

# **Regulatory Stewardship and Intermediation: Lessons from Human Rights Governance**

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**Abstract:** The regulator-intermediary-target (RIT) framework exposes the potential for intermediaries to provide alternative channels for capture. In this article, I argue that the risk of capture can be mitigated through what I call regulatory stewardship—a novel conception of regulatory management that involves the intermediaries themselves monitoring the performance of one another. I explore regulatory stewardship by examining a new generation of human rights treaty innovation: the Optional Protocol to the Convention against Torture (OPCAT) and the Convention on the Rights of Persons with Disabilities (CRPD). These instruments differentially formalize relations among intermediaries. I use their contrasting experiences to identify three factors central to effective regulatory stewardship: (1) the nature of the task environment; (2) the quality of rule frameworks; and (3) the approaches adopted by potential stewards in practice. This study argues for the importance of regulatory stewardship within RIT arrangements, particularly where targets are strongly motivated to resist implementation.

Keywords: human rights; regulation; international organization; governance; theory and practice; United Nations

## **Regulatory Stewardship and Intermediation: Lessons from Human Rights Governance**

The regulator-intermediary-target (RIT) framework advanced by Abbott, Levi-Faur, and Snidal (this volume) provides a valuable model of regulation as a three (or more)-party game, providing the foundations for complex accounts of regulatory processes and outcomes. For the purposes of this study, the framework problematizes the interests of diverse players and the potential for intermediation to provide alternative channels for capture. Intermediaries charged with acting in conjunction with a regulator to affect the behavior of a target may be particularly vulnerable to capture. This opens up the possibilities of both capture of the regulator through the intermediary (T captures R through I), and capture of the intermediary alone, where that is sufficient (T captures I). Regulators often lack the operational capabilities to effectively shield the intermediary from interference. In this article, I argue that the threat of capture in regulatory regimes that involve intermediation can be mitigated with what I call regulatory stewardship, a novel conception of capture control.

Regulatory stewardship involves the assignment of mutual-monitoring and support responsibilities among intermediaries themselves, with the goal of safeguarding against capture and enhancing performance. It is an increasingly viable mode of governance within global regulatory arrangements that involve more than one intermediary. However, unlike other methods to control capture, such as screening, contract design, and sanctions, it has rarely been identified or explored in regulatory theory.<sup>1</sup> Less narrow and contractual than delegation, but more formalized and purposive than experimental governance, stewardship draws on both hierarchy and managerialism (Hawkins et al. 2006; de Búrca 2015).

Stewards are intermediaries themselves, who employ both instrumental and normative mechanisms of influence. If mutual monitoring is their primary task, stewardship also involves a second aspect, providing advice and assistance through a mutual-support function. Stewardship highlights an overlooked internal, dynamic realm of capture control that can

become institutionalized as intermediation practice. Such accountability innovation, aimed at providing additional checks within the RIT system, may be particularly important in settings where targets are strongly motivated to resist implementation.

To explore this conjecture, I examine a new generation of human rights treaty innovation: the Optional Protocol to the Convention against Torture (OPCAT) and the Convention on the Rights of Persons with Disabilities (CRPD).<sup>2</sup> Both instruments take a turn toward more intrusive governance architecture via intermediation, reflecting the limited capacity of human rights regulators (UN treaties and their state parties) to effectively bring pressure to bear on targets (individual states). Both also provide compelling examples of RIT regulation, with viable sites of regulatory stewardship apparent among international and nationally located intermediaries.

State parties to human rights conventions are typically obliged to recognize the monitoring jurisdiction of a Geneva-based UN treaty body, comprising independent experts. In the CRPD, this body is the Committee for the Rights of Persons with Disabilities. The OPCAT directs state parties to recognize the jurisdiction of a Subcommittee for the Prevention of Torture (SPT). As explained below, these international intermediaries are good candidates for exercising regulatory stewardship toward national mechanisms, which the conventions obligate individual state parties to establish. The CRPD prescribes the designation of “one or more focal points” and a “national framework” as legal obligations, and also directs states to consider establishing an optional “coordination mechanism.”<sup>3</sup> Parties to the OPCAT must designate a “national preventive mechanism” (NPM).<sup>4</sup> These national intermediaries may in turn pursue a regulatory stewardship policy.

Not all intermediaries in these two RIT systems are independent of government. The CRPD focal point and the (voluntary) coordination mechanism are governmental bodies, mandated to oversee implementation within the public administration of the state party. In

contrast, the CRPD national framework, subsequently termed the national monitoring mechanism (NMM), must include “one or more independent [from government] mechanisms,” tasked with the “promotion, protection and monitoring” of implementation.<sup>5</sup> The CRPD NMM is the closest analogue to the OPCAT’s NPM, which similarly must be guaranteed “functional independence” from government. Both instruments also explicitly reference independent safeguards (“the Paris Principles”) for the design of national human rights institutions (NHRIs).<sup>6</sup> Reflecting this standard, the majority of these bodies are NHRIs: statutory bodies appointed by the legislature, independent of the executive, and undertaking their mandate without instruction (Pegram 2015).

The premium placed on the independence of this class of national-level intermediaries is complicated by the nature of their designation. The regulator in the CRPD and OPCAT authorizes the intermediaries’ role and requires targets to accept their regulatory jurisdiction. However, and crucially, both instruments provide that each state may individually designate its own national intermediaries, as opposed to designation by the regulator or another external party. In contexts where the target is strongly motivated to resist implementation, this introduces a high risk that the intermediary will lack independence from the target and/or the requisite operational capacity. Anticipating this risk, the regulator may also adopt safeguards that make capture difficult for the target, including rules that mandate or encourage intermediaries to independently monitor each other’s behavior: regulatory stewardship.

To investigate what makes for effective stewardship, this study identifies three key dimensions, along which the CRPD and OPCAT vary significantly: First, the characteristics of the task environment, in particular, the extent to which the target is motivated to resist implementation. Second, the enabling quality of formal rule frameworks, especially the extent to which they provide intermediaries (as potential stewards) independence safeguards, as well as mutual-monitoring and support prerogatives. Third, the policy approaches that potential

stewards pursue in practice. The findings of this article have clear implications for the quality of regulatory outcomes in other fields, such as environment, transnational business, and health, which also typically display multiple intermediaries and where implementation of policy directives often proves problematic.

I begin by applying the RIT model to the CRPD and OPCAT. It then introduces the concept of regulatory stewardship. This is followed by an examination of variation in task environments between disability rights and torture prevention. The study then analyzes the enabling design features granted to the international intermediaries established by these two instruments, with particular attention to monitoring and support, before assessing their approach toward stewardship in practice. The conclusion examines the implications of regulatory stewardship for the RIT model and regulatory politics more generally.

### **An RIT Model of Human Rights Treaty Innovation**

The UN human rights regime plays a central role in agenda-setting and negotiation of human rights treaties. It also undertakes the hierarchical task of monitoring human rights treaty implementation. Notwithstanding progress on this front, a persistent compliance gap has led to sharp criticism. The compliance challenge underpins longstanding efforts by regulators to engage intermediaries in their activities. This has traditionally taken the form of international monitoring mechanisms. However, recent treaty innovations mark a significant departure from precedent. The OPCAT and the CRPD oblige state parties to recognize the monitoring prerogatives of not only international treaty bodies, but also domestic monitoring and implementation mechanisms.

Both instruments are unique within the international treaty system in that they require a national mechanism to be established, as a matter of international legal obligation. Figure 1

illustrates this new generation of RIT architecture, highlighting the shift from a traditional model of international monitoring to a two-tier monitoring arrangement.

FIGURE 1

**RIT Arrangement in the CRPD and OPCAT**



*The regulator*

The regulator in this domain is the collective of state parties acting through the relevant UN treaty, the CRPD, and OPCAT respectively. It is important to note that the regulator in each instrument delegates to individual states (the targets) the task of appointing independent experts to the international monitoring mechanism, as well as designating the national intermediary. The fact that the regulator (collective state parties) and targets (individual states) are closely related introduces an important complication to the RIT framework. Treaties are binding laws intended to change the behavior of the targets: states acting individually. If the target approaches its regulatory duties in good faith, then absent capacity constraints, compliance is largely assured. However, states display a high risk of defection, as shown by the limited effectiveness of human rights agreements. Recognition of this credibility gap has motivated UN regulators to directly engage the services of international and national-level intermediaries as a matter of treaty law and practice.

*The international intermediary*

UN human rights treaty bodies play a key intermediary function, tasked with defining the legal scope of human rights treaty obligations and monitoring compliance.<sup>7</sup> However, these bodies labor under significant government constraints, traditionally exercising only indirect forms of watchdog oversight, their work circumscribed by consent requirements, confidentiality clauses, and reliance on self-reporting by states. Such constraints have driven them to innovate more intrusive working practices, including facilitating third-party access and continuous feedback through monitoring and reporting (de Búrca 2015). The OPCAT and CRPD mark a formalization of this recent trend.

The OPCAT is the more intrusive instrument of the two, establishing an international intermediary, the SPT, which is unique among treaty bodies because it has the authority to conduct field visits to arrive at its own independent assessment of state compliance.<sup>8</sup> As this article details, the ability of the SPT to directly access local sites of detention without prior authorization from governments, coupled with a range of formal monitoring and support functions vis-à-vis national intermediaries, provides it with a robust basis on which to pursue regulatory stewardship in practice.

In the CPRD, monitoring duties at the international level are entrusted to the Committee on the Rights of Persons with Disabilities. The committee follows the traditional human rights treaty body model. It is mandated to review state reports, assess information from third parties, and issue general comments. The most significant difference between the committee and the SPT lies in the former's inability to conduct field visits—the committee is reliant on state self-reporting.<sup>9</sup> The committee, like most treaty bodies, will review each state party every six to eight years, at most. As such, monitoring and implementation activities by national mechanisms assume particular importance.

*The domestic intermediary*



The OPCAT and CRPD introduce a new tier of domestic intermediaries into the traditional treaty law paradigm, with the regulator formally delegating functions to domestic mechanisms. OPCAT National Preventive Mechanisms (NPM) are intended to “regularly examine the treatment of the persons deprived of their liberty in places of detention.”<sup>10</sup> The CRPD provides for two obligatory national mechanisms: “one or more focal points within government for matters relating to implementation” and “a framework, including one or more independent mechanisms ... to promote, protect and monitor implementation.”<sup>11</sup> It also includes an optional “coordination mechanism within government to facilitate related action in different sectors.” Notably, the CRPD brings in beneficiaries as active participants, with state parties directed to ensure that disabled persons’ organizations (DPOs) are “involved and participate fully in the monitoring process” (Koenig-Archibugi and MacDonald, this volume). The OPCAT relies on the NPM to engage persons deprived of their liberty.

Both instruments lay down rules to govern the structural form and activities of their domestic mechanisms. However, the CRPD and OPCAT differ markedly in this regard, with the latter providing much more detailed obligations as to intermediary form and function. The OPCAT obliges states to “guarantee the functional independence of the [NPMs] as well as the independence of their personnel.”<sup>12</sup> In addition, NPM design is subject to required safeguards and powers. These include independence (functional, personnel, and institutional), monitoring prerogatives to examine regularly the treatment of detainees, access without prior notice to all places of deprivation of liberty, submission of proposals and observations on legislation, requests for any relevant information, enjoyment of privileges and immunities, and, importantly, engagement with UN bodies.<sup>13</sup>

This precision contrasts with the brevity of the CRPD on design of the independent NMM: it prescribes no specific organizational form beyond reference to “one or more independent mechanisms.” State parties are instead directed “to take into account” the Paris

Principles. The convention is, however, unusually detailed on state obligations related to implementation activities, also reflected in the embedding of the focal point and coordination mechanism within government itself.<sup>14</sup>

In effect, the CRPD and OPCAT establish a complex RIT system to strengthen monitoring and implementation of treaty obligations. The success or failure of these instruments is likely to hinge on the robustness of triangulation between the international and domestic level, with intermediary performance of central concern. It is also important to acknowledge the role of informal intermediaries across both regimes, in particular other UN agencies and civil society organizations. International and domestic NGOs, such as the International Committee of the Red Cross, European Disability Forum, International Disability Council, and Association for the Prevention of Torture (APT), play prominent roles in the development of rules, information-gathering, and advice and support to diverse regulatory actors, including those intermediaries established by the two instruments. Such support will continue to be vital. Formal rules are insufficient to guarantee the independence or effective function of these actors, especially in settings where targets are strongly motivated to resist implementation. To the greatest extent possible, diverse intermediaries should seek to strengthen the regulatory system through regulatory stewardship.

### **What Is Regulatory Stewardship?**

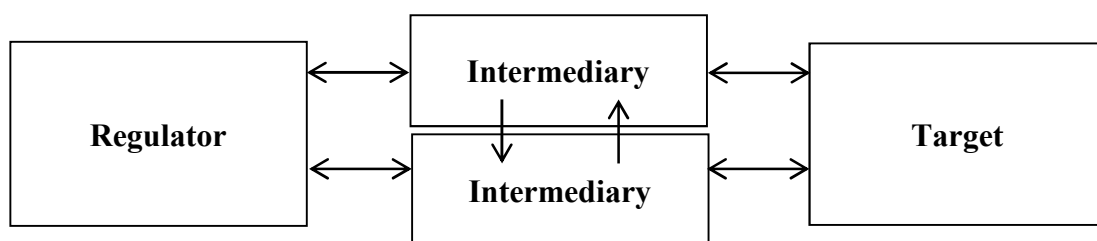
*Regulatory stewardship* can be defined as the assignment of mutual-monitoring and support responsibilities among intermediaries themselves, with the goal of safeguarding against capture and enhancing performance. The focus is on the role of the intermediary in respect to other intermediaries, so stewardship may occur in any regulatory system with multiple intermediaries. Stewardship addresses a central concern: the performance of intermediaries and their influence on regulatory interactions. Given that intermediaries are vulnerable to capture

and may expand opportunities for capture, intermediaries should also engage in monitoring one another. Multiple intermediaries enable this stewardship function, quite apart from the other structural benefits of RIT systems that Abbott, Levi-Faur, and Snidal (this volume) identify. Stewards may monitor intermediary form and function against established rules, provide support and assistance to bring performance into line, and deter capture through positive incentives and negative sanctions, such as adverse publicity.

In principle, any intermediary can act as a regulatory steward. As shown in Figure 2, stewardship focuses on the intermediary acting on behalf of the regulator, but in conjunction with other intermediaries. Stewardship may operate vertically across levels of governance and/or horizontally within a particular jurisdiction, with bidirectional flows of influence between intermediaries. It mirrors the extension that Havinga and Verbruggen (this volume) developed, in which multiple intermediaries operate in parallel to one another, yet still between the regulator and target. Stewardship is therefore a nonlinear arena of intermediation, operating in parallel to regulatory chains within the regime. It does not only involve intermediaries *inter se*; stewards can also monitor the regulator to make sure it is not captured.

FIGURE 2

**Regulatory Stewardship within an RIT Arrangement**



Diverse goals may make particular intermediaries more or less suitable as stewards in different settings. For example, government agencies may be encouraged to develop

professional norms of stewardship and often possess the advantage of executive authority. However, they will typically require special supervision to avoid conflicts of interest given their proximity to the target. This qualification applies to any intermediary that is the recipient of significant resources from the target.

Regulatory stewardship can be formal and an actor's core function, but it can also be informal and one of many roles that an actor plays, alongside rule-developer, monitor, or facilitator or enforcer of target compliance. Stewards may be created by the regulator (or other actors) through rules that require mutual monitoring and support among intermediaries (De Silva, this volume). Alternatively, an authorizing actor may adopt enabling rules, such as guarantees of direct access among intermediaries, knowing that these will empower intermediaries to engage in stewardship activities. Or stewardship may be a policy pursued by an intermediary without any formal authorization. Where multiple intermediaries do not exist, a single intermediary may encourage the regulator or other actors to create a suitable structure to establish a stewardship arrangement.

Working under a formal mandate is likely to magnify the impact of a steward, and to elicit cooperation from other intermediaries. However, acceptance of a steward's role by other stakeholders may be sufficient for this innovation to take hold, potentially triggering emulation of stewardship practices more widely. Regardless of whether stewardship is formally regulated or informal, the intermediary should take responsibility for the integrity of the entire regulatory system, to the extent that it can. An intermediary might be a more effective steward if it has express authorization, but all intermediaries should be expected to undertake this task, using whatever authority they possess. Given that some intermediaries may have their own goals and be reluctant to assume this function, whoever creates them should consider mandating the stewardship function, as well as providing potential stewards with the appropriate authority.

Stewards may use both hierarchical and managerial techniques to monitor and support other intermediaries. As developed further below, their choice will depend in part on the task environments that they encounter. Two strands of explanation, managerial and instrumental, can be identified in the scholarship on compliance. Prominent managerial accounts argue for noncoercive strategies to support targets that genuinely wish to comply but find that they cannot (Chayes and Chayes 1993). Conversely, instrumental explanations highlight compliance problems inherent to regulatory contexts defined by strong distributive and value conflicts, above all resistance by the target to implementation (Posner 2010). Such adverse settings will require harder enforcement mechanisms. Applying these two logics to stewardship, intermediaries operating in contested regulatory terrain may be particularly vulnerable to capture and/or under-performance, requiring stewards to employ harder hierarchical techniques to steer behavior. Conversely, where intermediaries operate in relatively cooperative regulatory settings, but find that they cannot fulfill their functions due to low capacity or insufficient authority, stewards may adopt a mutual-support approach.

Mutual monitoring is the primary task of the steward, through police patrol or watchdog procedures, supervision and even sanctions. Stewards typically focus on monitoring other intermediaries' mandates, independence, capacity, routines, and operating procedures as they develop over time. However, stewardship can also be extended to monitoring the creation of intermediaries yet to be established, whether the creator is a target, beneficiary, regulator, or any other actor with a view to facilitate subsequent stewardship activities. The second aspect of stewardship is mutual support. Managerial stewardship might involve promoting voluntary adherence through training, technical assistance, fostering dialogue, and capacity-building. Where an intermediary is structured appropriately and undertaking significant efforts to fulfill its function—even if falling short of optimal performance—stewards can support and assist it so as to make the overall regulatory system stronger. The hierarchical and managerial logics of

action are not mutually exclusive. Indeed, they may be complementary. Astute stewardship will require deploying a mix of regulatory instruments, responsive to changing circumstances and managing relationships on which the long-term success of the regime depends.

The techniques a steward employs to influence an intermediary also depend on the powers that it is granted. In turn, a steward might have higher capacity to influence some intermediaries more than others. For example, stewards may establish transnational networks, and even accreditation systems, to promote a stewardship system among peer agencies. Capacity is likely to be a function of enabling rules including mandates, direct access to other intermediaries, expertise and organizational resources, and legitimacy. Regulatory stewardship does not make any assumptions regarding intermediary capacities to advance its goals. Lobbying skills may provide an important additional resource.

The CRPD and OPCAT provide fertile terrain to explore the application of regulatory stewardship. The formal and informal linkages among intermediaries map relatively straightforwardly onto this conceptual framework, allowing us to investigate the important questions of how, and under what conditions, effective regulatory stewardship can become institutionalized in practice. We turn now to the experience under these instruments. For reasons of space, I focus on the international intermediaries expressly established by the two instruments vis-à-vis formal domestic intermediaries. The analysis is guided by the three factors identified as impacting effective stewardship: (1) the characteristics of the task environment, in particular the extent to which the target is motivated to resist implementation; (2) the enabling quality of formal rules, especially the extent to which they provide intermediaries (as potential stewards) independence safeguards, mutual-monitoring, and support prerogatives; and (3) the policy approaches potential stewards apply in practice.

### **Drawing Out the Contrast: Human Rights as Regulatory Task Environments**

Task environment has important implications for effective regulatory stewardship. Intermediaries operating in regulatory settings where the target is motivated to resist implementation may be subject to strong incentives to modify their own practices to benefit the target (T captures I) or otherwise be rendered ineffectual (T immobilizes I). Conversely, even in settings where the target genuinely wishes to comply, an intermediary may find that low capacity or insufficient administrative authority undermines its performance. As such, the compliance problem varies depending on the goal alignment between the regulator and the target, the degree to which the target exercises influence over the intermediary, and the capacity of intermediaries to discharge their function. Stewards seeking to influence other intermediaries should be attentive to this underlying task environment and tailor their use of hierarchical and managerial strategies accordingly.

Human rights governance presents a particularly challenging task environment for achieving policy implementation. The prominent role of states in rule-making and rule enforcement reflects a fundamental paradox in the human rights enterprise: “principal moral hazard” (Miller 2005). Whereas principal-agent theory is preoccupied with negative behavior on the part of the agent (shirking or slacking), principal moral hazard focuses attention on how the conflicting interests of authorizing actors pose a threat to the independent and effective conduct of the agent. Observers note persistent violating behavior as indicative of systemic flaws that leave “false positives” unaccountable—individual states that commit to UN treaties without sincere intent to comply (Simmons 2009). However, as Dai (2015, 164) observes, “what matters is not the issue-area, but the strategic environment underlying a particular problem.” Notably, such variation differentiates disability rights from torture prevention.

In general terms, the disability rights environment is more one of cooperation than of compliance (Chayes and Chayes 1993). A cooperative task environment underpins de Búrca’s (2015) modeling of the CRPD as emblematic of experimentalist human rights governance. The

unprecedented speed of negotiation and ratification of the instrument also aligns with a logic of cooperation.<sup>15</sup> The CPRD seeks to benefit vulnerable groups that already enjoy significant legal protections, is generally situated in low visibility (and low status) policy domains such as social welfare, and often implicates the state in violations resulting from omission or neglect, as opposed to criminal or egregious actions.

One implication of a cooperative regulatory setting is that the hierarchical stewardship imperative recedes and more weight is placed on the secondary task: mutual support. A managerial logic is implicit in the embedding of the CRPD focal point and coordination mechanism within government, directed to coordinate activities across government and facilitate cooperative solutions. As one CRPD expert puts it: “States know what’s wrong, they need solutions, they need people to actually contrive blueprints for change.”<sup>16</sup> However, the task of monitoring remains important, particularly given the proximity of intermediaries to the target, coupled with resistance to ambitious elements of the CRPD that call for major social reform and budget allocations. Recent government pushback against controversial opinions of the CRPD committee is indicative of such resistance.<sup>17</sup> Monitoring the NMM to ensure it is effectively monitoring these processes therefore remains a pressing concern.

In contrast to the CRPD, the OPCAT is more a realm of compliance than of cooperation (Downs, Rocke, and Barsoom 1996). Torture prevention typically does not involve a collective-action problem or material benefits to government. Unlike the CRPD’s open-ended revisability, the general obligation contained in the Convention Against Torture (CAT) is absolute. The OPCAT negotiations were not open to nonstate stakeholders, and intermediary form and function were the subjects of heated disagreements.<sup>18</sup> Fourteen years since adoption, OPCAT has only eighty state parties and eighteen signatories. OPCAT seeks to protect beneficiaries often labeled as “undeserving,” which intrudes into core domains such as



security, and may implicate state officials in egregious, sometimes criminal, behavior (Holmes 2013). Expert observers draw out the contrast:

Everybody wants to be seen to be promoting the rights of persons with disabilities. It's a sort of good cause everyone can get behind; you're a good champion, whereas nobody wants to be seen to be fighting torture, because by doing so you admit that torture exists. In that equation, there is the recognition that we have a problem with torture. Nobody wants to admit to having that problem, and that's where the difficulty lies.<sup>19</sup>

The narrow regulatory objective of OPCAT, to gain effective access to all places of detention, also provokes strong sovereignty concerns. The Australian Parliament declared in 2009 that there was “no immediate need” for Australia to ratify the OPCAT, objecting to the fact that the instrument would constitute a standing invitation to the SPT.<sup>20</sup>

Hard-nosed monitoring by regulatory stewards in this domain, including police patrol, watchdog procedures, and supervision, is likely to be necessary to guard against intermediary capture and poor performance. OPCAT practitioners are keen to contrast the protocol's preventive paradigm (identifying risk factors and then making recommendations) with an accountability paradigm (holding people to account). Scope does exist for more managerial strategies of influence. However, practitioners also concede that “challenging [government officials] and holding them to account is high risk.”<sup>21</sup> In adverse regulatory settings, express authorizations or enabling rules are likely to provide an important resource for empowering potential stewards.

## **Regulatory Stewardship by Design**

A regulator (or other actor) may install a regulatory stewardship arrangement through rules that require mutual monitoring and support among intermediaries. Alternatively, an authorizing actor may adopt enabling rules, or an intermediary may pursue a stewardship policy without any formal authorization. Neither the CRPD nor OPCAT expressly authorizes the SPT and CRPD committee to undertake regulatory stewardship. However, both instruments contain, to varying degrees, rules that can enable stewardship in practice. These include rules related to mandate, access, expertise, organizational autonomy, and independence.

A stewardship function is most clearly imprinted in the design of the SPT. Mutual monitoring prerogatives can be inferred from the SPT mandate to undertake three core tasks: (1) conduct country visits in places of deprivation of liberty, (2) coordinate the work of NPMs, and (3) cooperate with other UN and regional organizations. This triadic function provides a robust basis for elaborating a stewardship role. However, the overarching mission of the SPT remains coordination of a global inspection system of detention facilities.

Notably, the SPT is also granted an express mandate to advise on NPM establishment. The subcommittee is further directed to maintain direct (and, if necessary, confidential) contact with NPMs. Governments are also obliged to guarantee NPMs direct access to the SPT. On the secondary task of mutual support, the SPT is instructed to offer training and technical assistance to enhance NPM capacity, and to advise and assist on protection activities. The OPCAT also provides for a fund to support SPT capacity-building of NPMs.<sup>22</sup> OPCAT rules regarding SPT-NPM engagement are supplemented by the SPT's "rules of procedure," which it establishes itself.<sup>23</sup>

In the event of noncooperation by the target or intermediary, the SPT can deploy a limited range of formal sanctions, which include releasing critical preliminary findings and making public statements.<sup>24</sup> Finally, while SPT independence safeguards are more robust than other treaty bodies, SPT members are not subject to any external form of accountability,

beyond periodic reelection. The OPCAT sets down detailed independence, impartiality, and expertise criteria for committee membership.<sup>25</sup> However, there is no prohibition on SPT members working for governments simultaneously. Stewardship activities by other intermediaries, including NPMs and civil society organizations, are important to ensure that these independence shortcomings do not jeopardize the legitimacy of the SPT.<sup>26</sup>

The CRPD displays a less-enabling stewardship framework, especially in terms of monitoring prerogatives. It has no provision for a subcommittee, with legal interpretation and monitoring duties entrusted to a Committee on the Rights of Persons with Disabilities. Following the traditional treaty body paradigm, the committee is restricted to an indirect form of watchdog oversight. Committee discretion to engage independent monitors can be inferred from the reporting obligations of state parties. Another point of interaction may come under the convention's optional protocol, which includes an individual complaints procedure and provision for country visits (with state-party consent).<sup>27</sup>

The CRPD committee is not guaranteed direct access to national mechanisms. However, neither is it proscribed from engaging with them as a matter of institutional practice, and importantly, like the SPT, it can “establish its own rules of procedure.”<sup>28</sup> Article 37 provides a general directive that the committee “give due consideration to ways and means of enhancing national capacities,” which provides scope for elaborating a stewardship function. Interestingly, Article 16 (protection of disabled persons in places of detention) offers a point of intersection with the OPCAT, opening up the possibility of regulatory stewardship across the two regimes. Committee prerogatives in the event of noncooperation are not addressed in the convention. In terms of independence, the convention shares similar deficits and is less exacting than the OPCAT. The committee comprises up to eighteen members, who serve in their personal capacity and must be “competent, experienced and possess high moral

standing.”<sup>29</sup> No independence or impartiality criteria are provided. Requisite expertise is also nonspecific.

In effect, the CRPD provides less scope for the subcommittee to exercise a fully fledged regulatory stewardship function. Nevertheless, the convention does provide some limited scope for it to pursue a policy of stewardship. As the next section elaborates, compliance problems have provided a motive for the committee to (reluctantly) assume a regulatory stewardship role.

### **Regulatory Stewardship in Practice**

Rules are not self-activating. Their scope of application hinges in large part on motivated actors invoking them as a basis for action. Regulatory stewardship is not expressly authorized in either the OPCAT or CRPD. However, the SPT and CRPD committee operate under a range of enabling rules that make stewardship a viable policy option. This section surveys policies adopted by both bodies in practice, with attention to the primary task of mutual monitoring, monitoring the creation of intermediaries, and the secondary component of mutual support.

#### *OPCAT regulatory stewardship*

Although the work of the SPT is conducted in a “spirit of cooperation,” the SPT has recognized that unless “the NPM are able to fulfil their role ... the work of the [s]ubcommittee will be seriously limited and adversely affected.”<sup>30</sup> Monitoring of NPMs has emerged as a priority. Observers urged the subcommittee to “step up to the challenge of establishing itself as a central player in OPCAT” or “risk losing credibility” (Murray et al. 2011, 176). The SPT responded by placing oversight of NPM at the center of its strategy, with particular attention to monitoring NPM’s operation and functioning. The SPT issued detailed guidelines on NPM form and function in 2010.<sup>31</sup> SPT country visits have provided an important focal point for

monitoring activities. The SPT introduced the innovative category of “NPM advisory visit” in 2012. A total of fifty-two visits have been undertaken as of August 2016.

Although visits are typically framed in terms of advice and assistance to NPMs, they also provide opportunities to police intermediary independence. This has led the subcommittee to issue critical statements on NPM independence, addressing issues of NPM membership,<sup>32</sup> the lack of civil society participation,<sup>33</sup> inappropriate placement of NPMs within state structures,<sup>34</sup> and budget allocations compromising the autonomy of the office.<sup>35</sup> The SPT has engaged state officials directly to strengthen NPM independence.<sup>36</sup> As one expert puts it, the SPT “is like an international cousin to the national mechanisms, [they] can protect them with a more extended field of influence and prestige in the UN.”<sup>37</sup> They also typically encourage NPMs themselves to “take steps to back up the efforts made on [their] behalf by the [s]ubcommittee.”<sup>38</sup> NPMs must also follow up on SPT visit reports, with delays in doing so monitored by the subcommittee.<sup>39</sup>

The capacity of the SPT to engage in NPM monitoring is in part a function of resources, which is a constant source of concern. However, it also has much to do with an enabling rule framework. As the SPT chair puts it:

The power of a legal mandate is more than some people think, we have been able to do things which they [state parties] absolutely don’t want us to do, but then they can see that we mean business and that we’ve got the legal mandate on our side.<sup>40</sup>

Country visits, coupled with guarantees of direct and confidential contact with NPMs, give the SPT a significant informational advantage in independently assessing NPM performance. The subcommittee has not shied away from criticizing NPMs that are manifestly

failing in their duties.<sup>41</sup> Although the SPT is unable to compel intermediaries, it can issue formal public statements and can utilize “all possible good offices within the United Nations system and any other appropriate forums.”<sup>42</sup> It has used publicity and press statements to criticize governments where political support for NPM is lacking.<sup>43</sup>

SPT stewardship activities have also been extended to monitoring the creation of intermediaries yet to be established. Experts note that “the space between ratification and NPM designation must be monitored very closely by everyone.”<sup>44</sup> The SPT website hosts information on established NPMs and pending designations.<sup>45</sup> Of seventy-nine state parties that have ratified the OPCAT, fifty-five have designated an NPM. In the face of official resistance, the SPT has successfully requested access to drafts of NPM legislation.<sup>46</sup> The SPT has not been shy in challenging state parties that fail to abide by NPM design safeguards.<sup>47</sup> The SPT may also work with existing domestic agencies. In Peru, a robustly independent NHRI was designated the NPM in December 2015, nine years after OPCAT ratification and in the face of significant government hostility.<sup>48</sup> In this case, sustained NGO and NHRI advocacy, coupled with an SPT country visit in 2013, were important. Such episodes indicate the compliance problems that plague this domain.

In assessing NPM form, the SPT endorses the Paris Principles, which provide a standard on which to assess NHRI design conformity. The peer-network Global Alliance of NHRIs (GANHRI) undertakes a letter-grade accreditation system (“A” status indicating full compliance) within the UN system.<sup>49</sup> However, the principles have some drawbacks, which have led the SPT to resist deferral to GANHRI accreditation. First, as Reif (2015) points out, accreditation may exclude independent institutions that effectively protect human rights, but do not comply with all aspects of the principles. Second, it risks reducing assessment of NPMs to a tick box exercise. The subcommittee has stated that the formal suitability of a NHRI for the NPM role must be assessed on a country-by-country basis.<sup>50</sup>

SPT experts are even more wary of using the GANHRI letter grade system for a purpose for which it was not intended: monitoring NPM performance. This reflects a distinct approach toward the mutual support aspect of regulatory stewardship. The SPT does regularly employ managerial strategies to influence NPM performance. In the words of the SPT chair:

If it turns out that they're [the NPM] not independent or they're not functioning as they ought, then rather than just label them as bad or not very good, our role is to talk to the NPM, to understand its practice, find out what the problems are, and try to get it to work better.<sup>51</sup>

Geneva-based engagement with NPMs is important in this respect, including informal dialogues, exchange of information, and regular meetings under the aegis of the OPCAT contact group. This also allows NPMs to exercise mutual regulatory stewardship. Notably, some members of the SPT are former NPM functionaries. However, particular emphasis is placed on advice, assistance, and training to NPMs in the field. SPT visits often involve joint missions to places of detention, training, and capacity-building. These activities typically result in corrective strategic advice.<sup>52</sup> The subcommittee also regularly advises NPMs on questions of law and its adaptation to local conditions.<sup>53</sup>

#### *CRPD regulatory stewardship*

Although the CRPD grants the committee some stewardship prerogatives, since becoming operational in 2010 the committee has made minimal efforts to pursue such a policy in practice. Activities have focused on defining CRPD legal scope, rather than monitoring compliance with Article 33 (national implementation and monitoring). Observers attribute this

omission to a range of factors, including resource constraints, mandate-overload, and individual preferences of committee members.

The committee's activities have focused almost exclusively on the independent NMM, as opposed to the focal point or coordination mechanism. Official guidelines on the form and function of NMMs were issued (in draft form) in June 2016,<sup>54</sup> but no guidelines have been issued with respect to the two governmental intermediaries. Although "committee working methods" provide for the committee to designate focal points to foster interaction with these entities, none have been established. Many of the committee's concluding observations omit references to the focal point or coordination mechanism.<sup>55</sup> In more recent observations, the committee has generally lamented the lack of designation of such bodies.<sup>56</sup> Exceptions include observations on Hong Kong (China), which express worry at "the low rank of the focal point."<sup>57</sup> Observations on Slovakia refer briefly to the limited capacity of the focal points and coordination mechanism.<sup>58</sup>

Given the emphasis of the CRPD on implementation and the committee's inability to conduct field visits, the lack of rigorous monitoring of independence and performance of national intermediaries is perhaps surprising. However, underlying this deficit is the difficulty the committee confronts in obtaining access to information, given its reliance on third parties and its lack of visitation powers. As one observer notes, given these limitations, "it is easier to make recommendations when there is no structure or when you know that the structure is governmental."<sup>59</sup> This is reflected in various concluding observations. For example, the committee notes that the so-called Independent Monitoring Committee in Austria "appears to lack the independence required."<sup>60</sup> Similarly, concluding observations on Serbia express concern about the lack of information on the composition of the NMM.<sup>61</sup>

This informational disadvantage has also impeded the committee's ability to undertake monitoring of intermediary performance. CRPD experts underscore the importance of "a strong



independent analogue to the implementation role of government” (Quinn 2008). In its NMM guidelines, the committee calls on states to “refrain from directly or indirectly restricting, limiting or interfering with monitoring activities.”<sup>62</sup> But the committee has been reluctant to address NMM performance in its concluding observations. This has begun to change with recent reports on problem cases, including Mexico, Paraguay, and Uganda, where observations address issues of strategy, insufficient resources, participation of disability organizations, and independence.<sup>63</sup>

The committee has no formal mandate to advise on intermediary establishment. However, a survey of designation outcomes in Europe suggests that the committee could make greater use of its reporting procedure to do so. Of thirty-two countries, twenty-one have designated their NMMs. Some of these mechanisms clearly do not comply, including Italy where the Minister of Labor and Social Policy chairs the independent mechanism.<sup>64</sup> This is attributed largely to confusion among governments as to the obligations arising from Article 33.<sup>65</sup> In response, the committee has begun to advise on NMM creation. Notably, its 2015 report on the Czech Republic is the first to explicitly recommend that a particular entity be designated as the NMM.<sup>66</sup> However, observations on yet-to-be-established intermediaries are generally short, nonspecific and, in contrast to the SPT, reliant on the Paris Principles.

The committee has also not taken advantage of its mandate to actively pursue a managerial policy of mutual support. In surveying best practice on UN treaty body engagement with national mechanisms, the committee conspicuously omits the SPT from its 2016 draft guidelines. Instead, interaction centers on Geneva-based modalities: NMM participation in the committee’s general reporting procedure, working group pre-sessions, and dialogue between the committee and the state party. These modalities of treaty body engagement fall short of direct intermediary support. For many observers, an exclusively Geneva-based engagement policy is problematic. Distant from the realities of human rights violations, they argue that it is

also difficult for national mechanisms to justify the resource demands of international participation.

The committee does have tools at its disposal to actively assist NMMs within local jurisdictions. The committee has recently acknowledged its “role as a capacity-building agent under article 37.”<sup>67</sup> But it defers to NHRIs and NMMs for this function. The committee recognizes that CRPD implementation will require “collective, coordinated and continuous efforts” by diverse actors but is reluctant to take a lead on coordination itself.<sup>68</sup> That said, the committee has recently stated its intention to explore the possibility of working more closely with national intermediaries on developing core indicators and supporting their activities.<sup>69</sup> This could lay the groundwork for more active regulatory stewardship in practice.

## **Conclusion**

The RIT framework provides scholars an opportunity to examine regulatory regimes involving intermediation that highlight significant reform and bely prominent claims of gridlock (Hale, Held, and Young 2013). This study has illuminated a new generation of formalized intermediary-centered human rights treaty innovation that builds on longstanding efforts to orchestrate informal action through third parties (Pegram 2015). Separating out the intermediary from the rule-maker and the rule-taker is a necessary addition to accounts of an evolving UN system (de Búrca 2015), and highlights new intrusive channels for affecting the behavior of regulatory targets.

The OPCAT and CRPD introduce a novel formalization of engagement between and among international and national intermediaries. The imprinting of national intermediary form and function within binding treaty law represents a paradigm shift in the human rights field. This article finds that the RIT model maps relatively straightforwardly onto these two instruments, with the crucial qualification that in this domain it is the target that appoints the

formal intermediaries. This, of course, introduces a high risk of capture and shows how the RIT framework can foreground intermediation as an alternative channel for regulatory capture. This study has advanced regulatory stewardship as a novel solution to this policy dilemma, especially where targets are strongly motivated to resist implementation.

Focusing on the experience of international intermediaries established by these two instruments, the study has probed three factors posited as influencing effective regulatory stewardship: (1) the nature of the task environment; (2) the enabling quality of rule frameworks; and (3) the approaches adopted by potential stewards in practice. The findings here support this three-fold explanation, with SPT policy entrepreneurs drawing on a more robust enabling rule framework to exercise effective regulatory stewardship in practice, despite confronting an adverse task environment.

Additional factors also emerge as central to the study; in particular, access assumes particular significance. The SPT scores highly on this dimension. Its ability to access local jurisdictions without state party consent, combined with guaranteed access to national intermediaries, has proven to be a significant resource. More broadly, the study suggests that in-country supervision by independent international monitors, alongside domestic peers, is important. It offers a superior arrangement to the remote watchdog oversight exercised by other treaty bodies, and to ideas of subsidiarity, whereby international actors may only intervene when national mechanisms are not established or manifestly not functional.

These findings provide a robust premise for further analysis of RIT regulation in multilevel governance settings, as well as more careful, contextual analysis of those factors that may enable or impede regulatory success and failure, including capture. Regulatory stewardship provides additional insight into an internal, dynamic realm of RIT intermediation, one that may become institutionalized as policy. Further study could illuminate the opportunities and constraints that regulatory stewardship presents for a wide array of formal

and informal regulatory intermediaries, for example, probing power asymmetries among stewards and the potential for relations to shift (from mutual reinforcement to co-dependency, for example).

The challenge of compliance within multilevel governance settings is central to this study. The RIT model is emblematic of efforts by regulatory scholars to innovate coherent and realistic alternatives to old governance orthodoxies. Regulatory stewardship reflects this scholarly and real-world imperative, identifying an additional benefit to be derived from RIT regulation. It represents an adaptive response by motivated actors (both regulators and others) to the risk of regulatory failure. It highlights the latent power of enabling rules, providing new arenas for experimentation in the shadow of interstate hierarchy. Above all, it exemplifies efforts to connect global regulatory arrangements to the realities of the violation. As both CRPD and OPCAT experts agree: “no violation is ever addressed in Geneva. It always ... depends on what happens when you go back home.”<sup>70</sup>

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## Notes

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- <sup>1</sup> Useful parallels may be drawn with Ayres and Braithwaite's (1991) theory of tripartism, in which different actors within the regulatory process, including civil society groups, monitor one another.
- <sup>2</sup> Optional Protocol to the Convention against Torture, entered into force on 22 June 2006; Convention on the Rights of Persons with Disabilities, entered into force 3 May 2008.
- <sup>3</sup> CRPD Art. 33(1–2).
- <sup>4</sup> OPCAT Art. 17.
- <sup>5</sup> CRPD, Art. 33(2).
- <sup>6</sup> See Principles Relating to the Status and Functioning of National Institutions for the Promotion and Protection of Human Rights. UN General Assembly, Res. 48/134, 20 December 1993. Hereafter: "The Paris Principles."
- <sup>7</sup> See <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx> (accessed 18 July 2016).
- <sup>8</sup> OPCAT Art. 14.
- <sup>9</sup> An individual complaints procedure and visitation power (subject to state party consent) are found in the CRPD Optional Protocol.
- <sup>10</sup> OPCAT Art. 19(a).
- <sup>11</sup> CRPD Art. 33(1) and Art. 33(2).
- <sup>12</sup> OPCAT Art. 18(1).
- <sup>13</sup> OPCAT Art. 4; 18; 19; 20; 21; 22.
- <sup>14</sup> For example, Article 31 requires state parties to collect appropriate information, including statistical and research data.
- <sup>15</sup> The CRPD is now approaching universal ratification, having been signed by 159 countries worldwide and ratified (made legally binding) by 151.
- <sup>16</sup> Interview with Gerard Quinn by Skype. Disability rights expert (3 March 2016 14:00 GMT).
- <sup>17</sup> See recent declarations by governments, including Australia, Denmark, and Germany, rejecting the Committee General Comment No. 1 on Article 12.
- <sup>18</sup> For an in-depth analysis of the OPCAT negotiations see Murray et al. (2011).
- <sup>19</sup> Interview via Skype (19 February 2016) (Confidential).
- <sup>20</sup> APT, Australia – OPCAT Ratification. Available: [http://www.apr.ch/en/opcat\\_pages/opcat-ratification-3/](http://www.apr.ch/en/opcat_pages/opcat-ratification-3/) (accessed 22 February 2016).
- <sup>21</sup> Interview with Malcolm Evans, Chair of the SPT (2007-present). London, UK (23 March 2016 11:00 GMT).
- <sup>22</sup> OPCAT Art. 11; 20; 26.
- <sup>23</sup> OPCAT Art. 10.
- <sup>24</sup> OPCAT Art. 16.
- <sup>25</sup> OPCAT Art. 5(6).
- <sup>26</sup> See APT. "October 2016 elections to the Subcommittee on Prevention of Torture." July 2016.
- <sup>27</sup> CRPD Optional Protocol Art. 6.
- <sup>28</sup> CRPD Art. 34(10).
- <sup>29</sup> CRPD Art. 34(3).
- <sup>30</sup> SPT. Second Annual Report, UN Doc. CAT/C/42/2, 7 April 2009: para. 35.
- <sup>31</sup> SPT. "Guidelines on national preventive mechanisms." UN Doc. CAT/OP/12/5. 9 December 2010. Hereafter: "SPT NPM Guidelines."
- <sup>32</sup> SPT press release. "Ensure torture prevention body well-resourced and independent, UN experts urge Tunisia." 15 April 2016.
- <sup>33</sup> See The Phnom Penh Post. "UN to review detention sites." 10 December 2013.

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- <sup>34</sup> SPT. Report to the NPM on the visit made by the SPT to Ecuador. UN Doc. CAT/OP/ECU/2. 25 January 2013, para. 16.
- <sup>35</sup> SPT. Report on the visit made by the SPT to Armenia. UN Doc. CAT/OP/ARM/1. 22 May 2015, para. 28.
- <sup>36</sup> SPT. Report on the visit made by the SPT to Mexico. UN Doc. CAT/OP/ARM/1. 31 May 2010, para. 30.
- <sup>37</sup> Tom Pegram interview by Skype (22 April 2016) (Confidential).
- <sup>38</sup> SPT. Report to the NPM on the visit made by the SPT to Honduras. UN Doc. CAT/OP/HND/3. 25 January 2013, para. 10.
- <sup>39</sup> See Ninth annual report of the SPT. UN Doc. CAT/C/57/4. 22 March 2016, para. 17.
- <sup>40</sup> Malcolm Evans in interview.
- <sup>41</sup> SPT. Report on the visit of the SPT to Paraguay. UN Doc. CAT/OP/PRY/1. 7 June 2010, para. 52.
- <sup>42</sup> Obligations of States parties to the OPCAT, UN Doc. CAT/OP/24/1, 9 December 2014.
- <sup>43</sup> SPT press release, “Netherlands detention monitoring body needs more political support – UN experts.” 3 August 2015.
- <sup>44</sup> Interview with Ben Buckland via Skype, NHRI Advisor, Association for the Prevention of Torture (3 May 2016 15:30 GMT).
- <sup>45</sup> SPT NPM directory, available from <http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx> (accessed: 13 August 2016)
- <sup>46</sup> SPT. Report on the visit of the SPT to Paraguay. UN Doc. CAT/OP/PRY/1. 7 June 2010, para. 52.
- <sup>47</sup> SPT. Report on the visit of the SPT to Ukraine. UN Doc. CAT/OP/UKR/1. 16 March 2016, para. 14.
- <sup>48</sup> Interview with Eduardo Vega, Peruvian Human Rights Ombudsman, (Brussels, Belgium, 4 June 2015 14:00 GMT).
- <sup>49</sup> GANHRI Subcommittee on Accreditation: <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Pages/default.aspx> (accessed 13 August 2016).
- <sup>50</sup> Ninth annual report of the SPT. UN Doc. CAT/C/57/4. 22 March 2016, Annex III.
- <sup>51</sup> Malcolm Evans in interview.
- <sup>52</sup> Report on the visit of the SPT to Germany. UN Doc. CAT/OP/DEU/1. 16 December 2013, para. 23–24.
- <sup>53</sup> See SPT. “Compilation of SPT Advice in response to NPMs requests”, <http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIndex.aspx> (accessed 13 August 2016).
- <sup>54</sup> CRPD. “Draft Guidelines on the establishment of Independent Monitoring Frameworks and their participation in the work of the Committee.” 20 April 2016. Hereafter: “CRPD Draft Guidelines.”
- <sup>55</sup> See CRPD. Concluding observations on Ecuador. UN Doc. CRPD/C/ECU/CO/1, 27 October 2014, para. 54.
- <sup>56</sup> See CRPD. Concluding observations on Costa Rica. UN Doc. CRPD/C/CRI/CO/1, 12 May 2014, para. 65.
- <sup>57</sup> CRPD. Concluding observations on China. UN Doc. CRPD/C/CHN/CO/1, 15 October 2012, IV B(3).
- <sup>58</sup> CRPD. Concluding observations on Lithuania. UN Doc. CRPD/C/LTU/CO/1, 15 October 2012, para. 67.
- <sup>59</sup> Interview with Esteban Tromel via Skype, Senior Disability Specialist at the International Labour Organization (21 April 2016 14:00 GMT).
- <sup>60</sup> CRPD. Concluding observations on Austria. UN Doc. CRPD/C/AUT/CO/1. 30 September 2013, para. 52.
- <sup>61</sup> CRPD. Concluding observations on Serbia. UN Doc. CRPD/C/SRB/CO/1. 21 April 2016, para. 67.
- <sup>62</sup> CRPD. Draft Guidelines, para. 11.
- <sup>63</sup> CRPD concluding observations on state reports available from <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx> (accessed 13 August 2016).
- <sup>64</sup> See <http://www.disability-europe.net/dotcom> (accessed 18 July 2016)
- <sup>65</sup> Interview with Catalina Devandas via Skype, Special Rapporteur on the Rights of Persons with Disabilities (8 April 2016 10:00 GMT).
- <sup>66</sup> CRPD. Concluding Observations on Czech Republic, UN Doc. CRPD/C/CZE/CO/1. 15 May 2015, para. 62.
- <sup>67</sup> Report of the CRPD on its twelfth session (15 Sept-3 Oct 2014). UN Doc. CRPD/C/12/2. 5 November 2014, para. 16.
- <sup>68</sup> CRPD Draft Guidelines, para. 36.
- <sup>69</sup> Report of the CRPD on its twelfth session, Annex V, para. 4.
- <sup>70</sup> Malcolm Evans in interview.