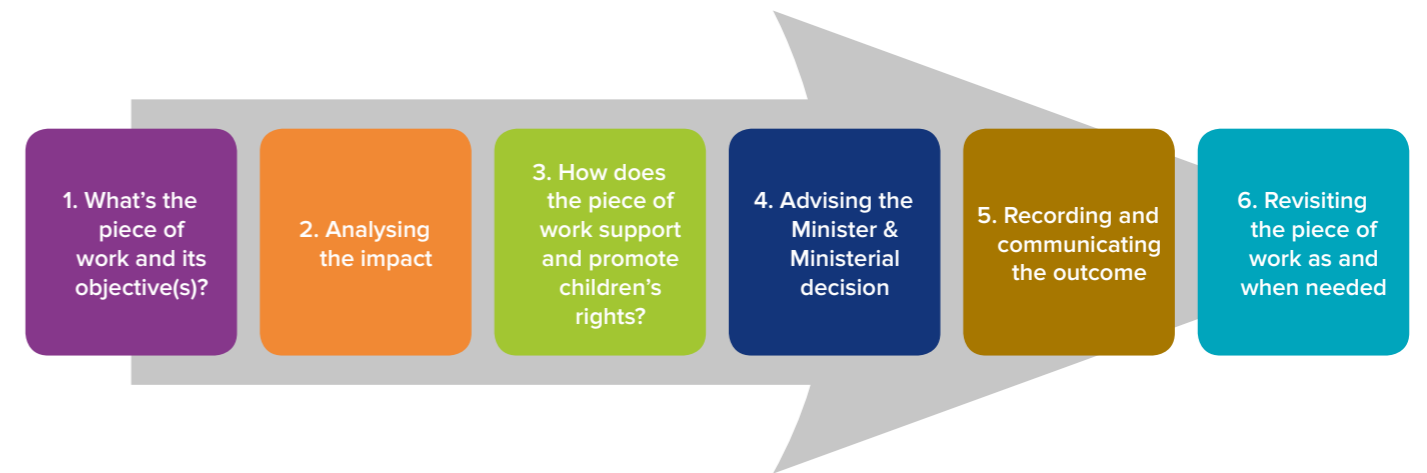
<sup>5</sup> See <https://www.hrc.co.nz/your-rights/social-equality/our-work/inquiry-discrimination-experienced-transgender-people/>; <https://www.hrc.co.nz/your-rights/people-disabilities/our-work/accessible-journey/>; [https://www.hrc.co.nz/files/1214/2360/8576/Caring\\_Counts\\_Report.pdf](https://www.hrc.co.nz/files/1214/2360/8576/Caring_Counts_Report.pdf).

<sup>6</sup> Respondents 13. New Zealand human rights expert and former Human Rights Commissioner and 16. New Zealand human rights expert and academic 3.

<sup>7</sup> Respondent 16. New Zealand human rights expert and academic 3.

<sup>8</sup> Equality Act 2010, s. 149. The EHRC has described the 'broad purpose' of the public sector equality duty as being 'to integrate consideration of equality and good relations into the day-to-day business of public authorities': *The Public Sector Equality Duty* (<https://www.equalityhumanrights.com/en/advice-and-guidance/public-sector-equality-duty>).

Fig. 2: CRIA (Wales): 'Six Steps to Due Regard' model (Source: Children's Rights Scheme 2014)



minimum requirements placed on public bodies.<sup>9</sup> In Wales and Scotland Ministers have duties in respect of the CRC and this is reportedly leading to concrete change (see case studies 13 and 15 below).

##### CASE 13: The CRC 'due regard' duty and impact assessments in Wales

The Children's Rights (Wales) Measure 2011 requires Welsh Ministers, whenever they exercise their functions, to have due regard to the requirements of the CRC. It also requires Welsh Ministers to establish a Children's Rights Scheme, setting out the arrangements they have made, or propose to make, for the purpose of securing compliance with the due regard duty.

As a consequence of the due regard duty, under the Children's Rights Scheme 2014, a 'Children's Rights Impact Assessment (CRIA)' process was established. When decisions are taken that are relevant to children and young people, and that have the potential to impact upon their rights, Welsh Government staff are expected to carry out a CRIA, following a prescribed (six-step) template (see fig. 2 below). CRIAs are generally made publicly available, thereby enhancing transparency and encouraging scrutiny. Their use and development is generally seen as a positive means of ensuring full compliance with the CRC.<sup>10</sup>

The impact assessment model, as operationalised in Wales, could be implemented on a national level, and could be expanded to other treaties to which the UK is a party.

As in Wales, the non-legal measures that have been brought in to accompany the Children and Young People (Scotland) Act, such as children's rights indicators and the children's rights and well-being impact assessments, are also considered a very strong complement to the duty. Interviewees noted that impact assessments are being

<sup>9</sup> Government Equalities Office, *The Independent Steering Group's Report of the Public Sector Equality Duty (PSED) Review and Government Response* (Government Equalities Office, 2013), at 15.

<sup>10</sup> Committee on the Rights of the Child, *Concluding Observations on the UK's Fifth Report*, para. 9.

used at national government level, as well as by local authorities and health boards, as illustrated in Case 15 below. Thus, due regard duties and impact assessments can be a powerful tool to ensure human rights compliance (see case study 15, below). It is imperative however that the scope of a due regard duty be clear at the outset. Section 42 of the Irish Human Rights and Equality Commission Act 2014 places a positive duty on public sector bodies to have regard to the need to eliminate discrimination, promote equality, and protect human rights, in their daily work. However this legislation is not particularly prescriptive, and two of our respondents emphasised that greater clarity is needed as to what the public sector equality and human rights duty actually requires in practice.<sup>11</sup>

It is also very useful if there is broad acceptance of the duty by those who have to implement it in their work: although the gender mainstreaming obligation is a 'strategy' in Sweden, it is more akin to a duty because of the level of acceptance of that obligation:

##### CASE 14: Swedish CEDAW implementation: Government gender mainstreaming strategy

Sweden is among the highest ranked countries in the world in terms of gender equality and the current Government has declared itself a 'feminist Government'.<sup>12</sup> There is strong civil society work in this area, e.g. the Swedish Women's Lobby<sup>13</sup> and the Swedish CEDAW network<sup>14</sup> have lobbied for 'systematic, structured, long term work'<sup>15</sup> by the Swedish government. Amongst other targets for follow-up after the CEDAW Committee examination of the Swedish Government's report was the establishment of a government authority dedicated to gender equality work and gender mainstreaming, which began work in 2018.

<sup>11</sup> Respondents 21. The Director of a prominent anti-racism organisation in Ireland and 24. An independent Northern Ireland lawyer with experience consulting on equality duties across the UK.

<sup>12</sup> <http://www.government.se/government-policy/a-feminist-government/>

<sup>13</sup> <http://sverigeskvinnolobby.se/en/about/about-the-organization/>

<sup>14</sup> <http://sverigeskvinnolobby.se/en/shadow-report-living-up-to-cedaw-what-does-sweden-need-to-do/>

<sup>15</sup> Respondent 17. A manager with the Swedish Women's Lobby, an organisation which lobbies for women's rights and gender equality.



This authority aims to provide structured support for gender equality.<sup>16</sup> There is a clear political requirement via the gender mainstreaming strategy to include a gender perspective in all processes, including gender budgeting and gender impact analysis.<sup>17</sup> 60 public sector authorities participate in the Government's programme. Each authority develops its own action plans, based on gender analysis, and then initiates activities such as education in gender mainstreaming for their employees. The strength of the gender mainstreaming strategy appears to lie in the 'support and follow-up' measures that accompanied the strategy, and the fact that each public sector authority has autonomy to develop and implement its own action plan.<sup>18</sup>

In Scotland, the duty to consider the CRC is reported by our respondents to have had the positive effect of normalising children's rights amongst authorities.

#### CASE 15: The CRC duty in Scotland

Public authorities are provided in Scotland with significant guidance and resources to help them prepare reports on how they have considered the CRC in their activities.<sup>19</sup> There is a sense that the greatest success of the CRC duty in Scotland is that it has normalised children's rights amongst public authorities to some degree. As one of our respondents reported: 'Everyone is now talking about children's rights because the Act, that is laying the ground work...'<sup>20</sup> Civil society actors report some positive results, such as a perceived impact on for example the CRC on the consultation around raising the age of criminal responsibility in Scotland from eight to 12 years. It is felt that the duty contributed to co-operative work between government entities and NGOs in this process.<sup>21</sup>

### 3.4. Analysis

There is a suite of intermediate measures that can be undertaken by parliaments, legislatures, and/or policymakers in ensuring that the status of human rights treaties is enhanced in their activities.

#### 3.4.1. 'Statements of compatibility' can raise the profile of human rights treaties for legislators

'Statements of compatibility' can be used when legislatures are considering how new legislation might impact upon the State's human rights obligations. The Australian example (case 10) showed that this initiative can have a positive impact in bringing human rights considerations to the forefront of parliamentarians' minds. They should be accompanied by a means of accountability for incomplete assessments, to avoid the risk of assessments being cursory, 'tick box', exercises. The Australian example illustrates that statements of

compatibility could work for a broad range of treaties in the UK context, in the manner that they currently operate for the ECHR in the context of the HRA. They could be introduced to ensure that all human rights treaty obligations are considered in the drafting of legislation, or they could be introduced to assess compatibility with a particular human rights treaty.

#### 3.4.2. National Inquiries with a Statutory Basis can Bring Real Change for Human Rights

The use by New Zealand's NHRI of national inquiries to progress human rights issues has brought concrete change, in particular by leading to strategic litigation (case 11). It is useful to consider inquiries as part of a broader campaign on a particular issue as part of a wider strategy for achieving change in line with international human rights standards.

#### 3.4.3. Due regard duties are of use where they are clear

Due regard duties have the potential to lead to positive actions to enhance the status of UN treaty rights, such as the obligation to carry out impact assessments. This is illustrated in the Wales example (case 13), and the example of the positive role of the duty in achieving practical change, such as its perceived impact in raising the age of criminal responsibility in Scotland (case 15). A due regard duty should, however, be accompanied by clear guidance to clarify obligations, responsibilities and specific requirements in practice, because otherwise its effect may be weak. The fact that CRC due regard duties have been introduced in Scotland and Wales and have been considered successful in many ways indicates the likelihood that such a CRC duty would be successful in England also.

#### 3.4.4. Intermediate measures are not equal to legal incorporation

The measures discussed in this chapter bring an operational depth to human rights commitments and can acquaint actors with the idea of meeting rights standards in decision-making and law-making. However, these measures rarely result in substantive rights enforcement in the courts. As such, they are likely to be limited in their effect unless they are accompanied by the 'threat' of ultimate enforcement (such as that provided by incorporation, as outlined in Chapter 2), which sharpens the sense of personal and institutional responsibility to give rights considerations sufficient weight.

## 4. 'SOFT' (EXTRA-LEGAL) MEASURES OF IMPLEMENTATION OF UN TREATY RIGHTS

The previous two chapters discussed measures of incorporation that are either directly enforced through national legislation or otherwise imposed as public sector duties. This chapter, by contrast, analyses 'soft' or 'extra-legal' means of enhancing the status of treaty rights domestically. In contrast to the measures identified in Chapters 2 and 3, which are generally taken by governments, parliaments, or public sector organisations, the steps identified in this chapter can be taken by civil society organisations or NHRIs, although governments, local authorities, and other public sector bodies can and do also undertake some of these activities. 'Soft' measures include action plans, benchmarking exercises, awareness-raising activities, sector-specific actions and human rights budgeting.

### 4.1. Action Plans and Benchmarking Exercises

Human rights treaties oblige States to reflect on their own progress in meeting their treaty obligations when reporting to the relevant treaty body.<sup>1</sup> The CRPD expressly requires States to 'collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention.'<sup>2</sup> Over the past decade in particular, there has been an increased emphasis on the importance of measurements and indicators in determining the extent to which human rights are realised.<sup>3</sup>

In the context of measuring progress against hard data, the formulation of national action plans and other benchmarking exercises has gained increased traction in recent years.

#### CASE 16: Measuring compliance with the CRPD in Denmark

In 2013, the Danish Government devised a 'Disability Policy Action Plan', noting the need to comply with the CRPD. The Danish Institute for Human Rights (Denmark's NHRI) sought to move the plan beyond existing initiatives and established a set of statistical outcome indicators to measure the progress of the implementation of the CRPD in Denmark. These 'Gold Indicators' compare the situation of persons with and without disabilities using 10 thematic areas of the CRPD, including accessibility, employment, and independent living. The indicators were developed through an inclusive process with stakeholders, and their main purpose is to generate structural change and stimulate action to ensure enhanced CRPD compliance. As such, indicators are a means through which NHRIs can hold governments to account in meeting their human rights treaty obligations.

Since 2017, the Institute has also published a 'disability barometer',<sup>4</sup> which aims to raise awareness on the lack of equality of opportunities for persons with disabilities in Denmark. Our respondent noted the importance of statistical indicators and interactive tools like the disability barometer in highlighting the status of particular groups, and in calling the Danish Government to account in respect of its human rights obligations.<sup>5</sup>

National Action Plans on human rights can also facilitate governments to operate more strategically, improving co-ordination of implementation of international human rights standards.<sup>6</sup>

#### CASE 17: Human Rights National Action Plans in New Zealand

The Government of New Zealand committed in 2014 to work with New Zealand's Human Rights Commission and civil society to develop its second National Plan of Action for the Promotion and Protection of Human Rights. This plan is focused on the recommendations received by the state through the UPR.

For the initial National Action Plan developed in the 2000s, the New Zealand Human Rights Commission undertook a comprehensive and innovative consultation process – with people across New Zealand – about their human rights priorities, and what human rights mean to them. Our respondents noted that this consultative process created a much more positive perception of human rights as being about economic situations and about communities.<sup>7</sup> One perceived that the focus of the NHRI on civil and political rights had previously created a sense amongst the public that human rights were 'for criminals'.<sup>8</sup> Respondents report that the willingness of New Zealand's Government to adopt the Action Plan was significantly enhanced by a perception of a democratic mandate, as a consequence of the consultation.

New Zealand's Action Plan includes an interactive online tool on the Human Rights Commission's website. Through this tool, viewers can see an extensive list of the UPR recommendations, a description of government responses, and an analysis of the extent to which the recommendations have been implemented.<sup>9</sup>

16 Ibid.

17 Respondent 18. A civil servant at Swedish government offices (Q).

18 Respondent 17.

19 See Scottish Government, *Guidance on Part 1, Section 2 (Duties of Public Authorities in relation to the UNCRC) of the Children and Young People (Scotland) Act 2014* (Scottish Government, 2016), at: <http://www.gov.scot/Publications/2016/12/4047/1>.

20 Respondent 9: The Director of a leading Scottish children's rights organisation. Respondents 10: A researcher at a Scottish children's law centre (Q) and 11 A manager at the Scottish Children's Commissioner (Q) also emphasised this.

21 Respondent 9: The Director of a leading Scottish children's rights organisation.

1 E.g. Article 40, ICCPR; Article 10, CEDAW; Articles 12 and 16.

2 Article 31, CRPD.

3 Office of the High Commissioner for Human Rights (OHCHR), *Human Rights Indicators: A Guide to Measurement and Implementation* (OHCHR, 2012), HR/PUB/12/5.

4 <https://handicapbarometer.dk/>

5 Respondent 6. Staff member at the Danish Institute for Human Rights (Q).

6 The ECHR has recommended that the UK Government adopt a National Action Plan for Human Rights. See ECHR, *Children's Rights in the UK: Updated Submission to the UN Committee on the Rights of the Child in Advance of the Public Examination of the UK's Implementation of the Convention on the Rights of the Child* (ECHR, April 2016).

7 E.g. Respondents 13. New Zealand human rights expert and former Human Rights Commissioner and 14. New Zealand human rights expert and academic 1.

8 Respondent 13. New Zealand human rights expert and former Human Rights Commissioner.

9 Specific targets are established, for example in relation to the objective to 'improving Māori justice outcomes'. It is then outlined whether targets have been achieved (in this case, both have). See <http://npa.hrc.co.nz/#/action/54>

## 4.2. Public education, awareness campaigns and training

Many of our respondents emphasised the importance of training, capacity-building, working closely with civil society, and human rights education in enhancing the status of UN treaty rights in domestic settings.<sup>10</sup> Of course, NHRIs have a significant role to play in this and EHRC conducts many activities in this regard.<sup>11</sup>

### CASE 18: Australia: Awareness-raising about experiences of asylum seekers in detention

Australia's Human Rights Commission conducted a national inquiry into the impact of immigration detention on children released in 2015.<sup>12</sup> The NHRI has a number of CAT-based Torture Prevention Ambassadors who sought to build on the findings of the report to raise awareness and contribute to change in law and policy.<sup>13</sup> They called for changes to be made to the policy of detaining asylum seekers offshore (with indefinite detention) to bring it line with CAT obligations. The report was disseminated through media releases, media interviews and numerous public presentations by the Commission President, staff and medical professional consultants. The initiative increased awareness amongst the public about the harmful impact of Australia's immigration detention practices, particularly on children (as evidenced by extensive media coverage of the issue), and increased the engagement of medical professionals in documenting the health impacts of detention.<sup>14</sup> It therefore was felt by the NHRI to have brought a new, rights-based perspective to the policy debate around immigration detention, and laid the groundwork for potential law reform to limit the impact of detention by introducing a time limit for detention of children. A sharp reduction in the number of children detained on Nauru was detected in 2016.<sup>15</sup>

Recognising the importance of a strong civil society presence in realising UN treaty rights domestically, our research has revealed a number of instances where the attention of governments has been drawn to particular rights deficiencies, and specific measures have been taken to address those issues. As outlined in Chapter 3, this is seen in the work of gender equality NGOs in building compliance with CEDAW in Sweden through gender mainstreaming. It is also to be seen in the work of women's rights NGOs in Latin America in relation to tackling gender-based violence.

### CASE 19: Tackling gender-based violence in Latin America

Grassroots organisations in various Latin American States have worked with the Office of the High Commissioner for Human Rights of the UN to address impunity for gender-related killings. One element

of this has been a Model Protocol for the investigation of femicide in the Latin America region which aims to ensure that crimes are approached in a way which explicitly considers gender-specific aspects.<sup>16</sup> This includes changes to analysis of crime scenes and identification of expert evidence. Courts have been provided with technical assistance, such as training for judges, on international standards regarding women's rights. Analysis of judicial decisions regarding killings of women is being conducted in the Dominican Republic, with a view to identifying potential obstacles to adequate judicial responses.<sup>17</sup> Our UN respondent reports that better-trained judges are more likely to deal with cases concerning gender violence in a way that considers international human rights standards concerning gender.<sup>18</sup>

There is also evidence that training can ensure that there is adequate knowledge of the law and how it can be used.

### CASE 20: Norway: Training has improved the use of CRC in the courts

Lawyers and judges in Norway have received training about the CRC and how it can be used. Evidence indicates that this training has led to increased use of the CRC in the courts and increased both the quality and quantity of cases taken on behalf of children.<sup>19</sup>

Such initiatives have been acknowledged by UN treaty bodies. The Committee against Torture noted for example the steps taken by Canada in response to the issue of overrepresentation of indigenous offenders in the criminal justice system, praising Canada's 'innovative and culturally sensitive alternative criminal justice mechanisms, such as the use of healing lodges' in addressing the problem.<sup>20</sup> Similarly, the Committee on the Elimination of Racial Discrimination welcomed New Zealand's ring fencing of NZ\$10 million of the Justice Sector Fund with the specific aim of addressing Maori overrepresentation in its correctional system.<sup>21</sup> The CERD Committee has also welcomed, for example, Cyprus's adoption of a Code of Conduct against Racism in Schools to address the issues of racial violence and racist incidents in schools.<sup>22</sup>

## 4.3. Human rights budgeting

Human rights budgeting is a system of budgeting which has human rights needs as its starting point, and in which resources are allocated first and foremost to ensure those needs are fulfilled.<sup>23</sup> The aim is

<sup>16</sup> UN Women, *Latin American Model Protocol for the Investigation of Gender-Related Killings of Women (Femicide/Feminicide)*, (UN Women, 2014).

<sup>17</sup> UN Office of the High Commissioner for Human Rights, *Briefing: Gender-Related Killings of Women and Girls* (Aug. 2013). See <https://nhri.ohchr.org/EN/Themes/WomenRights/DocumentsPage/Gender%20related%20killings.pdf>

<sup>18</sup> Respondent 28. A UN Official in the Latin American Region.

<sup>19</sup> Lundy *et al.*, note 47, at 61.

<sup>20</sup> Committee against Torture, *Conclusions and Recommendations on the Report of Canada*, CAT/C/CO/34/CAN, May 2005, para. 3.

<sup>21</sup> Committee on the Elimination of Racial Discrimination, *Concluding Observations on Report of New Zealand*, CERD/C/NZL/CO/21-22, 22 September 2017, para. 4.

<sup>22</sup> Committee on the Elimination of Racial Discrimination, *Concluding Observations on Report of Cyprus*, CERD/C/CYP/CO/23-24, 12 May 2017, para. 3.

<sup>23</sup> See generally, Aoife Nolan, Rory O'Connell, Colin Harvey (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart, 2014); UN Office of the High Commissioner for Human Rights and the International Budget Partnership, *Realizing*

to advance just and equitable distribution in society by grounding decisions and processes on public finance in key human rights principles; universality, equity, transparency, accountability and participation. Other principles particular to socio-economic rights, such as obligations on the State to devote the maximum available resources to rights realisation, and to avoid regressing on rights, are also important in human rights budgeting processes.

Our research did not uncover any examples of a full process of state budgets that were explicitly linked to meeting a state's obligations under the UN human rights treaties. There have however been some examples of gender and equality rights budget analyses.<sup>24</sup>

### CASE 21: South African Women's Budget Initiative

The South Africa's Women's Budget Initiative was established in the early 1990s. This Initiative is based on collaboration between NGOs and the Parliament Finance Committee. It has regularly assessed all aspects of the national budget in relation to its gender impact, providing oversight, transparency and critique of the process. Partially as a result of the initiative, South Africa's public works programmes require that more than 60% of beneficiaries be women.<sup>25</sup>

## 4.4 Analysis

This Chapter has illustrated that 'soft' measures taken to enhance the status of treaty rights, which often do not require specific legislative footing, can have an impact when introduced in the right political climate, often as a complement to some of those harder measures identified in earlier chapters.

### 4.4.1. Well-targeted national action plans are invaluable

Measures such as national action plans can play a substantial role in laying the groundwork for the realisation of rights and raising awareness of rights and accountability, both amongst the general public and in policy-making. It is important that such action plans should go beyond being mere 'wish lists' of the things States would like to be able to do to fully respect their treaty obligations; in the context of the CRC the Committee on the Rights of the Child has emphasised the need for national strategies to be comprehensive, unifying, and firmly rooted in the CRC, and to 'include targets, processes, goals, and sufficient resource allocation'.<sup>26</sup>

*Human Rights Through Government Budgets* (United Nations, 2017); Colin Harvey and Eoin Rooney, 'Integrating Human Rights? Socio-Economic Rights and Budget Analysis' (2010) 3 *European Human Rights Law Review* 266.

<sup>24</sup> On gender rights budgeting, over 60 countries have taken steps towards gender sensitive budgeting, including trainings for public officials and other institutionalised strategies. See, Ronnie Downes, Lisa von Trapp and Scherie Nicol, 'Gender Budgeting in OECD Countries' (2016) 3 *OECD Journal on Budgeting* 1.

<sup>25</sup> See, Deepthi Bhatnagar *et al.*, 'Women's Budget Initiative: South Africa', in World Bank, *Empowerment Case Studies* (World Bank, 2003). In 2005, the South African Department of Justice and Constitutional Development published a set of Gender Responsive Budgeting Guidelines. There is evidence of progress on the ground: see Expanded Public Works Programme, Report for the period 1 April-31 December financial year 2016/17 (Department of Public Works, 2017), [http://www.epwp.gov.za/documents/Reports/Year13-16-17/Q3-2016-17/Q3\\_2016\\_17\\_Annexure\\_A-E.pdf](http://www.epwp.gov.za/documents/Reports/Year13-16-17/Q3-2016-17/Q3_2016_17_Annexure_A-E.pdf), although of course there is still room for improvement: Tes-sa Hochfeld *et al.*, 'How to make South Africa's public works programme work for women', *The Conversation*, 14 June 2017, <https://theconversation.com/how-to-make-south-african-public-works-programme-work-for-women-79049>.

<sup>26</sup> Committee on the Rights of the Child, *General Comment No. 5*, para. 29.

New Zealand's National Action Plan involved a comprehensive consultation process which raised the profile of human rights in a positive way (case 17). In the UK, where the HRA has similarly been portrayed as a 'villains' charter' that serves 'undeserving' claimants more than ordinary people,<sup>27</sup> a similarly broad consultation process may have the result of creating more positive perceptions of human rights. Some efforts around this have, of course, already been made in the UK (for example in defence of the HRA).<sup>28</sup> However the New Zealand example indicates that a more holistic approach with greater emphasis on socio-economic rights is desirable.

### 4.4.2. A vibrant civil society is crucial

A key lesson to be drawn from this research is that a strong civil society sector is vital in enhancing treaty rights domestically. Note the Swedish CEDAW experience (case 14), and the work on gender violence in Latin America (case 19). Building the capacity of civil society organisations devoted to promoting and protecting human rights is therefore crucial.

### 4.4.3. Other tools such as online resources, specific measures and budgeting can also be valuable

The other case studies highlighted here are of relevance to the UK context. The interactive online tool like that used in New Zealand's Action Plan could be suitable for the UK context, not just in response to UPR recommendations, but also in publicising human rights treaty bodies' recommendations to the UK and monitoring the State's progress in implementing those recommendations. Such a tool is at present being developed in the UK.<sup>29</sup> It is clear that, on occasion, specific issues relating to treaty obligations may call for bespoke solutions. While the theory and practice of human rights budgeting is relatively new, there is potential for UK civil society to encourage a more rights-based approach to budgets, and could take lessons from the success of rights-based budget analyses in other jurisdictions such as South Africa (case 21) in enhancing the realisation of human rights and calling States to account.

It is important to note that these benchmarking and awareness-raising activities should be part of a concerted effort to enhance treaty rights, together with efforts to legally incorporate instruments and standards.

<sup>27</sup> Lieve Gies, 'A Villains' Charter? The Press and the Human Rights Act' (2011) 7 *Crime, Media Culture: An International Journal* 167.

<sup>28</sup> See e.g. <http://reidfoundation.org/2015/06/co-ordinated-campaign-to-support-human-rights/>

<sup>29</sup> EHRC, *Business Plan 2017/2018*, [https://www.equalityhumanrights.com/sites/default/files/business-plan-2017-2018\\_0.pdf](https://www.equalityhumanrights.com/sites/default/files/business-plan-2017-2018_0.pdf), 21.

<sup>10</sup> There is also much emphasis across the literature and within UN documents on the importance of such measures. See for example Committee on the Rights of the Child, *General Comment No. 5*.

<sup>11</sup> <https://www.equalityhumanrights.com/en/our-work/latest-projects>.

<sup>12</sup> Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (Australian Human Rights Commission, 2014).

<sup>13</sup> Asia Pacific Forum, *The Torture Prevention Ambassadors' Good Practice Report: Good Practices from National Human Rights Institutions* (Asia Pacific Forum, 2016) [https://nhri.ohchr.org/EN/Themes/PreventionTorture/Documents/TPA\\_Good\\_Practice\\_Report.pdf](https://nhri.ohchr.org/EN/Themes/PreventionTorture/Documents/TPA_Good_Practice_Report.pdf)

<sup>14</sup> *Ibid.*, at 26.

<sup>15</sup> Refugee Council of Australia, *Statistics on People in Detention in Australia*, <https://www.refugeecouncil.org.au/getfacts/statistics/aust/asylum-stats/detention-australia-statistics/>

## 5. FINAL CONCLUSIONS

### 5.1 Legal Incorporation

- This research concurs with previous studies which indicate that full legal incorporation for all seven instruments is highly desirable in order to ensure maximal human rights implementation.
- The research also concurs with previous studies which indicate that direct incorporation of entire treaties is preferable. As the Norwegian example demonstrates (case 3), this method appears to have the best results in terms of the effective realisation of rights and in raising the consciousness of rights-holders and duty bearers.
- There is evidence that a statutory framework incorporating socio-economic rights can be designed in the same way as the HRA (case 7), to provide fully justiciable socio-economic rights (subject to progressive realisation and proven resource constraints as in the South African example, case 1) and preserve all of the major features of the HRA as described above.
- Strategic litigation parallel to seeking incorporation of these instruments is crucial for progressing UN human rights treaties.
- The US experience of CEDAW ordinances (case 8) highlights that local level incorporation can be successful also.

### 5.2 Intermediate Measures

- The research highlights the effectiveness of 'statements of compatibility' in the context of the ECHR. Broadening them out to encompass all UN human rights treaties in the UK context would provide strong human rights implementation.
- Public inquiries are important as part of a broader strategy on a particular human rights issue (see case 11).
- This research indicates that due regard duties (in relation to UN treaties) are an important means of implementation, to accompany incorporation (see Section 3.3). Such duties should be accompanied by strong guidance on what they actually require and who is responsible.
- It is important for government departments to report regularly to Parliament and specialised human rights committees on their efforts to comply with international human rights standards. This raises awareness and intensifies a human rights culture.

### 5.3 'Soft' (Extra-Legal) Measures

- In conjunction with legal incorporation of UN treaties, 'soft' measures are a crucial part of human rights implementation.
- Educational and promotional activities which build public support for rights are important (see in particular cases 1, 3, 5, 13 and 17 for successes in this regard). This must be adequately funded from the appropriate bodies.

- National action plans for human rights and individual plans, for example around disability and gender violence, are useful means of implementation. These initiatives can, in turn, provide supporting evidence and act as a precursor to incorporation efforts. Such plan/s include targets, processes, goals, and sufficient resource allocation.<sup>1</sup>
- Supporting civil society in particular areas in need of work is also very important, considering the key role played with civil society in human rights implementation.
- Online tools, such as those used in New Zealand's Action Plan (see cases 16 and 17) permit interactive engagement with government's human rights progress.
- Our research points to the importance of a more rights-based approach to governmental budgeting.
- Considering the relative lack of evidence and prior research in the area, we conclude that a more extensive piece of research is needed on the different means of implementation of UN treaty rights and the success (or otherwise) which can be attributed to them.

<sup>1</sup> Committee on the Rights of the Child, *General Comment No. 5*, para. 29.

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## APPENDIX: CASE STUDY RESPONDENTS

1. Irish constitutional law academic 1 (Q)
2. Irish constitutional law academic 2 (Q)
3. Indian human rights non-governmental organisation staff member (Q)
4. New Zealand human rights and constitutional law academic 1 (Q)
5. New Zealand human rights and constitutional law academic 2 (Q)
6. Staff member at the Danish Institute for Human Rights (Q)
7. Staff member at the Norwegian Ombudsman for Children (Q)
8. Norwegian Professor specialising in children's rights (Q)
9. The Director of a leading Scottish children's rights organisation
10. A researcher at a Scottish children's law centre (Q)
11. A manager at the Scottish Children's Commissioner (Q)
12. A manager at the Office of the Ombudsman, New Zealand (Q)
13. New Zealand human rights expert and former Human Rights Commissioner
14. New Zealand human rights expert and academic 1
15. New Zealand human rights expert and academic 2
16. New Zealand human rights expert and academic 3
17. A manager with the Swedish Women's Lobby, an organisation which lobbies for women's rights and gender equality
18. A civil servant at Swedish government offices (Q)
19. A member of the board of UN Women national committee in Sweden (Q)
20. An official from the Irish Office for the Promotion of Migrant Integration. (Q)
21. The Director of a prominent anti-racism organisation in Ireland
22. An interviewee from the Irish Human Rights and Equality Commission
23. An Israeli academic involved with the piloting of a CRC-related measure in the family law courts (Q)
24. An independent Northern Ireland lawyer with experience consulting on equality duties across the UK
25. A Swedish academic specialising in public law and children's rights
26. An academic and member of the deaf community who campaigned for the Irish Sign Language Act
27. A manager at a leading Irish deaf organisation
28. A UN Official in the Latin American Region
29. Australian legal practitioner (Q)
30. A Former Commissioner who led on OPCAT for the New Zealand Human Rights Commission (Q)
31. A Member of the Australian Human Rights Commission (Q)

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