Monitoring international human rights law from above or below? The role of non-governmental organisations in United Nations Human Rights State Reporting

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(LLB (Hons), MHumRights)

This thesis is presented for the degree of Doctor of Philosophy of
The University of Western Australia
Law School
2017
THESIS DECLARATION

I, Fiona McGaughey, certify that:

This thesis has been substantially accomplished during enrolment in the degree.

This thesis does not contain material which has been accepted for the award of any other degree or diploma in my name, in any university or other tertiary institution.

No part of this work will, in the future, be used in a submission in my name, for any other degree or diploma in any university or other tertiary institution without the prior approval of The University of Western Australia and where applicable, any partner institution responsible for the joint-award of this degree.

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The research involving human data reported in this thesis was assessed and approved by The University of Western Australia Human Research Ethics Committee. Approval #: RA/4/1/7183.

The author received an Australian Postgraduate Award and University of Western Australia top-up grant during some of the period of candidature and was in receipt of a bursary, awarded by Graduate Women (Western Australia).

This thesis contains only sole-authored work, some of which has been published and/or prepared for publication under sole authorship.

Signature:  
Date: 22nd August 2017
ABSTRACT

Non-governmental organisations (NGOs) have become important, although sometimes overlooked, actors in monitoring international human rights law. Although NGOs are not generally provided for in the hard law of human rights treaties, they use the United Nations (UN) human rights system to hold Governments to account. In particular, this thesis examines their role and influence in State reporting mechanisms, whereby States’ compliance is assessed on the basis of reports they submit to UN human rights bodies. These reports can be balanced with reports submitted by civil society, including NGOs, on the actual human rights situation on the ground.

Prior to 2008, the key State reporting mechanisms were those of UN human rights treaty bodies where independent experts sit on quasi-judicial bodies. Since 2008, these have been supplemented by the Human Rights Council’s key monitoring mechanism, the Universal Periodic Review (UPR), a more politicised, peer-review mechanism. Therefore, State reporting as a form of monitoring mechanism warrants a renewed focus, as does the NGO role in this altered landscape.

The thesis addresses the following research question: what is the role and influence of NGOs in monitoring international human rights law using UN State reporting mechanisms? This is underpinned by three sub-questions: How and why do NGOs engage with key stakeholders and each other in reporting to the well-established UN treaty body State reporting and the more recent UPR? Have NGOs been significant in influencing the recommendations from each of these State reporting mechanisms? What are the differences in their role and influence in the two mechanisms and what does this mean for the future?

These questions are considered in the thesis through a series of four publications. Firstly, the NGO role in UN human rights treaty body State reporting is analysed, using the example of the Committee on the Elimination of Racial Discrimination (CERD). Secondly, the NGO role in the UPR is assessed. Thirdly, a comparative analysis of the NGO role in the two State reporting mechanisms is provided. Finally, an explanation of how NGOs engage with the mechanisms and each other is offered, together with a discussion of why the NGO role exists in a State-centric system.
In light of the dearth of empirical research on this topic, a bespoke empirical methodology was used to examine both the international context and an Australian case study. It involved 26 semi-structured interviews at international and domestic level with key stakeholders, including UN, NGO and Government representatives. In the Australian case study, NGO influence was charted using Microsoft Excel to identify matches in language between NGO reports, and recommendations made by CERD and the UPR Working Group. In the case of CERD, the documentary analysis found a strong correlation between the NGO coalition report and the Committee's concluding observations. The UPR findings indicate that, again, an NGO coalition report was most influential on recommendations. However, in the UPR the causal link of NGO influence is less clear, and the summary of UN information report was more influential than NGO reports. This suggests that other UN human rights mechanisms, such as treaty bodies, complement the UPR and as such NGOs should continue to engage with both.

Overall, the NGO role in the UPR is more limited than the role in treaty bodies. Treaty bodies are more accessible, providing NGOs with more opportunities to have their voices heard and to influence recommendations. State representatives expressed a firm preference for the UPR and some predicted the demise of treaty bodies, a possibility requiring further research.

There has been little previous analysis of the heterogeneous nature of human rights NGOs. The thesis presents a functional taxonomy with seven categories of NGOs as follows: international facilitative, gatekeeper, imperialist, domestic self-sufficient, domestic dependent, Governmental Non-governmental Organisations (GONGOs) and NHRIs. It notes that although NHRIs are not NGOs, they perform a similar role to some domestic NGOs and suggests that this requires further analysis.

The thesis concludes that although NGOs have advanced their role in treaty body State reporting, they have a reduced role in the UPR. Nonetheless, they remain key actors and in their role as local to global intermediaries, NGOs play a pragmatic role in providing information and developing recommendations and contribute to global democratisation and governance.
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ACKNOWLEDGEMENTS

There are many people to whom I owe a debt of gratitude for their support over the past few years. I am grateful to the University of Western Australia (UWA) for supporting me during my PhD candidature, both as a student and as a staff member. In particular I would like to acknowledge the unwavering support of my principal supervisor, Adjunct Professor Holly Cullen, whose international law expertise, patience and good nature were all invaluable. Assistant Professor Sean Richmond made an important contribution to the design of the methodology before moving back to Canada, at which time Assistant Professor Philipp Kastner joined my supervision team and I am grateful to him for his interest in the project and his contributions. I am grateful to my current and former colleagues in the UWA Law School who supported my project, provided feedback and encouraged me to prioritise the thesis in a world of competing priorities - Dean, Associate Professor Natalie Skead, former Dean, Professor Erika Techera, Ms Ambelin Kwaymullina, Associate Professor Jani McCutcheon, Dr Tamara Tulich and others.

Other invaluable supports from UWA included the training and guidance from the excellent Graduate Research School, with particular thanks due to Dr Michael Azardias. Professor Richard Ingleby who provided entertaining and informative thesis writing workshops for the UWA Law School deserves particular acknowledgement. My PhD colleagues Ms Peta-Jane Hogg, Dr Dilyara Nigmatullina, Mr Michael Bennett, Ms Natalie Brown, Ms Emily Camins and others with whom I shared ideas, peer-review, encouragement and coffees were wonderful.

Financial support for my thesis through the three-year Leah Jane Cohen bursary from Graduate Women (Western Australia) enabled me to carry out interviews and observational studies in Geneva and enabled a much more rigorous empirical study than would otherwise have been possible. Government funding via an Australian Postgraduate Award (APA) and UWA top-up grant were also gratefully received.

I am indebted to those who facilitated my visits to Geneva and helped with access to interviewees both there and in Australia, particularly UWA’s Professor Stephen Smith, CERD Committee Chair Ms Anastasia Crickley and Australian Government representatives
in Canberra and Geneva. Thank you to all the NGOs who participated in interviews. Your work is so important in protecting and promoting human rights.

Finally, to my amazing husband, Conleth O’Loughlin, it really would not have been possible without your support and encouragement every step of the way. To my three children, Cahir, Daire and Máidhe, thank you for putting up with mum’s late nights in the office and for providing an important counter-balance to academic pursuits.
This thesis contains the following sole-authored work that has been prepared for publication.

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Location in thesis:
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Signature: [Redacted]

Date: 22nd August 2017
Chapter One: Introduction
1.1 Introduction

There has been a growing interest in non-state actors in international law, and in international human rights law, it has become clear that Non-Governmental Organisations (NGOs) play an important role. In a largely voluntary system, bereft of enforcement mechanisms, NGOs hold Governments to account on their human rights obligations – monitoring ‘from below’, often using mechanisms of the United Nations (UN) which monitors ‘from above’, as reflected in the title of this thesis. Whilst there is interest in the ‘naming and shaming’ role of NGOs, a key international legal mechanism frequently used by NGOs – that of State reporting – is less analysed. In State reporting mechanisms, States’ compliance with obligations is assessed on the basis of reports they submit to UN human rights bodies. NGOs and other civil society actors can also engage with these State reporting mechanisms by submitting their reports on the actual human rights situation on the ground. These can balance the State reports which have been found to be ‘descriptive, formalistic, legalistic and self-congratulatory’.

Up until 2008, the key State reporting mechanisms were those of UN human rights treaty bodies. In an interesting development since 2008, these existing State reporting mechanisms have been supplemented by the ‘cornerstone of the Human Rights Council’s institution building package’, the Universal Periodic Review (UPR). Whereas the nine core UN human rights treaties cover thematic areas such as civil and political rights, torture, or children’s

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1 See, eg, Math Noortmann, August Reinisch and Cedric Ryngaert (eds), *Non-State Actors in International Law* (Hart Publishing, 2015).
rights and are entered into by States voluntarily, the UPR applies to all 193 UN member States and covers all aspects of a State’s human rights obligations.

The introduction of an additional UN human rights State reporting mechanism, the UPR, means State reporting as a mechanism warrants further analysis as does the importance and nature of the NGO role. Although it has been claimed that NGOs play an essential role in treaty body State reporting, there has been little empirical evidence of this. Whilst there is some emerging literature on the NGO role in the UPR, the same claims of importance of the NGO role in the UPR have not yet been made, unlike their role in treaty bodies.

The establishment of the UPR led the author to consider the following research question: what is the role and influence of NGOs in monitoring international human rights law using UN State reporting mechanisms? A number of sub-questions underpin this, namely: a) How and why do NGOs engage with key stakeholders and each other in reporting to the well-established UN treaty body State reporting and the more recent UPR? b) Have NGOs been significant in influencing the recommendations from each of these State reporting mechanisms? c) What are the differences in their role and influence in the two mechanisms and what does this mean for the future?

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7 Human Rights Council, above n 5.

8 Forsythe, above n 2; Freeman, above n 2; Wiseberg, above n 2.
It is important to establish what is meant by ‘NGO’ in this thesis. The coining of the term ‘non-governmental organisations’ is most commonly linked to Article 71 of the UN Charter which mandated the UN Economic and Social Council to make ‘suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence’. Although the UN now more commonly uses the broader umbrella term ‘civil society’, this thesis focuses predominantly on NGOs. Despite being a commonly used term, there is a lack of consensus on the definition of NGO. This is not surprising given the heterogeneous nature of NGOs. The NGOs of interest to this thesis are NGOs that engage with UN human rights State reporting mechanisms and the definition of NGO used by the UN Department of Public Information provides a working definition: ‘...a non-profit, voluntary citizens’ group which is organized on a local, national or international level.... Some are organized around specific issues, such as human rights, the environment or health.’

1.2 Significance and originality of thesis
This thesis is significant and original as it is the first in-depth analysis of the NGO role in monitoring States’ implementation of their human rights obligations in both of the two key UN human rights State reporting mechanisms. As Chapter Two (Literature Review) outlines, the NGO role in treaty body State reporting has been the topic of some scholarship and there is also an emerging body of literature on the UPR, including consideration of the NGO role. Building on this, the key gaps which this thesis contributes to filling include the general lack of attention to the NGO role in international human rights law literature and where it is considered, a tendency to rely on insider perspectives. With its empirical methodology, this thesis begins to address the current dearth of empirical research, for example to support claims of the critical nature of the NGO role. The author developed a bespoke methodology, as described in Section 1.3. Empirical legal research methods in international law is a rapidly

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9 Charter of the United Nations, 4 October 1945, 1 UNTS XVI.
12 UN Department of Public Information, What is an NGO <https://outreach.un.org/ngorelations/content/about-us-0>
developing area, and one to which this thesis can make a contribution. Moreover, there has not been any previous study comparing the NGO role in the UN human rights treaty bodies with the NGO role in the UPR.

This work comes at a critical time, when the relatively recent UPR is becoming established as the first truly universal human rights State reporting mechanism. In addition to being significant internationally, the choice of an Australian case study as a lens through which to view the international system and NGOs’ role in it, will also contribute to Australian human rights practice and academic study.

The following Section, (1.3), details the methodology adopted for the research. This will be followed by an outline of the remainder of the thesis in Section 1.4.

1.3 Methodology

The following conclusion by Keith in her chapter in the *Oxford Handbook of Empirical Legal Research*, in which she synthesises and analyses empirical legal research on international human rights instruments, provides strong validation for the research questions and empirical methodology selected for this thesis:

As a whole the most promising empirical result is evidence of the role of non-governmental organizations in increasing participation in the human rights regime. Unfortunately, the current empirical literature does not provide an examination of the mechanisms through which these organizations work; clearly this is one of the most important directions for future work… The role of NGOs and INGOs [International NGOs] seems to offer a tremendous opportunity for future study, but researchers need to reach beyond simple counts of organizational membership to examine empirically the processes and contexts through which these organizations influence compliance.

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14 This is important since the UPR was introduced to run in parallel with treaty body State reporting, and to complement rather than duplicate those mechanisms. See, *Human Rights Council, UN GAOR, 60th Session, UN Doc A/RES/60/251 (3 April 2006)* para 5(e).

More generally, there is a common understanding that the research methodology should be
designed to answer the research question posed. In this thesis, the primary research
questions as outlined above, focus on exploring the role, networks and influence of NGOs in
UN treaty body reviews and the UPR, and on comparing the two. There is a well established
difficulty in determining the impact or influence of activities described broadly as
‘advocacy’. Although some authors conclude that there is no way to accurately measure
human rights impact in any multi-causal situation, the pragmatic approach taken by authors
in recent analyses of the influence of civil society organisations (CSOs) on the UPR is useful:

…it is not possible to prove causation i.e. whether states made these recommendations as
a result of the CSO suggested recommendations. However, examination of the extent to
which CSO concerns are reflected in state recommendations can at least demonstrate the
level to which CSO interests are correlated and thus represented, in the process.

The documentary analysis method is discussed further at Section 1.3.7 below. Bespoke
methods have been selected and developed as to suit the research questions. The design was
informed both by the established methodologies used by other researchers on related
projects, and by the gaps in existing research, such as the acknowledged need for more
empirical data on the NGO role in UN human rights mechanisms.

16 See, eg, Lisa Webley, ‘Qualitative Approaches to Empirical Legal Research’ in Peter Cane and
Herbert M. Kritzer (eds), The Oxford Handbook of Empirical Legal Research (Oxford University
17 Steven Teles and Mark Schmitt, ‘The Elusive Craft of Evaluating Advocacy’ (2011) 9 (3) Stanford
Social Innovation Review 38. See also Forsythe, above n 2, 200.
18 Laurie S. Wiseberg and Harry M. Scoble, ‘Recent Trends in the Expanding Universe of NGOs
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Shepherd Jr. (eds), Global Human Rights: Public Policies, Comparative Measures, and NGO
19 Edward McMahon et al, The Universal Periodic Review, Do Civil Society Organization –
20 Jasper Krommendijk, ‘The (Non) Implementation of Recommendations of the Committee on the
Elimination of Racial Discrimination in the Netherlands Explained’ (2012) 13(4) Perspectives on
European Politics and Society, 462; Lena J. Kruckenberg, The Unreal world of human rights: An
ethnography of the UN Committee on the Elimination of Racial Discrimination
(NomosVerlagsgesellschaft, 2012); McMahon et al, above n 19.
21 See, eg, Don Hubert, ‘Inferring Influence: Gauging the Impact of NGOs’, in Charlotte Ku and
Thomas G. Weiss (eds), Toward Understanding Global Governance: The International Law and
International Relations Toolbox, (ACUNS Reports and Papers 1998 No. 2) 27; Felice D. Gaer,
The socio-legal research methodology developed for the thesis research involved empirical, qualitative research methods with a component of quantitative data drawn from an Australian case study. Generally, in legal research there is a growing recognition of the potential of empirical methods. Ginsburg and Shaffer note that much empirical legal research is quantitative and stress the importance of qualitative research, particularly for exploring the mechanisms and key actors involved, critical for this thesis. Galligan sees the open curiosity which leads to empirical legal research as ‘buttressed by a concern for social justice’, again, resonating with the current research.

Webley identifies quantitative methods as associated with deductive reasoning, and qualitative methods with inductive reasoning. A quantitative approach is more likely to be based on hypotheses posed before data is collected, whereas inductive reasoning uncovers themes or patterns from the data in the course of the research. This mirrors the positivist-constructivist dichotomy. The current study is more qualitative in nature and adopts a constructivist approach. From an epistemological perspective, a constructivist approach assumes that reality is socially constructed – the researcher constructs knowledge from a variety of views, rather than discovering it. Adopting a constructivist approach is somewhat of a leap of faith for the researcher who does not know exactly what findings will emerge from the empirical data. In the subsequent chapters, there are several findings that emerged as a result of adopting the constructivist approach, including the development of the functional taxonomy (Chapter Six).

23 Ginsburg and Shaffer, above n 13, 755.
25 Webley, above n 16, 930.
26 Ibid.
27 Bill Gillham, Research Interview (Continuum International Publishing Group, 2000) 2-3; Webley, above n 16, 926, 930. Although Webley uses the term ‘interpretivism’, she equates this to constructivism.
Although traditional international legal scholarship has not employed empirical methods, there is increasing plurality of methodologies in the discipline.\textsuperscript{29} This lack of empirical research in the past may be partly explained by international legal researchers’ focus on doctrinal and normative concerns; \textit{assuming} rather than \textit{examining} the effectiveness of international law.\textsuperscript{30} McCrudden has identified ‘doctrinal legal analysis’, commonly used over the last few centuries, as a type of critical reasoning based on authoritative texts that takes an internal viewpoint.\textsuperscript{31} The arrival of empirical legal research, which came to prominence in the United States in the 1990s, was a significant departure from traditional legal research methods.\textsuperscript{32} Now, using both doctrinal and empirical methods is gradually becoming more common in legal research.\textsuperscript{33}

A significant branch of empirical legal research is that of socio-legal studies.\textsuperscript{34} Features of socio-legal studies include use of empirical investigation and moving beyond ‘law in books’ towards ‘law in action’ in society.\textsuperscript{35} As such, this thesis, involving empirical research and considering a role played by key actors in the international and domestic legal systems, fits within the realm of socio-legal research. In examining legal instruments, such as human rights treaties or Human Rights Council resolutions, and associated documents, the thesis also involves some more traditional doctrinal legal research.

Each of the selected methods used in research for this thesis will be discussed below.

\textbf{1.3.1 Semi-structured Interviews}

Semi-structured interviews carried out with key stakeholders were central to the qualitative data gathering in this thesis. Twenty-six semi-structured interviews were carried out in 2015 and 2016 with stakeholders relevant to the NGO role in UN human rights State reporting.

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{29} Ginsburg and Shaffer, above n 13, 754.
  \item \textsuperscript{30} Ibid, 754-755.
  \item \textsuperscript{31} Christopher McCrudden, ‘Legal research and the social sciences’ (2006) 122 \textit{Law Quarterly Review} 632. For a discussion of legal methodology in an international law context, and a discussion of the boundaries between this and sociological research see: Anne Orford, ‘On International Legal Method’ (2013) 1 \textit{London Review of International Law} 166.
  \item \textsuperscript{32} Peter Cane and Herbert M. Kritzer (eds), \textit{The Oxford Handbook of Empirical Legal Research} (Oxford University Press, 2010) 1.
  \item \textsuperscript{33} McCrudden, above n 29, 641.
  \item \textsuperscript{34} Ibid; Cane and Kritzer (eds), above n 32.
  \item \textsuperscript{35} McCrudden, above n 29, 638.
\end{itemize}
\end{footnotesize}
Table 1 presents the full list of interviewees. Seventeen interviewees were international interviewees based in Geneva, including staff in the UN Office of the High Commissioner for Human Rights (OHCHR), State representatives, treaty body independent experts and international NGOs. Eight interviews were conducted with Australian interviewees including representatives from Government, domestic NGOs and the National Human Rights Institution (NHRI). In Table 1, some interviewees are not identified by name or specific organisation or department due to ethics requirements, discussed further in Section 1.3.3.

**Table 1: List of Interviewees**

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<th>Organisation Name and Type</th>
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<td>Mr. Phil Lynch Director</td>
<td>International</td>
<td>28/04/15 Geneva</td>
</tr>
<tr>
<td>UPR-Info International NGO</td>
<td>Mr. Roland Chauville Director</td>
<td>International</td>
<td>28/04/15 Geneva</td>
</tr>
<tr>
<td>International Movement Against All Forms of Discrimination and Racism (IMADR) International NGO</td>
<td>Mr Taisuke Komatsu UN Advocacy Coordinator</td>
<td>International</td>
<td>29/04/15 Geneva</td>
</tr>
<tr>
<td>Minority Rights Group International NGO</td>
<td>Mr Glenn Payot UN Advocacy Consultant</td>
<td>International</td>
<td>29/04/15 Geneva</td>
</tr>
<tr>
<td>UN CERD Committee member 1</td>
<td>Anonymous</td>
<td>International</td>
<td>27/04/15 Geneva</td>
</tr>
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<td>Anonymous</td>
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<td>28/04/15 Geneva</td>
</tr>
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<td>Organisation Name and Type</td>
<td>Name and Position</td>
<td>Predominantly International / Australian Case Study?</td>
<td>Interview Date and Location</td>
</tr>
<tr>
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<td>Anonymous</td>
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<td>30/04/15 Geneva</td>
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<td>Anonymous</td>
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<td>Anonymous</td>
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<td>29/04/15 Geneva</td>
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<td>Anonymous</td>
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<td>30/04/15 Geneva</td>
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<td>Anonymous</td>
<td>Australian case study</td>
<td>29/04/15 Geneva</td>
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<td>14 Domestic NGO</td>
<td>Anonymous</td>
<td>Australian case study</td>
<td>10/09/15 Telephone interview</td>
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<td>15 Human Rights Law Centre, Domestic NGO</td>
<td>Ms Emily Howie Director of Legal Advocacy</td>
<td>Australian case study</td>
<td>23/09/15 Telephone interview</td>
</tr>
<tr>
<td>16 National Native Title Council, Domestic NGO</td>
<td>Ms Carolyn Betts Senior Administrative Officer</td>
<td>Australian case study</td>
<td>5/10/15 Cannington, Western Australia</td>
</tr>
<tr>
<td>Organisation Name and Type</td>
<td>Name and Position</td>
<td>Predominantly International / Australian Case Study?</td>
<td>Interview Date and Location</td>
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</tr>
<tr>
<td>20 The Centre for Civil and Political Rights (CCPR Centre), International NGO</td>
<td>Mr Patrick Mutzenberg Director</td>
<td>International</td>
<td>12/11/15 Geneva</td>
</tr>
<tr>
<td>21 Edmund Rice International, International NGO</td>
<td>Mr Brian Bond Executive Director</td>
<td>International</td>
<td>17/11/15 Geneva</td>
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<td>22 Australian Government representative Canberra 1 &amp; 2</td>
<td>Anonymous</td>
<td>Australian case study</td>
<td>7/1/16 Telephone interview</td>
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<tr>
<td>23 Australian Human Rights Commission, National Human Rights Institution</td>
<td>Professor Gillian Triggs President</td>
<td>Australian case study</td>
<td>13/5/16 Perth</td>
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<td>25 Australian Government representative Canberra 3</td>
<td>Anonymous</td>
<td>Australian case study</td>
<td>20/05/16 Telephone interview</td>
</tr>
<tr>
<td>26 National Association of Community Legal Centres, Domestic NGO</td>
<td>Ms Amanda Alford Director, Policy and Advocacy</td>
<td>Australian case study</td>
<td>26/05/16 Telephone interview</td>
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</tbody>
</table>

The sections below describe the sampling approach, research ethics, types of questions and responses, and the transcribing and coding of interview data.
1.3.2 Sampling
Interviewees were primarily selected using purposeful sampling,\textsuperscript{36} due to their direct participation in, or experience working with, the selected UN State reporting mechanisms. Snowball sampling was also used when interviewees nominated other potential interviewees.\textsuperscript{37} For example, interviewees in Geneva recommended, and helped to arrange, interviews with their colleagues in the OHCHR or with relevant NGOs such as the CCPR Centre. Unlike quantitative research, qualitative research of this nature is concerned with developing rich understanding through interviews, rather than with having a representative sample.\textsuperscript{38}

At an international level, staff within the OHCHR were identified as relevant stakeholders as they provide secretariat functions to the State reporting mechanisms and so understand the ‘behind the scenes’ machinations. In some roles, they also have a good overview of the two State reporting mechanisms and the interaction between them, or lack thereof. Three senior staff members in the Geneva office at Palais Wilson with relevant experience were interviewed during the field trip in April 2015. This did not include the UPR Secretariat, however, as they did not respond to the author’s requests for interview. Also key to the research were members of the UN CERD Committee. The Committee has 18 members and from these, interviewees were selected to represent geographical origin, gender, and length of membership of the Committee. Committee members’ availability in their heavy schedule and having English as a working language were also factors in identifying interviewees and advice was sought from the CERD Secretariat in this regard.\textsuperscript{39} As a result, five Committee members were interviewed during the field trip in April 2015. State representatives on the Human Rights Council were identified as relevant to the UPR. In addition to staff at the Australian Mission in Geneva, representatives from three other States were selected for interview following consultation with the Australian Mission and having regard to other factors.\textsuperscript{40} Two State representatives agreed to participate but the third was unavailable.

\textsuperscript{36} Uwe Flick, \textit{Designing Qualitative Research} (Sage Publications, 2007) 27.
\textsuperscript{38} Zina O’Leary, \textit{The Essential guide to Doing your Research Project} (Sage, 2\textsuperscript{nd} ed, 2014) 186; Webley, above n 16.
\textsuperscript{39} Via email contact and telephone calls.
\textsuperscript{40} These factors are not discussed here due to the ethical requirements of the interviews regarding anonymity.
For the Australian case study, NGOs that had participated in the two mechanisms being examined – the last CERD review in 2010 and the last UPR review in 2015 – were specifically targeted for interview, including NGOs leading the coalition in each case. Professor Gillian Triggs, President of the NHRI, the Australian Human Rights Commission, was also selected for interview as the Commission had engaged with both of the selected mechanisms in the case study. Relevant Australian Government departments were targeted for interview and agreed to participate, as did a staff member in the Australian Mission in Geneva.

The preferred mode of conducting the interviews was face-to-face. Roller and Lavrakas have found that the face-to-face mode has a number of advantages, including its ‘naturalness’, and has been found to allow for an atmosphere conducive to dialogue and trust-building, resulting in longer interviews with more input from interviewees. Six out of the 26 interviews were conducted by telephone, a well-recognised data collection method, particularly for logistical, geographical, and cost considerations. In this author’s experience, contrary to Roller and Lavrakas’ research, telephone interviews were not always necessarily shorter. The busy schedule of UN staff, Committee members and State representatives in Geneva, who were interviewed face-to-face, was more likely to reduce the interview time. Furthermore, as the author had previously met a few of the interviewees (both face-to-face and telephone interviewees), the ‘trust-building’ factor was less problematic.

1.3.3 Ethics Approval

Human Research Ethics Approval (RA/4/1/7183) for the research was sought and granted by the University of Western Australia in November 2014. In the ethics application, identified risks to participants were minimal but included the risk, or perceived risk for staff employed by the Government or the UN, that they could make critical statements about their employer that could be embarrassing and / or potentially detrimental to their career. Also, an identified risk or perceived risk for staff employed by NGOs in Australia was that if they made critical

42 Margaret Glogowska, Pat Young and Lesley Lockyer, ‘Propriety, process and purpose: considerations of the use of the telephone interview method in an educational research study’ (2011) 621(1) *Higher Education* 17.
43 Roller and Lavrakas, above n 41, 61-62.
comments about the Government in the course of their interview, it might bring their 
organisation into disrepute and / or cause Government funding restrictions as a result of such 
comments. A mitigation to these risks was to offer interviewees the option of anonymity, as 
discussed below.

Also in adherence to the conditions of ethics approval, interview participants were provided 
with a Participant Information Form outlining the objectives and aims of the research and any 
potential benefits and risks to participants. If they chose to participate, interviewees were 
given a Participant Consent Form that they signed to confirm their willingness to participate, 
their rights to withdraw, and the option to remain anonymous if they wished. Where they 
chose to remain anonymous, a descriptor was agreed with the interviewee, their preferences 
in this regard are reflected in Table 1 above. Government representatives, staff at the 
OHCHR, and CERD Committee members all opted for anonymity, as summarised in Table 1 
above. All other interviewees consented to attribution in the thesis and associated 
publications with only one exception – a domestic NGO.

Again, in compliance with the ethics approval, interviewees were asked to give their 
informed consent to their interviews being recorded. If they did not wish to be recorded, or if 
recording equipment was prohibited (as was the case in some Government interviews) note-
taking was used instead. Interviewees were sent a copy of their interview transcript to check 
for accuracy. This was useful where recordings were not made, where English was not the 
interviewee’s first language, or where there was background noise during the interview, as it 
mitigated against the risk of misunderstandings. Very few interviewees requested any 
changes to their transcript. One, whose first language was not English, chose to correct some 
minor grammatical errors and asked to view all direct quotes prior to publication. These 
wishes were complied with.

1.3.4 Types of Interview Questions and Responses
When consent was given and the interviews proceeded, an interview template was prepared 
for each interviewee group – for example, CERD Committee and OHCHR staff, international 
NGOs, State representatives, domestic NGOs, Australian Government, and so forth. As 
semi-structured, rather than structured, interviews, the template served as a prompt for the
interviewer but each interview took its own direction, broadly within the scope of the research.

The literature and theories described in Chapter Two (Literature Review) helped inform the interview questions and also helped with theorising the responses, following Gillham: ‘The relationship between beliefs, opinions, knowledge and actual behaviour is not a straightforward one. What people say in an interview is not the whole picture; adequate research and, in particular, adequate theorizing, needs to take account of that.’

For example, State-centric theories ensured that government interviewees were selected for interview, even though the focus of the thesis is on NGOs, and that interviewees were asked questions about the relationship and tensions between governments and NGOs. As discussed further in Chapter Two, a number of key authors and theories influenced the design of the interview template. For example, transnational theories meant that both international and domestic NGO interviewees were selected, and the relationships between these actors were discussed. Following Koh, questions about ‘enforcement’ (or ‘follow-up’ in the case of these State reporting mechanisms) were also asked. ‘Glocalisation’ theories informed interview questions on how domestic NGOs engage with both international actors and institutions, and their local constituents.

The types of questions interviewees were asked were two-fold; those that contributed to the knowledge base on the UN mechanisms and NGO role, and those that elicited the interviewees’ perceptions of these. Warren proposes that constructivist qualitative interviewers generally see interviewees as meaning-makers, as opposed to survey interviewers who see interviewees more as information providers. Although

44 Gillham, above n 27, 94.
47 Sally Engle Merry, Human Rights and Gender Violence: Translating International Law into Local Justice (University of Chicago Press, 2006); Beth Simmons, Mobilizing for Human Rights (Cambridge University Press, 2009).
48 Carol A. B. Warren, ‘Qualitative Interviewing’ in Jaber F. Gubrium and James A. Holstein (eds),
predominantly constructivist qualitative in nature, there were also elements of straightforward information garnering in the current study. As many interviewees had significant expertise in the international human rights legal system, their factual information was also important in understanding the role of NGOs. For example, some CERD Committee members were asked questions similar to the following at some point in their interviews:

1. How does the Committee decide whether to take an NGO’s written or verbal input on board? How does that decision-making take place?
2. Should the NGO role be expanded or formalised?

Question 1 sometimes elicited responses about the practical workings of the Committee, for example by focusing on the role of the Committee’s Country Rapporteur. This is an observable reality of how the system works but is often overlooked in the literature and UN and NGO documents and guidelines. However, Question 1 also elicited responses that may have been more subjective or ‘meaning making’; for example ‘we use our expertise’ or ‘it’s a matter of prioritising’. This moves away from provision of factual information in some cases and is ontologically more similar to the responses to Question 2, which tended to be more based on perception and opinion.

Perceptions and opinions in responses are more commonly analysed and problematised in the literature – the ‘how can we know if this is true?’ type of question. Constructivist qualitative interviewers would argue that this misunderstands the purpose of the interview, which is to derive interpretations, not facts or laws.49 Warren’s ‘meaning making’ perception of interviewees in this type of interview is particularly apt in this thesis if we draw on Koh’s transnational legal process theory.50 As described further in the subsequent Chapter, Koh theorises a dynamic process by which public and private actors (including States, international organisations and NGOs) interact in public and private, domestic and international fora to make, interpret, enforce and internalise rules of international law.51 As such, the NGO, Government and UN interviewees in this study were not merely ‘meaning makers’ but also international human rights law makers, interpreters, enforcers and

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49 Ibid.
50 Koh, above n 45, 181-208.
51 Ibid,183-184.
internalisers. Therefore, they contributed to both building the knowledge base and giving their perceptions.

1.3.5 Transcribing, Coding and Analysis of Interview Data
Having conducted the interviews, the author transcribed, coded and analysed the interview data. Once interviewees had confirmed the content of the transcript, the files were uploaded to the NVivo qualitative analysis software that was selected as suitable for coding and analysis.\textsuperscript{52} Coding the interview data involved identifying themes. Themes in the context of analysing qualitative interview data means ‘an implicit topic that organizes a group of repeating ideas’.\textsuperscript{53} In other words, the researcher looks for patterns. Coding is an iterative process and transcripts were revisited several times before coding was completed. Several themes can overlap in one piece of text, requiring multiple codes. Initially the author coded the more obvious themes such as ‘NGO submissions to UN bodies’, ‘NGO oral presentations to UN bodies’, ‘Government – NGO tensions’ and so forth. However, using the constructivist approach, some themes emerged that the author had not anticipated.

One example of this was the varying functions and relationships between NGOs, not adequately explored in the existing literature, including the concept of what the author has termed the ‘Gatekeeper NGO’. This is discussed in Chapter Six where the functional taxonomy of NGOs is presented. Other themes emerged that the author had anticipated but had decided to exclude from the scope of the thesis as not integral to the research questions and for conceptual clarity. An example of this was the ubiquitous nature of interviewee comments about the role of NHRI. Therefore, although the thesis is focused on the role of NGOs and not civil society more broadly, references are made in the subsequent chapters to NHRI and to their relationships with NGOs. Of particular note is their inclusion in the NGO functional taxonomy in Chapter Six.

As these examples demonstrate, during the iterative process of coding, the researcher necessarily begins to engage in analysis or interpretation of the data and themes (codes) and

\textsuperscript{52} See, eg, Alan Bryman, Social research methods (Oxford University Press, 3rd ed, 2008) Ch 25 ‘Computer Assisted Qualitative Analysis: Using NVivo’ 598. The author received training in using NVivo, organised by the University of Western Australia’s Graduate Research School.

\textsuperscript{53} Carl Auerbach and Louise B. Silverstein, Qualitative Data: An Introduction to Coding and Analysis (New York University Press, 2003) 38.
in theorising. The broad themes emerging from the analysis formed the Chapters of the thesis – the NGO role in CERD (Chapter Three), the NGO role in the UPR (Chapter Four), a comparative analysis of these two (Chapter Five), and the ‘how and why’ chapter (Chapter Six). It also contributed to the development of sections within the Chapters. However, precisely how to use interview data in writing can be a challenge for researchers. Interview transcripts, once codified and analysed, still need to be converted to a coherent narrative. Researchers need to be able to summarise themes from the interview data, but also to give a sense of what interviewees actually said, in their own words. As Gillham notes, ‘The simple truth is that none of us speak like a tightly edited written text: the effect would be inhuman if we did.’

In writing up the interview data for publication as part of this thesis, the author chose to include both summary themes and analysis from the interviews, but also to give voice to the interviewees by relying quite heavily on quotations at times. Gillham refers to this as ‘letting the interviewees speak for themselves’. Findings from the interviews themselves are discussed in subsequent chapters. Each individual chapter draws on distinct subsets of the interview data. For example, Chapter Three relates to the NGO role in treaty body State reporting and as such draws heavily on interview data from the UN CERD Committee members interviewed and the international and domestic NGOs working closely with CERD. Chapter Four then moves on to an analysis of the NGO role in the UPR, drawing on interview data from State representatives on the Human Rights Council and the lead international NGO, UPR-Info. Some interviewees spoke about both treaty bodies and the UPR and so relevant aspects of their interview data have been used in various chapters.

1.3.6 The Case Study
Before discussing the choice of Australia and CERD, it is important to first explain the choice of case study as a methodology.

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54 Gillham, above n 27, 73.
55 Ibid 60.
56 Gillham, above n 27, 74.
Case Study as a Methodology

Firstly, as with all of the selected methodologies, the case study has been chosen in order to provide a robust response to the research questions. Case studies have been identified as a useful method for a number of reasons, including the examination of causal mechanisms and modelling and assessing complex causal relations. In particular, George and Bennett recommend process tracing in case studies to map out complex interactions and track causality. The current thesis necessarily engages with complex causal relations, for example in determining whether recommendations in UN reports can be traced to NGO influence, or whether there are other causal links. Chapter Four (UPR), discusses the importance of analysing not just ‘CSO’ influence but whether NHRIs or NGOs could have been sources of information, concluding in fact that the key influence was the UN compilation of information report. This thesis does not purport to use George and Bennett’s process tracing as a distinct method per se, but it was informative in developing the current methodology; in particular, using documentary analysis to trace the influence of NGO reports through two UN human rights mechanisms.

Secondly, as the literature review in Chapter Two will discuss, one gap in the literature is the paucity of empirical data to support the aggrandisement of NGOs which is reflected in the work of authors such as Forsythe, Freeman and Wiseberg. The case study is useful to test the accuracy of such claims by tracing NGO influence through two UN human rights mechanisms. Yin argues that case studies are useful in exactly this context – namely, when the researcher wishes to test a hypothesis that has been based on a broadly accepted theory but when the theoretical underpinning of the hypothesis is not the subject of the enquiry. Case studies are also compatible with the constructivist methodology used in this study as in the case study approach, findings ‘emerge as the inquiry progresses’.

Case studies as a methodology do have limitations, including that due to the level of detail, it may be prohibitively time consuming to undertake case studies for a large number of

58 Ibid.
59 Forsythe, above n 2; Freeman, above n 2; Wiseberg, above n 2.
situations or events.\textsuperscript{62} In this thesis, only one State is selected for a case study, although two UN human rights mechanisms will be analysed. Favouring one or more case studies varies by academic discipline, with sociologists for example favouring multiple, and anthropologists favouring a single case study.\textsuperscript{63} As legal research has traditionally been doctrinal and has not often employed empirical methods,\textsuperscript{64} there is no accepted standard for the selection of, or number of, case studies in legal research. A comparative analysis of two or more States could have contributed to more generalisable findings, but focusing on one selected State, Australia, allowed for a more in-depth examination of the NGO role in the two selected UN human rights mechanisms. In particular, it allowed for comprehensive documentary analysis of all of the key inputs and outputs from both State reporting mechanisms.

Another limitation of case studies is the risk of ‘selection bias’.\textsuperscript{65} This is arguably less of an issue here as only one case study was selected as an in-depth study, which is not necessarily assumed to have wholly generalisable results in the way that a selected number of case studies might be assumed to have. The lack of generalisable findings can be a limitation also; however, case-study research is designed to focus in detail on a given situation rather than to provide findings that are generalisable to other situations.\textsuperscript{66} It has even been argued that ‘… basing generalisations on case studies is hazardous.’\textsuperscript{67} However, it may be possible to reach general conclusions, depending on the selected case,\textsuperscript{68} and for the purposes of this study, some features of NGO engagement with the UN may be common across the Western European and Other Groups (WEOG) States.\textsuperscript{69} These States are seen as geographically

\textsuperscript{62} Webley, above n 16.
\textsuperscript{63} Ibid.
\textsuperscript{65} George and Bennett, above n 57, 22.
\textsuperscript{66} Webley, above n 16.
\textsuperscript{68} Yin, above n 60.
\textsuperscript{69} Current members of the UN’s WEOG regional grouping are: Andorra, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Israel, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States of America. United Nations Department for General Assembly and Conference Management, United Nations Regional Groups of Member States.\textless http://www.un.org/depts/DGACM/RegionalGroups.shtml\textgreater
diverse but more homogenous in terms of culture, political approach and economic development.\textsuperscript{70}

**Choice of Australia for Case study**

As the following comments made in 2000 by Alexander Downer, then Foreign Minister, testify, Australia has had a tumultuous relationship with the UN: ‘… if a United Nations committee wants to play domestic politics here in Australia, then it will end up with a bloody nose’.\textsuperscript{71} This relationship spans from Dr Herbert Vere Evatt’s instrumental role in the founding of the UN,\textsuperscript{72} to recent rejections of the authority of UN human rights bodies.\textsuperscript{73} Australia has at times had quite an antagonistic relationship with UN treaty bodies, in particular Australia’s review by CERD in 2000.\textsuperscript{74} However, Australia has been more disposed towards positive engagement with the UPR and is seeking a seat on the Human Rights Council in 2018. The Australia – UN relationship will be described briefly in Chapters Three, Four and Five. This relationship is one of the reasons why Australia makes an interesting choice of case study.

Another reason for selecting Australia is that NGO engagement with the UN on human rights issues is particularly important for States such as Australia that are not part of a regional human rights framework. This is compounded by the fact that Australia is the only Western


\textsuperscript{72} David Lee and Christopher Waters (eds), *Evatt to Evans: The Labour Tradition in Australian Foreign Policy* (Allen and Unwin Australia Pty Ltd, 1997) 13.

\textsuperscript{73} In relation to ignoring views of UN treaty bodies in petitions see, eg, Fiona McGAughey, Tamara Tulich and Harry Blagg, ‘UN Decision on Marlon Noble case - imprisonment of an Aboriginal man with intellectual disability found unfit to stand trial in Western Australia’ (2017) 42(1) *Alternative Law Journal* 67. In relation to resisting critique from the UN Special Rapporteur on Torture and expressing fatigue with UN criticism, see, eg, Fiona McGaughey and Mary Anne Kenny, ‘Lashing out at the UN is not the act of a good international citizen’ *The Conversation* (10 March 2015) <https://theconversation.com/lashing-out-at-the-un-is-not-the-act-of-a-good-international-citizen-38587>.

\textsuperscript{74} Spencer Zifcak’s 2003 book narrates Philip Ruddock, the then Minister for Immigration and Multicultural Affairs’ controversial engagement with the CERD Committee in 2000. Spencer Zifcak, *Mr Ruddock Goes to Geneva* (University of New South Wales Press, 2003).
democracy lacking a constitutional or statutory Bill of Rights. As a result, the role of the UN processes in advancing human rights issues in Australia is unusually significant, thus warranting examination. In terms of analysing the NGO role, Australia is a suitable selection as it has an informed human rights NGO sector with strong internal networks, although stymied somewhat by funding shortages,\textsuperscript{75} and recurrent gagging clauses in funding.\textsuperscript{76}

Set within the international context, the Australian case study is an important component of the thesis and features predominantly in Chapters Three (on CERD) and Four (on the UPR). The case study involved a comparative analysis of NGO engagement with both selected UN human rights mechanisms – Australia’s last review by the UN CERD Committee in 2010 – and NGO engagement with Australia’s last UPR in 2015. The case study comprises doctrinal legal research and eight semi-structured interviews with Australian stakeholders. In addition, the documentary analysis, described in Section 1.3.7, is a distinct feature of the case study.

**Choice of UN CERD for Case study**
The two key UN human rights State reporting mechanisms being analysed and compared were the UPR and the State reporting of treaty bodies. As there are nine core treaty bodies, to carry out a detailed documentary analysis and interviews, it was necessary to select one. The UN Committee on the Elimination of Racial Discrimination was selected. It is an often overlooked fact that the ICERD was actually adopted and entered into force before either the ICCPR or the ICESCR.\textsuperscript{77} ICERD was adopted and opened for signature and ratification by General Assembly in 1965 and entered into force in January 1969.\textsuperscript{78} Therefore ICERD is the longest standing of all the UN human rights treaties and as such, ICERD and the CERD Committee led the way for the drafting and operation of future human rights treaties. Of particular interest here is the fact that the CERD Committee was the testing ground for NGO involvement in treaty body reporting. States and some Committee members were initially very resistant to the NGO role, and in 1972 the Chair of the Committee concluded ‘it appears… that the Committee would continue the practice it had followed to date, allowing

\textsuperscript{75} Simon Rice and Scott Calnan, *Sustainable Advocacy, Capabilities and attitudes of Australian human rights NGOs* (University of New South Wales - Australian Human Rights Centre, 2007).

\textsuperscript{76} Refer to Chapter Two: Literature Review Section 2.8 Australian NGOs, for discussion of this issue.

\textsuperscript{77} ICCPR, above n 6; ICESCR, above n 6.

\textsuperscript{78} ICERD, above n 6.
members to use any information they might have as experts.’ In light of continuing resistance, in 1974 the UN Office of Legal Affairs advised that ICERD did not specify which sources the Committee would use, leaving it open for the Committee to use unofficial material from NGOs. This paved the way for NGO reporting, and subsequently briefings, in all the other UN human rights treaty bodies as they subsequently became operational. These developments are discussed in Chapter Three.

ICERD was also selected for this research as it is one of the most commonly ratified of the human rights treaties, currently the third most commonly ratified of the nine core UN human rights treaties with 177 States parties. Only the CRoC and the CEDAW have more States parties at 196 and 189 respectively. By comparison, the ICCPR has 168 States parties and ICESCR 164.

It is important to consider whether findings relating to CERD are generalisable to other treaty bodies. It is argued here that there may be some broader transference due to similarities in the Committees’ *modus operandi*. Although each has its own rules of procedure, there are commonalities in how the Committees work with NGOs. With some minor variations, such as the role for NGOs in article 45 (a) of the CRoC, all Committees engage with NGOs in quite similar ways. The Chairs of the Committees co-operate with each other, meeting annually, and the UN is working towards more simplified reporting with common working methods among the Committees. Therefore, there is increasing harmonisation of working methods between the UN human rights treaty bodies and as such, an analysis of NGOs and the CERD Committee may also have broader relevance to other treaty bodies.

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79 Gaer, above n 21, 343.
80 Ibid 342.
82 Ibid.
83 CRoC, above n 6.
1.3.7 Documentary Analysis

The documentary analysis method aims to identify NGO recommendations reflected in subsequent UN documents and as such is an example of intertextuality, where texts refer to other texts based on principles of sequence and hierarchy.\(^{85}\)

Documents do not construct systems or domains of documentary reality as individual, separate activities. Documents refer – however tangentially – to other realities and domains. They also refer to other documents…. The analysis of documentary reality must, therefore, look beyond separate texts and ask how they are related.\(^{86}\)

Documentary analysis is a distinct method used for the Australian case study. The analysis of documents is used in many disciplines in various ways. In this thesis, documentary analysis means an examination of the contents of several types of reports by NGOs, NHRI, Government and UN bodies, as summarised in Table 2. In particular, NGO recommendations were categorised and themed. As described below, these were then traced through each mechanism to examine firstly whether they were taken on board by the UN body in question, and to what extent. Documentary analysis was selected as a method that could triangulate the qualitative research in the thesis and would lend itself to answering the research question.

The design of this methodology was key to answering one of the research sub-questions, namely: ‘b) Have NGOs been significant in influencing the recommendations from each of these State reporting mechanisms?’ Examining the influence of NGO activities described broadly as advocacy has been well established as a difficult feat.\(^{87}\) Therefore, a methodology was developed which could measure one clear indicator of influence – evidence of NGO recommendations in the relevant UN body’s recommendations. The outcomes NGOs seek in using these mechanisms are two-fold. Firstly, as an immediate outcome, they seek to influence the UN human rights body in question and see their issues and recommendations reflected in the recommendations made by the UN body. Secondly, there is the outcome of implementation of said recommendations by the Government. This may also happen

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\(^{86}\) Ibid, 86.

\(^{87}\) Teles and Schmitt, above n 17; Forsythe, above n 2, 200.
immediately, but more commonly it is a medium or long-term outcome. As such, this is more difficult to assess and is outside of the scope of this thesis, but worthy of future research.

Webley has argued that documentary analysis can provide rich data, but despite this, documentary sources, other than primary legal sources such as cases and statutes, are under-utilised in empirical legal research. At least one other researcher has used a type of documentary analysis in a study on UN treaty bodies – Krommendijk’s examination of the lack of implementation of CERD Committee recommendations in the Netherlands was primarily based on a type of documentary analysis, supplemented with several interviews. McMahon et al’s study of the UPR also involved a type of documentary analysis. However, unlike McMahon et al’s analysis of the UPR, this study does not ask whether CSOs’ recommendations were reflected in recommendations made by States, but rather inverts this approach and asks what the possible sources of State recommendations could be – including the UN compilation report. This is important as the case study found significant overlap between UN recommendations and NGO recommendations, questioning some of the previous assumptions about possible NGO influence. Also, as this study is particularly seeking to ascertain NGO influence, NGO content from the stakeholder summary report was captured separately from NHRI content. This differs from the approach taken by other authors who were more interested in the overall CSO influence and not in isolating the specific influence of NGOs.

There have been criticisms of documentary analysis – from a positivist’s perspective, that it is not sufficiently scientific; for others, the documents do not represent reality but merely a source of meanings. Such criticisms are not seen as valid for this thesis, which purports to undertake a very narrow form of documentary analysis. It does not rely on the written

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88 Webley, above n 16.
89 Ibid. There have been some effective international law studies drawing on documentary sources, for example Orford’s use of UN archive material: Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge, 2011).
90 Krommendijk, above n 14.
91 McMahon et al, above n 19.
92 Ibid.
93 For additional information on these and other criticisms of documentary analysis, see Webley, above n 16.
information provided in the documents per se, or derive ‘knowledge’ from the data or opinions contained therein; rather, it uses the documents as a way of tracking NGO issues and recommendations through UN human rights mechanisms. Ultimately, the subject matter content of the specific issues and recommendations is not the focus of the documentary analysis; it is whether the content in the NGO report is reproduced in the UN body report that is of interest.

The analysis was carried out in Microsoft Excel, starting with simple binary (yes / no) data in a worksheet; namely - is there a match? This was then extended to reflect level of match, potential sources, and other factors, such as whether the Government accepted the recommendation (in the case of the UPR).

Documentary analysis was carried out for CERD (Chapter Three) and the UPR (Chapter Four). The recommendations made by the relevant UN body were input in a spreadsheet. For CERD, these were compared with recommendations and issues in NGO reports. For the UPR, they were compared with the stakeholder summary report and the compilation of UN information report. To allow for comparison, where the same issue or recommendation featured, it was input against the UN body recommendation. Matches were either considered to be general or specific – specific matches being those that had very similar or identical language. Where very similar recommendations, or sometimes identical language, appeared in a UN body recommendation and any of the other sources, these were highlighted in the spreadsheet.94 As an example, each of the 290 recommendations in Australia’s 2015 UPR had a Microsoft Excel row such as the one below. Note, not all columns are represented here due to page width. Green font is used to highlight text that matches closely.

Figure 1: Sample Microsoft Excel Row - UPR

<table>
<thead>
<tr>
<th>No.</th>
<th>UPR Recommendation</th>
<th>Category</th>
<th>Accepted?</th>
<th>Close match with UN Summary?</th>
<th>From Stakeholder Summary report - NGO section?</th>
<th>Close match with original AHRC submission?</th>
</tr>
</thead>
<tbody>
<tr>
<td>136.65</td>
<td>Develop in partnership with Aboriginal and Torres Strait Islander peoples a National Strategy to give effect to the UN Declaration on the Rights of Indigenous Peoples, and to facilitate the constitutional recognition of Aboriginal Australians (Estonia)</td>
<td>UNDRP, national strategy, Constitutional recognition</td>
<td>Notes</td>
<td>Yes - part 1 info, AHRC submission ‘national strategy for UNDRP &amp; review existing policies: A4’</td>
<td>Yes, part J51 submission (50)</td>
<td>Yes, part 1 info, develop in partnership with Aboriginal and Torres Strait Islander peoples, a National Strategy to give effect to the Declaration.</td>
</tr>
</tbody>
</table>

94 McMahon et al, above n 19, had used a ‘no match, general match, specific match’ methodology in their study. This informed the current study.
Similarly, each of the 21 CERD concluding observations had a Microsoft Excel row such as the one below.

**Figure 2: Sample Microsoft Excel Row - CERD**

For the UPR, data were then input against each recommendation as to whether the recommendation had been accepted by the Australian Government. Using Microsoft Excel tools such as filters allowed for analysis of the results – for example, how many matches there were between NGO recommendations and State recommendations, how many of these were also shared with UN and/or NHRI recommendations and how many were unique. In addition, the spreadsheets captured which NGO recommendations were not taken on board by States. Table 2 summarises the sources used in the documentary analysis.

**Table 2: Documentary Analysis – List of Data Sources**

<table>
<thead>
<tr>
<th></th>
<th>UN CERD Committee 2010 Review of Australia</th>
<th>UPR 2015 Review of Australia</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>NGO reports</strong></td>
<td>Five reports</td>
<td>20 reports</td>
</tr>
<tr>
<td><strong>State report</strong></td>
<td>One report</td>
<td>One report</td>
</tr>
<tr>
<td><strong>Australian Human Rights Commission report</strong></td>
<td>One report</td>
<td>One report*(^5)</td>
</tr>
<tr>
<td><strong>Summary of stakeholders’ information</strong></td>
<td>Not applicable</td>
<td>One stakeholder summary report</td>
</tr>
<tr>
<td><strong>Compilation of UN information</strong></td>
<td>Not applicable</td>
<td>One report</td>
</tr>
<tr>
<td><strong>UN body recommendation reports</strong></td>
<td>One report</td>
<td>One report</td>
</tr>
<tr>
<td><strong>State response to recommendations</strong></td>
<td>One report</td>
<td>One report</td>
</tr>
</tbody>
</table>

* Some are endorsed by multiple NGOs.

\(^5\) There were also annual status reports but these were not used in the documentary analysis.
Asking how the texts were related yielded interesting findings in this thesis. For example, Chapter Three presents close similarities in language in NGO recommendations and recommendations of the UN CERD Committee. Chapter Four on the UPR shows that there was closer correlation between the UN compilation report and the recommendations made by States (197 recommendations), than there was with NGO recommendations (177 recommendations).

**1.3.8 Observational Studies**

The author also used observational methodology during trips to the UN in Geneva in April 2015, November 2015 and August 2016 to observe sessions of the CERD Committee and the UPR. Observation as a method was selected to gain first hand insight into the mechanisms. These field trips also facilitated face-to-face interviews with key stakeholders as described above (Section 1.3.1). Observational studies are considered to be particularly powerful when used with other qualitative research methods including interviews, which serve to mitigate against observer bias.\(^96\) Participant observation of a session of CERD has been successfully used previously by Kruckenberg in her 2012 in-depth ethnographic study of the CERD Committee,\(^97\) which provided useful background and context for this thesis. Kruckenberg triangulated her observations with a range of documents,\(^98\) but not with interview data.

It can be argued that other authors also draw on observation based on their experience of working within the system but without explicitly stating their methodological approach. For example, international law scholars, including ‘insiders’ such as current or former members of the treaty bodies, UN Special Rapporteurs, or UN employees,\(^99\) have made significant

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\(^97\) Kruckenberg, above n 18.

\(^98\) Ibid.

\(^99\) These include the following authors, and a sample publication – most have numerous publications:

contributions to the literature on human rights treaties and treaty body monitoring. NGO representatives, who can also be considered insiders due to their regular involvement in the UN processes, contribute to the literature in this area, both in practice and in academic publications.\textsuperscript{100} Such insiders generally do not use additional empirical research for triangulation purposes, particularly important given the risk of observer bias.\textsuperscript{101} The social scientist might critique the lack of methodological rigour, lack of objectivity, and risk of bias in scholarship produced by such insiders,\textsuperscript{102} but in international legal research insider literature remains largely uncontested. On the contrary, McCrudden has defined doctrinal legal research as follows: ‘Crucially, traditional legal analysis adopts an “internal” approach. The internal approach is the analysis of legal rules and principles taking the perspective of an insider in the system.’\textsuperscript{103} Scholarship by insiders is discussed further in the subsequent chapter (Chapter 2: Literature Review). Part of the significance and originality of this thesis is that the research is being carried out by a researcher who is not working, and has not worked, within the UN system, and who is providing substantial empirical research.

1.3.9 Doctrinal Legal Research and Interdisciplinary Literature Review

This component of the methodology involved a literature review and analysis of international legal instruments and related documents. The literature review drew on scholarship from various disciplines, including international relations, anthropology and international law. This interdisciplinary literature was useful in filling the identified gaps in existing doctrinal legal literature and in informing not only a legal understanding of the topic, but a broader socio-legal understanding. This includes for example an awareness of the relationships between actors, their networks, behaviours and motivations.

The doctrinal legal research established what NGO role was provided for in hard and soft law and in the working methods of CERD and the UPR working group. Analysing the international legal instruments and related documents involved identifying the sources of


\textsuperscript{101} McKechnie, above n 96.

\textsuperscript{102} Ibid.

\textsuperscript{103} McCrudden, above n 54, 633.
relevance to the role of NGOs and the two UN mechanisms under consideration. To understand the establishment and development of the NGO role, this involved going back to the foundation of the UN itself, the UN Charter.\textsuperscript{104} Subsequent to this, other significant documents were analysed in chronological order, including UN Economic and Social Council (ECOSOC) resolutions on the role of NGOs and significant UN reports on the role of NGOs.\textsuperscript{105} For CERD, this included the ICERD treaty itself,\textsuperscript{106} and comparison between ICERD and the eight other most commonly ratified UN human rights treaties.\textsuperscript{107} Further to that, any relevant rules of procedure, working methods, or General Comments of the Committee were analysed.\textsuperscript{108} Documents such as resolutions of UN bodies and reports relating to the treaty bodies more generally, including on the topic of treaty body reform, were also reviewed.\textsuperscript{109} A doctrinal legal analysis of the UPR involved reviewing the UN resolutions that established the Human Rights Council,\textsuperscript{110} and the Human Rights Council resolution that established the UPR.\textsuperscript{111} Other relevant documents to consider include Government, NGO and UN reports used in the State reporting mechanisms. These were analysed comprehensively for the Australian case study using documentary analysis as described in Section 1.3.7.

\textsuperscript{104} \textit{Charter of the United Nations}, 4 October 1945, 1 UNTS XVI.


\textsuperscript{106} ICERD, above n 6.

\textsuperscript{107} The nine treaties are listed at above n 6.


\textsuperscript{109} Pillay, above n 84; \textit{We the peoples: civil society, the United Nations and global governance: Report of the Panel of Eminent Persons on United Nations–Civil Society Relations}, (‘We the peoples’) UN GAOR, 58\textsuperscript{th} sess, Agenda Item 59, Strengthening of the United Nations system, UN Doc A/58/817 (11 June 2004).

\textsuperscript{110} General Assembly \textit{Human Rights Council} UNGA Res. A/RES/60/251, 60\textsuperscript{th} sess. (3 April 2006); Human Rights Council, above n 5.

\textsuperscript{111} Human Rights Council, above n 5.
1.3.10 Conclusion on Methodology

Several methods have been discussed here: semi-structured interviews, doctrinal legal research, observation, and a case study with documentary analysis. Use of mixed methods allowed for methodological triangulation - using various methods of data collection as a check on the quality or veracity of data, assuming that any weaknesses in one set of data will be addressed by the others.\textsuperscript{112} There was some strong resonance between the data sets. For example, literature and interview data attested to the importance of NGOs working in coalitions. The value of NGO coalitions was confirmed in the documentary analysis from the Australian case study, where NGO coalition reports had most influence on the UN bodies’ recommendations, as explored in Chapters Three and Four. Moreover, although triangulation of qualitative and quantitative data was traditionally understood as a way of validating different data sets, it has more recently been used to increase ‘scope, depth and consistency’ in methodologies.\textsuperscript{113} This approach to triangulation was also useful in the current study. For example, whereas the documentary analysis traced whether and to what extent NGO reports had influenced UN bodies’ recommendations, the richness and depth of interview data expanded on this somewhat linear analysis. NGOs that did not appear to have influenced the UN bodies’ recommendations significantly in the documentary analysis nonetheless expressed in interviews the importance of having their voices heard at an international level, as discussed in Chapter Five.

How the mixed methods were used in a complementary way to respond to the research questions and weave a coherent narrative will become clearer in the substantive Chapters of the thesis. These Chapters are mapped in the following thesis outline.

1.4 Thesis Outline

This thesis has been written and formatted in accordance with the University of Western Australia \textit{Doctor of Philosophy Rules} for the content and format of a thesis and is presented as a series of papers.\textsuperscript{114} The rules state that in theses presented as a series of papers ‘there must be a full explanatory introduction and a review article at the end to link the separate

\begin{itemize}
  \item \textsuperscript{112} Paulette M. Rothbauer, ‘Triangulation’ in Lisa M. Given (ed), \textit{The Sage Encyclopedia of Qualitative Research Methods} (Sage, 2008) 892.
  \item \textsuperscript{113} Uwe Flick, ‘Triangulation in Qualitative Research’ in Ernst, von Kardoff and Ines Steinke (eds), \textit{A Companion to Qualitative Research} (SAGE Publications, 2004) 248, 248-249.
  \item \textsuperscript{114} University of Western Australia, \textit{Doctor of Philosophy Rules}, 41.
\end{itemize}
papers and to place them in the context of the established body of knowledge.\textsuperscript{115} To this end, the following section provides a map of the remainder of the thesis. A literature review (Chapter Two) and a conclusion (Chapter Seven) also meet the requirements of this rule. In particular, this section charts the thesis as a series of publications and explains the logical progression of the papers so as to link them to form a coherent whole for the reader.\textsuperscript{116} Each article has either been accepted for publication or is under review by a respected international peer reviewed journal and is presented as a distinct thesis chapter.\textsuperscript{117}

**Chapter Two** consists of a literature review. The subsequent substantive chapters, (Three to Six), also contain a summary review of the literature relevant to that specific publication.

**Chapter Three**


This article was peer-reviewed by the International Journal of Group and Minority Rights.\textsuperscript{118} It begins with the first of the State reporting mechanisms in the study – that of the UN treaty bodies, using the CERD Committee for a more in-depth analysis. It draws on the international interview data and Australian case study including documentary analysis, examining Australia’s last review in 2010. The article contributes to answering the primary research question and two of the sub-questions identified at the beginning of this chapter: what is the role and influence of NGOs in monitoring international human rights law using UN State reporting mechanisms? a) How and why do NGOs engage with key stakeholders and each other in reporting to the well-established UN treaty body State reporting and the more recent UPR? b) Have NGOs been significant in influencing the recommendations from each of these State reporting mechanisms?

\textsuperscript{115} Ibid, 41(4).
\textsuperscript{116} Ibid, ‘If a series of papers is presented, there must be a full explanatory introduction and a review article at the end to link the separate papers and to place them in the context of the established body of knowledge.’
\textsuperscript{117} The thesis author was also the sole author of each journal article.
\textsuperscript{118} It has been revised based on reviewer comments and is currently under review in revised form.
Chapter Four

*The Role and Influence of Non-governmental Organisations in the Universal Periodic Review – International Context and Australian Case Study*

This article has been accepted for publication by the Human Rights Law Review in 2017. Chapter Four progresses to the second of the UN human rights State reporting mechanisms in the study – that of the UPR. Using a broadly similar approach to the previous chapter, it also draws on relevant sets of the international interview data and the Australian case study empirical data in relation to the UPR. The case study analysis for this article is more complex due to the greater number of recommendations – 290 compared with 21 for CERD – in the documentary analysis and the fact that the potential influence of the summary of UN information report also had to be taken into account. Again, this article contributes to answering the primary research question and two of the sub-questions: what is the role and influence of NGOs in monitoring international human rights law using UN State reporting mechanisms? a) How and why do NGOs engage with key stakeholders and each other in reporting to the well-established UN treaty body State reporting and the more recent UPR? b) Have NGOs been significant in influencing the recommendations from each of these State reporting mechanisms?

Chapter Five

*Advancing, Retreating or Stepping on Each Other’s Toes? The Role of Non-Governmental Organisations in United Nations Human Rights Treaty Body Reporting and the Universal Periodic Review*

This article has been submitted for review to the Australian Yearbook of International Law. The separate, individual analyses of the NGO role in the two State reporting mechanisms in Chapters Three and Four are now progressed to a direct comparison of the role of NGOs in treaty body State reporting with the role of NGOs in the UPR. The chapter draws on the findings from Chapters Three and Four and expands on these through an analysis of additional interview data relating directly to interviewees’ experiences and perceptions of the differences and complementarity of the two mechanisms for NGOs. Complementarity of the mechanisms is also considered, including the risk emerging from interview data that the UPR

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could colonise treaty body State reporting. The primary research question addressed in this article, which is not substantively addressed in the previous two, is: c) What are the differences in their [NGO] role and influence in the two mechanisms and what does this mean for the future?

Chapters Three, Four and Five follow a logical progression – an analysis of NGOs in treaty body State reporting (Chapter Three), an analysis of NGOs in the UPR (Chapter Four), and a comparative analysis of the role of NGOs in these two mechanisms (Chapter Five). The subsequent Chapter, Chapter Six, departs somewhat from this. Using a constructivist approach, this Chapter emerged from the author’s observation and reflection on the NGO role as the study progressed and is more of an overarching analysis of the NGO role in UN human rights State reporting.

**Chapter Six**

*The Role of Non-Governmental Organisations in Monitoring International Human Rights Law in United Nations State Reporting Mechanisms: a Functional Taxonomy*

This article has been submitted for review to the Journal of Human Rights Practice. It draws on the author’s observational data, international interview data, and some illustrative interview data from the Australian case study. It maps and problematises the functions which NGOs play, and the interactions between them, in State reporting systems in a functional taxonomy with seven categories of NGOs. Unlike the previous Chapters, this article does not draw heavily on the Australian case study and findings from the documentary analysis are not used. In addition to proposing a functional taxonomy – the ‘how’ question of NGO engagement with State reporting – it addresses the ‘why’ question. It primarily addresses the primary research question and one of the sub-questions: what is the role and influence of NGOs in monitoring international human rights law using UN State reporting mechanisms? a) How and why do NGOs engage with key stakeholders and each other in reporting to the well-established UN treaty body State reporting and the more recent UPR?

**Chapter Seven** presents the conclusion to the thesis. This chapter synthesises the findings from the previous chapters of the thesis in response to the research questions and identifies future research directions. It concludes that NGOs are recognised by States and other actors as playing a significant role. It is clear that NGOs use this role to influence the
recommendations of UN human rights bodies by bringing information on the human rights situation on the ground to the attention of the international community. As such, they are a critical component of the international legal machinery, serving to protect and promote human rights.
Chapter Two: Literature Review
2.1 Introduction

There has undoubtedly been a growth in literature on NGOs in the past few decades, often in disciplines other than international law. The existing scholarship does not yet provide a theoretical or empirical account of the influence of NGOs engaging with UN human rights State reporting mechanisms, an area to which this thesis makes a contribution. The current Chapter charts the existing scholarship relevant to NGOs and to the two UN human rights State reporting mechanisms – the UPR and treaty bodies, with an emphasis on CERD. Each subsequent chapter of the thesis will also refer to relevant literature; therefore this chapter provides an overview and identifies overall gaps which the thesis contributes to filling.

A few introductory comments about the scholars writing in this area will give useful context. Legal scholars tend to take a vocational perspective on international human rights law - this manifests itself in two primary ways: an interest in the NGO role in developing the international legislation (treaties),\(^1\) and the NGO role in litigation (individual complaints).\(^2\) Yet some literature attests to the fact that individual and inter-state complaints mechanisms are not always widely used,\(^3\) arguably indicating that this is a less critical research area. With this focus on drafting of treaties and litigation, there has been less analysis of the NGO role in UN human rights State reporting – the core work of the treaty bodies and the key monitoring mechanism of the Human Rights Council. As the NGO role is not generally provided for in the hard law of treaties, traditional doctrinal legal research can overlook their role.

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\(^3\) Phoebe Okowa, ‘The International Court of Justice and the Georgia/Russia Dispute’ (2011) 11(4) \textit{Human Rights Law Review} 739; in relation to ICERD, see, eg, Patrick Thornberry, \textit{The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary} (Oxford University Press, 2016) 491. He describes the inter-State procedure as ‘inoperative or dormant’ and argues that the individual complaints procedure ‘has not made the impact that might have been expected in terms of the number of States parties “opting in”’. 

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Where authors have been cognisant that NGOs do play a role, an NGO practitioner is often called upon to write a chapter in an edited book. In addition to NGO practitioners, insiders are also common contributors to the international human rights law scholarship more broadly. These include current or former members of the treaty bodies, UN Special Rapporteurs, or UN employees as discussed in Chapter One, Section 1.3.8. These insiders bring unique expertise and insight into the internal workings of human rights mechanisms and to the role of NGOs. Generally in legal literature, such insiders do not reflect on their dual role as both insiders and independent academic writers. This aligns with the doctrinal legal research method described in Chapter One which is a more internal approach, using the author’s own legal reasoning skills. For research that aims to, *inter alia*, assess NGO influence, more than a purely doctrinal approach is required. Insiders using doctrinal legal reasoning are less likely to bring empirical research and objectivity, important considerations when analysing NGO influence on UN bodies and given the risk of observer bias. This thesis is therefore significant in contributing independent, empirical research to the existing literature.

The Chapter outline is as follows: sections 2.2-2.5 provide an overview of theoretical scholarship on the NGO role, and sections 2.6-2.8 engage with the more applied literature. Section 2.2 sets the context of literature pertaining to NGOs against the backdrop of State-centrism which has previously limited scholarship on non-State actors. This is followed by Section 2.3 which notes the emergence of literature on NGOs and the tendency of many authors to aggrandise the NGO role but without empirical evidence of the essential nature of the role. The subsequent section, 2.4, discusses literature on transnationalism which has also engaged with the role of NGOs. This is presented under the headings of ‘Transnational Advocacy Networks’ and ‘Transnational Legal Process’. Section 2.5 moves beyond transnationalism to ‘glocalisation’, literature that portrays NGOs as local-to-global intermediaries.

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These theoretical sections are followed by a review of the more applied literature on this topic, analysing the literature on NGOs in the two mechanisms considered in this thesis – treaty body monitoring (Section 2.6) and the UPR (Section 2.7). Finally, Section 2.8 discusses the literature of relevance to the Australian case study, including NGOs in Australia and Australia’s engagement with UN human rights State reporting, and Section 2.9 is a brief conclusion.

2.2 The Limitations of State-centrism

Dominant theories of international law, including State-centric theories, have influenced scholarship on international human rights law also. For example, researchers have sought to understand States’ behaviour - why they ratify human rights treaties; the relationship between human rights treaties and States’ human rights practices; whether States’ intentions are genuine or they are merely seeking to be identified as a ‘good nation’, and so forth. These theories emanated primarily, although not exclusively, from international relations scholars, whereas traditional legal scholars have focused on normative content with less concern for theory. Ku and Weiss explain that in the social sciences, the purpose of studying interactions between States is to understand their behaviour; in the case of law, it is to assess the status of legal norms.

State-centrism is also reflected in the fact that the NGO role in human rights treaty body reviews, for example, is given scant attention in the literature, or is confined to a stand-alone chapter or section in a book. Some international law scholars effectively ignore the role of

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6 See, eg, Linda Camp Keith, ‘Human Rights Instruments’ in Peter Cane and Herbert M. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 353, 355, in relation to traditional State-centric theories including the realist and rational functionalist perception of States as single rational actors driven by self-interest.

7 Beth A. Simmons, ‘Compliance with International Agreements’ (2000) 1 *Annual Review of Political Science* 75.


11 See, eg, Brett, above n 4; Clapham, above n 4; Andrew Clapham, ‘UN human rights reporting procedures: An NGO perspective’ in Philip Alston and James Crawford (eds), *The Future of UN*
NGOs in international human rights law,\textsuperscript{12} or briefly describe the ‘mechanics’ of the role without further analysis or critique.\textsuperscript{13} State-centrism in practice means that the role of NGOs in the UN human rights system is often not enshrined in treaties and is at best soft law or sometimes an accepted custom.\textsuperscript{14} Therefore, legal academics’ general lack of attention to the role of NGOs may be partly explained by the lawyers’ primary focus on the legal norms as identified by Ku and Weiss above.

The application of traditional State-centric theories and literature on international human rights law to the current study is limited, as this study aims to understand and analyse the NGO role in two selected UN human rights State reporting mechanisms. Other authors have noted the same limitations in scholarship.\textsuperscript{15} Nonetheless, State-centrism is applicable when considering the complex relationship between States and NGOs. This is reflected in the literature with references to the tensions between the actors. For example, Jordaan writes that African States tried to minimise the potential impact of NGOs in the UPR process when that mechanism was being developed.\textsuperscript{16}

There is less literature about successful State-NGO relationships in engaging with UN human rights mechanisms, for example in consultations on the drafting of the State report.\textsuperscript{17} This would be of applied interest as there is an increasingly strong focus on developing positive relationships between governments and civil society. For example, according to the Human

\begin{flushright}
\textsuperscript{12} See, eg, Bertrand G. Ramcharan, \textit{The fundamentals of international human rights treaty law} (Leiden, 2011); Olivier De Schutter, \textit{International Human Rights Law} (Cambridge University Press, 2010) where two pages from a total of 955 pages are allocated to ‘The role of non-governmental organizations’.
\textsuperscript{13} Helen Keller and Geir Ulfstein (eds), \textit{UN Human Rights Treaty Bodies Law and Legitimacy} (Cambridge University Press, 2012).
\textsuperscript{14} For example some of the informal NGO briefings to treaty bodies which are not provided for in the treaty or in general comments or other soft law, but which are a well-established part of the process, as described in Chapter Three.
\textsuperscript{15} Pearson, above n 1, 87.
\textsuperscript{17} There is some general literature on the topic, for example the chapter on ‘NGO relations with States’ in Shamima Ahmed and David Potter, \textit{NGOs in International Politics} (Stylus Publishing, 2006) 57.
\end{flushright}
Rights Council Resolution 5/1, States are encouraged to prepare their report for the UPR review ‘through a broad consultation process at the national level with all relevant stakeholders’. Also, treaty bodies frequently recommend that States consult with civil society in the preparation of their next report. The State-NGO relationship is a minor theme explored in several subsequent chapters in this thesis.

In addition, as State agencies, albeit independent ones, National Human Rights Institutions (NHRIs) and their role in UN human rights monitoring mechanisms have attracted growing interest in the literature. It has been noted that NHRIs are gaining importance as stakeholders in international human rights law, including in State reporting mechanisms. Existing literature has suggested that NHRIs have been ‘steadily supplementing’ the NGO role in reporting procedures in recent years. However, in general the NHRI role vis-à-vis the role of NGOs in these mechanisms remains under-explored, an area to which this thesis makes a modest contribution through the functional taxonomy in Chapter Six.

2.3 The Emergence of Scholarship on NGOs

Although State-centric theories remain influential, they are subject to challenges. In the 1990s, international law entered a post-ontological era more open to self-analysis and

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21 Cardenas above n20; Linos and Pegram above n 20.
23 See, eg, Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004). She posits that we do in fact have a new world order - she reimagines State sovereignty as a disaggregated sovereignty and argues that the concept of the unitary State is a useful myth.
critique. New ways of thinking about international law, and an openness to the application of social sciences theories and methods to international law emerged at this time. With its emphasis on identifying participants in decision-making, including NGOs, and the perspectives of these actors, the New Haven School paved the way for socio-legal research in international law such as the research in this thesis. Concurrently, increasing globalisation posed a challenge to traditional theories of international law: ‘Globalisation processes and emerging trends of global civil society present challenges to underlying assumptions of the homogeneity of international law created by traditional state-centric theories.’

This era – the 1990s - saw a growth in literature and theories relating to non-State actors and international civil society, including in the area of international law. Post-Cold War, NGOs became more prolific and international human rights laws and monitoring increased, the two being interconnected. Several authors point to the involvement of NGOs in UN human rights world conferences in the 1990s as an important turning point in NGOs’ role within the UN system and much of the literature post-dates this. Not only was there high participation by NGOs at such international fora, there were also a significant number of more grass-roots level NGOs, rather than international NGOs, for the first time. Several authors have charted the development of the NGO sector internationally, including the establishment of

28 Pearson, above n 1, 92.
significant human rights NGOs, and specific achievements of human rights NGOs. Others began to quantify the growth of both international NGOs and later international-facing domestic NGOs.

However, despite the breadth of literature in this area, there remains no universally accepted definition of ‘NGO’. Some early scholarship on NGOs grappled with the definition and ontology of NGOs. Some understood NGOs as a balance to the power of the State, describing them as ‘… organizations that operate as an essential break on the juggernaut of state power’, or that ‘act as a solvent against the strictures of sovereignty’. Meanwhile applied definitions in the form of criteria for accreditation for NGO consultative status were being developed by the UN through the Economic and Social Council, discussed further at Section 2.4.1 below.

A trend emerged from the 2000s with some scholars, in their enthusiasm to engage with the topic of NGOs in international human rights law, tending to aggrandise the NGO role but without empirical evidence to support the claims. For example, some posited that NGOs played a significant role in UN State reporting mechanisms. Others went further. For example, Forsythe wrote that the NGO role was not just significant, but was in fact essential

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to State reporting and concluded that when critical questions were asked of governments during reviews, or critical conclusions were reached by UN rapporteurs or committees, it was frequently based on information provided by NGOs. Forsythe did not provide empirical data to support this. Like Forsythe, Wiseberg confirmed the essential nature of NGO involvement, making the claim that the UN human rights machinery would grind to a halt without the fact-finding work of NGOs. Again, the empirical evidence to support this claim is lacking and it is always difficult to prove the counterfactual – as the machinery continues to be fed by NGOs, we cannot know for sure what would happen if this stopped. More recent authors follow Forsythe and Wiseberg’s assessment of the critical role of NGOs. Egan, writing in 2013, supports the view of Connors who had described the NGO role in treaty body monitoring as a ‘critical dependency’. NGOs were also deified in the literature throughout the 1990s and 2000s. There were references to NGOs’ idealism, their adherence to their ‘cause’ in the face of adversity, and the importance of their moral authority. The title of Willetts’ book famously described NGOs as ‘the Conscience of the World’. However, grandiose claims about the importance of NGOs have not been uncontested. There has been consistent concern with NGOs’ legitimacy and accountability. More directly relevant to this thesis, as early as 1998, the criticism emerged that research on the significance of NGOs offered little evidence to support claims of success in influencing policy outcomes. The general lack of empirical research continues to be a gap in the scholarship and there is an acknowledged need for further work.

41 David P. Forsythe, Human Rights in International Relations (Cambridge University Press, 2006) 203–204.
42 Wiseberg, above n 37.
45 United Nations Secretary General, Kofi Annan (Speech delivered at the NGOs Forum on Global Issues, Berlin, 29 April 1999).
47 Willetts, above n 31.
in this area. This has informed the author’s methodology to include a strong empirical research component to establish whether the empirical evidence supports the aggrandisement claims. Therefore this thesis will make a modest contribution to filling this gap through the documentary analysis in the Australian case study (in particular Chapters Three and Four).

Nonetheless, despite a number of key authors’ acknowledgement of the importance of the NGO role to UN human rights State reporting mechanisms, in many cases the NGO role is given limited attention in the literature on international human rights law, as described in Section 2.2. There have been examples of more in-depth analyses of the role of NGOs at the UN, or in international law or international human rights law, but with the exception of Bayefsky in 2000, described further in Section 2.7, these do not generally provide an in-depth analysis of the NGO role in State reporting.

2.4 Transnationalism and NGOs
Another challenge to State-centrism is transnationalism, referring to economic, social and political linkages between people or institutions across the borders of nation-states. Transnational scholarship is relevant to the current thesis as it includes consideration of the NGO role. Two main branches of transnational theory will be discussed here; firstly, the social sciences-based transnational advocacy networks, and secondly, the law-based theory of transnational legal process. McCrudden has noted that ‘modelling’ of the kind described in Section 2.4.1 below, is generally the realm of the social sciences, rather than law. As discussed in the methodology section in Chapter One, socio-legal research has emerged more strongly since McCrudden’s analysis in 2006 and although not ‘modelling’ per se, the author has contributed to this body of literature through a socio-legal analysis of the NGO role, resulting in the functional taxonomy of NGOs in Chapter Six.

52 Camp Keith, above n 6, 357.
53 See, eg, Steven Vertovec, Transnationalism (Routledge / Taylor & Francis Group, 2009).
2.4.1 Transnational Advocacy Networks

Key authors such as Keck, Sikkink, Risse, (formerly Risse-Kappen), and Ropp argue that international human rights norms are used by networks of transnational and domestic activists and other actors who effectively socialise States to accept and comply with such norms. Firstly, in the mid-1990s, Risse-Kappen proposed a transnational model to explain NGO behaviour, focusing on international NGOs and networks but with less recognition of domestic NGOs. This emphasis on international networks and NGOs mirrors the initial focus at the UN, which was on engagement with international NGOs as reflected in Article 71 of the UN Charter. There was pressure from NGOs to change this, and a recognition of the important role played by more grass-roots level NGOs at the early 1990s World Conferences. As a result, ECOSOC Resolution 1996/31 Consultative relationship between the United Nations and non-governmental organizations, recognised in its preamble ‘the need to take into account the full diversity of the non-governmental organizations at the national, regional and international levels’. Resolution 1996/31 also provided for a three-level hierarchy of NGO status for accreditation purposes and specified the nature of activity in which each level could engage. The highest level of accreditation is ‘general consultative status’, reserved for large international NGOs who have substantial and sustained contributions to make and are closely involved with the economic and social life of the peoples of the areas they represent. They tend to have broad geographical reach; examples include: Commission of the Churches on International Affairs of the World Council of Churches, Greenpeace International, and Oxfam International. Therefore, although a wider range of NGOs were included by Resolution 1996/31, a hierarchy was also introduced, with international NGOs at the top.

56 Charter of the United Nations, 4 October 1945, 1 UNTS XVI, Article 71.
57 Willetts, above n 31.
59 Ibid, para 22.
The focus in the literature on international NGOs and transnational advocacy networks changed as more domestic NGOs were established, and some began to engage with the UN system. Following the transnational model, two subsequent models were significant in academic literature – the spiral model and the boomerang model. First published in 1999, the spiral model still remains influential in human rights research. In the spiral model, diffusing international human rights norms depends on domestic and transnational networks using international regimes to bring issues to the attention of Western governments and citizens. The spiral has five phases which can be summarised as follows. Firstly, a human rights abuse occurs and the transnational network is triggered, using human rights norms to put pressure on the State. In the second phase, the State relies on non-intervention and rejects human rights norms but in phase three, as a result of pressure, the State makes tactical concessions to the transnational network. In the fourth phase, the State’s own rhetoric and concessions cause a gradual liberalisation or a regime change. In the fifth and final phase, the State accepts international human rights norms.

Keck and Sikkink’s boomerang model was perhaps less widely adopted by scholars than the spiral model, but focuses more on the distinctive role of domestic NGOs. It uses the boomerang as a metaphor for the interaction between domestic NGOs and INGOs, who put pressure on the government in question. Using the boomerang model, networks of transnational and domestic NGOs and other actors ‘bring pressure “from above” and “from below” to accomplish human rights change’. The title of this thesis includes the words ‘monitoring from above or below’ and so concepts from the boomerang model were somewhat influential. Another influence was the work of Professor Jim Ife who was a strong

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62 Union of International Associations (eds), above n 35.
advocate for human rights work to be taken up by non-lawyers as well as lawyers and who led the way in using human rights in community development work, a seminal text in that area being his book *Human Rights from Below: Achieving Rights through Community Development*.67

Transnational advocacy network theories do not engage directly and specifically with the UN human rights State reporting mechanisms. Instead, they relate more to the ‘naming and shaming’ work of NGOs. As such, as a way of understanding the functions and behaviours of NGOs in these mechanisms, they do not resonate closely with the author’s findings and observations. This lack of detailed analysis and associated model of NGO functions and behaviours when engaging with UN human rights mechanisms led the author to develop the functional taxonomy of NGOs presented in Chapter Six.

Nonetheless, elements of the models and theories summarised above are evident in the NGO role in State reporting and provide good explanations for some aspects of the role. For example, using UPR State reporting to bring issues to the attention of Western governments resonates with the fundamental concept of the spiral model. The boomerang model helped inform inquiry into the influence of, and interaction between, international and domestic NGOs as considered in the documentary analyses in Chapters Three and Four and in the functional taxonomy in Chapter Six.

2.4.2 Transnational Legal Process Theory

The second significant transnational theory of relevance to this thesis is Koh’s transnational legal process theory.68 Transnational legal process is a dynamic process by which public and private actors, including States, international organisations and NGOs, interact in public and private, domestic and international fora to make, interpret, enforce and internalise rules of international law.69 Again, this theory departs from previous State-centric theories; Koh identifies the theory as non-traditional and non-Statist.70

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69 Ibid, 183-184.

70 Ibid, 184.
Koh’s perception of the NGO role however, appears to be litigation focused, whereas this thesis examines the NGO role in State reporting. Nonetheless, Koh’s theory has other relevance for the current research; particularly, the inclusion of NGOs and other actors, the use of both domestic and international fora, and the actors’ role in ‘enforcing’ and internalising international law. Koh also argues that through a ‘repeated process of interaction and internalization’ international law acquires its ‘stickiness’. The cyclical nature of State reporting to UN treaty bodies and to the UPR is a ‘repeated process’. Koh’s theory also helped inform the research design by bringing awareness to interactions in domestic and international fora. The author included interview questions on how NGOs engaged with the UN and international actors, but also how the NGOs engaged with Government and other actors at a domestic level. Transnational legal process theory contributed to the author’s analysis through interviews and documentary analysis, of the NGO role in follow-up to the UN mechanisms as a way of ‘enforcing’ and internalising the decisions of the UN bodies.

2.5 Glocalisation

The concept of NGOs as enforcers and internalisers is also reflected in glocalisation theories. The author has adopted the term ‘glocalisation’ to express the intermediary role that NGOs play between the global; namely, the UN and international actors such as international NGOs; and the local; namely, domestic Governments and people on the ground. Initially a Japanese business term meaning the creation of products or services intended for the global market, glocalisation was later adopted by sociologists. The Oxford English dictionary definition of glocalisation is: ‘The action, process, or fact of making something both global and local; specifically the adaptation of global influences or business strategies in accordance with local conditions; global localization.’

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71 Ibid, 198.
Some of the relevant literature in this area has questioned underlying assumptions about the concept of global civil society, and the importance of transnational networks. A number of authors acknowledge the importance of domestic NGOs and other actors, and the need for international human rights law to be adapted locally. Both Simmons and Merry have proposed that whilst transnational networks may be critical in the case of a repressive regime, in most States, domestic actors are the most significant. Simmons concludes that international human rights treaties are powerful in mobilising domestic NGOs in holding States to account. She argues that this theory is a crucial supplement to existing literature on mechanisms such as transnational alliances.

Merry finds that NGOs can act as intermediaries so that international law can be adapted as a ‘localized globalism’. Some international law scholars had already reached the same general conclusions but without reference to the popular international relations literature described above. For example, Heyns and Viljoen’s study of human rights treaty impact on twenty States concluded that treaty norms must be internalised in the domestic legal and cultural system by harnessing ‘domestic constituencies’.

Given that this thesis includes a case study on Australia, where most NGOs engaged with the UN system are domestic NGOs, the work of Simmons and Merry was useful. It also resonates with the author’s own experience of working in the NGO sector in non-repressive regimes (Ireland and Australia). This body of literature contributed to the drafting of interview questions and influenced the development of the functional taxonomy (Chapter Six). For example, together with the transnational theories, they add to the understanding of the relationship between international and domestic NGOs. In addition, they prompted the author to consider how domestic NGOs operate with their own constituencies – how are they

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76 Simmons, above n 75.
77 Merry, above n 75.
78 Wiseberg, above n 37, 350.
linked to both the people experiencing human rights abuses, and those in a position to address those issues?

### 2.6 NGOs in Treaty Body Monitoring

A seminal book published in 2000, *The UN Human Rights Treaty System in the 21st Century*, edited by Bayefsky, considers the role of NGOs in some detail. It contains a number of useful chapters on NGOs in the UN human rights treaty system. Although slightly dated now, this book was one of the first attempts to grapple with the rapidly developing role for NGOs in the UN human rights treaty system; it engaged with the topic more comprehensively than previous literature. Of the 27 chapters from various authors, seven chapters are primarily related to the role of NGOs. These include case studies and definition and analysis of the NGO role in State reporting. Most of these chapters are written by people who were working for international NGOs at the time. As noted in the introduction (2.1), literature by ‘insiders’ may allow for an insight into the system but may also raise questions of objectivity and generally lack empirical research. This thesis builds on Bayefsky’s work in a number of ways, including the introduction of findings from qualitative and quantitative empirical research to the discussion. It also provides an update, incorporating key developments in the past 17 years including a gradually expanded role for NGOs in treaty body State reporting, the treaty body strengthening process, the adoption of new treaties, and the introduction of another State reporting mechanism – the UPR.

Some of the early scholarship on treaty body monitoring of human rights was quite descriptive, following the development of the system and providing useful information on the relatively new and developing processes and on how Governments and NGOs could engage with them. This type of writing is still common in the domain of international human rights

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80 Bayefsky (ed), above n 51.  
82 See, eg, Hannum (ed), above n 2; Michael O’Flaherty, *Human Rights and the UN, Practice before the Treaty Bodies* (Sweet & Maxwell, 1996).
law text books,\textsuperscript{83} and in publications by the UN or large international NGOs.\textsuperscript{84} Of course, in this digital age, much of the factual information about how the UN human rights system works is now available on websites of the UN and NGOs.

In parallel with this descriptive work, analysis and critique of the treaty body system began to emerge, sometimes using case studies to reflect on the experiences of selected States, or selected treaties (or both).\textsuperscript{85} The critique of the treaty body system has led to almost 30 years of discussion and reporting on UN human rights treaty body reform.\textsuperscript{86} Referred to as the treaty body strengthening process, it began with the reports by independent expert Philip Alston from 1988 – 1996,\textsuperscript{87} and was solidified most recently in General Assembly Resolution

\begin{itemize}
\item \textsuperscript{83} See, eg, De Schutter, above n 12; Adam McBeth, Justine Nolan and Simon Rice, \textit{The International Law of Human Rights} (Oxford University Press, 2\textsuperscript{nd} ed, 2017).
\item \textsuperscript{87} Alston’s first report was published in 1989 pursuant to General Assembly resolution 43/115 of 8 December 1988, Alston, above n 85.
\end{itemize}
The role of NGOs in treaty body reform, or opportunities to improve civil society engagement with treaty bodies, receives little attention in UN reports and resolutions and in most of the associated literature. The most detailed reform proposal of relevance to NGOs related to the streamlining and harmonisation of NGOs’ and NHRIs’ meetings with treaty bodies. However, the fact that the NGO role was not a focus in the treaty body strengthening process and did not result in extensive changes to the NGO role, may be a positive development for NGOs. During the treaty body strengthening process, several States, not well disposed towards civil society involvement in human rights monitoring, had attempted to restrict or remove the NGO role. Refer for example to the coherent responses of some States to proposals for more formal inclusion of NGOs and NHRIs in the work of treaty bodies.

Another body of literature engages with questions on the effectiveness of the human rights treaty system, but the role of NGOs is not usually considered as a factor. A key example is the international study by Heyns and Vilijoen, published in 2002. It synthesised more micro-level analyses of twenty States including Australia, and drew conclusions on the impact of human rights treaties on domestic laws and practice. The Heyns and Vilijoen study is significant as it was one of the first attempts to assess the impact of human rights treaties. The study looked at the influence of human rights treaties overall, rather than the particular role of NGOs, which is the focus of this thesis. Although published 15 years ago, the study included a useful summary profile of the NGOs in each of the twenty countries, including Australia.

88 General Assembly Resolution 68/268 of 9 April 2014 *Strengthening and enhancing the effective functioning of the human rights treaty body system.*

89 Egan, above n 43.


92 Heyns and Vilijoen above n 79.
Within the general treaty body literature, some authors have focused specifically on the CERD Committee, discussed in the case study component of this thesis. Kruckenberg’s 2012 ethnographic study of the CERD Committee contained some useful background material and also some insights into the NGO role. For example, she notes some instances of NGO influence on CERD concluding observations, commented that transnational human rights NGOs, national human rights NGOs, and organisations representing minority groups engaged with the CERD Committee, and identified key international NGOs which monitor CERD including the International Service for Human Rights (ISHR) and the International Movement Against All Forms of Discrimination and Racism (IMADR). The most recent publication of interest is Thornberry’s 2016 commentary on ICERD. Thornberry is an academic and former member of the CERD Committee. This extensive commentary on ICERD makes scant reference to NGOs – not surprising given that there is no reference to NGOs in the text of the Convention. His section on ‘Sources of Information’, does refer briefly to the NGO information-provision role. Resonating with other authors, (and subsequently interviewees for this thesis), he comments that ‘The efforts of civil society are vital to Committee work since its research capacity is limited and in situ visits to reporting States are not a part of its regular practice.’

Recently, the CERD Committee launched a consultation with civil society organisations (CSOs) to ‘strengthen its work and engagement with civil society organizations as an integral part of its efforts’. It held a consultation day on 23 November 2016 to explore new and innovative ways for the CERD to work with CSOs to increase the implementation of the Convention and invited submissions from CSOs in advance. The recommendations included

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95 Ibid, Ch 5:1.


97 Ibid, 52.

the creation of a fund for CSOs to enhance their work in the field and further their engagement with CERD, and for CERD to travel to States parties and to present reports and provoke discussions in the country under review. This development is noted here in the literature review, as it occurred after the author had written the chapter on CERD (Chapter Three). The CERD Committee’s move to have a consultation followed the author’s presentation on preliminary findings from her research to the CERD Committee in August 2016, including recommendations for strengthening NGO engagement with the Committee. However, no direct causal link can be drawn between the author’s presentation and subsequent decision by the Committee.

Moving beyond treaty body literature, there is some relevant literature on State reporting mechanisms more generally. Some legal commentators have minimised the importance of State reporting such as that carried out by treaty bodies. In an early critique, Fischer concluded that ‘a reporting system is the weakest in the range of implementation techniques’ in international human rights law. Whereas Brett later argued that providing information to UN Committees in State reporting can allow NGOs to raise issues of concern that may not meet the definition of ‘violations’, such as proposed laws where the Committee might recommend preventive action. The introduction of the UPR has reasserted the importance of State reporting in international human rights law.

Of interest regarding the question of what influence NGOs have on treaty body State reporting and the UPR, is the literature relating to the effectiveness of NGOs. There is a well established difficulty in evaluating activities described broadly as ‘advocacy’. In fact, some authors conclude that there is no way to accurately measure human rights impact in any multi-causal situation. For example, Cody argues that ‘It will always be impossible, unless

99 Ibid.
100 In keeping with the thesis by publication format, Chapter Three was submitted to a journal and is reproduced in this thesis in its original format.
102 Brett above n 81, 57.
government explicitly states a connection, to prove that a policy goal achievement is due to engagement in a UN human rights process.\textsuperscript{105} However, she later contradicts this when she attributes policy change\textsuperscript{106} to, \textit{inter alia}, CERD concluding observations, but without any supporting evidence.\textsuperscript{107} Other authors rely on hypothesising on the counterfactual: if human rights NGOs had \textit{not} existed, human rights would presumably have a less salient position internationally.\textsuperscript{108}

### 2.7 Emerging Literature on the UPR

Given the relative infancy of this mechanism – it has been operational since 2008 - there is less relevant literature on UPR than on treaty bodies. However, a seminal work on the UPR was published in 2015, edited by Australian authors Charlesworth and Larking: \textit{Human Rights and the Universal Periodic Review: Rituals and Ritualism}.\textsuperscript{109} The editors’ theory, advanced and explored by a number of the authors in the book, has two components – that the UPR is a ritual, and that it demonstrates hollow ritualism. This ritualism can undermine the intention that the UPR would be a comprehensive review of all of a State’s human rights obligations and the book suggests how such ritualism might be overcome. The editors question whether ritualism can morph into conformity or commitment, stages borrowed from Braithwaite’s typology of postures towards normative systems.\textsuperscript{110} Whilst not central to the current research question, an awareness of the ritualism theory is useful in understanding how States engage with the UPR and helps with understanding how NGOs operate in this ritualistic context. Charlesworth and Larking note that ‘The ability of the UPR to transcend

\begin{footnotesize}
\begin{enumerate}
\item[106] Specifically the reinstatement of the \textit{Racial Discrimination Act} 1975 (cth) in relation to the Northern Territory Emergency Response.
\item[107] Cody, above n 105, 255.
\item[108] Forsythe, above n 41, 204.
\item[110] Ibid, 11; using Valerie Braithwaite, \textit{Defiance in Taxation and Governance} (Edward Elgar, 2009) 77-79.
\end{enumerate}
\end{footnotesize}
ritualism and to function as an empowering regulatory mechanism depends heavily on effective NGO and civil society engagement in the process.¹¹¹

Part II of the book, entitled *Assessing and engaging with the Universal Periodic Review*, includes several chapters of relevance to the role of NGOs in the UPR. Firstly, there is a chapter on *Effective NGO engagement with the Universal Periodic Review* by NGO practitioners from a domestic (Australian) and international NGO, Schokman and Lynch respectively.¹¹² Based on their experience of engaging with the UPR, they take a practical approach and explore the challenges and opportunities the UPR poses for NGOs, such as engaging in a politicised environment.

Also of interest is the chapter by Chauville, Director of international NGO UPR-Info, entitled: *The Universal Periodic Review’s first cycle: successes and failures.*¹¹³ As the head of the organisation facilitating State and civil society engagement with the UPR, Chauville’s chapter provides a very useful summary of key developments in the first cycle of the UPR. The empirical data in this thesis adds to these perspectives. For example, Chauville includes an analysis of the ‘space for civil society at the UPR’, concluding that the limited formal role for civil society at the UPR ‘has turned out to be a positive development’ and that ‘most observers now agree’ on this point.¹¹⁴ In doing so, he is perhaps writing as an insider, without identifying who such ‘observers’ are or by drawing on empirical data. In Chapter Four and Five of this thesis, some dissent about the limited civil society role is noted, for example from domestic NGOs.

Another fascinating insider perspective is provided in Billaud’s chapter *Keepers of the truth: producing ‘transparent’ documents for the Universal Periodic Review* based on her


¹¹⁴ Ibid, 103.
experience of interning with the Office of the High Commissioner for Human Rights. Her useful behind-the-scenes perspective on the UPR compensated somewhat for the lack of an interview with the UPR secretariat in this thesis, and elucidated the process of selecting, prioritising and negotiating in relation to stakeholder reports (including NGO reports).

The book is an excellent example of the potential for interdisciplinary research in this area. Having originally been the exclusive domain of lawyers, the need for an interdisciplinary approach to human rights has been recognised in recent years. The UPR itself requires more than a simply legal approach in practice also. Compared with the treaty bodies for example, the UPR process requires NGOs to engage not only with the legal human rights provisions but also to use politics and/or international relations to lobby for change. As Schokman and Lynch state: ‘The inherently political nature of the UPR continues to provide the biggest opportunity for achieving significant human rights change on the ground, but also remains the biggest challenge for NGOs’.

As with treaty body monitoring, there are a few international law scholars, including ‘insiders’ such as current or former members of the treaty bodies, or UN employees who write about the UPR. However, as a more recent mechanism, some of the UPR literature remains descriptive and focuses on explaining the new system. As such, NGO representatives are active contributors to the literature in this area, both in practice and in academic publications. Some NGOs have progressed to preliminary analyses and critiques

115 Unfortunately the Secretariat did not respond to requests for an interview.
116 Freeman, above n 40; Ku and Weiss, above n 10; David Armstrong, Theo Farrell and Hélène Lambert, International Law and International Relations (Cambridge University Press, 2012) Ch 5.
117 Schokman and Lynch, above n 112.
based on outcomes of the initial UPR reviews. Due to the centralised, universal nature of the UPR, international NGOs have been formed or existing NGOs have adapted to provide information, training and support to civil society organisations on the UPR process. Some of these, such as UPR-Info, also provide statistics and analysis on the UPR.

Analyses and critiques of the UPR in academic literature are beginning to emerge. Some have analysed the politics of the UPR, others provide case studies of particular countries or regions. There has also been some analysis of the role of NGOs in the UPR but often within the context of civil society organisations more broadly. In the first empirical study on the UPR in 2010, Moss identified that the UPR presented opportunities for NGOs, not only by engaging in Geneva but also by using the UPR as a lobbying tool domestically. He analysed the reviews of 16 States in the UPR’s second cycle and concluded that NGOs had had considerable success in influencing the recommendations made in the UPR, but that States were more resistant to accepting these recommendations. The comprehensive study in 2013 by McMahon et al examined UPR sessions three to 13 from December 2008 to May 2012. They found that CSO recommendations were reflected in State recommendations, (at a rate of 67 per cent). Contrary to Moss’ findings, McMahon’s study concluded that CSO-suggested recommendations were slightly more likely to be accepted by the State-under-review. McMahon et al’s methodology of ‘matching’ CSO recommendations with

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Moss, above n 119.

Ibid, 123.

McMahon et al, above n 122.
those of States was useful in developing the methodology for the current study as was their pragmatic assertion that:

…it is not possible to prove causation i.e. whether states made these recommendations as a result of the CSO suggested recommendations. However, examination of the extent to which CSO concerns are reflected in state recommendations can at least demonstrate the level to which CSO interests are correlated and thus represented, in the process.128

The current study builds on these studies in four ways: firstly, in the Australian case study it differentiates between NGO and NHRI content in order to isolate potential NGO influence, in so far as is possible to do so. Secondly, unlike the previous studies, it also takes into account UN sources as potential influencers of State recommendations, an important consideration given the likely perceived legitimacy of UN reports compared with NGO reports in a peer-review mechanism. Thirdly, by drawing on qualitative interview data it provides depth and context to accompany the quantitative results. Finally, it analyses which specific NGOs, and which types of NGOs, had most influence on States’ recommendations.

Another author, Baird, used a case study approach to explore the NGO role in the UPRs of Pacific Island States, although this was more doctrinal in nature and did not draw on the same empirical methods as this thesis.129 There have also been some preliminary discussions by international law academics of whether the UPR and treaty body systems complement or duplicate each other.130 The complementarity / duplication question has not been examined with any empirical rigour, perhaps partly as initial research was published when the UPR was in its infancy. This thesis makes a modest contribution to this discussion through the lens of the NGO role, predominantly in Chapter Five.

Similar to the literature on treaty bodies, although there is more analysis of quantitative data in relation to the UPR (for example regarding numbers of recommendations, which States

128 Ibid, 5.
make which type of recommendations and so forth), there is generally no accompanying qualitative research to give further depth and analysis to the topic - an area to which this thesis makes a contribution.

2.8 Australian NGOs

For the Australian case study, literature on Australian NGOs, with a particular focus on NGO engagement with UN human rights State reporting mechanisms, was reviewed. Australian NGO engagement with these mechanisms was well summarised by Cody in her article ‘NGOs and Human Rights Monitoring: The 'how, when, where, what and why' of effective engagement’. With this exception, Australian NGOs’ role in international human rights law is underexplored in academic literature. As noted in Section 2.6, there is a brief analysis of NGO involvement in treaty body monitoring in the international study of 20 States by Heyns and Vilijoen in 2002. The study provided an overview of Australian human rights NGOs and named some key international NGOs and NGOs in Australia. Some key NGOs which engage with treaty bodies and the UPR are not mentioned in the study – some because they were established after 2002.

An Australian publication, Zifack’s short book Mr Ruddock goes to Geneva published in 2003, provides an interesting snapshot of Australia’s engagement with the UN – specifically the CERD Committee - and as such provided useful context for the case study component of this thesis. Zifack describes and analyses the then Minister for Immigration and Multicultural Affairs’ appearance before the UN CERD Committee in 2000. There are occasional references to NGOs in the book. For example, Zifack writes that one of the Australian government’s main criticisms of UN human rights bodies at that time was that they gave too much weight to the voice of those critical of the government, namely NGOs.

Of course there are many types of NGO which do not engage with UN human rights bodies - in fact many NGOs have a limited human rights advocacy role either domestically or

131 See, eg. McMahon and Ascherio, above n 122.
132 Cody, above n 105.
133 Heyns and Viljoen, above n 79.
134 For example, the Melbourne based Human Rights Law Centre.
135 Spencer Zifcak, Mr Ruddock Goes to Geneva (University of New South Wales Press, 2003).
136 Ibid, 38.
internationally. For the case study, it was useful to develop a profile of the Australian NGO sector. In Australia there is a large not-for-profit (NFP) sector which is predominantly a service delivery, rather than advocacy, sector. There are around 600,000 NFPs in Australia.\textsuperscript{137} According to the Australian Bureau of Statistics, the key areas of activity for the NFP sector are, Social Services (25%), Education and Research (25%), Health (18%), and Culture and Recreation (12%).\textsuperscript{138} As a result of this profile, the Australian academic literature reflects the service provision focus for the NFP sector. In particular, literature has analysed and responded to the NFP reforms at Federal and state level in the last five to ten years.\textsuperscript{139} These reforms have been quite extensive and are still evolving. They have been categorised as follows: a) creating a coordinated architecture within government for NFPs; b) supporting and sustaining the NFP sector; and c) reforming the regulation and taxation of NFPs.\textsuperscript{140}

Arguably within the reform agenda, and of relevance to this thesis, was the removal of so-called ‘gag clauses’ which had restricted advocacy in Australia.\textsuperscript{141} In 2008, the Government announced that gag clauses tied to funding agreements for NFPs would be removed.\textsuperscript{142} This was followed in 2010 by the High Court decision in \textit{Aid/Watch Incorporated v Commissioner of Taxation}.\textsuperscript{143} In the Aid/Watch case, the Commissioner for Taxation argued that Aid/Watch did not meet the definition of a charity for tax exemptions and concessions due to its advocacy work on foreign aid policies. The Full Court of the Federal Court allowed an appeal of an Administrative Appeal Tribunal Decision because Aid/Watch’s main purpose

\begin{itemize}
\item \textsuperscript{137} Myles McGregor Lowndes, ‘The Not for Profit Sector in Australia Fact Sheet: ACPNS Current Issues Information Sheet’ (2014) 4 \textit{The Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology} 1.
\item \textsuperscript{138} Australian Bureau of Statistics, \textit{Not-for-profit Organisations, Australia}, 2006-07. Service delivery NGOs are also common in the sphere of humanitarian relief, some of whom are entirely government funded. It has long been established that receipt of government funding by NGOs raises questions of independence. See, eg, Antonio Donini, ‘The bureaucracy and the free spirits: Stagnation and innovation in the relationship between the UN and NGOs’ (1995) 16(3) \textit{Third World Quarterly} 421.
\item \textsuperscript{139} See, eg, Ann O’Connell, Fiona Martin and Joyce Chia, ‘Law, policy and politics in Australia's recent not-for-profit sector reforms’ (2013) 28(2) \textit{Australian Tax Forum} 289.
\item \textsuperscript{140} Commonwealth of Australia, \textit{Australian Charities and Not-for-Profits Commission, Not-for-Profit Reform and the Australian Government} (2013).
\item \textsuperscript{141} Ibid.
\item \textsuperscript{142} Gemma Edgar, ‘Agreeing to Disagree: Maintaining dissent in the NGO sector’ (The Australia Institute, Discussion Paper Number 100, August 2008) 2.
\item \textsuperscript{143} \textit{Aid/Watch Incorporated v Commissioner of Taxation} [2010] HCA 42
\end{itemize}
was political, rather than charitable. However, the High Court held that unfettered communication on government policies is an important part of the system of government established by the Constitution and that public debate about foreign aid to relieve poverty, is a purpose beneficial to the community and as such Aid/Watch could be regarded as a charitable institution.

Subsequent to the Aid/Watch case and a Productivity Commission inquiry into the NFP sector, the *Not-For-Profit Sector Freedom to Advocate Act 2013* was introduced.\(^\text{144}\) The long title is as follows: ‘An Act to prohibit Commonwealth agreements from restricting or preventing not-for-profit entities from commenting on, advocating support for or opposing changes to Commonwealth law, policy or practice, and for related purposes.’ This important Federal-level development for human rights NGOs and others engaging with advocacy work within the NFP sector can be undermined by State and Territory laws and policies.\(^\text{145}\) Perhaps conversely, much scholarship has identified State funding of NGOs as an area of concern, potentially raising questions about their independence and integrity.\(^\text{146}\)

The most relevant study of NGOs for the purposes of the Australian case study component of this thesis is the 2007 report *Sustainable Advocacy: Capabilities and attitudes of Australian human rights NGOs*.\(^\text{147}\) The report was driven by Australian Lawyers for Human Rights’ concern that some human rights issues in Australia were not being sufficiently addressed. It asked whether there were significant gaps in the range of human rights activities, and/or significant outstanding needs among human rights NGOs in Australia.\(^\text{148}\) It concluded that Australian NGOs were well-planned organisations with good human rights knowledge but with constraints such as funding. They worked within strong networks and their activities

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\(^\text{146}\) Willetts, above n 31.


\(^\text{148}\) Ibid, 9.
were primarily lobbying, policy submissions, some individual representation, reports and community education.\textsuperscript{149}

Importantly for this thesis, Australian NGOs were found to refer to international human rights standards in their work, but have little emphasis on the use of international human rights mechanisms.\textsuperscript{150} This is evident in the relatively small number of NGO reports submitted to the two UN mechanisms being examined in this thesis – CERD and the UPR. There were 22 stakeholder submissions for the last UPR of Australia in 2015, and five NGO reports to the CERD Committee in 2010.\textsuperscript{151} For example, in a comparable jurisdiction such as Canada, there were 48 stakeholder submissions to its 2013 UPR and 31 NGO reports to the CERD Committee in preparation for Canada’s 2012 review by the Committee.\textsuperscript{152}

The \textit{Sustainable Advocacy} report also found that Australian human rights NGOs wanted a more targeted approach to national human rights advocacy and would like to see the establishment of an NGO coalition, rather than a new peak body or national human rights NGO. It is interesting then, that around the time that this report was published, a new NGO, the Human Rights Law Centre (HRLC) was established in Melbourne in 2006. The HRLC’s aim is to bring international human rights law to bear in domestic law.\textsuperscript{153} From the outset it engaged with the UN, drafting communications to UN Special Rapporteurs in its first year,\textsuperscript{154} and now regularly submits reports to UN treaty bodies and to the UPR, often leading coalitions. Co-ordinating and working in partnership on such reports is the HRLC’s common practice, particularly with bodies such as the National Association of Community Legal

\begin{flushright}
\textsuperscript{149} Ibid.
\textsuperscript{150} Ibid, 40.
\textsuperscript{154} Ibid.
\end{flushright}
The collaborative approach may to some extent fulfil the wishes of Australian NGOs for a coalition rather than a new stand-alone NGO.

The question of representation of Aboriginal and Torres Strait Islander peoples in the NGO sector in Australia was important for this thesis, particularly given the prevalence of Indigenous rights issues in the UPR in 2015 and the fact that CERD was the treaty body selected for the case study. Relevant literature relating to, and by, Aboriginal and Torres Strait Islander peoples in Australia was reviewed, as was international literature on Indigenous peoples, diversity of representation in NGOs, (literature on this was more limited), and in Government consultations – a key part of domestic preparation for State reporting.

Postcolonial literature has provided some critique of international law and the UN in terms of its force as a neocoloniser. In particular, it has been argued that Indigenous peoples and NGOs engaging with the UN can become colonised. Corntassel posits that by engaging with the UN, groups begin to limit their other political activities and conform to the dominant norms of UN structures, becoming a part of the system, removed from their grassroots movements. In addition, some international literature acknowledges that the NGO concept is a Western one in origin and may be foreign to many Indigenous communities and in many developing countries. Whilst some authors have explored concepts such as Indigenous social movements, and Indigenous engagement with the UN, Indigenous peoples’ engagement with mainstream UN human rights reporting mechanisms, and associated national consultations and NGO coalitions, remains underexplored.

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155 Both NACLC and HRLC were interviewed for this thesis.
158 Donini, above n 138.
It has previously been confirmed that minority groups are under-represented in Government consultations,\textsuperscript{161} an important component of the State reporting mechanisms. Internationally, consultation has been identified as an important institutionalised means for members of minority communities to participate in public policymaking, providing a forum for them to voice their concerns and not just participate as individuals in an electoral process skewed towards majority representation.\textsuperscript{162} It is acknowledged that there is a lack of minority representation in politics and Government world-wide,\textsuperscript{163} therefore ensuring adequate representation of diverse ethnic groups in NGO networks is particularly important.

Other key primary sources for the Australian case study include Australian Human Rights Commission reports, Australian Government reports to the UN CERD committee and the Human Rights Council, and recommendations from the UN bodies to Australia.

### 2.9 Conclusion

Primary sources of international human rights law and existing academic literature provide a context for the current study. This thesis builds on and contributes to a range of scholarship from various disciplines on NGOs, transnationalism and glocalisation. It adds to the body of literature on the NGO role in treaty body State reporting, providing a more recent and empirical study. For example, as outlined in the next chapter, most treaty body–related interviewees expressed some reservations about NGOs or about the reliability of NGO information. Scholarship on the NGO role in treaty body monitoring so far has generally been positive about the role and has not explored this reticence towards NGOs arising in interviews and discussed in this thesis.

The thesis also makes a contribution to emerging literature on the UPR, bringing a focus to the role and influence of NGOs (in particular vis-à-vis other stakeholders). The Australian


case study offers an example of the NGO role, of potential international interest, but also contributes to the limited literature on Australian NGOs and the UN.

In summary, the main gaps that exist which this thesis contributes to filling include the lack of attention to the NGO role in international human rights law literature and where it is considered, a tendency to rely on insider perspectives. With some exceptions in the case of the UPR, there is a dearth of empirical research in this area, for example to support claims of the critical nature of the NGO role. In the case of the UPR, empirical data has generally been quantitative rather than qualitative in nature. The qualitative data drawn from interviews brings additional depth and analysis to the existing body of knowledge. Finally, there has not been any previous study comparing the NGO role in the UN human rights treaty bodies with the NGO role in the UPR.

This chapter is a journal article which was accepted by the International Journal of Group and Minority Rights subject to revisions. The revisions were subsequently made and this is the revised version, resubmitted in 2016.
Abstract
Non-governmental organisations (NGOs) have become important, although often overlooked, actors in monitoring international human rights law. This paper explores the precise role and influence of NGOs in relation to United Nations (UN) human rights treaty body State reporting, using the example of the Committee on the Elimination of Racial Discrimination (CERD). It draws on interviews with CERD Committee members, UN staff and international NGOs to confirm theories on the essential information provision role of NGOs. These findings are triangulated with a case study of the CERD Committee’s most recent review of Australia in 2010, finding a strong correlation between an NGO coalition report and the Committee’s concluding observations. Three factors for the influence of this report are posited: its quality, the legitimacy derived from the large coalition, and its domestic nature. The paper concludes with recommendations for improvements to the CERD Committee’s engagement with NGOs and suggestions for future research.

1. Introduction
Non-governmental Organisations (NGOs) have carved out a role for themselves in the international human rights framework, welcomed by the United Nations (UN), but often resisted by States. With only limited opportunities provided for ‘consultation’ with NGOs in Article 71 of the UN Charter, NGOs began as almost extraneous to the international human rights system. In the last 71 years however, they have become increasingly important. In 1994, the UN Secretary General noted that ‘NGO involvement has not only justified the inclusion of Article 71… but that it has far exceeded the original scope of these legal provisions’.

A pertinent example of this is the role of NGOs in monitoring UN human rights treaty obligations, which is the subject of this article. This small scale study uses empirical data to explore firstly the nature of the NGO role and secondly its influence, in the context of the

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3 Charter of the United Nations, 4 October 1945, 1 UNTS XVI.
International Convention on the Elimination of Racial Discrimination (ICERD).\textsuperscript{5} Each of the UN’s nine core human rights treaties has its own Committee to monitor implementation of the treaty among States parties, primarily through considering periodic reports.\textsuperscript{6} It is an often overlooked fact that the ICERD is the longest standing of the UN human rights treaties and as such, ICERD and the CERD Committee led the way for the drafting and operation of future human rights treaties. As described in Section 3.2, the CERD Committee was the testing ground for NGO involvement in State reporting. As 2015 marked the 50\textsuperscript{th} anniversary of the ICERD, it is timely to reflect on the now critical role played by NGOs in State reporting to the CERD Committee - a role not provided for in the hard law of the ICERD. The ICERD contains legally binding obligations for States to implement the provisions of the treaty with the objective of eliminating racial discrimination.

Following discussion of theory and method in Section 2, Section 3 explores the nature of the NGO role in the CERD Committee’s State Reporting. Sections 4 and 5 form the crux of this article, presenting data primarily from interviews with staff from the UN Office of the High Commissioner for Human Rights (OHCHR), CERD Committee members and international NGOs (INGOs) on their perceptions of the NGO role (Section 4). This data is triangulated with an Australian case study of NGOs’ influence on the CERD Committee’s recommendations in 2010 (Section 5). As Australia’s last review took place in 2010, this analysis is timely in preparing for Australia’s upcoming review.\textsuperscript{7} Section 6 concludes that NGOs fill a gap in the UN treaty body State reporting system, with specific reference to CERD, and identifies opportunities for future research.\textsuperscript{8} The gap filled by NGOs is the provision of critical information to supplement the information provided by Governments, so


\textsuperscript{6} The terms UN Committee and treaty body are both used in this paper, with the same meaning.

\textsuperscript{7} Australia’s report to the Committee was submitted on 2 February 2016: Australian Government, Consideration of reports submitted by States parties under article 9 of the Convention: Eighteenth to twentieth periodic reports of States parties due in 2014: Australia, UN Doc CERD/C/AUS/18-20, 17 February 2016. The review is scheduled to place in 2017.

\textsuperscript{8} Although this study focuses on NGOs, it is acknowledged that National Human Rights Institutions are gaining importance as stakeholders in international human rights law, including in State reporting mechanisms. See for example Sonia Cardenas, Chains of Justice: The Global Rise of State Institutions for Human Rights (University of Pennsylvania Press, 2014). However, the documentary analysis in this study did not find evidence of a strong influence from the Australian Human Rights Commission’s report to CERD in the last Australian review, (Section 5).
that the Committee of independent experts can better assess the actual state of human rights on the ground and make suitable recommendations.

2. **Theory and Method**

The role of NGOs and INGOs seems to offer a tremendous opportunity for future study, but researchers need to reach beyond simple counts of organizational membership to examine empirically the processes and contexts through which these organizations influence compliance.⁹

This statement by Keith in the conclusion of her chapter synthesising and analysing empirical legal research on human rights instruments, provides strong validation for the need for empirical research on NGOs. This is the first way in which this paper makes a unique contribution as it uses interview data. The second way in which it makes a unique contribution is by analysing whether NGO and NHRI recommendations were used by the CERD Committee in concluding observations. Some authors have cited instances of NGO influence on concluding observations but have not comprehensively analysed all NGO and civil society input for one or more State reviews and cross-referenced it with the concluding observations.¹⁰ To date, there has not been a study mapping whether NGO documents have directly influenced a Committee’s concluding observations.¹¹

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¹⁰ See for example Lena J. Kruckenberg, *The Unreal world of human rights: An ethnography of the UN Committee on the Elimination of Racial Discrimination* (Nomos Verlagsgesellschaft, 2012) 122, who notes some instances of NGO influence on CERD concluding observations. Another study - Ayelet Levin, ‘The Reporting Cycle to UN Human Rights Treaty Bodies: Creating a Dialogue Between the State and Civil Society – The Israeli Case Study’ (2016) 48 *George Washington International Law Review* 315, 361 - relies on interview data to indicate that NGOs influence treaty body concluding observations, but without other empirical data to support the argument: ‘…some concluding observations are at least partially drafted by NGOs. For example, one NGO interviewee mentioned that the suggested recommendations handed out to the Treaty Body were adopted almost word for word by the committee in its concluding observations.’

¹¹ In contrast, this exercise has been done for the Human Rights Council’s Universal Periodic Review mechanism, see for example: Edward McMahon et al, *The Universal Periodic Review, Do Civil Society Organization – Suggested Recommendations Matter?* (Friedrich-Ebert-Stiftung, Dialogue on Globalization, 2013).
International legal scholarship on the NGO role in international human rights treaty law has tended to focus on their role in drafting international legislation,\(^\text{12}\) and in bringing individual complaints to treaty bodies,\(^\text{13}\) but less on understanding the NGO role in State reporting. A seminal work by Bayefsky in 2000 on the UN treaty body system contains a number of useful chapters on NGOs in the treaty system, generally providing an NGO perspective using case studies.\(^\text{14}\) However, it is now 17 years since this was published and the role of NGOs have changed in that time period. This is a general trend in edited books on human rights and treaty bodies – academics write the core chapters whilst NGO practitioners provide their perspectives in a stand-alone chapter.\(^\text{15}\) As mentioned above, these studies did not assess the influence of NGOs on concluding observations, also they were generally written from the practitioner’s own perspective, rather than drawing on empirical data. There have also been useful studies on the impact of human rights treaties and a body of literature on treaty body reform; although these contain limited analysis of the NGO role.\(^\text{16}\)

International relations and political science scholars who write about NGOs and human rights have placed NGOs in the UN human rights system on a spectrum ranging from important,\(^\text{17}\)

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to essential,\(^\text{18}\) or even elevated to a God-like status.\(^\text{19}\) So how important are NGOs in State reporting to UN human rights treaty bodies, specifically CERD? How might we establish firstly, the nature of their role, and secondly the influence they have? An empirical research methodology was selected to best answer these questions. The paper uses semi-structured interviews and documentary analysis and draws on the author’s observation of CERD State reporting.\(^\text{20}\) The design was informed by established methodologies used by other researchers on related projects. The observational methodology was informed by Kruckenberg’s ethnographic study of the CERD Committee in 2012.\(^\text{21}\) This paper builds on her study by bringing an additional analysis to the NGO role, introducing interview data and providing updates on the NGO role since 2012. The documentary analysis approach was partly informed by Krommendijk’s analysis of the lack of implementation of CERD concluding observations in the Netherlands.\(^\text{22}\) The design was also informed by gaps identified in the existing research, such as the well-established need for more empirical data on the NGO role in UN human rights mechanisms.\(^\text{23}\)

Semi-structured interviews were carried out with the 17 key stakeholders listed below. The majority of the interviews took place in Geneva in April 2015 when the researcher was an observer at the Committee’s 86th session. Several interviews were also conducted by

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\(^{19}\) Peter Willetts (ed), ‘\textit{The Conscience of the World}: The Influence of Non Governmental Organisations in the UN System’ (David Davies Memorial Institute of International Studies and the Brookings Institution, 1996) 11.

\(^{20}\) The author observed constructive dialogues and NGO briefings at the Committee’s 86th session in April 2015 as part of the research for this study. She also participated in the 66th session in March 2005 as part of an Australian NGO delegation.

\(^{21}\) Kruckenberg, above n 10.


telephone between May 2015 and January 2016. The interviews were recorded and transcribed, they were then codified and analysed using NVivo qualitative analysis software. The research was conducted in accordance with the University of Western Australia’s ethics approval for the research, which requires that interviewees be given the option of anonymity. Offering anonymity in qualitative research allows candid disclosure of information while protecting participants.\(^\text{24}\) All NGO and INGO interviewees consented to their organisation being identified; all other interviewees chose to remain anonymous and agreed to one of three descriptors (as relevant to their organisation): ‘CERD Committee member’, ‘OHCHR staff member’ and ‘Australian Government Representatives’. Interviewees have been allocated these titles and a number in footnote references.

Interviewees were selected due to their particular role or expertise – purposeful sampling – or because they were recommended by other interviewees – snowball sampling.\(^\text{25}\) In addition, CERD Committee members were selected to reflect, as far as possible, diversity of geographical origin, gender and ethnicity, length of time on the Committee, current or previous positions of authority in the Committee, and professional background. Restrictions included the requirement that the Committee members interviewed must speak English as a working language and their availability and willingness to participate.

List of interviewees:

a) Current CERD Committee members (five interviewees)

The CERD Secretariat assisted with identifying suitable Committee members and conveying the invitation to participate to them.\(^\text{26}\) Three Committee members responded directly to the researcher and suggested two other Committee members who were also interviewed. The end result was that interviewees did reflect the diversity sought from the sample.

b) Relevant UN Staff in the OHCHR (three interviewees)

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\(^{26}\) The researcher was not informed which members the Secretariat had contacted.
Two interviewees were selected due to their positions within the OHCHR in relation to treaty bodies, and a third was suggested by one of these interviewees. One stakeholder approached for interview did not wish to participate.

c) Australian Government Representatives (three interviewees)
These interviewees were selected due to their roles and familiarity with CERD (or treaty bodies generally in one case), one was based in Geneva, the other two in Canberra, Australia.

d) INGOs (three interviewees)
Three INGOs were selected for interviews. One, Minority Rights Group (MRG), was suggested by a CERD Committee member, the International Movement Against All Forms of Discrimination and Racism (IMADR) was identified by the researcher as an INGO actively engaged with the CERD Committee. The third, International Service for Human Rights (ISHR), had been identified in Kruckenberg’s study of the CERD Committee.27

e) Domestic Australian NGOs (three interviewees)
Five NGO reports were submitted in Australia’s last review by the CERD Committee in 2010. Of these, the researcher interviewed three: one of the lead NGOs in the NGO coalition – the Human Rights Law Centre, one NGO which had contributed to the coalition report and submitted their own report, and one which had just submitted their own report – The National Native Title Council.

Qualitative interview data was triangulated with a small-scale case study of the last Australian review before the CERD Committee in 2010. Documentary analysis examined issues raised and recommendations made in NGO reports and the report of the Australian Human Rights Commission, the National Human Rights Institution (NHRI), and compared these with the recommendations made by the CERD Committee in the concluding observations. The CERD recommendations in concluding observations were input into an Excel spreadsheet and where similar (or the same) text appeared in an NGO or NHRI report, it was input beside the CERD recommendations for comparative purposes. This also indicated which CERD recommendations did not have any links to NGO or NHRI reports. The Committee’s previous concluding observations from 2005 were also input into the spreadsheet where they were similar to the 2010 concluding observations, to check if they, rather than NGO influence, were the source of the 2010 recommendations.

27 Kruckenberg, above n 10.
As some literature has attested to the importance of the NGO role in providing information to Committees, but generally without supporting empirical evidence, this research makes a modest contribution to verifying those assertions. Forsythe claims that when critical conclusions are reached by UN Committees, it is frequently based on information provided by NGOs.\(^{28}\) The documentary analysis carried out here specifically examined whether there was evidence of NGO influence in the concluding observations of the Committee. A case study focusing on one reporting cycle for a selected State, under one human rights treaty, allows for a more in-depth analysis than a broader study not incorporating the same level of documentary analysis.

This small scale case study approach has limitations. Firstly, the sample sizes were relatively small with only five of the 18 CERD Committee members interviewed and only three OHCHR staff. As such it cannot necessarily be assumed that their views are representative. However, interviews did not only capture perceptions but also facts such as the recent history of NGO engagement with the Committee which has not been documented elsewhere. Secondly, findings relating to CERD are not necessarily generalisable to NGO engagement with all UN human rights treaty bodies. However, much of the literature cited above on NGOs relates to their role with treaty bodies generally, rather than CERD specifically. This literature remains useful as all Committees engage with NGOs in similar ways - with some minor variations such as the role for NGOs in article 45 (a) of the Convention on the Rights of the Child.\(^{29}\) The Chairs of the Committees co-operate with each other and the UN is working towards more simplified reporting with common working methods among the Committees.\(^{30}\) Therefore, the current study may have broader application. Thirdly, Australian NGOs may not be typical of all NGOs, but it is feasible that some features of NGO engagement with treaty bodies may be common across the Western European and

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\(^{28}\) Forsythe, above n 17, 203-204; Freeman, above n 18; Wiseberg, above n 18.

\(^{29}\) *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990). Contrary to what is often asserted, Article 45 a) does not provide for an NGO role *per se*, but rather that the Committee ‘may invite… other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates.’ However, the Committee’s rules 34, 70 and 74 of the Provisional Rules of Procedure, CRC/C/4 (14 November 1991) confirm that ‘other competent bodies’ includes NGOs.

\(^{30}\) Pillay, above n 16.
Other Groups (WEOG) States. These States are seen as geographically diverse but more homogenous in terms of culture, political approach and economic development.31

Finally, the study is limited to considering the influence of NGO reports on the Committee’s recommendations. It recognises the need for further work to trace the implementation of the recommendations, and any eventual outcomes in realising people’s rights under ICERD.

3. Setting the Scene - NGOs and the CERD Committee
This section explores the context of NGO engagement with the CERD Committee. It explains which NGOs engage with the Committee (Section 3.1) and how the NGO role developed (Section 3.2), before discussing the current NGO role in State reporting (Section 3.3) which is conceptualised as filling a gap in CERD State reporting.

3.1 Types of NGOs Engaging with the CERD Committee
There is no universally accepted definition of ‘NGO’.32 In this study, the organisations of interest are those who engage in human rights advocacy work with UN human rights treaty bodies, CERD in particular. It must be acknowledged that the NGO concept is a Western one in origin and may be foreign to many Indigenous communities and in many developing countries.33 This is important to note for some of the minority groups protected by ICERD.

In 2012, Kruckenberg observed that transnational human rights NGOs, national human rights NGOs, and organisations representing minority groups engaged with the CERD Committee.34 She identified key INGOs which monitor CERD including ISHR and IMADR. Since 2012, ISHR now focuses on human rights defenders, not CERD per se.35 A CERD Committee

33 Antonio Donini, ‘The bureaucracy and the free spirits: Stagnation and innovation in the relationship between the UN and NGOs’ (1995) 16(3) Third World Quarterly 421, 430.
34 Kruckenber above n 10, Ch. 5:1.
35ISHR’s focus is now more on human rights defenders. ISHR, INGO Interviewee 9, interview conducted 28 April 2015, Geneva.
member interviewee identified IMADR as one of the key NGOs currently working with the CERD Committee; \(^{36}\) IMADR also has the contract to provide webcasting of the Committee’s sessions. \(^{37}\) In addition, MRG is now identified as a leading NGO for the CERD Committee. \(^{38}\)

These types of INGOs and transnational advocacy networks were the subject of influential scholarship by Keck, Sikkink and others. \(^{39}\) More recently, authors such as Merry and Simmons argue that while transnational networks may be critical in the case of a repressive regime, in most States, domestic actors, including NGOs, are the most significant. \(^{40}\) Similarly in international law, Article 71 of the UN Charter was weighted towards INGOs and provides for consultation with ‘international organizations and, where appropriate, with national organizations’. \(^{41}\) Subsequently ECOSOC Resolution 1996/31 broadened this initial narrow focus on international NGOs to include national and regional organisations. \(^{42}\) So are INGOs or domestic NGOs more significant for the CERD State reporting mechanism? This study has found that both are important. Merry and Simmons’ analysis resonates with the Australian case study which found that in this Western democracy, a coalition of domestic NGOs emerged as most influential on the CERD Committee and the INGO Amnesty International had less obvious impact (Section 5).

However, interviews confirmed that INGOs do play an important role for the CERD Committee. In the case of a repressive regime they will submit reports and present to the Committee on behalf of domestic NGOs but without naming them, to protect them from

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36 CERD Committee Member Interviewee 3, interview conducted 30 April 2015, Geneva.
37 IMADR is part of an NGO coalition that provides webcasting of the treaty body sessions, see: UN Treaty Body Webcast, About Us  <www.treatybodywebcast.org/about-us/>. 
38 CERD Committee Member Interviewee 3, above n 36; CERD Committee Member Interviewee 1, interview conducted 27 April 2015, Geneva.
41 *Charter of the United Nations*, above n 3.
reprisals. In most cases, the majority of their work is facilitating engagement between domestic NGOs and the CERD Committee. This can include providing training, explaining how to use concluding observations in follow up, editing reports, and introducing domestic NGOs to Committee members who might be most interested in their issues. In addition, they can bring legitimacy to domestic NGO reports and presentations. Both CERD Committee member and INGO interviewees indicated that reports submitted by IMADR and MRG may be more likely to be taken on board by the Committee:

Of course there are some NGOs that we know are doing specialised work; may I mention some of them – Minority Rights Group and IMADR from Japan and some other organisations. Of course it’s not that we are going to prioritise but we are going to take their information because we know that they are specialised agencies who are doing that work. ‘I should mention that we, Minority Rights Group, are a big NGO and we are known to them. So when we work with a partner, just by giving a stamp, it’s just a way to give credibility.”

Therefore, both domestic NGOs and INGOs play their own distinct role with the CERD Committee. The former brings ‘on the ground’ information and the latter facilitates their engagement if required, and in some cases protects their identity or gives them credibility in the eyes of the Committee.

3.2 Development of the NGO Role with the CERD Committee
In the early days, some CERD Committee members were resistant to NGO involvement - they were keen to preserve State sovereignty and not to interfere in the internal affairs of the States parties. To provide clarity, in 1972 the Chair of the Committee concluded ‘it appears… that the Committee would continue the practice it had followed to date, allowing members to use any information they might have as experts.” Therefore, use of unofficial information, such as NGO reports, was considered valid for those Committee members who wished to use it. The UN regulates engagement with NGOs through the UN Economic and Social Council

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43 MRG INGO interviewee 12, interview conducted 29 April 2015, Geneva.
44 Ibid; IMADR INGO interviewee 11, interview conducted 29 April 2015.
45 CERD Committee Member Interviewee 3, above n 36; CERD Committee Member Interviewee 1, above n 38; MRG INGO interviewee 12, above n 43.
46 CERD Committee Member Interviewee 3, above n 36.
47 MRG INGO interviewee 12, above n 43; IMADR INGO interviewee 11, above n 44.
48 Gaer, above n 23, 343.
(ECOSOC), with its legal basis in Article 71 of the UN Charter. However, perhaps because the role developed gradually and informally, ECOSOC accreditation has never been required for NGOs to submit a report to the CERD Committee or to brief the Committee.

The weakening of resistance to NGO involvement was bolstered in 1974. At the request of the CERD Committee, the UN Office of Legal Affairs advised that ICERD did not specify which sources the Committee would use, leaving it open for the Committee to use unofficial material from NGOs. The use of NGO reports by the CERD Committee has been challenged by governments a number of times since, albeit unsuccessfully. Most recently, UN proposals to align interaction of treaty bodies with Governments, NGOs and NHRIs as part of the treaty body strengthening process, were vehemently rejected by some States who sought to use the opportunity to reduce the NGO role.

In the 1990s, NGOs submitting reports and information to the CERD Committee became more common and the Secretariat began to provide support for this function. A significant driver for this change was the founding of the Anti-Racism Information Service (ARIS), an NGO facilitating other NGOs’ engagement with CERD. The increased NGO participation was first noted in the Committee’s annual report to the General Assembly in 1996, which

49 Charter of the United Nations, above n 3.
51 Gaer, above n 23, 42.
52 Ibid, 342-343.
53 Office of the High Commissioner for Human Rights, Non-exhaustive list of emerging proposals identified so far in the context of the treaty body strengthening informal consultations (including Dublin, Marrakesh, Poznan, Sion, Seoul, Pretoria, Bristol and Lucerne) and those of the Inter-Committee Meeting (ICM) and Meeting of Chairpersons (MC), as well as other proposals stemming from the process (9 November 2011) <http://www2.ohchr.org/english/bodies/HRTD/docs/ProposalsTBStrengtheningProcess.pdf>.
55 Up until then, NGOs had to send the information to each Committee member individually, see Kruckenberg above n 10.
56 Ibid.
acknowledged that NGO commentaries ‘…complemented the information available to members and helped improve the quality of the Committee’s examination of those reports.’ Therefore by 1996, NGOs had become important to the CERD Committee. After ARIS’ establishment, the CERD Committee adopted general guidelines for interacting with NGOs and NHRIs. CERD Committee members interviewed for this study commended ARIS as playing a very useful facilitative role for engagement between NGOs and the Committee, and for providing interpreters for NGO informal briefings.

At the start, all NGOs coming from everywhere in the world were co-ordinated by ARIS. It worked quite well because we had meetings here in this room – lunchtime briefings – and ARIS co-ordinated everything. They put together those NGOs which were going to address the specific country, and they translated.

However, due to funding constraints, ARIS’ role declined in 2007 and petered out in 2008. Committee members then found ‘we had NGOs coming to us individually and it was very difficult for us to work’. Although IMADR and MRG now work closely with the CERD Committee, neither perform tasks such as interpreting and overall co-ordination that ARIS undertook. One solution to managing engagement with NGOs was for the Committee to establish ‘formal informal’ NGO briefings each week as described in the following section.

3.3 CERD State Reporting and the NGO role

State reporting is provided for in Article 9(1) of ICERD. NGO reports may be submitted by individual NGOs or by coalitions of NGOs. NGOs may also contribute reports to develop the list-of-themes and to follow-up, although these are not the focus of this paper. The

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58 Kruckenberg above n 10, Ch. 5:2.
59 CERD Committee Member Interviewee 4, interview conducted 30 April 2015, Geneva; CERD Committee Member Interviewee 5, interview conducted 30 April 2015, Geneva.
60 CERD Committee Member Interviewee 4 above n 59.
61 CERD Committee Member Interviewee 4 above n 59; CERD Committee Member Interviewee 5, above n 59.
62 CERD Committee Member Interviewee 4 above n 59.
63 UN Committee on the Elimination of Racial Discrimination, NGO Information Note (84th session, 3 to 21 February 2014).
64 Shirane, above n 50, 25, 35.
CERD Committee recommends concise reports and prefers coalition reports. An NGO coalition report can be mutually beneficial to the UN Committee and to NGOs - the endorsement of multiple, sometimes even hundreds, of NGOs brings added legitimacy. For resource-poor NGOs, being part of a coalition is more cost-effective. A disadvantage is that their human rights issues of concern may get lost in the larger report.

NGO reports are an informal part of the process and as such there are no formal restrictions on word limit; nor does the Secretariat translate NGO reports into the working languages of the Committee. The lack of restrictions on word limit is problematic, as some Committee member interviewees expressed being inundated by NGO reports for some States.

‘The very first State in the very first week was Canada and there was a pile of submissions two feet high and many of them very duplicative so it’s impossible, even if a Committee member wanted to go through them all, to do so.’

Some CERD Committee members attend State-specific informal NGO lunchtime briefing sessions where NGOs present their concerns to the Committee members. This author’s observation of the Committee confirmed that lunchtime briefings were not always well attended by Committee members, and that interpreting was not provided by the Secretariat. These short, one-hour meetings, held in a standard meeting room, do not compare favourably with the formal, lengthy constructive dialogue held in conference rooms decked with interpreters behind glass partitions. It is clear that States parties to ICERD are the primary actors and that NGOs remain soundly on a lesser and more informal footing. NGOs also meet informally with CERD Committee members on an ad hoc basis, sometimes on the advice of international NGOs who identify which Committee members to target based on areas of interest and expertise. Committee member interviewees also expressed a

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65 Ibid.
66 Ibid.
67 Discussed further at Section 4.2.
68 CERD Committee Member Interviewee 2, interview conducted 28 April 2015, Geneva.
69 Author’s attendance at Committee’s 86th session in April 2015 and 66th session in March 2005.
70 Sometimes Committee members will interpret for each other, CERD Committee Member Interviewee 5, above n 59.
71 MRG INGO interviewee 12, above n 43; IMADR INGO Interviewee 11, above n 44.
willingness to meet informally with NGOs. One recommended that NGOs ‘…make it your business to talk to people on the Committee’, and another explained:

…there are less formal meetings over lunch or you can meet as individual committee members with them in the cafeteria just to have coffee or something. I will try to do that if I’m the rapporteur, I’ll try to meet with them in addition to the settings that are available to all the committee members. Then in those meetings I try to assess their views about the significance of the problems.

Certainly it was this author's observation that the cafeteria at Palais Wilson was a hive of NGO activity. There were ongoing meetings between Committee members and NGO representatives, and it was noticeable that some INGO representatives and Committee members work quite closely together.

Since 2012, all Committee members attend a weekly NGO briefing with NGOs from all States being reviewed in a given week. As discussed above, some CERD Committee member interviewees felt that the demise of ARIS posed a logistical problem for the already over-worked and under-resourced CERD Committee who now had no co-ordinating body for NGOs. Additional pressure to engage in a more structured way with NGOs came from the treaty body reform agenda, and a meeting with NGO representatives at the Committee’s 77th session, on 3 August 2010, where strengthening cooperation with NGOs was discussed.

As a result, weekly briefings were introduced, in which NGOs from all States under review can participate. They are organised by the Secretariat and as such, these meetings have two distinguishing features from the informal lunchtime briefings organised by NGOs. Firstly, all Committee members are expected to be in attendance, and secondly, full interpreting services

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72 CERD Committee Member Interviewee 1, above n 38.
73 CERD Committee Member Interviewee 2, above n 68.
74 The UN building in Geneva where the majority of treaty body sessions are held.
76 CERD Committee Member Interviewee 4 above n 59; CERD Committee Member Interviewee 5, above n 59.
are provided in the working languages of the Committee. These are important improvements to ensuring NGOs have an opportunity to have their voices heard effectively by the Committee. In typical UN language, some interviewees described the Secretariat-arranged meetings as ‘formal informal briefings’ to differentiate them from lunchtime briefings. It also indicates a cautiously more elevated status for the briefings.

All NGO briefings are held outside of the formal review with Governments. The meeting with the State under review, called the constructive dialogue, is held in public plenary sessions and generally spread across two half-day sessions lasting several hours in total. NGOs have no speaking rights at these sessions but can attend as observers. In State reporting to UN Committees generally, the constructive dialogue has been described as ‘the centrepiece of the exercise’. It tends to take the form of diplomatic pleasantries on both sides, positive comments on progress and questions on areas of concern arising from the State’s report from the Committee, and responses from the Government. Despite the diplomacy, an Australian Government representative described treaty body constructive dialogues as ‘like an inquisition’. The now well-accepted practice of State involvement in the review was only adopted as practice following a request by Pakistan to be present during the review; this was subsequently adopted as a rule of procedure. Constructive dialogues between CERD and the States parties can now be viewed online - they are webcast live and archived. The questions asked of States parties may be informed by NGO reports, or informal briefings. As the INGO interviewee from IMADR said: ‘You can see committee members don’t have enough time to get information on each country so NGOs provide information and you can see that Committee members are using it in their questions and

78 CERD Committee Member Interviewee 4 above n 59; CERD Committee Member Interviewee 5, above n 59.
79 UN Committee on the Elimination of Racial Discrimination, above n 63. For additional information on the constructive dialogue, see Michael O’Flaherty, The UN and Human Rights, Practice Before the Treaty Bodies (Martinus Nijhof, The Netherlands, 2002), Ch. 1.
81 Australian Government Interviewee 13, interview conducted 29 April 2015, Geneva. Australia had a tense engagement with the CERD Committee in its review in 2000, as documented in: Spencer Zifcak, Mr Ruddock Goes to Geneva (University of New South Wales Press, 2003).
82 Gaer, above n 23, 342.
84 Wiseberg, above n 18, 350; Forsythe, above n 17.
opening remarks from country rapporteurs. The next paragraph expands on the NGO role in providing information for the Committee.

The importance of the NGO role in treaty body monitoring is primarily the provision of critical, ‘on the ground’ information, offering a practical, cost-effective solution to fill a gap in the UN system. Leading human rights scholars have claimed that in their role of providing alternative information to UN Committees, NGOs play a significant role in State reporting.

The importance of information provided by NGOs has also been acknowledged by the UN Secretary General, by CERD Committee members both in interviews for this study, and by Thornberry, an academic and former CERD Committee member. Thornberry and Cushman argue that there is a lack of resources available to the OHCHR staff and Committee members to undertake fact-finding on the human rights situation in each State. This was also a recurrent theme in interviews. As one of the OHCHR staff members interviewed stated: ‘People forget that the treaty body system does not have a fact finding tool of its own, unlike Special Rapporteurs who move, who go and research and make reports but independent experts sit in Geneva.’

Therefore the UN lacks fact finding capacity and Government reports are unlikely to highlight their own shortcomings. Heyns and Viljoen’s study found government reports to UN Committees to be ‘descriptive, formalistic, legalistic and self-congratulatory, rather than reflective and focused on substance and practical realities, and problems encountered’. The gap for UN Committees includes this content on practical realities and problems; a gap filled by reports from civil society actors, predominantly NGOs, as borne out in the interview findings and Australian case study in the next two sections.

85 IMADR INGO interviewee 11, above n 44.
86 See for example: Wiseberg, above n 18, 350; Freeman, above n 18, 152.
87 See for example: UN General Assembly, above n 1.
90 OHCHR interviewee 6, interview conducted 28 April 2015, Geneva; MRG INGO interviewee 12, above n 43; Human Rights Law Centre Domestic NGO interviewee 15, interview conducted 23 September 2015, telephone interview; CERD Committee Member Interviewee 5, above n 59.
91 OHCHR interviewee 6, above n 90.
92 Heyns and Viljoen, above n 15, 25.
4. Interview Findings

Within the context of NGOs filling a gap in CERD State reporting, this section explores perceptions of three staff members from the OHCHR and five CERD Committee members on the importance of the NGO role. To a lesser extent, it also draws on INGO and Australian NGO and Government interviews and will be triangulated with the Australian case study data in the subsequent section. The analysis of interview data has been themed as follows - importance of the NGO role (Section 4.1); reticence about the NGO role (Section 4.2); and the NGO role in developing concluding observations (Section 4.3).

4.1 Importance of the NGO Role

Confirming some of the theories on the NGO role, all OHCHR and CERD Committee member interviewees perceived NGOs to play an important role in State reporting. The words they used to describe NGOs ranged from ‘important’ to ‘very important’ and ‘very useful’. One used much more emphatic language such as ‘critical’, and ‘absolutely crucial’. This resonates with Wiseberg’s assertion that the UN human rights machinery ‘…would grind to a halt were it not fed by the fact-finding of human rights NGOs.’ What was particularly valued by OHCHR staff and CERD Committee members was the provision of critical, in both senses of the word, information. In the Australian context, the Government representatives interviewed saw the NGO role as ‘important’ and ‘really useful’; however, they also indicated that from their experience of the international system, not all Governments would agree with their perspective on NGOs.

Most CERD and OHCHR interviewees perceived the NGO role as a balance in the State reporting system, resonating with a theme from literature on NGOs in international human

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93 See, eg, Forsythe, above n 17; Freeman, above n 18; Wiseberg, above n 18.
94 CERD Committee Member Interviewee 5, above n 59.
95 CERD Committee Member Interviewee 3, above n 36; CERD Committee Member Interviewee 1, above n 38.
96 CERD Committee Member Interviewee 1, above n 38.
97 CERD Committee Member Interviewee 2, above n 68.
98 Ibid.
99 Wiseberg, above n 17, 354.
100 Australian Government Interviewee 17, interview conducted 7 January 2016, telephone interview.
101 Australian Government Interviewee 13, above n 81.
For example as one OHCHR staff member stated in relation to NGOs: ‘The treaty bodies get both sides of the story. They [NGOs] are half of the story.’ This mirrors the views of a CERD Committee member who said: ‘…they’re critical. At least from the perspective of the Committee in terms of their use and value to us, because without them we would only have one side of the story.’

Information provided by NGOs is frequently referenced in the CERD Committee’s annual report to the UN General Assembly, also indicating its importance. The provision of ‘on the ground’ or ‘first hand’ information to complete the picture clearly emerged as interviewees’ most valued role for NGOs.

4.2 Reticence about the NGO role

Despite the overwhelmingly positive response to questions about the NGO role, most interviewees expressed some reservations about NGOs or about the reliability of NGO information. Scholarship on the NGO role in treaty body monitoring has generally been more positive about the NGO role and has not explored this reticence towards NGOs to the same degree. Some general literature on NGO accountability, and acknowledgement of the complexities of the CERD Committee’s engagement with NGOs, touches on issues raised in the interviews. In this regard, OHCHR staff and CERD Committee members ranged from those who were sympathetic to NGOs, open to NGO reports and quite trusting of their content; to those who indicated quite high levels of scepticism of NGO information and motives. However, they tended to express support for NGO input once it could be verified:

103 OHCHR interviewee 6, above n 90.
104 CERD Committee Member Interviewee 2, above n 68.
105 See for example United Nations General Assembly, above n 75.
106 CERD Committee Member Interviewee 3, above n 36.
107 CERD Committee Member Interviewee 2, above n 68.
108 See for example: Wiseberg, above n 18; Forsythe, above n 17; Freeman, above n 18.
110 Thornberry, above n 88.
111 For example CERD Committee Member Interviewee 1, above n 38.
‘Of course NGOs are important sources of information but sometimes, because they are partisans of ideas, sometimes they might be exaggerating…’

The most common theme from interviews was that NGO information needed to be verified against other ‘official sources’ or that the Committee needed to be ‘critical and questioning of NGO information’. Two interviewees suggested that NGO information be used only in order to present that information to the State party, ‘not as allegations but for your response’. In reality though, this author’s observation of CERD Committee sessions and webcasts confirms that States are asked many questions and will not respond to each one, either due to lack of time, lack of information to hand, or perhaps lack of willingness to respond.

At the most extreme end of the scale, some interviewees indicated that suspect NGO information is ‘filtered out’, that in practice, the OHCHR can exclude NGO reports to any treaty body if they are: ‘… unsubstantiated in any way… what’s obviously inflammatory or politically motivated. We discount this type of information before it gets to the treaty body to prevent too much paperwork which would eat up time. If it’s manifestly one-sided.’

Some CERD Committee members on the other hand seemed unaware of the behind-the-scenes filtering by the OHCHR but applied their own filter to NGO information they deemed to be lacking credibility. This included NGOs whose position appeared to contradict the object and purpose of the ICERD, for example NGOs that were critical of ethnic minorities or advocated harsh immigration policies. Another example was NGOs that ‘were more supportive of the government than the government themselves were’, or GONGOs –

112 CERD Committee Member Interviewee 5, above n 59.
113 OHCHR Interviewee 8, interview conducted 30 April 2015, Geneva; CERD Committee Member Interviewee 5, above n 59; OHCHR interviewee 6, above n 90.
114 CERD Committee Member Interviewee 3, above n 36; OHCHR interviewee 6, above n 90.
115 Ibid.
116 Ibid.
117 CERD Committee Member Interviewee 2, above n 68; CERD Committee Member Interviewee 5, above n 59.
118 CERD Committee Member Interviewee 5, above n 59.
119 CERD Committee Member Interviewee 2, above n 68.
Governmental Non-governmental Organisations. Some also described filtering out information or recommendations they did not agree with in their role as independent experts, based on their knowledge and expertise.

Finally, within the context of a system beset by delays, backlogs, a lack of resources and questionable effectiveness, OHCHR staff expressed frustrations with the current system and a few of the CERD Committee member interviewees acknowledged that due to time pressures and volume of information received, they cannot read all NGO reports. One commented: ‘The problem for us, because we do have a problem, we have too much to read. At the last minute. They [NGOs] send it very late and we have more than the State party report. It’s difficult for us.’

To some extent therefore, the OHCHR treaty body secretariats perform a gatekeeper role. In terms of engagement with the CERD Committee through informal briefings, ARIS had also played a type of gatekeeper role and once gone, Committee members interviewed stated that NGO engagement became very difficult for them. As noted by Rodriguez-Garavito however, human rights gatekeeping is difficult in an increasingly globalised world where NGOs and other actors are flexible and mobile. NGOs can easily circumvent the OHCHR gatekeepers - if their reports are excluded by the Secretariat, they can still meet with CERD Committee members in Geneva at informal briefings or meet them for coffee and hand over factsheets or other materials directly.

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120 See Kerstin Martens, ‘Examining the (Non-) Status of NGOs in International Law’ (2003) 10 Indiana Journal of Global Legal Studies 1, 8.
121 CERD Committee Member Interviewee 4 above n 59; CERD Committee Member Interviewee 5, above n 59.
123 CERD Committee Member Interviewee 4 above n 59; CERD Committee Member Interviewee 5, above n 59; CERD Committee Member Interviewee 1, above n 38.
124 CERD Committee Member Interviewee 5, above n 59.
126 Based on the author’s observations at the CERD Committee’s 86th session in April 2015 and 66th session in March 2005 as part of an Australian NGO delegation.
session of the CERD Committee does not require ECOSOC accreditation; NGOs merely require an approved UN conference registration form for security purposes. This may be positive - the system of ECOSOC accreditation has been harshly criticised by some, and treaty bodies being accessible to all civil society actors who wish to engage ensures they hear from people ‘on the ground’, and not just from those NGOs with ECOSOC status. However, interview data has indicated that the absence of any kind of regulation means that the CERD Committee is at times overloaded with information from NGOs. Much of it is useful, some of it less so, particularly information from GONGOs and some domestic NGOs: ‘Five or six years ago I was the country rapporteur for Guatemala and I received three alternative reports, each quite long and not very good, sometimes confusing.’

In a system beset by logistical challenges, the question of better facilitating quality NGO engagement with the CERD Committee requires some consideration. Solutions for further investigation include introducing a strict word limit for NGO reports and co-opting an INGO to fill the gap left by ARIS, to perform a type of gatekeeper role, similar to those used by the Human Rights Committee and the Committee on the Elimination of Discrimination Against Women.

4.3 NGO Role in Developing Concluding Observations

After the provision of information, OHCHR and CERD Committee member interviewees identified a second particularly useful aspect of the NGO role: suggesting recommendations for the CERD Committee’s Concluding Observations. The unique understanding and expertise of NGOs, particularly domestic NGOs, was seen as invaluable by some interviewees. One Committee member gave the example of a submission from NGOs that had very focused recommendations about financing for housing to comply with Muslim

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127 International Service for Human Rights, above n 50; Shirane, above n 50.
129 See, eg, ISHR, UN Committee on NGOs: Don’t deny NGO the right to speak <http://www.ishr.ch/news/un-committee-ngos-dont-deny-ngo-right-speak>.
130 CERD Committee Member Interviewee 5, above n 59.
131 The Centre for Civil and Political Rights facilitates engagement with the Human Rights Committee and the International Women’s Rights Action Watch (IWRAW) facilitates engagement with the Committee on the Elimination of Discrimination Against Women.
132 CERD Committee Member Interviewee 2, above n 68; CERD Committee Member Interviewee 5, above n 59; OHCHR Interviewee 8, above n 114.
law. The interviewee felt that this particular recommendation would not have occurred to the Committee and suggested that proposing very precise, specific and ‘implementable’ recommendations is a useful role for NGOs.

However, several interviewees also discussed the need to question NGO information, submit it to additional scrutiny, or exclude it if it lacked credibility. In light of these responses, these interviewees were generally asked how the strong correlation between concluding observations and NGO reports, as discussed in Section 5 (the Australian case study), could be explained. Interviewees’ responses tended to link this strong reliance on NGO recommendations to a number of factors including the credibility or legitimacy of the NGO in question such as it being a ‘specialised NGO’, or a key NGO within the country, or a coalition of NGOs (as occurred in the Australian case study). Other interviewees focused more on the quality of the report itself, for example:

‘It would relate to many things, it could relate to the quality. I cannot say it is a phenomenon but the most usable input has a higher chance of finding its way through.’

Some interviewees still maintained ‘there is not a direct link in the way you are suggesting’, and reiterated that NGO information is used during the constructive dialogue to pose questions to the State. According to them, the information may make its way into the concluding observations if the State’s response is inadequate or unsatisfactory. The following documentary analysis of Australia’s last review by the CERD Committee in 2010 suggests that this is not the case. The findings of the documentary analysis also resonate with the views of two of the Australian Government interviewees who felt that Australian NGOs produced quality, influential reports; one of them saw this as common across treaty bodies: ‘That’s the trend that we’ve seen with NGOs engaging with treaty bodies. They write really detailed shadow reports and those shadow reports are really influential on the kinds of areas

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133 CERD Committee Member Interviewee 2, above n 68.
134 CERD Committee Member Interviewee 3, above n 36.
135 CERD Committee Member Interviewee 2, above n 68.
136 OHCHR interviewee 6, above n 90.
137 CERD Committee Member Interviewee 1, above n 38.
138 Ibid, CERD Committee Member Interviewee 3, above n 36; OHCHR interviewee 6, above n 90.
139 CERD Committee Member Interviewee 3, above n 36.
140 Australian Government Interviewee 17, above n 101; Australian Government Interviewee 18, interview conducted 7 January 2016, telephone interview.
that the Committees look at.\textsuperscript{141} Geneva-based INGO interviewees identified the same trend, noting that Committee members directly use NGO information in the constructive dialogue,\textsuperscript{142} and in the concluding observations: ‘So from our perspective a key factor is the issue of credibility, so when you have an NGO that has a lot of credibility, the information will be taken as secure, and the information will be taken for granted.’\textsuperscript{143}

Therefore although some CERD Committee and OHCHR interviewees argued that NGO information is used to pose questions to the Government in the constructive dialogue and not to directly input into concluding observations, other actors disagree. Furthermore, the documentary analysis below provides evidence of direct influence of some NGO recommendations on the concluding observations. Some interviewees indicated that this can be due to the quality and credibility of the report and NGO. CERD Committee and OHCHR reluctance to acknowledge the full extent of NGO influence is not surprising. Firstly, only the CERD Committee has the authority to develop concluding observations.\textsuperscript{144} Secondly, as noted above (Section 3.2), there have been ongoing attempts by some Governments to reduce or eliminate the NGO role in treaty body reporting. A Committee member commented: ‘I think their role is really crucial and the fact that their attempt to restrict our ability to make use of them and to have a dialogue with them was rejected, is important.’\textsuperscript{145}

Given that NGOs play a useful role, the CERD Committee and the OHCHR are likely to be reluctant to acknowledge the potential extent of NGO influence lest States protest. As one said: ‘It is a delicate balancing act. There is no point in the outcome of a treaty body discussion being lauded by NGOs if it’s ignored by the States parties. It’s essential that that balance is found and that’s challenging for both NGOs and States parties.’\textsuperscript{146}

The subsequent section demonstrates that NGOs can directly influence CERD Committee concluding observations.

\begin{itemize}
\item \textsuperscript{141} Australian Government Interviewee 17, above n 101.
\item \textsuperscript{142} IMADR INGO interviewee 11, above n 44.
\item \textsuperscript{143} MRG INGO interviewee 12, above n 43.
\item \textsuperscript{144} Committee on the elimination of Racial Discrimination, ‘Rules of Procedure’, UN Doc CERD/C/35/Rev.3, Rule 67(3) in accordance with Article 9(2) ICERD.
\item \textsuperscript{145} CERD Committee Member Interviewee 2, above n 68.
\item \textsuperscript{146} CERD Committee Member Interviewee 1, above n 38.
\end{itemize}
5. Australian Case Study on NGO Influence on the CERD Committee’s Concluding Observations

This case study examines the extent to which information provided by NGOs was used by the CERD Committee in its most recent review of Australia in 2010. In the 2010 review, there were five NGO reports. Only one report was from an INGO – Amnesty International\(^{147}\) and the remainder were from domestic NGOs: Concerned Australians,\(^{148}\) Intervention Rollback Action Group,\(^{149}\) the National Native Title Council, and the National Association of Community Legal Centres and the Human Rights Law Centre\(^{150}\) leading a coalition of NGOs - henceforth ‘the NGO coalition report’\(^{151}\). The NGO coalition report contained substantial input from over 30 NGOs and was wholly or partly endorsed by over 100 NGOs.\(^{152}\)

5.1 Close Correlation between NGO Coalition Report and Concluding Observations

A documentary analysis of each of these reports and a comparison with the concluding observations of the Committee was carried out in order to establish whether NGO reports had influenced the recommendations made by the Committee. What emerged from the documentary analysis is a clear link between the Committee’s recommendations as contained in the concluding observations, and recommendations made in one particular NGO report - the NGO coalition report. Of the recommendations made by the Committee, 21 were specific actions for the Government based on issues within Australia and were not administrative in nature (related to rules of procedure, requests for follow-up, or scheduling of the next reports to the Committee).\(^{153}\) Of those 21 recommendations, 11 contained very similar text to the text


\(^{152}\) National Association of Community Legal Centres and Human Rights Law Resource Centre, above n 151.

\(^{153}\) UN Committee on the Elimination of Racial Discrimination, \textit{Consideration of reports submitted by States parties under article 9 of the convention: Concluding observations of the Committee on the}
used in the NGO coalition report. An additional six of the 21 recommendations covered issues raised by the NGO coalition report, but used either completely or somewhat different wording.

Table 1 shows five examples where there was closest correlation between the Committee’s recommendation and the recommendation in the NGO coalition report. In some cases, the text in the table is an extract from a longer recommendation. Italics are used in the table to illustrate the similarities in text.

Table 1: NGO Coalition Report Recommendations Reflected in Committee’s Concluding Observations

<table>
<thead>
<tr>
<th>CERD Committee’s recommendation</th>
<th>NGO coalition report recommendation</th>
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<tbody>
<tr>
<td>Para. 13: … the Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of Australian corporations which negatively impact on the enjoyment of rights of indigenous peoples domestically and overseas and to regulate the extra-territorial activities of Australian corporations abroad…</td>
<td>THAT the Australian Government take appropriate legislative and administrative measures to regulate the extra-territorial activities of Australian transnational corporations and to prevent activities that negatively impact on the enjoyment of rights of indigenous peoples…</td>
</tr>
<tr>
<td>Para 14: The Committee encourages the State party to develop and implement an updated comprehensive multicultural policy</td>
<td>THAT Australia develop and implement a comprehensive Multicultural Policy…</td>
</tr>
<tr>
<td>Para 15:…The Committee also recommends that the State party provide the National Congress of Australia’s First Peoples with the adequate resources to become fully operational by January 2011 and support its development.</td>
<td>THAT the Australian Government continue to support the National Congress of Australia’s First Peoples to become fully operational by January 2011.</td>
</tr>
</tbody>
</table>

Elimination of Racial Discrimination: Australia, 77th sess, UN Doc CERD/C/AUS/CO/15-17 (27 August 2010).
Para 21. …It recommends that the State party, in consultation with Indigenous communities, hold a national inquiry into the issue of bilingual education for Indigenous peoples. The Committee also recommends that the State party adopt all necessary measures to preserve native languages and develop and carry out programmes to revitalize indigenous languages and bilingual and intercultural education for Indigenous peoples...

Para 25. The Committee recommends that as part of its harmonisation of federal anti-discrimination laws, the Racial Discrimination Act be amended, as far as civil proceedings are concerned, to require the complainant to prove prima facie discrimination, at which point the burden shifts to the respondent to prove no discrimination existed.

<table>
<thead>
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<tr>
<td>Para 21. …It recommends that the State party, in consultation with Indigenous communities, hold a national inquiry into the issue of bilingual education for Indigenous peoples. The Committee also recommends that the State party adopt all necessary measures to preserve native languages and develop and carry out programmes to revitalize indigenous languages and bilingual and intercultural education for Indigenous peoples...</td>
<td>THAT the Australian Government, in consultation with Aboriginal and Torres Strait Islander peoples, hold a national inquiry into the issue of bilingual education for Aboriginal and Torres Strait Islander peoples, with a view to improving measures to preserve native languages and THAT the Australian Government consult with Aboriginal and Torres Strait Islander peoples to develop and implement bilingual education programs.</td>
</tr>
<tr>
<td>Para 25. The Committee recommends that as part of its harmonisation of federal anti-discrimination laws, the Racial Discrimination Act be amended, as far as civil proceedings are concerned, to require the complainant to prove prima facie discrimination, at which point the burden shifts to the respondent to prove no discrimination existed.</td>
<td>THAT as part of its harmonisation of federal anti-discrimination laws, the Racial Discrimination Act 1975 (Cth) be amended to require the complainant to prove prima facie discrimination, at which point the burden shifts to the respondent to prove that there was no discrimination.</td>
</tr>
</tbody>
</table>

One possibility for this close correlation could have been that the NGO coalition report had repeated the Committee’s 2005 recommendations. Could the Committee simply have relied heavily on its own previous concluding observations, rather than relying on the NGO coalition report per se? To answer this question, documentary analysis of the previous concluding observations in 2005 was also carried out. It showed that although many of the same issues were discussed in both 2005 and 2010, there was little similarity in the text of the actual recommendations in the 2005 and 2010 concluding observations. Where there were minor similarities, they were in recommendations that were not found in the 2010 NGO coalition report. Therefore, the Committee did rely on the NGO coalition report and not on its own previous recommendations.
Some interviewees had asserted that NGO information is used to inform the questions asked and only in the case of unsatisfactory responses do they lead to concluding observations. To establish whether this was the case in Australia’s 2010 review, the summary record of the constructive dialogue was reviewed as there is no webcast available for the session. There was no indication from the summary record that the NGO recommendations discussed in this section had first been posed as questions to the Australian Government.

Although Table 1 shows some clear use of the language from the NGO coalition report, in some cases the NGO content forms only a small part of a more detailed recommendation, and not all recommendations of the Committee relied on the NGO coalition report. There is little evidence of any links between the Committee’s concluding observations and the other three NGO reports. One reason may be that two of the NGO reports contained no recommendations, or just a few brief recommendations. Many of the issues raised by NGOs are taken on board by the Committee and reflected in concluding observations in the Committee’s own terms. One example was the deficiencies in the legislation and practices governing Indigenous land rights (Native Title) which was the sole focus of one NGO report, and featured in two other NGO reports to the Committee. One recommendation in the concluding observations did address Native Title, including concerns raised by NGOs such as 2009 amendments to legislation and the onerous burden of proof requirements. However, the recommendation was phrased in language quite different from that of the NGOs.

The Amnesty International report is the only other report to have content closely reflected in the concluding observations, although only in one recommendation. In relation to criminal justice, Amnesty International recommended that the Government ‘Halt the escalating imprisonment rate of Indigenous peoples through addressing the social and economic factors underpinning crime, including by adopting of a justice reinvestment strategy.’

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154 UN Committee on the Elimination of Racial Discrimination, Seventy-seventh session Summary record of the 204th meeting Held at the Palais Wilson, Geneva, on Tuesday, 10 August 2010, at 3 p.m., UN Doc CERD/C/SR.2024. Note, as this is a summary, not all the dialogue is captured.
155 Nicholson, Harris and Gartland, above n 149; Intervention Rollback Action Group, above n 150.
156 National Native Title Council, above n 152.
158 UN Committee on the Elimination of Racial Discrimination, above n 153, para. 18.
Committee recommended ‘...that the State party dedicate sufficient resources to address the social and economic factors underpinning Indigenous contact with the criminal justice system. It encourages the State party to adopt a justice reinvestment strategy...’.

Therefore, the documentary analysis shows clear evidence of NGO influence on the CERD Committee’s concluding observations in Australia’s last review in 2010. Only one report, the domestic NGO coalition report, was clearly influential; the other four NGO reports may have had some limited influence on the issues prioritised by the Committee and the recommendations made.

5.2 Dissonance between NGO Reports and Concluding Observations

The NGO Coalition report clearly had an influence on the Committee, but this does not mean that all recommendations made by the NGO coalition were taken on board. The majority were not. The Committee’s tendency is to rely heavily on its own interpretative comments.\textsuperscript{159} In general, NGO recommendations and statements were more strident and direct than those made by the Committee which retained its diplomatic tone. For example, the Amnesty report called on the Government to ‘Implement outstanding recommendations of the Royal Commission into Aboriginal Deaths in Custody’.\textsuperscript{160} The Committee’s recommendation was less absolute: ‘... take immediate steps to review the recommendations of the Royal Commission into Aboriginal Deaths in Custody, identifying those which remain relevant with a view to their implementation’.\textsuperscript{161}

An example of a gap between NGO input and the Committee’s concluding observations is the attention paid to the Northern Territory Emergency Response (NTER) - the most common issue raised in the 2010 NGO reports.\textsuperscript{162} Despite a critical mass of NGO input and

\textsuperscript{159} Ibid, paras. 13, 15, 16, 17, 20, 24, 29.
\textsuperscript{160} Amnesty International, above n 64, 24.
\textsuperscript{161} UN Committee on the Elimination of Racial Discrimination, above n 153, para. 20.
recommendations on the NTER in their reports, the CERD Committee’s concluding observations did not reflect the attention paid to this topic by NGOs. The content of two short reports out of the five NGO reports was based primarily on the issue of the NTER. The two most detailed NGO reports – Amnesty International’s and the NGO coalition’s – both included comprehensive coverage of the NTER. For example, in terms of page count, approximately one third of the Amnesty report is dedicated to this issue alone. Only one of the five NGO reports did not address the NTER and was focused solely on Native Title.

The issue is reflected in the CERD Committee’s concluding observations, but only in one of the 21 recommendations. The Committee urged the Australian Government to ensure that any special measures were in accordance with the Committee’s general recommendation No. 32 (2009) and that their actions affecting the Aboriginal communities respect human rights law and conform with the *Racial Discrimination Act 1975 (Cth)*. They also urged the Government to address the unacceptably high level of disadvantage and social dislocation of Aboriginal peoples in remote communities in the Northern Territory and reset the relationship with them based on consultation, engagement and partnership. However, the level of concern expressed by the committee does not seem to be commensurate with the concern expressed by NGOs. For example, the Committee drew attention to the particular importance of three of its 21 recommendations and requested that the Australian Government provide detailed information in its next periodic report on concrete measures taken to implement these recommendations. The NTER was not one of those selected recommendations.

### 5.3 Conclusions from the Case Study

What conclusions can be drawn from this small-scale case study? There is evidence of strong NGO influence on the CERD Committee’s concluding observations in Australia’s last review in 2010. The most influential report was the NGO coalition report and three salient characteristics of this report posited by the author as significant in achieving this outcome are its quality, legitimacy and domestic nature.

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163 Intervention Rollback Action Group, above n 68; Nicholson et al, above n 67.
164 National Native Title Council, above n 70.
165 UN Committee on the Elimination of Racial Discrimination, above n 153, para. 16.
166 UN Committee on the Elimination of Racial Discrimination, above n 153, para. 32.
In terms of quality, it was a comprehensive report, 163 pages in total, well written and presented. CERD Committee member, OHCHR and INGO interviewees identified important features of NGO reports. These included having recommendations or suggestions\(^{167}\) that are ‘precise, specific and implementable’\(^{168}\). They advised NGOs to produce ‘usable’,\(^{169}\) ‘professional reports’\(^{170}\) and to ‘be empirical and provide evidence’\(^{171}\). Other features of a useful NGO report included having an executive summary\(^{172}\) and working in a co-ordinated way or as part of a coalition.\(^{173}\) The Australian NGO coalition report had all of these features.

In terms of legitimacy, the report contained substantial input from over 30 NGOs and whole or part endorsement by over 100 NGOs.\(^{174}\) As noted above, the CERD Committee has stated a preference for coalition rather than individual reports. Having a report endorsed by so many NGOs may go some way towards protecting against critiques of NGOs and questions about their legitimacy and accountability, although there was no evidence of concern about the NGOs in the current case study. The CERD Committee is aware of some of complexities of relying on NGOs, such as the difficulty that NGOs are often not a ‘unified constituency’, and can each have their own agenda or differing perspectives on human rights.\(^{175}\) Therefore, a coalition report which offers what seems to be a ‘unified constituency’ could be more likely to influence the Committee than one that is not. A theme in the interviews was the importance of NGOs’ credibility or legitimacy in considering whether their recommendations would be taken on board. According to interviewees, factors improving an NGO report’s credibility or legitimacy included support from a well-known INGO,\(^{176}\) which was not the case for

\(^{167}\) CERD Committee Member Interviewee 1, above n 38; OHCHR interviewee 6, above n 90; CERD Committee Member Interviewee 5, above n 59.
\(^{168}\) CERD Committee Member Interviewee 2, above n 68.
\(^{169}\) OHCHR interviewee 6, above n 90.
\(^{170}\) IMADR INGO interviewee 11, above n 44.
\(^{171}\) OHCHR interviewee 6, above n 90.
\(^{172}\) CERD Committee Member Interviewee 1, above n 38; CERD Committee Member Interviewee 5, above n 59.
\(^{173}\) CERD Committee Member Interviewee 2, above n 68; CERD Committee Member Interviewee 1, above n 38.
\(^{174}\) National Association of Community Legal Centres and Human Rights Law Resource Centre, above n 151.
\(^{175}\) Thornberry, above n 88, 249.
\(^{176}\) MRG INGO interviewee 12, above n 43.
Australia’s review, being a ‘specialised NGO’,\textsuperscript{177} or ‘THE main NGO or a coalition of leading NGOs’,\textsuperscript{178} which was the case here.

The third salient characteristic of the NGO coalition report is that it was \textit{domestic} in nature. Based on the documentary analysis, a coalition of domestic NGOs exerted most influence - not the INGO report by Amnesty International. Domestic NGOs were also more prevalent in the reporting process (four out of five). This resonates with the trend both in international human rights law, and in the literature, both of which have gradually moved from a focus on INGOs to recognition of the importance of domestic NGOs as described in Section 3.1 above, particularly in WEOG States. Domestic NGOs have the added advantage for the UN of acting as intermediaries so that international law can be adapted as what Merry describes as a ‘localizing transnational knowledge of rights’.\textsuperscript{179} Domestic NGOs play a significant role in bridging the gap between international standards and local human rights issues. They also use the international system to hold their Governments to account and as such provide social accountability.\textsuperscript{180} Despite being a Committee of international independent experts who review the 177 States parties’ compliance with \textit{ICERD}, the Committee recognises that local expertise in identifying issues and suggesting workable and relevant recommendations is required, as noted in the interview data above.

As demonstrated though, NGO influence was not absolute. Many NGO recommendations were not directly reflected in similar language by the CERD Committee, although their content and the issues raised was sometimes similar. For example, despite strong content on the NTER, the issue did not receive commensurate attention by the Committee. In these cases, NGOs which allocate time and resources to producing NGO reports may question whether it has been a useful exercise. The NTER example reinforces interview data above in which Committee members explained their internal filtering process and the application of their expertise in developing recommendations, not merely being an unquestioning reliance on NGO information.

\textsuperscript{177} CERD Committee Member Interviewee 3, above n 36.
\textsuperscript{178} CERD Committee Member Interviewee 2, above n 68.
\textsuperscript{179} Merry, above n 40, 179.
6. Conclusion

Despite the informal nature of the NGO role, it has been shown here to fill a gap in the UN treaty body State reporting system, with specific reference to CERD. The gap filled by NGOs is the provision of critical information to supplement the information provided by Governments so that the Committee of independent experts can better assess the actual state of human rights on the ground. NGOs are also important for developing recommendations.

In the Australian case study, domestic NGOs were more influential, which may be the case in WEOG States more generally. Domestic NGO engagement may be facilitated by INGOs if required, as they bring both expertise and credibility but where NGOs are at risk of reprisals, INGOs can speak on their behalf.

This small scale study considered one reporting cycle for a single State – Australia - before one treaty body - CERD. As such it made a modest but unique contribution to existing literature on CERD and on NGOs by presenting both interview data and evidence of NGO influence in concluding observations. Future research could use the same methodology to further analyse the NGO role in protecting minority rights but across various States parties and treaty bodies. Indigenous rights featured strongly in the current case study and as such, considering comparable States with an Indigenous population, such as New Zealand and Canada, would be useful. Another area for future research is the importance of the NGO role in follow-up, a theme emerging from the interviews but outside the scope of this paper. In particular, research is required on whether the concluding observations of the CERD Committee lead to better racial equality on the ground.

In this paper, the importance of the NGO role was explored using a semi-structured interview methodology and found that OHCHR staff and CERD Committee members strongly value the NGO role and all saw it as ranging from ‘important’ to ‘absolutely crucial’. There was also evidence of filtering out of NGO information and of some scepticism and caution of the NGO role, particularly where the NGO’s credibility or legitimacy was in question. Despite being supportive of the NGO role, several interviewees from OHCHR staff and the CERD Committee acknowledged difficulties with the volume of NGO information received and lack of co-ordinated NGO engagement with the Committee. It is proposed that word limits on NGO reports and the role of a gatekeeper INGO should be explored further to address these issues.
The findings from the documentary analysis of Australia’s last review in 2010 were that there were strong similarities between an NGO coalition report and 11 out of the 21 recommendations of the Committee. Three possible factors for this NGO report’s success in influencing the Committee were presented. Firstly, the *quality* of the report may have been a factor; it was detailed and included clear recommendations for the Committee to use. Secondly, it was an NGO coalition report, endorsed by over 100 NGOs, which may bring added *legitimacy*. Finally, it was a report from domestic NGOs, validating the trend in both international human rights law and in the literature, towards recognising the importance of *domestic* NGOs in holding Western democratic Governments to account.
Chapter Four: The Role and Influence of Non-governmental Organisations in the Universal Periodic Review – International Context and Australian Case Study

Abstract
Non-governmental Organisations (NGOs) play an important, albeit limited, role in the United Nations’ (UN’s) most recent human rights monitoring mechanism, the Universal Periodic Review (UPR). Drawing on empirical data from an Australian case study and interviews with international stakeholders, the study explores the NGO role and influence in this State-centric, peer review mechanism. Case study findings indicate that recommendations made by NGOs, in particular a coalition of domestic NGOs, correlate closely with many UPR recommendations but that UN sources are more influential. This suggests that other UN human rights mechanisms complement the UPR, so that NGOs should continue to engage with both these and the UPR.

1. Introduction
The Universal Periodic Review (UPR) was introduced to great fanfare in 2008 as the cornerstone of the new Human Rights Council’s (HRC) Institution-building package. It is a unique and significant mechanism for three reasons. Firstly, each country is reviewed by the HRC in a UPR only once every four-and-a-half years. Secondly, unlike other United Nations (UN) human rights reviews, the State’s record on all its human rights obligations is under examination. Thirdly, while independent experts carry out other UN human rights reviews, the UPR is a peer-review mechanism - States hold each other to account on their human rights records. The review is based on a report from the State-under-Review (SuR), a compilation of UN information and a stakeholder summary report. Sending submissions to be included in the stakeholder summary report and lobbying States prior to the review are the key ways in which NGOs can engage with the UPR.

This is an interesting juncture at which to further analyse the UPR - the second cycle, (completed in late 2016), was underway at time of writing. Modalities were still being refined during the first cycle and there was something of a ‘honeymoon period’, where States and other key actors showed initial enthusiasm about the new HRC and its UPR. This included optimism that the UPR would offer unique opportunities for Non-governmental Organisations (NGOs) to bring human rights issues of concern to the attention of the Unhuman Rights Council, Institution-building of the United Nations Human Rights Council, HRC Resolution 5/1, Human Rights Council 9th meeting, UN Doc A/HRC/RES/5/1 (18 June 2007). Such as those by UN human rights treaty bodies and Special Rapporteurs.
international community and to engage in associated advocacy at a national level. For example, Schokman and Lynch stated: 3 ‘The UPR has attracted a great deal of attention since it commenced in 2008. From an NGO perspective, this excitement flows from the new and high profile opportunities for NGOs to advocate for the improved protection and promotion of human rights on the ground.’

There has been less discussion of the fact that the NGO role in the UPR is in many ways quite limited. In other UN human rights State review mechanisms, the treaty body reporting process in particular, NGOs have been found to play an essential role in providing information and informing the development of relevant recommendations. 4 The same claim has not yet been made in relation to the UPR for two inter-related reasons. Firstly, as this article argues, the NGO role is more limited than in other UN human rights State reporting mechanisms. Secondly, the UPR is a State-led peer review, rather than a review by independent experts, such as a treaty body, and States can be resistant to NGOs and their criticism. 5

This article seeks to contribute to a better and more nuanced understanding of the NGO role in the UPR. Using semi-structured international interviews and an Australian case study, it asks what influence NGOs have on the recommendations made by States, whether those recommendations are more or less likely to be accepted by the SuR and which NGOs are most influential. It is useful to establish the extent of NGO influence, firstly because they hold a tenuous position, often under threat from States. Secondly, as often resource-poor organisations, NGOs should consider whether the UPR is a useful mechanism with which to

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engage and understand how it might compare with other mechanisms such as the UN treaty bodies.

The following section summarises what is known about the NGO role in the UPR, including existing literature and gaps. The methodologies selected to contribute to filling these gaps is then presented, followed by findings. The interview data suggests that NGOs are viewed as legitimate stakeholders in the UPR and that the UPR has facilitated relationship and network building for NGOs. The Australian case study notes that recommendations made by States in Australia’s review had most correlation with recommendations from the UN report, a source overlooked in previous studies, followed by NGO sources. It concludes that a domestic NGO coalition, working closely with the National Human Rights Institution (NHRI), was the most influential of the NGOs engaging with the Australian UPR. Finally, the article identifies opportunities for further research and makes recommendations to improve NGO engagement with the UPR.

2. The NGO Role in the UPR – the Story so Far

NGOs now have a long history of engagement with UN human rights bodies and it has been said that ‘the intergovernmental human rights machinery would grind to a halt were it not fed by the fact-finding of human rights NGOs’. However, it was not always so. NGOs were originally granted only limited consultation status under Article 71 of the UN Charter. They were excluded from the texts of human rights treaties, and have had to carve out a role for themselves in the UN human rights system. They have successfully done so, for example by their active participation in the UN World Conferences in the 1990s, contributing their expertise to drafting international instruments, bringing individual complaints and

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6 Wiseberg, above n 4, 354.
7 With the exception of Article 45(a) of the Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990). Contrary to what is often asserted, Article 45 a) does not provide for an NGO role per se, but rather that the Committee ‘may invite… other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates.’ However, the Committee’s rules 34, 70 and 74 of the Provisional Rules of Procedure, CRC/C/4 (14 November 1991) confirm that ‘other competent bodies’ includes NGOs.
submitting reports to UN human rights treaty bodies.\textsuperscript{10} As a result, they are now more likely to be acknowledged as a relevant stakeholder, as evidenced by their inclusion in HRC Resolution 5/1 establishing the UPR.\textsuperscript{11} It is no coincidence that NGOs were also more active in drafting this resolution than they had been, for example, in discussions on the review of the former Sub-Commission or the ‘1503’ complaints procedure under the Commission.\textsuperscript{12}

The subsequent two sections discuss the opportunities for NGO engagement with the UPR, including limitations. It is not surprising that in the UN State-centric system there are limitations to what NGOs can do as they are ‘a continual source of controversy and irritation’ for Governments.\textsuperscript{13} When the modalities of the UPR were being developed, the African Group argued that NGOs should have no role at all in the HRC, including the UPR.\textsuperscript{14} Jordaan notes that, although not all of the recommendations made by the African Group in this regard were taken on board, the resultant UPR mechanism put States in a very dominant position.\textsuperscript{15}

Perhaps because of the quite limited NGO role, many NGOs have been able to participate relatively unfettered in the UPR. UPR-Info, the International NGO (INGO) facilitating NGO and other stakeholders’ engagement with the UPR, reported that, by March 2016, over 400 human rights defenders had raised human rights concerns on 129 countries in their UPR pre-

\textsuperscript{11} Human Rights Council above n 1, para 3(m).
\textsuperscript{13} Brett, above n 5, 674.
\textsuperscript{15} Ibid, 121.
sessions with Government representatives. However, other NGOs have been prevented from attending, or managed to participate but suffered intimidation and reprisals as a result.

A. NGO Reports to the UPR

The ability of the UPR to transcend ritualism and to function as an empowering regulatory mechanism depends heavily on effective NGO and civil society engagement in the process.

NGO reports balance the information provided by States by raising human rights issues that may have been avoided or even misrepresented in State reports. However, unlike other UN State reporting mechanisms such as reviews by human rights treaty bodies, in the UPR NGOs do not have the benefit of having seen the Government report and responding to it. NGO reports must be submitted in advance of the Government report, at least five months before the relevant session of the UPR Working Group. Individual NGO submissions to the UPR should not exceed 2,815 words and submissions from coalitions should not exceed 5,630 words, an extremely tight word limit to cover all human rights issues within each SuR. The OHCHR guidelines state that ‘Joint submissions by a large number of stakeholders are encouraged’, and Schokman and Lynch concluded from their experience that a co-ordinated and strategic NGO coalition is key to effective engagement with the UPR. In this study, the

17 See, eg, reports of reprisals in: UN Secretary General, Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, Human Rights Council, Thirtieth session, UN Doc A/HRC/30/29 (17 August 2015).
19 Whether NGOs see the State report in advance, and whether they see a draft or final version, depends on the SuR. States are encouraged to consult with civil society in drafting their report. See the guidelines adopted at the 6th HRC session in September 2007, Human Rights Council, Decision adopted by the Human Rights Council, UN Doc A/HRC/DEC/6/102. They were modified for the second and subsequent UPR cycles by Human Rights Council, Decision adopted by the Human Rights Council, UN Doc A/HRC/DEC/17/119 of June 2011.
20 Office of the High Commissioner for Human Rights, Universal Periodic Review: information and guidelines for relevant stakeholders’ written submissions (Rev 17/03/2015), para 27.
21 Ibid.
22 Ibid, para 23.
23 Schokman and Lynch, above n 3, 133.
interview data and Australian case study also testify to the effectiveness of a co-ordinated and strategic NGO coalition.

The NGO and NHRI submissions are then summarised by the UPR Secretariat into a ten page stakeholder summary report. This forms one of the three official UN reports on which the UPR is based and as such it is important for NGOs that their content is reflected in this report. The OHCHR technical guidelines for stakeholder submissions encourage submissions which, *inter alia*, contain credible and reliable information, highlight main issues of concern and identify possible recommendations.24

However, Billaud’s ethnographic study of the UPR exposed that there are other criteria for submissions, not made public for NGOs and that these are constantly negotiated and re-interpreted by those drafting the stakeholder summary reports.25 For example, priority may be given to NGOs with ECOSOC status, even though this is not required to submit a report. Also, NGO contributions may be excluded if they contain ‘second-hand information’ or were written in a non-official UN language.26 These constraints ignore the reality of resource-poor NGOs, particularly from developing countries, who may have valid issues to raise but may not have the resources to present them effectively. The covert rules and politicised nature of the UPR also mean that reports by Governmental NGOs (‘GONGOs’) could be included in the stakeholder summary report.27 For example, in Venezuela’s UPR, where 80 per cent of ‘civil society’ contributions came from Communal Councils praising Government policies, the Secretariat chose not to dismiss these but rather grouped them together so they could be referred to collectively in the stakeholder summary report.28 The lack of transparency described by Billaud is concerning. Given the criticisms of the HRC’s predecessor, the UN Human Rights Commission,29 including political bias in the selection of States for scrutiny

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24 Office of the High Commissioner for Human Rights, above n 20, 3.
26 Ibid.
27 For a brief discussion of GONGOs, see Kerstin Martens, ‘Examining the (Non-) Status of NGOs in International Law’ (2003) 10 *Indiana Journal of Global Legal Studies* 1, 8.
28 Billaud, above n 25, 68.
and lack of credibility and professionalism,\textsuperscript{30} transparent guidelines and working methods in the UPR are important for the legitimacy of the HRC.

\textbf{B. Consultation and Lobbying}

NGOs do not have an opportunity to brief recommending States as part of the UPR - they can merely make a two-minute statement before the adoption of the report of the Working Group.\textsuperscript{31} Instead, NGOs carry out informal lobbying outside of the HRC meetings. Given the peer-review and more politicised nature of the UPR compared with other UN State reporting mechanisms, such as reviews by human rights treaty bodies, NGOs’ ability to lobby other States is an important skill and one that many NGOs have had to develop.\textsuperscript{32}

There are consultation and lobbying opportunities at both a national and international level. States are encouraged to engage civil society in consultations in the drafting of the national report.\textsuperscript{33} NGOs can also use recommendations from the UPR in their national advocacy work and can play a role in monitoring progress on the SuR’s implementation of the recommendations.\textsuperscript{34} This article predominantly focuses on NGO engagement at an international level to complement the documentary analysis on whether NGOs influenced States’ recommendations. This international lobbying takes place in three main ways - NGOs can engage with embassies in their own country, they can lobby missions in Geneva and they can attend UPR-Info’s pre-sessions. Pre-sessions bring together embassy staff from the Permanent Missions in Geneva, NGOs and NHRI’s to discuss the human rights situation of the SuR, one month prior to their review. These sessions present a unique lobbying opportunity for NGOs.\textsuperscript{35} Lobbying and relationship building were key themes from the interviews, as explored in Section 4.

\begin{itemize}
  \item \textsuperscript{30} UN Secretary General, \textit{In Larger Freedom: Development, Security, and respect for Human Rights}, UN Doc A/59/2005.
  \item \textsuperscript{32} Schokman and Lynch, above n 3.
  \item \textsuperscript{33} Human Rights Council, above n 19.
  \item \textsuperscript{34} Office of the High Commissioner for Human Rights, above n 31, 48-49.
  \item \textsuperscript{35} UPR-Info, \textit{Pre-sessions}, \texttt{<http://www.upr-info.org/en/upr-process/pre-sessions>}.\end{itemize}
C. Previous Studies on NGOs and the UPR

As well as being active participants in the UPR process, NGO and other civil society representatives are also active contributors to the UPR literature, both NGO sector reports and academic publications. UPR-Info publishes regular reports on the UPR, and NGOs and academics rely on its comprehensive database of recommendations. A chapter in the first book on the UPR edited by Charlesworth and Larking is authored by NGO representatives Schokman and Lynch, who discuss effective NGO engagement with the UPR. They offer valuable, practical perspectives on NGO engagement with the UPR, concluding that it represents a potentially powerful ritual if NGOs can engage strategically and creatively. They state that the ‘…evidence is clear: effective NGO engagement enhances the relevance, efficiency and impact of UN human rights mechanisms…’. The evidence they refer to is based on previous NGO engagement with the UN and their chapter in itself does not offer evidence per se of the benefits of NGO engagement with the UPR. The current article contributes to the evidence base and builds on two previous empirical studies in particular.

In the first empirical study on the UPR in 2010, Moss identified that the UPR presented opportunities for NGOs, not only by engaging in Geneva but also by using the UPR as a lobbying tool domestically. He analysed the reviews of 16 States in the UPR’s second cycle and concluded that NGOs had had considerable success in influencing the recommendations made in the UPR, but that States were more resistant to accepting these recommendations. The second analysis of NGO influence was the more comprehensive study in 2013 by McMahon et al examining UPR sessions three to 13 from December 2008

38 For an analysis of the UPR more generally, see: Charlesworth and Larking (eds) above n 18.
39 Schokman and Lynch, above n 3.
40 Ibid, 126.
41 Moss, above n 3.
42 Ibid, 123.
They also found that Civil Society Organisation (CSO) recommendations were reflected in State recommendations (at a rate of 67 per cent). Contrary to Moss’ findings, McMahon’s study concluded that CSO-suggested recommendations were slightly more likely to be accepted by the SuR. It is possible that one reason for the difference is that McMahon’s study included both NGO and NHRI recommendations but it is unclear whether Moss’ did as he refers only to NGOs. The current study will differentiate between NGO and NHRI content in order to isolate potential NGO influence, in so far as is possible to do so. Unlike the previous studies, it will also take into account UN sources as potential influencers of State recommendations, an important consideration given the likely perceived legitimacy of UN reports compared with NGO reports in a peer-review mechanism.

3. Methodology

This study seeks to bring new understanding to the NGO role in the UPR. Two complementary empirical methodologies are used – qualitative data drawn from semi-structured interviews, and quantitative data from documentary analysis of UPR recommendations in an Australian case study.

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43 McMahon et al, *The Universal Periodic Review, Do Civil Society Organization – Suggested Recommendations Matter?* (Friedrich-Ebert-Stiftung, Dialogue on Globalization, 2013). ‘Civil society organisations’ is a broader term than NGOs and includes, *inter alia*, NGOs, human rights defenders, victim groups, faith-based groups, unions, and research institutes such as universities.


A. Semi-structured Interviews

The first methodology, semi-structured interviews, addresses a gap in previous studies. As the literature review summarised in the previous section indicates, the trend in UPR-related reports and articles thus far has been to analyse quantitative data, for example numbers of recommendations made, accepted and implemented.\(^{46}\) There is generally no accompanying qualitative research to give further depth and analysis to the topic. Semi-structured interviews for this study were carried out with the ten key stakeholders listed below. There were five international interviewees and five Australian for the case study. The majority of the interviews took place in Geneva in April and November 2015 and the remainder were conducted by telephone between May 2015 and May 2016. The interviews were recorded and transcribed, they were then codified and analysed using NVivo qualitative analysis software. The research was conducted in accordance with the University of Western Australia’s ethics approval for the research which requires that interviewees be given the option of anonymity – thus facilitating candid disclosure of information, while protecting interviewees.\(^{47}\) All NGO, INGO and NHRI interviewees consented to their organisation being identified; Government interviewees chose to remain anonymous and agreed to ‘Government Representative’ and ‘Australian Government Representative’ descriptors. Interviewees have been allocated these titles and a number in footnote references.

Interviewees were selected due to their particular role or expertise (purposeful sampling), or because they were recommended by other interviewees (snowball sampling).\(^{48}\) The international interviewees were as follows:\(^{49}\)

a) International Government representatives (two interviewees). These interviewees were selected to reflect some diversity of geographical origin and membership of regional groupings at the UN, as well as being involved in Australia’s UPR. Three embassies were approached, two participated and one was unable to participate for logistical reasons.

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\(^{47}\) Ogden, above n 306.

\(^{48}\) See, eg, Uwe Flick, Designing Qualitative Research (SAGE Publications, 2007) 25; David L. Morgan, ‘Snowball Sampling’ in Lisa M. Given (ed), The Sage Encyclopedia of Qualitative Research Methods (Sage, 2008) 816.

\(^{49}\) The UPR Secretariat was contacted by the author but did not respond to the request for an interview.
b) INGOs (three interviewees). One INGO, UPR-Info, was selected due to its key role in the UPR, described further below. The International Service for Human Rights (ISHR) and Minority Rights Group (MRG) were suggested by other interviewees.

An additional part of the methodology was the observation of some of the 23rd session of the UPR Working Group, including reviews of Australia, Austria and Saint Kitts and Nevis. The author also attended UPR NGO side events and Australian Government events. The observational methodology was informed by ethnographic studies of the UPR and other UN human rights mechanisms.50

B. Australian Case Study
This qualitative interview and observation data was triangulated with a small-scale case study of Australia’s UPR in 2015. A single case study approach was selected as it is a useful method for the examination of complex causal relations.51 Assessing the influence of NGO engagement with UN mechanisms has traditionally been considered difficult in any multi-causal situation;52 however, the pragmatic approach taken by authors in recent analyses of CSOs’ influence in the UPR is useful:

…it is not possible to prove causation i.e. whether states made these recommendations as a result of the CSO suggested recommendations. However, examination of the extent to which CSO concerns are reflected in state recommendations can at least demonstrate the level to which CSO interests are correlated and thus represented, in the process.53

McMahon et al also note that where identical language is used in recommendations; that strongly indicates causation.54 There are some instances of identical language or ‘specific

53 McMahon et al, above n 43, 5.
54 Ibid.
matches’ in the Australian case study (Section 5). Although it is often assumed that a single case study cannot produce generalisable findings, Flyvbjerg contests that this is one of the myths of case study research and that ‘the force of example’ is underestimated. In this case study, it is at least feasible that some features of NGO engagement with the UPR may be common in Western European and Other Groups (WEOG) States. These States are seen as geographically diverse but more homogenous in terms of culture, political approach and economic development.

Australia is an interesting case for a number of reasons. One is that it has had a somewhat adversarial relationship with other UN human rights bodies but it engaged well in its first UPR in 2011. Furthermore, NGO engagement with the UN on human rights issues is particularly important for States such as Australia which are not part of a regional human rights framework. In terms of analysing NGO engagement, Australia is a useful case as it has an informed human rights NGO sector with strong networks, although stymied somewhat by funding shortages.

The documentary analysis component of the case study focuses on the reports submitted to the UPR and the recommendations made by States in the UPR Working Group Report. As stated in the introduction, the UPR is based on three short reports which are publicly

57 Current members of the UN’s WEOG regional grouping are: Andorra, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Israel, Italy, Liechtenstein, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States of America. United Nations Department for General Assembly and Conference Management, United Nations Regional Groups of Member States, <http://www.un.org/depts/DGACM/RegionalGroups.shtml>.
60 Support for a documentary analysis methodology can be found in Webley, above n 55. She argues that documentary analysis can provide rich data but that despite this, documentary sources, other than primary legal sources such as cases and statutes, are under-utilised in empirical legal research.
available as UN official documents - a Government report, a compilation of UN information report and a summary of stakeholder submissions. The summary of stakeholders’ submissions is largely drawn from submissions by NGOs and the NHRI in the SuR. The compilation of UN information report includes key recommendations from UN treaty bodies, Special Rapporteurs and other UN human rights bodies. Therefore, unlike State reporting to most UN treaty bodies for example, which are quite reliant on NGOs, the compilation of UN information is a strong alternative to State reports from which to source information on the situation on the ground for those making recommendations.

In the documentary analysis, the recommendations made by States were input in a spreadsheet. These were compared with recommendations and issues in the stakeholder summary report and the compilation of UN information report; where the same issue or recommendation featured, it was input against the State recommendation for comparative purposes. Matches were either considered to be general or specific – specific matches being those that had very similar or identical language. This bespoke method was partly informed by methodology used by others examining UN human rights bodies. However, unlike McMahon et al’s analysis of the UPR, this study does not ask whether NGO recommendations were reflected in recommendations made by States, but rather inverts this approach and asks what the possible sources of State recommendations could be – including the UN compilation report. This is important as the case study found significant overlap between UN recommendations and NGO recommendations, questioning some of the previous assumptions about possible NGO influence. Also, as this study is particularly seeking to ascertain NGO influence, NGO content from the stakeholder summary report was captured separately from NHRI content, unlike the approach taken by other authors more interested in CSO influence broadly.

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61 Freeman, Wiseberg, above n 4.
63 McMahon et al, above n 43.
Where very similar recommendations, or sometimes identical language, appeared in a State recommendation and any of the other sources, these were highlighted in the spreadsheet.\textsuperscript{64} Data were then input against each recommendation as to whether it had been accepted by the Australian Government. The spreadsheet allowed for analysis of the results – for example, how many matches there were between NGO recommendations and State recommendations, how many of these were also shared with UN and/or NHRI recommendations and how many were unique. In addition, it captured which NGO recommendations were \textit{not} taken on board by States.

The Australian case study also involved interviews with key stakeholders. The combination of documentary analysis and interviews allows for a more in-depth and nuanced analysis of the influence of NGOs. The following were interviewed for the Australian case study:

a) Australian Government Representatives (three interviewees). These interviewees were selected due to their positions in relevant Government Departments and their familiarity with Australia’s international human rights obligations and associated UN reporting. One interviewee was based in Geneva, the other two in Canberra, Australia.

b) Domestic Australian NGOs (one interviewee). The Director of Policy and Advocacy at the National Association of Community Legal Centres (NACLC) was interviewed as one of the co-ordinators of the NGO coalition report to the 2015 UPR.

c) NHRI (one interviewee). The President of the Australian Human Rights Commission, Professor Gillian Triggs, was identified as a key stakeholder as the NHRI contributed to the stakeholder summary report and engaged with fora on the UPR, both domestically and in Geneva.

A limitation of the study is the small sample sizes; however, further research could apply a similar methodology to more States in order to draw stronger and more generalisable conclusions about NGO influence.

\textsuperscript{64} McMahon et al (ibid) had used a ‘no match, general match, specific match’ methodology in their study. This informed the current study but the same categories were not used \textit{per se}. 

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4. Interview Findings

A. Perceptions of the NGO Role

Government representatives (Australian and two other States), were generally positive about the NGO role in the UPR, seeing it as useful and helping to provide information and recommendations to States. One State representative said: ‘In Geneva, NGOs really have a huge role. The Human Rights Council is very open to NGOs, for example, NGOs can make statements and can participate in informal meetings regarding drafting of resolutions.’

However, among Government interviewees, there was also some reticence about NGOs and a sense that their information may lack credibility in some cases. For example, the same interviewee said that NGO information could help to inform follow-up ‘although we need to verify these’. Another Government interviewee said that there were many requests for bilateral meetings with NGOs and that it is important to first establish if the NGOs are legitimate and credible.

The three Australian Government interviewees were generally slightly more positive about the NGO role than either of the other two States. They saw NGOs as fulfilling a unique, complementary role in providing information that was critical of Governments to UN human rights bodies:

… the Government report is the Government report and whilst we try to be transparent, we’re not going to go in and say ‘oh we think we’ve completely stuffed this up’. We’ll acknowledge some areas we’re struggling to achieve progress and here’s what we’re doing about it. NGOs have that counter-balancing role of saying ‘you’ve just stuffed it up and it’s a complete debacle’. The Government is not just going to say that we got it wrong and we might not agree with the NGOs that we did get it wrong, but NGOs can focus the attention… in a way that the Government report itself can’t.

65 Government Representative (b), interviewee 6, interview conducted 12 November 2015, Geneva.
66 Ibid.
67 Australian Government Representative (a), interviewee 7, interview conducted 29 April 2015, Geneva.
68 Australian Government Representative (b), interviewee 8, interview conducted 7 January 2016, by telephone.
NGO and INGO interviewees were very positive about the importance of the NGO role in the UPR and saw it as important and legitimate. For example, the Australian domestic NGO interviewee’s view was that NGOs are essential: ‘I don’t think the treaty body processes and the UPR processes actually work without NGO engagement.’

The President of the Australian NHRI noted both the expertise of the sector and their unique attributes that enable them to engage in a way that Government or independent statutory agencies cannot:

… they can do very good work for very little money. They can do what a whole department can’t do because you haven’t got the flexibility, the agility, the authority, you’ve got to go through processes. They can sit down … they agree on it and someone just does the work immediately. The agility is fantastic.

There was also a sense among some interviewees that the NGO role was quite limited in the UPR and that it involved a way of engaging that was different for NGOs used to other UN mechanisms such as treaty bodies. Lobbying was seen by interviewees as a significant way of influencing State recommendations in the UPR. In the Australian case study, the NHRI and NGOs reported using the UPR-Info database of recommendations to develop a targeted approach:

The feedback we got from some of the countries we spoke to was that there were no other countries doing this work in such a co-ordinated and strategic way and that it was really refreshing and useful for them. They didn’t have to wade through lots of materials, the information was concise and we had already considered the areas that might be of interest to them and they were able to formulate their recommendations accordingly.

69 Amanda Alford, Director of Policy and Advocacy, National Association of Community Legal Centres (NACLC), Domestic NGO, interviewee 4, interview conducted 26 May 2016, by telephone.
70 Prof. Gillian Triggs, President of the Australian Human Rights Commission, interviewee 10, interview conducted 13 May 2016, Perth, Australia.
71 Alford, above n 69; Glenn Payot, Minority Rights Group, INGO, interviewee 3, interview conducted 29 April 2015, Geneva.
72 Alford, above n 69; Payot, above n 71; Triggs, above n 70.
73 Alford, above n 69.
A word of caution on simply relying on previous recommendations is that State priorities can change. The Australian NGO interviewee recalled meeting one State to discuss their previous, unimplemented recommendation on marriage equality, only to be told that their priorities had shifted.\textsuperscript{74} Lobbying is seen as an alternative to actually being able to address the HRC’s UPR working group. Along with word limits, some interviewees saw this as a key restriction of the UPR. UPR-Info on the other hand, felt that NGOs had an adequate role at the international level but that in general the engagement of civil society at a national level was an area for improvement.\textsuperscript{75}

\textbf{B. The UPR Role in Facilitating Relationships for NGOs}

A recurrent theme in the interviews was the opportunity that the UPR had created to develop closer working relationships between key actors. The growth in NGOs and INGOs engaging with each other internationally to advance the human rights agenda has been well documented.\textsuperscript{76} This is also the case in the UPR, but the UPR is creating or bolstering three other types of relationship; firstly, the relationship between NGOs and the SuR, secondly the relationship between civil society and international diplomats and finally the relationship between NGOs themselves.

\begin{itemize}
\item \textbf{(i) Relationships between NGOs and the SuR}
\end{itemize}

The UPR emphasises the engagement between NGOs and the SuR, potentially improving relationships between the actors in-country who will ultimately be involved in ongoing work on the issues. The reporting guidelines require States to report on their ‘broad consultation process’,\textsuperscript{77} in their UPR report. Therefore, despite some of the limitations of the NGO role in the UPR, requiring that States report on their consultation with NGOs, together with summarising NGO reports into an official UN document, in some ways gives NGOs added legitimacy or at least a status in the process. The Executive Director of UPR-Info reflected:

\textsuperscript{74} Ibid.

\textsuperscript{75} Roland Chauville, Executive Director UPR-Info, INGO, interviewee 2, interview conducted 28 April 2015, Geneva.


\textsuperscript{77} Human Rights Council 2011, above n 19, para II (2) (A).
It has also pushed NGOs and governments to sit down together to discuss human rights… there is a majority of states doing national consultations. It is one of the key stages in the UPR process and I definitely think it is one of the things that the UPR has achieved. Most national reports report about national consultations – 80% of reports in second cycle talk about the national consultations that they had. There is a clear recognition by States that they have to do it and that NGOs are a legitimate actor in the process.\(^{78}\)

One Australian Government interviewee felt that civil society engagement in Australia had preceded the UPR and that not much had changed in this regard, but indicated that in States where consultation and engagement with civil society had not been common practice, this may have improved as a result of the UPR.\(^{79}\)

(ii) Relationships between Civil Society and International Diplomats

The second type of relationship that has the potential to be created or enhanced through the UPR, is between domestic civil society and international diplomats. NGOs can lobby international ambassadors by contacting embassies and missions directly and by attending the pre-sessions organised by UPR-Info. All interviewees welcomed these opportunities. Government interviewees expressed some concerns about the workload of reading NGO reports and meeting numerous NGOs but reported openness to doing so and to attend the UPR-Info pre-sessions.\(^{80}\) The NHRI was proactive in organising a briefing session in Australia, in which NGOs also participated:

We had 53 embassies attend for a full day session. Most of the people who came were ambassadors… We were putting a factual and a legal position to them. A lot of these ambassadors, they’re not lawyers and so a lot of them didn’t understand Australia’s legal system and didn’t know that Australia doesn’t have a bill of rights and why we can do things that other countries can’t do.\(^{81}\)

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\(^{78}\) Chauville, above n 75.

\(^{79}\) Australian Government Representative (a), above n 67.

\(^{80}\) Ibid; Government Representative (b), above n 65; Government Representative (a), interviewee five, interview conducted 11 November 2015, Geneva.

\(^{81}\) Triggs, above n 70.
(iii) Relationships between NGOs

The third type of relationship facilitated by the UPR is the forming of NGO coalitions and networks. These predominantly involve domestic NGOs, but can also include INGOs and the NHRI as demonstrated in the Australian case study below. The Australian NGO coalition was noted by several interviewees as having been very successful. Although in many States coalitions are formed to engage with UN treaty bodies, the fact that the UPR covers all human rights issues does generate a broader level of engagement. UPR-Info’s Executive Director observed:

…it has pushed NGOs to form coalitions and start working for the first time together, while they did not have that opportunity in the past because they were working on different issues. Now they work together and join forces. These are several ways of assessing the impact of the UPR – the discussion it has created at the national level, the attention it has put on human rights, and the energy and resources it has initiated.82

Some Geneva-based INGOs play an important role in supporting and facilitating domestic NGOs to engage with UN human rights mechanisms, including the UPR. Although the Australian NGOs did not feel they needed these networks per se, they did acknowledge the support of ISHR in their Geneva visits, including having a base to work from. Some INGOs support specific thematic areas and act as a conduit for national NGOs, for example Minority Rights Group (MRG):

One of the main issues is language, which is really difficult because we are working on minorities, they are not all well-educated and even well-educated people do not all speak English. So it’s a challenge but… diplomats that we meet in the context of the UPR are usually happy to have this direct contact with the people, they also have a sense that they are working on human rights from Geneva and that they need to have a direct link with people on the ground.83

UPR-Info was also seen to do a ‘fantastic job’ in organising pre-sessions and facilitating engagement between domestic NGOs and staff from missions in Geneva.84

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82 Chauville, above n 75.
83 Payot, above n 71.
84 Alford, above n 69.
reported prioritising input from domestic NGOs at these sessions where they aim for at least 70 per cent of speakers from domestic NGOs.\textsuperscript{85}

In some cases it was reported that it was mutually agreeable for INGOs to submit their own reports rather than join the coalition, for example because it was their policy internationally.\textsuperscript{86} There were also reports of INGOs acting as the spokesperson on behalf of domestic NGOs. In this case, coalitions of domestic NGOs and INGOs emerged as particularly important where there is a repressive regime.\textsuperscript{87} Where domestic NGOs cannot openly criticise their Government, INGOs are an important conduit for their information. As the Executive Director of Geneva-based ISHR explained:

\begin{quote}
\ldots in those cases we will put in the submission in our own name with no reference to the national level partner or ‘informant’ because to name them would be to put them at risk of reprisals. So a recent UPR submission that we did in respect of Oman is a good example of that.\textsuperscript{88}
\end{quote}

(iv) Tensions between the Actors

Tensions are an inevitable reality of such relationships. Although the lead Australian NGO representative interviewed was generally positive about engagement with the Australian Government, she did feel that the absence of NGO funding for engagement, the limited opportunities for consultation and the Government’s reluctance to take NGO feedback on board when they were consulted, were all limiting factors.\textsuperscript{89} NGO coalitions are actively encouraged by the UPR Working Group, but of course forming a cohesive, co-ordinated NGO coalition, where diverse interests and issues are accommodated, can be challenging. This is even more pronounced in the UPR than in other mechanisms given the breadth of topics for consideration and the very tight word limit for reports. The Australian interviewees (Government and NGO) reported some internal sector politics and sensibilities, but overall a strong and strategic coalition.\textsuperscript{90} More problematic at times was the relationship between domestic and international NGOs.

\begin{footnotesize}
\textsuperscript{85} Chauville, above n 75.
\textsuperscript{86} Alford, above n 69.
\textsuperscript{87} Payot, above n 71; Phil Lynch, Director ISHR, INGO, interviewee one, interview conducted 28 April 2015, Geneva.
\textsuperscript{88} Lynch, above n 87.
\textsuperscript{89} Alford, above n 69.
\textsuperscript{90} Ibid; Australian Government Representative (b), above n 68.
\end{footnotesize}
Some INGOs were criticised for submitting their own report without any knowledge of issues on the ground, or engagement with domestic NGOs. Furthermore, at the one formal opportunity to brief the HRC at the adoption of the working group’s report, it was reported that only one Australian NGO out of seven, was allocated a speaking slot. The perception was that these were on a ‘first-come first-served’ basis and that Geneva based INGOs with the institutional knowledge and benefits of being in the same time zone were first to be allocated speaking slots. For example, the Indigenous representative body, National Congress, did not get a speaking slot. This author observed at an Australian Government debrief with NGOs following the UPR, that one INGO took up some speaking time advocating for religious organisations’ right to discriminate against people on the ground of homosexuality – a perspective that no-one else in the room appeared to share. These tensions resonate with Baird’s findings that INGOs in Pacific Island States’ UPRs may have had a distorting effect on the interactive dialogue and may have diluted the voice of domestic civil society actors.

Whilst UPR-Info was seen as an invaluable facilitator, the Australian domestic NGO reported that the UPR-Info format for pre-sessions was perhaps too rigid and prescriptive. She felt that in the case of a highly co-ordinated and strategic NGO coalition, a slightly less bureaucratic approach may have worked better: ‘We had to convey that we were highly engaged and organised and so they needed to trust us a little bit in terms of involvement in the pre-session and how it might operate.’

UPR-Info is an interesting development in the INGO domain. Unlike some of the INGOs who were perceived to encroach on the space of domestic NGOs, they are quite clear that they do not engage in advocacy:

92 Alford, above n 69.
93 Observation at Australian NGO debrief meeting, 10 November 2015, Geneva.
94 Baird, above n 91.
95 Alford, above n 69.
Our primary role is to provide information, not just to NGOs but to all actors in the UPR, and to monitor the UPR process… we also play a role as facilitator between NGOs and governments. We do not advocate for certain issues and we aim to work on every country and in that sense the countries see us as a neutral actor. And so do NGOs so we can then build trust between the stakeholders.  

This type of international facilitative INGO does exist in other UN human rights mechanisms, such as some of the INGOs working closely with treaty bodies and co-ordinating NGO engagement with them. For example, the Centre for Civil and Political Rights (CCPR Centre) works closely with the Human Rights Committee and International Women’s Rights Action Watch (IWRAW) with the Committee on the Elimination of Discrimination Against Women. However, by carefully maintaining State engagement, refraining from advocacy and managing NGO engagement and input at pre-sessions, the unique gatekeeper role played by UPR-Info in the pre-sessions is partly a result of the peer-review nature of the UPR. Although the concept of a ‘gatekeeper’ INGO could have some negative connotations, with 193 UN member States participating in the UPR, each with multiple stakeholder groups, a gatekeeper may be essential to the effective functioning of the UPR. 

Predating the UPR, there has been extensive literature and theories on INGOs and transnational advocacy networks, but the complexities of the relationships between key stakeholders in the UPR and the opportunities and challenges of each, requires further research. This is an evolving area which has developed rapidly since the UPR’s first session in 2008, partly as a result of agile and informed NGOs working in an increasingly globalised environment. This section has explored stakeholder perceptions of the NGO role and presented new evidence of the UPR as a facilitator of relationships and networks between stakeholders. This qualitative analysis indicates some potentially broad and intangible outcomes of the UPR. The following section now moves to a narrower and more quantitative analysis, primarily focused on NGO recommendations matching State recommendations in the Australian case study. 

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96 Chauville, above n 75. 
97 The Secretariat also plays a gatekeeper role in producing the stakeholder summary report and in allocating speaking time for NGOs at the adoption of the reports. 
98 Keck and Sikkink above n 76; Risse, Ropp and Sikkink above n 76.
5. Australian Case Study

‘… if a United Nations committee wants to play domestic politics here in Australia, then it will end up with a bloody nose.’ Alexander Downer, Australian Foreign Minister 2000.99

As these comments indicate, Australia has at times had a tumultuous relationship with the UN.100 Australian Governments have resisted the authority of UN human rights bodies, beginning in earnest with the UN Committee on the Elimination of Racial Discrimination review in 2000. The Government in that case announced that the Committee’s concluding observations were ‘an unbalanced and wide-ranging attack that intrudes unreasonably into Australia’s domestic affairs’ and announced a review into Australia’s engagement with the UN.101 More recently, Australia has been criticised for failing to provide remedies following findings of treaty violations in views of treaty bodies on individual complaints.102 In 2015 the Prime Minister reacted to a critical report by the Special Rapporteur on Torture,103 by stating that Australians were ‘tired of being lectured to by the UN’.104

Conversely, Australia has in some ways engaged in a positive manner with the UN in recent years. It had a seat on the UN Security Council in 2014-2015 and, according to the Australian Department of Foreign Affairs and Trade, ‘established a strong reputation as an

100 Australia’s relationship with the UN has been more positive historically, see, eg, Gareth Evans, ‘The Labor Tradition: a View from the 1990s’, in David Lee and Christopher Waters (eds), Evatt to Evans: The Labour Tradition in Australian Foreign Policy (Allen and Unwin Australia Pty Ltd, 1997) 11, 13.
101 Spencer Zifcak, Mr Ruddock Goes to Geneva (University of New South Wales Press, 2003) 18.
102 Remedy Australia is an NGO which monitors individual complaints taken to the UN by Australians, and the Government’s responses to these. In 2014, they reported that only six out of 33 cases (18%) have been fully remedied in accordance with Final Views. Remedy Australia, Follow-up Report on violations by Australia of ICERD, ICCPR & CAT in individual communications (1994-2014), 11 April 2014.
103 Human Rights Council, Twenty-eighth session, Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez Addendum Observations on communications transmitted to Governments and replies received, UN Doc A/HRC/28/68/Add.1, 6 March 2015.
active, pragmatic, and outcomes-focused Member of the Council.¹⁰⁵ It has also launched a bid for a seat on the HRC,¹⁰⁶ something the Australian delegation made reference to at least three times in its UPR presentations.¹⁰⁷ Australia’s relationship with the UN is one of the reasons why it makes an interesting choice of case study. Despite its quite antagonistic relationship with treaty bodies and Special Procedures, Australia has been more disposed towards positive engagement with the UPR. In the first review in 2011, Australia accepted over 90 per cent of its recommendations and announced a number of voluntary commitments.¹⁰⁸

Australia’s 2015 UPR took place in a different context with a Government less committed to human rights and facing criticism from the NHRI and NGOs for the lack of implementation of the recommendations accepted in 2011. The NHRI reported that 62 per cent of the 2011 recommendations had been partially implemented and only 10 per cent fully implemented.¹⁰⁹ NGOs reported that only 19.7 per cent had been partially implemented and 11 per cent fully implemented.¹¹⁰ Nonetheless, the Government approached the 2015 UPR with nine voluntary commitments and subsequently accepted half of all recommendations - arguably - as explored in the following sections.

¹⁰⁷ Observation at Australia’s UPR, 9 November 2015, Geneva.
A. Overview of Australia’s 2015 UPR

Australia’s second UPR took place on the 9 November 2015 during the UPR Working Group’s 23rd Session. As has emerged as practice, the Government began by offering their voluntary commitments to the UPR Working Group. At a national level these included holding a referendum on Indigenous recognition in the Constitution; the resettlement of 12,000 Syrian refugees and a commitment to improving the criminal justice system for people with cognitive disability who are unfit to plead. Important for the purposes of the UPR, was a commitment to work with the NHRI to develop a monitoring mechanism on Australia’s progress in implementing UPR recommendations and designating a standing national mechanism to strengthen Australia’s overall engagement with UN human rights reporting. At an international level, their voluntary commitments included strengthening advocacy for the worldwide abolition of the death penalty and promoting the rights of older persons. The Australian NGO interviewee did not feel the NGO coalition had been able to strongly influence these voluntary commitments.

104 States took the floor during Australia’s review to make statements and recommendations. This was the highest number of participating States in the 14 reviews that took place in the 23rd cycle. A key theme emerging from the review was asylum policies. Recommendations included calls to stop boat turn-backs, end mandatory detention or use it only when strictly necessary and with limitations. There were also concerns about the conditions in detention and the refoulement of asylum seekers. Australia’s asylum policies are a common concern for UN human rights bodies, however, the strong focus on

112 Ibid, 3.
113 Alford, above n 69.
115 Based on the author’s analysis of the 14 outcomes documents from the 23rd session. A few States had over 90 States participating in their review (Myanmar, Austria, Lebanon), others had relatively few participating States, such as Saint Kitts and Nevis with 48 States.
117 Ibid.
118 Ibid.
asylum in a peer-review mechanism was more surprising. States in the UPR can be more reticent on this issue due to the fear of reciprocity - asylum policies are a politically charged topic in many States around the world which struggle to comply entirely with their international obligations in this area. As a result, they may be less inclined to hold other States to account. To illustrate, at the time of Australia’s review, there had been more than 8,000 recommendations on women’s rights during the UPR’s history, but only about 700 recommendations on asylum seekers and refugees. Australia’s review was a clear departure from this record but, as Sweden noted, according to the UN High Commissioner for Refugees, Australia is the only country in the world to use both offshore processing and mandatory detention.

Linked to this, a recurring recommendation made in the review was for Australia to ratify the Optional Protocol to the Convention Against Torture (OP-CAT) to allow visits to places of detention. The Australian delegation indicated that this is being actively considered. In the documentary analysis, the OP-CAT recommendation made by several States matched quite closely with a recommendation from the NHRI in the stakeholder summary report. The President of the NHRI made the following observation about the OP-CAT recommendations:

…OP-CAT effectively became code for ‘do something about offshore processing’. It’s annoying that the Department would then count out of the list of those States that had raised offshore processing and asylum seekers, those States that had made a recommendation on OP-CAT. Whereas in my view, when they had raised OP-CAT so strongly, it was a more multi-lateral code way of saying ‘just get your act together’ but not being so aggressive.

There is evidence to suggest that this is the case. Sixteen other States have signed but not yet ratified OP-CAT. To take the Western democracies from that group as comparable examples, Belgium received six recommendations relating to the ratification of OP-CAT in

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119 Using data from the UPR-Info database, UPR-Info, above n 37.
121 Triggs, above n 70.
its first cycle of the UPR, Iceland received five and Ireland received nine. In the 2015 UPR, Australia received 27 recommendations relating to the ratification of OPCAT.

The second most common recommendation theme was Indigenous peoples’ rights. Recommendations relating to constitutional recognition, consultation with Indigenous communities and reducing inequality in health, education and employment were common. The review covered a range of other issues, with quite a strong emphasis on rights of persons with disabilities, women’s rights, children’s rights, tackling racism and Islamophobia, plus a few recommendations on marriage equality. Section 5(b) will establish which of these recommendations may have been influenced by NGOs.

B. Did NGOs Influence State Recommendations?

In the documentary analysis, 290 original recommendations from the 104 UN member States who participated in Australia’s UPR in the HRC were considered. Although these were later consolidated by the UPR working group, the author decided to analyse the recommendations in their original form as this most closely reflected the language used by the recommending State in the UPR. As such, it provides more opportunity to draw parallels with the compilation of UN information and stakeholder summary reports. As NGOs are the primary focus of this paper, the author separated the stakeholder summary report into two categories – NHRI and NGO recommendations – rather than analyse them as one category of CSO recommendations.

As Table 1 indicates, the most influential source emerged as the compilation of UN information report, with 197 of the 290 recommendations made by States, (68 per cent), having either a general or specific match to the recommendations contained in this report. Of these 197 recommendations, 58 of them were the unique source for the recommendation made by the State in the UPR – meaning the recommendation had not also been made by the NHRI or NGOs. The second most influential source was NGO submissions from the stakeholder summary report with 177 of the 290 recommendations made by States, (61 per

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123 Using data from the UPR-Info database, UPR-Info above n 37.
125 Ibid.
126 Ibid.
127 For example, McMahon et al, above n 43.
cent), having either a general or specific match to the recommendations contained in this report. 33 of these 177 recommendations were the unique source for the recommendations made by States. Finally, the NHRI recommendations from the stakeholder summary report were a general or specific match for 148 of the final recommendations made by States, (51 per cent) and 17 were a unique match, not found in NGO or UN recommendations.

Table 1: Possible Sources of State Recommendation, Matches with UN and Stakeholder Reports.

<table>
<thead>
<tr>
<th>Recommendations made by other States to Australia in the UPR</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Matches with compilation of UN information report</td>
<td>197</td>
<td>68%</td>
</tr>
<tr>
<td>Unique matches with UN information – not found in other reports</td>
<td>58</td>
<td>20%</td>
</tr>
<tr>
<td>Matches with NGO content in Stakeholder summary report</td>
<td>177</td>
<td>61%</td>
</tr>
<tr>
<td>Unique matches with NGO information – not found in other reports</td>
<td>33</td>
<td>11%</td>
</tr>
<tr>
<td>Matches with NHRI content in Stakeholder summary report</td>
<td>148</td>
<td>51%</td>
</tr>
<tr>
<td>Unique matches with NHRI information – not found in other reports</td>
<td>17</td>
<td>6%</td>
</tr>
</tbody>
</table>

The documentary analysis also identified and counted specific matches, namely where the recommendation made by a State used very similar or the same wording as the recommendation in the stakeholder summary or compilation of UN information reports. The most influential single source was the compilation of UN information report - 17 of the recommendations made by States had a specific match with recommendations in the UN summary report. The second most influential single source for specific matches was the NHRI section of the stakeholder summary report with 13 specific matches. The NGO section of the stakeholder summary report had seven specific matches. For example, Iceland and Turkey made the following recommendations that Australia:
‘Fully incorporate its international human-rights obligations into domestic law by introducing a comprehensive judicially enforceable federal Human Rights Act.’ (Iceland)\textsuperscript{128}

‘Incorporate international human rights obligations into domestic law by adopting a comprehensive Human Rights Act at federal level.’ (Turkey)\textsuperscript{129}

The stakeholder summary report had quoted from JS5/ANGOC submission which recommended that Australia ‘..fully incorporate its international human rights obligations into domestic law …. By introducing a comprehensive, judicially enforceable federal Human Rights Act.’\textsuperscript{130}

The documentary analysis therefore, appears to indicate that the organisations with most international legitimacy – UN bodies – had most influence in Australia’s UPR. NGO issues and recommendations were also widely reflected in State recommendations and in 13 cases the NHRI influenced the precise wording of recommendations made by States. The influence of the UN compilation report though requires further analysis. As NGOs can also influence the recommendations made by other UN human rights bodies, where these recommendations were relied upon in the UPR, it is possible that they were originally informed by NGOs.

Documents do not construct systems or domains of documentary reality as individual, separate activities. Documents refer – however tangentially – to other realities and domains. They also refer to other documents…. The analysis of documentary reality must, therefore, look beyond separate texts and ask how they are related.\textsuperscript{131}

Certainly there was some mutual reinforcing of recommendations among the UN, NHRI and NGO sources. The same types of recommendations and sometimes similar language were used by all three. There were a few instances of the stakeholder summary report

\textsuperscript{128} Human Rights Council Working Group on the Universal Periodic Review, above n 114 at 136.71.
\textsuperscript{129} Ibid, 136.72.
\textsuperscript{130} Human Rights Council, \textit{Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Australia, UN Doc A/HRC/WG.6/23/AUS/3 (10 August 2015).
\textsuperscript{131} Paul Atkinson and Amanda Coffey, ‘Analysing Documentary Realities’ in David Silverman (ed), \textit{Qualitative Research} (Sage Publications, 3\textsuperscript{rd} ed, 2011) 77, 86.
recommendations supporting treaty body recommendations, which were also referred to in the UN compilation report. For example, the stakeholder summary report referred to the Human Rights Watch submission which recommended that Australia adopt the Committee Against Torture’s (CAT) recommendation to review mandatory sentencing laws with a view to abolishing them.\textsuperscript{132} This was also reflected in the UN compilation report which included the recommendation from the CAT’s last concluding observations to ‘review mandatory sentencing laws with a view to abolishing them’.\textsuperscript{133} This recommendation in turn was taken on board by Norway who made their recommendation using exactly the same language and with reference to the CAT: ‘Adopt the recommendation by the UN Committee against Torture to review mandatory sentencing laws with a view to abolishing them.’\textsuperscript{134} The recommendation to review and / or abolish mandatory sentencing laws was made by NGOs to the CAT in Australia’s last review,\textsuperscript{135} and arose as a recommendation in the previous concluding observations.\textsuperscript{136} It is also an issue that has been reflected in concluding observations for Australia from other treaty bodies in recent years.\textsuperscript{137} It is therefore difficult in such examples to identify the ‘origin’ of the recommendation.

In some cases, an NGO or other civil society organisation has been consistently vocal on a distinct and specific issue.\textsuperscript{138} Their concerns and recommendations have been taken on board by treaty bodies and subsequently by recommending States in the UPR. One example of this

\textsuperscript{132} Human Rights Council, above n 130, 8.
\textsuperscript{133} Human Rights Council, Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Australia, UN Doc A/HRC/WG.6/23/AUS/2, 31 August 2015, para 30.
\textsuperscript{134} Human Rights Council Working Group on the Universal Periodic Review, above n 114, at 136.
\textsuperscript{136} Committee Against Torture, Concluding observations of the Committee against Torture: Australia, UN Doc CAT/C/AUS/CO/3, 22 May 2008, para 23(c).
\textsuperscript{137} See, eg, Committee on the Rights of the Child, Concluding Observations: Australia, UN Doc CRC/C/AUS/CO/4, 28 August 2012, para 84 (c).
\textsuperscript{138} Distinct and specific differentiates such issues from, for example, the plethora of organisations advocating on immigration and asylum issues, including mandatory detention, push backs, refoulement, and so forth. In areas of high levels of advocacy activity such as this, it is more difficult to ascertain the more significant influencers. Whereas, with distinct and specific issues, the advocacy space tends to be less crowded and allows for examination of possible influence.
in the 2015 UPR recommendations for Australia is the issue of birth registration in Indigenous communities. Poland recommended that Australia:

Eliminate the disparities in access to services by Aboriginal and Torres Strait Islander children and their families, especially by reviewing the Australian birth registration process in order to ensure that all children are registered at birth.  

The UN compilation report had included recommendations from the Committee on the Rights of the Child (CRC) which closely correlated with the Polish recommendation:

…address disparities in access to services by Aboriginal and Torres Strait Islander children and their families… review its birth registration process to ensure that all children are registered at birth.

The CRC recommendation may have been influenced by a submission from the Castan Centre for Human Rights Law, which focused solely on this issue, under Article 7 of the Convention on the Rights of the Child which provides that ‘The child shall be registered immediately after birth.’ The Castan Centre’s submission to the CRC outlined the difficulties caused by the birth of Indigenous children not being registered, or being registered but people having difficulty getting a copy of their birth certificate to access other services (such as school, social welfare, applying for a driver’s licence etc.). The issue was reflected in the CRC’s concluding observations and, as outlined above, subsequently influenced a recommendation by Poland in the UPR. This recommendation was one that the Australian Government ‘Accepts on the basis of existing law, policy and action’.

Such linkages and repetition are interesting to observe as they indicate a degree of complementarity between existing mechanisms and the more recent UPR, as envisaged by

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140 Human Rights Council, above n 133, para 14.
resolution 5/1 which established the UPR.\textsuperscript{144} This degree of complementarity means that NGOs seeking to best influence the UPR should also consider the benefits of engaging with other UN human rights bodies such as the treaty bodies and Special Procedures.

Although the focus here has been on the content of the recommendations as these are ultimately what the State can accept and implement, analysis of the dialogue also showed evidence of NGO influence.\textsuperscript{145} For example, the US in their UPR statement to Australia expressed concern over the closure of remote communities without consultation with Indigenous peoples and spoke specifically of the Oombulgurri community in Western Australia. This community was mentioned in the stakeholder summary report, drawing on Amnesty International’s submission to the UPR.\textsuperscript{146}

Finally, there were also many recommendations from the compilation of UN information report and the NHRI and NGO section of the stakeholder summary report which were not reflected in the recommendations made by States. In terms of NGO issues, some themes in the recommendations not adopted by States include concerns over poverty, homelessness and funding for various bodies, sectors and services including the NHRI, the NGO sector, legal services and social inclusion services. Given the likely costs of implementing recommendations on these topics, this is perhaps not surprising in a peer-review mechanism where States are aware of the opportunity for reciprocity.

\textbf{C. Which NGOs Were Most Influential?}

The question of what types of NGO are most influential in the UPR has not previously been comprehensively considered. Moss analysed which NGOs were more likely to have their content reflected in the stakeholder summary report and found that it was INGOs with ECOSOC consultative status,\textsuperscript{147} (supporting Billaud’s claim that preference was given to content from NGOs with ECOSOC status in the stakeholder summary). This was followed by national NGOs without ECOSOC consultative status. However, in this part of his analysis

\textsuperscript{145} Observation at Australia’s UPR, 9 November 2015, Geneva.
\textsuperscript{146} Human Rights Council, above n 130, para 71.
\textsuperscript{147} Moss, above n 3.
he did not consider which of these then had their content reflected in recommendations made by States.

As summarised in Table 2, the documentary analysis in the Australian case study found that 17 NGOs had either a general or a specific match with recommendations made by States in Australia’s UPR, with most of these having less than ten matches. One NGO coalition clearly emerges as the most influential with 90 matches. This was the JS5/ANGOC submission, a domestic coalition endorsed by over 190 NGOs and civil society organisations. It was led by the Human Rights Law Centre, Kingsford Legal Centre and the peak body the National Association of Community Legal Centres (NACLC), an interviewee for this study. The second most influential source was Amnesty International with 33 matches, followed by World Vision with 21, the Law Council of Australia with 20 and the National Congress of Australia’s First Peoples with 11. Although referred to in the stakeholder summary report, JS3 submission does not appear to have influenced any recommendations.148

**Table 2 – NGOs with recommendations matching State recommendations**

<table>
<thead>
<tr>
<th>Title used in stakeholder summary report</th>
<th>Full NGO name or list of organisations in coalition</th>
<th>Type of NGO</th>
<th>Number of matches with recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td>JS5/ANGOC</td>
<td>Australian NGO coalition, joint submission by Human Rights Law Centre, Kingsford Legal Centre, National Association of Community Legal Centres and endorsed by 190 organisations.</td>
<td>Coalition (domestic)</td>
<td>90</td>
</tr>
<tr>
<td>AI</td>
<td>Amnesty International</td>
<td>INGO</td>
<td>33</td>
</tr>
<tr>
<td>WVA</td>
<td>World Vision Australia</td>
<td>INGO</td>
<td>21</td>
</tr>
<tr>
<td>LCA</td>
<td>Law Council of Australia</td>
<td>Domestic NGO</td>
<td>20</td>
</tr>
<tr>
<td>National-Congress</td>
<td>National Congress of Australia’s</td>
<td>Domestic</td>
<td>11</td>
</tr>
</tbody>
</table>

148 JS3 was a joint submission by Australian Christian Lobby, FamilyVoice, and Wilberforce Foundation.
<table>
<thead>
<tr>
<th>Title used in stakeholder summary report</th>
<th>Full NGO name or list of organisations in coalition</th>
<th>Type of NGO</th>
<th>Number of matches with recommendations</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Peoples</td>
<td></td>
<td>NGO</td>
<td></td>
</tr>
<tr>
<td>JS1</td>
<td>Joint submission by Franciscan International, Solidarity Foundation, Australian Catholic Religious against Trafficking in Humans; Destination Justice.</td>
<td>Coalition, domestic NGOs and INGOs</td>
<td>7</td>
</tr>
<tr>
<td>HRW</td>
<td>Human Rights Watch</td>
<td>INGO</td>
<td>4</td>
</tr>
<tr>
<td>RCOA</td>
<td>Refugee Council of Australia</td>
<td>Domestic NGO</td>
<td>2</td>
</tr>
<tr>
<td>JS2</td>
<td>Joint submission by Center for Democracy &amp; Technology (USA), Australian Privacy Foundation, New South Wales Council for civil Liberties, Privacy International.</td>
<td>Coalition, domestic NGOs and INGOs</td>
<td>2</td>
</tr>
<tr>
<td>GIECPC</td>
<td>Global Initiative to End all Corporal Punishment of Children (UK).</td>
<td>INGO</td>
<td>2</td>
</tr>
<tr>
<td>ADFI</td>
<td>Alliance Defending Freedom – International (Geneva)</td>
<td>INGO</td>
<td>1</td>
</tr>
<tr>
<td>ODVV</td>
<td>Organization for Defending Victims of Violence (Iran)</td>
<td>INGO</td>
<td>1</td>
</tr>
<tr>
<td>NATSILS</td>
<td>National Aboriginal and Torres Strait Islander Legal Services</td>
<td>Domestic NGO</td>
<td>1</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Commission of Jurists (Geneva)</td>
<td>INGO</td>
<td>1</td>
</tr>
<tr>
<td>National-Seniors</td>
<td>National Seniors</td>
<td>Domestic NGO</td>
<td>1</td>
</tr>
<tr>
<td>JS4</td>
<td>Joint submission by Franciscan International, Europe Third World</td>
<td>Coalition, INGOs</td>
<td>1</td>
</tr>
<tr>
<td>Title used in stakeholder summary report</td>
<td>Full NGO name or list of organisations in coalition</td>
<td>Type of NGO</td>
<td>Number of matches with recommendations</td>
</tr>
<tr>
<td>------------------------------------------</td>
<td>--------------------------------------------------</td>
<td>-------------</td>
<td>---------------------------------------</td>
</tr>
<tr>
<td></td>
<td>Centre, AlyansaTigil Mina, Fundacion de Estudios para la Aplicacion del Derecho.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Moss found that INGO content was reflected more in the stakeholder summary report, however Table 2 shows that the domestic NGO coalition had closest correlation with the recommendations made by States in Australia’s UPR. One reason may be that INGOs are more important in reviews of less democratic States with a restricted civil society, whereas in a WEOG State such as Australia, domestic NGOs are more significant. Given the opportunities for NGOs to engage with follow-up on the implementation of recommendations, the prevalence of a strong domestic NGO coalition is useful. Merry argues that domestic NGOs have the added advantage for the UN of acting as intermediaries so that international law can be adapted as a ‘localizing transnational knowledge of rights’. Another reason for the success of the NGO coalition is likely to be the legitimacy of being endorsed by almost 200 organisations and working closely with the NHRI in briefing embassies, both in Australia and in Geneva. The NGO coalition report also covered a broad range of human rights issues, rather than focusing on one specialised area, such as Indigenous rights or children’s rights, therefore it was likely to be more prevalent in the stakeholder summary report and in recommendations.

D. Were Recommendations Correlating to NGO Recommendations More or Less Likely to be Accepted?

A unique feature of the UPR is that in the weeks following the review, the SuR can choose whether they accept the recommendations. It could be argued that this weakens the effectiveness of the review. However, internationally, 74 per cent of all recommendations were

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149 Moss, above n 3.
150 See for example: Sally Engle Merry, Human Rights and Gender Violence: Translating International Law into Local Justice (University of Chicago Press, 2006); Beth Simmons, Mobilizing for Human Rights: International Law in Domestic Politics (Cambridge University Press, 2009).
151 Merry, above n 150, 179.
152 Human Rights Council, above n 1, para 32.
made in the UPR are accepted by the SuR. HRC Resolution 5/1 provides that States may accept or ‘note’ recommendations; however, States have responded in a variety of ways. This is relevant to the current study as we are interested in NGO influence, including whether Australia was more likely to accept or ‘note’ those recommendations correlating with NGO recommendations. As Table 3 shows, there is ambiguity surrounding whether the Australian Government has accepted or noted recommendations as there are six different responses used by the Government.

**Table 3: Government’s Response**

<table>
<thead>
<tr>
<th>Australia’s Response</th>
<th>Number of recommendations</th>
<th>Percentage of total</th>
</tr>
</thead>
<tbody>
<tr>
<td>i. Accepts</td>
<td>11</td>
<td>3.8%</td>
</tr>
<tr>
<td>ii. Accepts on the basis of existing law, policy and action.</td>
<td>139</td>
<td>47.9%</td>
</tr>
<tr>
<td>iii. Notes</td>
<td>22</td>
<td>7.6%</td>
</tr>
<tr>
<td>iv. Notes and will further consider</td>
<td>43</td>
<td>14.8%</td>
</tr>
<tr>
<td>v. Notes but will not further consider at this time</td>
<td>71</td>
<td>24.5%</td>
</tr>
<tr>
<td>vi. Notes pending (various other events)</td>
<td>4</td>
<td>1.4%</td>
</tr>
<tr>
<td><strong>Total:</strong></td>
<td><strong>290</strong></td>
<td><strong>100%</strong></td>
</tr>
</tbody>
</table>

Overall, the Australian Government had a low rate of acceptance of UPR recommendations (11 out of 290), but a higher rate of ‘accepted on the basis of existing law, policy and action’ (139 of 290) as outlined in Table 3. There are four separate ‘notes’ responses, with only one a clear rejection of the recommendation – ‘Notes but will not further consider at this time’. The proliferation of response categories in Australia’s 2015 review is unusual but not unique. Arguably, 150 (52 per cent) were accepted and 140 (48 per cent) were noted.

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154 Human Rights Council, above n 143.
155 Australia had four responses in 2011 – accepted, accepted-in-part, accepted on the basis that they are reflected in existing laws or policies, and rejected. An analysis of all 14 States in the UPR working group’s 23rd Session (2015) found that only one had more response categories than Australia.
However, it is very difficult to ascertain what is meant by each of these six responses. For example, does ‘accepts on the basis of existing law, policy and action’ mean that the Government believes it is already doing this and so no further action is required? Or does it mean that the Government will take action on this as it aligns with its policy position in any case? The NHRI takes the position that it means the former, confirmed in their response to the adoption of Australia’s review by the UPR Working Group: ‘… this ‘business as usual’ approach will not ensure compliance with Australia’s human rights obligations.’

In an interview subsequent to the UPR, a relevant Government representative was asked what was meant by ‘accepted on the basis of existing law and policy’. He explained that the timeframe in which to develop responses was inadequate and so they had responded as best they could but were now working towards a more detailed response to each recommendation. He further stated that Australia had written to complain to the HRC on this matter. He did indicate that the Government had taken a much more cautious approach than in 2011 as he felt the Government had been heavily criticised by NGOs and the NHRI in the lead up to the 2015 UPR for its perceived failure to have implemented the previous recommendations. It is an interesting consequence that NGOs and the NHRI held the Government to account on its previous commitments and that the Government then decided to reduce its level of commitment in the subsequent UPR to minimise the risk of such criticism in future. It was also part of the reason for the voluntary commitment to work with the NHRI to develop a monitoring mechanism for implementation. The NHRI has always done this independently and as this mechanism develops and becomes operational, it will be interesting to observe the implications of a joint Government-NHRI monitoring mechanism and to see the extent to which NGOs are involved.

Myanmar had the following responses: fully accepted, accepted in principle, accepted in principle with caveat, accepted in part with caveat, did not enjoy Myanmar’s support, unable to support recommendations, and not in a position to support recommendations. Most States had two responses: accepts and notes, (or enjoys support and does not enjoy support).


157 Australian Government Representative (c), interviewee nine, interview conducted 20 May 2016 by telephone.
In terms of whether the recommendations which may have been influenced by NGOs were accepted by Australia, aligned with McMahon et al.’s findings, the Government was slightly more likely to accept NGO influenced recommendations – but in this study, only where there was a unique match. 177 of the 290 recommendations had a general or specific match to NGO recommendations from the stakeholder summary report. As stated above, 52 per cent of recommendations were ‘accepted’, but of these 177 NGO-correlated recommendations, only 46 per cent were accepted. This would mean that recommendations influenced by NGOs were less likely to be accepted. However, most of these 177 recommendations were not unique matches as similar recommendations were made by the NHRI and / or the compilation of UN information report in 144 cases. 33 recommendations out of the 177 were unique matches and the acceptance rate for these was 70 per cent, meaning that if there was a unique match with NGOs alone, the recommendation was more likely to be accepted by the Australian Government.

There are a number of possible reasons for this finding. For example, the Australian Government’s resistance to treaty bodies and Special Procedures, described in the introduction to this case study, could mean that they would not accept recommendations influenced by those bodies. Some States clearly cited treaty body concluding observations in their recommendations, for example. It may also be the case that domestic NGOs were effectively acting in their intermediary role – suggesting recommendations that were both compliant with international law and suited to the local context.158 NGOs have considerable skills and knowledge which they bring to bear in influencing UN human rights bodies,159 and the unique role and expertise of Australian NGOs was acknowledged by interviewees.160 Therefore, NGOs, rather than UN bodies, may develop the most appropriate recommendations, more likely to be accepted by the SuR.

6. Conclusion
In the State-centric peer review mechanism that is the UPR, NGOs are recognised as a legitimate stakeholder and play an important, albeit limited role. Governments in the SuR are encouraged to consult with them, other Governments display a willingness to hear their

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158 Merry, above n 150, 179.
160 Triggs, above n 70; Australian Government Representative (b), above n 68.
concerns and there is some evidence that they influence the recommendations made by States. This study analysed interview data with international stakeholders and offered a case study for a single State - Australia. As such it makes a modest contribution to existing literature on the UPR and on NGOs, by presenting both interview data and a documentary analysis of NGO influence on recommendations. Future research could use the same methodology to further analyse the NGO role in the UPR across various States. Whilst it is not possible to prove causation – that NGO recommendations have had a specific and measurable impact on States’ recommendations in the UPR – it is clear that NGO influence cannot be discounted due to the close correlation in the documentary analysis. In some cases, very similar language is used in the NGO and State recommendations and not in the UN compilation report, nor the NHRI content in the stakeholder summary report. It seems reasonable to consider these recommendations as having been the direct influence of NGOs.

However, it is important to recall that in the case study there was closer correlation between the UN compilation report and the recommendations made by States (197 recommendations), than there was with NGO recommendations (177 recommendations). This means that influencing other UN bodies, particularly treaty bodies and special rapporteurs, could be important in order to influence UPR recommendations. For NGOs, this requires a focus on longer-term issues, a strategy around the sequencing of reports and an awareness of which Special Rapporteur visits or treaty body reviews are scheduled to take place in advance of the UPR.¹⁶¹

Building on existing literature, the Australian case study indicates the benefits of working in coalitions. It also identifies the benefits of NGO-NHRI co-operation, a topic less explored elsewhere. NGOs must navigate the gatekeepers who facilitate effective functioning of the UPR – the UPR secretariat which selects input for the stakeholder summary report and UPR-Info which facilitates lobbying at the pre-sessions. A coalition of domestic NGOs had most influence on State recommendations. Recommendations with a unique match to NGO content were also more likely to be accepted by the Australian Government. This article argues that in democratic States the unique understanding and expertise of domestic NGOs means that they may suggest more suitable solutions to address local human rights issues.

¹⁶¹ This is not always clear given the somewhat ad hoc scheduling of treaty body reviews and backlog of reports.
They are also best placed to engage in monitoring implementation of recommendations on an ongoing basis. There can be tensions between the roles of INGOs vis-à-vis domestic NGOs, which requires further reflection. One practical recommendation emerging from this study is that domestic NGOs should be given priority speaking rights at the adoption of the UPR report.

In the Australian case study, despite a decline in the number of recommendations accepted in 2015 compared with 2011, it remains the case that Australia has engaged in a positive way with the UPR compared with its engagement with treaty bodies and Special Rapporteurs. The trend internationally has been for positive engagement with the UPR, with all States to date having reported and acceptance levels of recommendations at around 74 per cent. Therefore, a final consideration for NGOs using UN mechanisms is to observe whether this trend of positive State engagement with the UPR will continue.

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162 UPR-Info, above n 153.
Chapter Five: Advancing, Retreating or Stepping on Each Other’s Toes? The Role of Non-Governmental Organisations in United Nations Human Rights Treaty Body Reporting and the Universal Periodic Review

This chapter is a journal article which was submitted to the Australian Yearbook of International Law in July 2017.
Abstract
Non-governmental Organisations (NGOs) use the United Nations human rights system to hold Governments to account. Drawing on international interviews and an Australian case study, this article compares the NGO role in two UN human rights State reporting mechanisms – that of the treaty bodies, and the Human Rights Council’s Universal Periodic Review (UPR). It finds that treaty bodies are more accessible, providing NGOs with more opportunities to have their voices heard and to influence recommendations. Through this analysis of the NGO role, complementarity of the mechanisms is also considered, including the risk that the UPR could colonise treaty body State reporting.

I. Introduction
The past seven decades have seen a gradual advance in the role of Non-Governmental Organisations (NGOs) in the United Nations (UN). One area in which NGOs have played an active role is using UN human rights State reporting mechanisms to hold Governments to account and there are now two co-existing mechanisms with which NGOs can engage. The first is the thematic reporting mechanism of the UN human rights treaty bodies, which monitor States’ compliance with their respective treaty. The second reporting mechanism is the more recent Human Rights Council’s (HRC’s) Universal Periodic Review (UPR), which became operational in 2008. The UPR is gradually becoming embedded as the first and only universal monitoring mechanism for human rights.

1 There is no universally agreed definition of ‘NGO’. For a comprehensive analysis of the difficulties of defining NGOs, see Kerstin Martens, ‘Mission Impossible? Defining Non-governmental Organizations’ (2002) 13(3) Voluntas: International Journal of Voluntary and Nonprofit Organizations 271. The current article considers only those NGOs which engage with UN human rights State reporting mechanisms and the following UN definition suffices: ‘…a non-profit, voluntary citizens’ group which is organized on a local, national or international level…. Some are organized around specific issues, such as human rights, the environment or health.’ UN Department of Public Information, What is an NGO <https://outreach.un.org/ngorelations/content/about-us-0>.
2 The UN has gradually moved towards the term ‘civil society’. The scope of this article however is specifically limited to NGOs, rather than civil society more broadly. Civil society includes, inter alia, NGOs, human rights defenders, victim groups, faith-based groups, unions, and research institutes such as universities. See Office of the High Commissioner for Human Rights, Working with the United Nations Human Rights Programme: A Handbook for Civil Society (2008).
General Assembly Resolution 60/251 stated that the UPR should complement, rather than duplicate, the work of UN human rights treaty bodies.\(^4\) It has been established that this refers primarily to non-duplication of the State reporting mechanism.\(^5\) There was some preliminary analysis of the complementarity of the two mechanisms, but not specifically considering the NGO role.\(^6\) There have been previous studies on the role of NGOs in treaty body State reporting,\(^7\) and some emerging scholarship on the NGO role in the UPR,\(^8\) but no scholarship that compares the two. This article is the first comparative analysis of the NGO role in the two UN human rights State reporting mechanisms. It argues that of the two mechanisms, treaty bodies are more accessible to NGOs, providing them with more opportunities to have their voices heard and to influence the recommendations made. Conversely, whilst the UPR has been seen as a mechanism that facilitates increased civil society engagement with UN human rights bodies,\(^9\) this article finds that its State-centric design means that it can be less accessible to NGOs, with more restricted opportunities to have their voices heard, both in

\(^4\) Ibid.  

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written reports and presentations. As a result, NGOs may have less influence on the recommendations made by States in the UPR, than they would have in treaty body State reporting.

The article is organised as follows. Section II explains the empirical methodology. Drawing on interview data from key stakeholders in Geneva, and on findings from an Australian case study, Section III considers NGOs’ opportunities to influence recommendations in each mechanism. Section IV presents the comparative analysis, finding that despite some similarities, the two UN human rights State reporting mechanisms are quite different for NGOs engaging with them. Most notably, the UPR is a peer-review and politicised mechanism whilst treaty body reviews are conducted by independent experts. There is evidence of complementarity between the two mechanisms and Section V proposes that this complementarity could be further developed, with opportunities for increased co-operation and mutual learning on the NGO role between the two mechanisms. The conclusions in Section VI recommend further research on the complementarity of the two mechanisms and consideration of the risk that the UPR will in fact colonise, rather than complement, treaty body State reporting. It concludes that the NGO experience of expanding their role in treaty body State reporting augurs well for securing more opportunities for NGO voices to be heard in the UPR.

II. Methodology

This article presents a comparative analysis of the NGO role in treaty body State reporting and the UPR. It draws on previous work by the author, together with additional interview data.\(^\text{10}\) Two complementary empirical methodologies are used – qualitative data from semi-structured interviews and quantitative data from a documentary analysis of CERD concluding observations and UPR recommendations in an Australian case study. The International Convention on the Elimination of all forms of Racial Discrimination (ICERD) was the first of the UN human rights treaties,\(^\text{11}\) and significantly for the current study, the Committee on the Elimination of Racial Discrimination (CERD) was the testing ground for NGO involvement


in treaty body State reporting. As such, it is used this article as an example of a treaty body for some of the more in-depth empirical analysis in the study.

Australia was selected as a case study because from a comparative perspective, Australia has had a somewhat adversarial relationship with some UN treaty bodies, CERD in particular, and UN Special Rapporteurs, but engages quite well with the UPR. One way in which Australia differs to all other Western democracies is that it is not part of a regional human rights system and lacks a constitutional or statutory bill of rights. As such, scrutiny of Australia’s human rights record by UN bodies is particularly important in terms of oversight and independent monitoring.

A qualitative interview methodology was chosen as an integral part of the study to address the recognised lack of empirical research in analysing the NGO role in the UN human rights system. Semi-structured interviews were carried out with 26 key stakeholders, most were conducted in Geneva in April and November 2015, and some by telephone between May 2015 and May 2016. All interviews were recorded, transcribed, codified and analysed using NVivo qualitative analysis software. Interviewees were given the option of anonymity.

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13 Spencer Zifcak, Mr Ruddock Goes to Geneva (University of New South Wales Press, 2003); Fiona McGaughey, Tamara Tulich and Harry Blagg, ‘UN Decision on Marlon Noble case - imprisonment of an Aboriginal man with intellectual disability found unfit to stand trial in Western Australia’ (2017) 42(1) Alternative Law Journal 67.
15 In 2011 Australia accepted over 90 per cent of the recommendations in its first UPR. In 2016, it arguably accepted around half; although used a number of categories and so the exact number accepted and ‘noted’ is more difficult to ascertain.
17 The research, including the requirement to offer anonymity, was granted ethics approval by the University of Western Australia’s ethics committee. For a discussion of anonymity in qualitative
which all UN and Government interviewees chose. The international interviewees were two (non-Australian) Government representatives on the UPR Working Group, three UN Office of the High Commissioner for Human Rights (OHCHR) staff, fifteen CERD Committee members, and seven representatives from international NGOs in Geneva. The Australian case study included interviews with four Australian Government representatives, four domestic Australian NGO representatives and the President of the Australian Human Rights Commission, Professor Gillian Triggs.

The qualitative interview data was triangulated with a case study of Australia’s last review before CERD in 2010 and its last UPR in 2015, allowing for a more in-depth comparative analysis of the two mechanisms. A particular objective of the case study was to analyse whether NGOs may have influenced the recommendations made to the State-under-Review (SuR) by CERD and by the States participating in the UPR. This was assessed using documentary analysis, by inputting recommendations from the CERD concluding observations, and recommendations made by States in the UPR working group, into spreadsheets. Where there was a match between these recommendations and an issue or recommendation from an NGO report, (in the case of CERD), or NGO content in the stakeholder summary report, (in the case of the UPR), these were input beside the UN recommendation for comparative purposes. Sometimes the match was ‘general’ – the same topic was raised or the same recommendation was made but using different language. In other cases there was a ‘specific’ match – very similar or identical language was used by the States in the UPR or CERD to the recommendation proposed in NGO reports.

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18 Not including the UPR Secretariat, which did not respond to the request for an interview.
20 The use of ‘specific’ and ‘general’ was adopted from McMahon et al, above n 8.
III. The NGO Role in Treaty Body State Reporting and the UPR

When the UN was established in 1945, NGOs had limited opportunities for consultation under Article 71 of the UN Charter. Subsequent UN human rights instruments omitted any reference to NGOs.21 However, NGOs carved out a role for themselves and are now an integral part of many aspects of the UN human rights system, including State reporting mechanisms.22 Following a brief overview, the NGO role in each of the two State reporting mechanisms will be explored under the headings of ‘submission of reports’, and ‘briefing and lobbying’ – the two main ways in which NGOs can engage with the mechanisms.

i) The NGO Role in Treaty Body State Reporting

Nine core UN human rights treaties were adopted between 1965 and 2006, each with its own treaty body. These treaty bodies review States’ human rights obligations, but only those States which have voluntarily committed to them and only the thematic area within the jurisdiction of their treaty. That said, levels of ratification are currently high, so whilst not every UN member State has ratified every treaty, most have ratified seven of the core nine treaties. Of these seven most widely ratified treaties, the numbers of States parties range from 159 in the case of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to 196 States parties to the Convention on the Rights of the Child.23 Therefore NGOs generally have several treaty bodies with which they can engage on any given SuR.

NGOs were initially excluded from the treaty body State reporting process but now play an integral role in providing information and developing recommendations.24 Economic and Social Council (ECOSOC) Resolution 1996/31 provided for a three-level hierarchy of NGO

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21 For example, none of the nine core human rights treaties provide for an NGO role. The only exception is Article 45 a) of the Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990) which provides for expert advice from ‘other competent bodies’. Committee’s rules 34, 70 and 74 of the Provisional Rules of Procedure, CRC/C/4 (14 November 1991) confirm that ‘other competent bodies’ includes NGOs.
22 See: Egan, above n 7; Schokman and Lynch, above n 9; Brett, above n 7; McMahon et al, above n 8; Wiseberg, above n 7.
24 Gaer, above n 12.
status for accreditation purposes. However, despite the system of NGO accreditation, perhaps because the NGO role developed gradually and informally within treaty bodies, ECOSOC accreditation is generally not required for NGOs to brief or submit a report to the treaty bodies. Each treaty body defines its own rules of procedure and may have slightly different modes of engagement with NGOs, but all engage in broadly similar ways with NGOs and there is movement towards common working methods.

Treaty bodies base their review on the State report and often receive reports from NGOs and National Human Rights Institutions (NHRIs), although these remain an informal part of the process. Treaty bodies are comprised of between 10 to 25 independent experts who are nominated by their Governments, but do not represent them. The States parties then appear before the treaty bodies in a constructive dialogue, following which the treaty body issues concluding observations containing recommendations for the SuR. Unlike the UPR, as described below, the SuR cannot decide which recommendations to accept.

Submission of Reports
Each of the UN human rights treaties provides only for State reporting, not NGO or other stakeholder reports, and as such, NGO reporting is largely based on practices that have developed, rather than having any legal basis. NGO reporting is governed primarily by information provided by the Secretariat such as brief ‘NGO Information Notes’. Although concise reports are recommended, there is generally no word limit for NGO reports. CERD Committee member interviewees reported that the lack of word limit means that they can

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30 See for example: Committee on the Elimination of Racial Discrimination, *NGO Information Note* (84th session, 3 to 21 February 2014).

31 Ibid.
become inundated with NGO information. The general trend is for NGOs to write their reports as a response to the Government report to the Committee.

**Briefing and Lobbying**

Engagement with treaty bodies is more about ‘briefing’ than ‘lobbying’, (in the sense that that term is used in political processes and has been used with reference to the UPR). NGOs can observe the treaty bodies’ constructive dialogue with the SuR but have no speaking rights in the session; instead there are three main ways in which NGOs can brief Committee members. Firstly, they can attend a ‘formal informal’ briefing session with the Committee. Rather than an NGO briefing relating to one SuR – this is an NGO briefing session for NGOs speaking on all SuRs for that week of the Committee’s session. Secondly, NGO ‘informal briefings’ for Committee members are held at lunchtime for each SuR. The third opportunity to brief Committee members is through informal meetings with Committee members on an ad hoc basis between sessions.

**ii) The NGO Role in the UPR**

The UPR is a peer-review mechanism carried out in a working group of the HRC in which non-HRC UN member States can also participate. It considers the human rights record of all UN member States on all human rights obligations, every four and a half years. The basis of the review is the States’ human rights obligations under the UN Charter, the Universal Declaration of Human Rights, human rights instruments to which a State is party, voluntary pledges and commitments, and applicable international humanitarian law.

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32 CERD Committee Member a), interviewee 1, interview conducted 27 April 2015, Geneva; CERD Committee Member d), interviewee 4, interview conducted 30 April 2015, Geneva; CERD Committee Member e), interviewee 5, interview conducted 30 April 2015, Geneva.
33 There are also additional opportunities to submit reports, for example to develop the Committees’ list-of-themes for discussion and to follow-up on implementation of the concluding observations. See Daisuke Shirane, *ICERD and CERD: A Guide for Civil Society Actors* (The International Movement Against All Forms of Discrimination and Racism (IMADR), 2011) 25, 35.
34 CERD Committee Member d), above n 32.
35 Author observations.
36 Human Rights Council, above n 3.
The UPR for each State considers three short reports. The first is a report from the SuR. The second report is a compilation of UN information report pertaining to the SuR, summarising treaty bodies’ concluding observations, special procedures and other relevant official UN documents. The third is the stakeholder summary report - a summary of ‘credible and reliable information provided by other relevant stakeholders’. Stakeholders include NGOs, NHRIs, human rights defenders, academic and research institutions, regional organisations, and civil society representatives. Using the content from these three reports, participating States ask questions and make recommendations to the SuR during the three hour ‘interactive dialogue’. The outcome of the review is a report summarising the proceedings, the recommendations and any voluntary commitments of the SuR. States can choose which recommendations to accept and at the end of the first cycle, 74 percent of recommendations were accepted by SuRs.

The UPR was designed at a time when the NGO role was well established in the UN human rights system, and whilst still generally lacking legal basis, had been in some ways formally recognised by the UN. However, State-centricity re-emerged at the drafting stage of the UPR, with attempts by some States to completely exclude NGOs. Whilst these attempts were not entirely successful, the UPR was clearly designed as a peer-review, State-led and State-centric mechanism with NGOs playing a limited role. As discussed in the previous section, NGOs were initially completely excluded from treaty body State reporting but carved out a more extensive role than had initially been envisaged. As Donini predicted in 1995 ‘New issues and actors are knocking at the UN’s door. It is no longer possible to keep them out; if the door is locked they will come in through the window or the cracks in the door.’

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38 Ibid, 15.
39 Ibid.
41 Ibid.
42 Human Rights Council, above n 37.
44 See, eg, General Assembly, Resolution 55/2. United Nations Millennium Declaration, 8 September 2000, Fifty-fifth session, Agenda item 60 b, para. 20, 30.
46 Ibid, 121.
47 Antonio Donini, ‘The bureaucracy and the free spirits: Stagnation and innovation in the relationship between the UN and NGOs’ (1995) 16(3) *Third World Quarterly* 421.
NGOs might well bring the same flexibility and tenacity to bear on expanding their role in the UPR.

ECOSOC accreditation is not required for NGOs to submit reports to the UPR,\textsuperscript{48} however, there is some evidence that NGOs with ECOSOC status may be more likely to have their content included in the stakeholder summary report.\textsuperscript{49} Nor is ECOSOC status required to lobby States, or attend UPR-Info’s pre-sessional briefings.\textsuperscript{50} However, it is required to access the HRC session and to make a two-minute oral statement at the adoption of the UPR Working Group report.\textsuperscript{51} NGOs without ECOSOC accreditation can view the session from the public gallery.\textsuperscript{52}

**Submission of Reports**

In the UPR, NGO reports are a more formalised part of the process than they are in treaty body State reporting. NGO reports are submitted in advance of the Government report,\textsuperscript{53} and there are strict word limits of 2,815 words for individual NGO reports and 5,630 words for NGO coalition reports – the preferred option.\textsuperscript{54} These reports are then synthesised and summarised by the UPR Secretariat into one ten page stakeholder summary report, as described above. The stakeholder summary report becomes an official UN document, available on the UN website.

**Briefing and Lobbying**

The UPR Working Group does not facilitate NGO briefings of its members. NGOs have a formal opportunity to make a two-minute statement before the adoption of the report of the

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\textsuperscript{48} Office of the High Commissioner for Human Rights, above n 40.


\textsuperscript{52} Ibid.

\textsuperscript{53} Office of the High Commissioner for Human Rights, above n 40, para 27.

\textsuperscript{54} Ibid, para 23.
Working Group – at which stage the recommendations have already been decided.\textsuperscript{55} Prior to this, there are two main ways in which NGOs can lobby States in order to influence their statements and recommendations in the UPR. The first opportunity is through bilateral meetings with embassies either in the SuR or in Geneva prior to the UPR session. The second opportunity is to participate in pre-sessions organised by UPR-Info, an international NGO facilitating engagement with the UPR.\textsuperscript{56} NGOs from all SuRs in the upcoming UPR Working Group session, together with embassy staff from Permanent Missions in Geneva are invited to attend so that recommending States can hear directly from NGOs on their issues of concern.\textsuperscript{57}

There are also opportunities to engage with the SuR itself, particularly through civil society consultations in the drafting of the national report. Under HRC Resolution 5/1, States are encouraged to prepare their report for the UPR review ‘through a broad consultation process at the national level with all relevant stakeholders’,\textsuperscript{58} and whether they have done so is monitored during the review.

IV. Comparative Analysis of the NGO Role in Treaty Body State Reporting and the UPR

This section compares NGO engagement in the two mechanisms, drawing on international and Australian interview data and the documentary analysis from the Australian case study. Some of the findings relate to the mechanisms more generally, rather than engaging with the NGO role \textit{per se}, but are included here as relevant to NGOs seeking to use the UN human rights State reporting mechanisms.

a) Scope for NGO Access and Influence

NGOs have a more expansive role in treaty body State reporting than they do in the UPR. They have access to the Committees on an informal basis and have two opportunities to


\textsuperscript{56} UPR-Info, \textit{Pre-sessions} \texttt{<http://www.upr-info.org/en/upr-process/pre-sessions>},

\textsuperscript{57} Roland Chauville, Executive Director UPR-Info, interviewee 10, interview conducted 28 April 2015, Geneva.

\textsuperscript{58} Human Rights Council, above n 37.
attend briefing sessions with them. As an Australian Government representative said, ‘NGOs are more powerful in the treaty body process as they gain direct access.’

This is in contrast with the UPR where the only formal opportunity to brief the UPR working group is a short two minute slot when the recommendations have already been decided. It was also reported by one international NGO interviewee that less NGOs engage with treaty bodies and so they can have more impact:

The UPR is more competitive, you don’t have that many NGOs engaging with treaty bodies. For example, this morning I was the only one here on Bosnia-Herzegovina, two from France and one group of Indigenous people from Guatemala. It’s not a lot. It means the Committee will have less information to rely on and those who are here will have a big impact on the concluding observations.

The limited formal opportunities for NGO engagement in the UPR has previously been recognised as problematic. An international NGO representative commented, ‘I agree that treaty bodies have more space [for NGOs] even though NGOs can lobby the state under review, it’s always being balanced with a political interest in the UPR. Treaty bodies are independent experts.’

Although NGO ECOSOC status is not required in either mechanism for most forms of engagement, as discussed above, it has some benefits in the UPR process. Specifically, there is more likelihood that the content of the NGO report from an NGO with ECOSOC status will be included in the stakeholder summary report, and there is the option to brief the UPR working group at adoption of the reports for NGOs with ECOSOC status. Neither of these emerged as restrictions in treaty body State reporting, meaning they are slightly more accessible to NGOs in terms of ECOSOC status. Some treaty bodies such as CERD, are also more accessible in lacking a ‘gatekeeper NGO’. The author uses the term ‘gatekeeper NGO’

59 Australian Government Representative (a), interviewee 7, interview conducted 29 April 2015, Geneva.
60 Glenn Payot, Minority Rights Group, INGO, interviewee 3, interview conducted 29 April 2015, Geneva.
61 Schokman and Lynch, above n 9, 145.
62 Taisuke Komatsu, UN Advocacy Coordinator, International Movement Against All Forms of Discrimination and Racism (IMADR), interviewee 11, interview conducted 29 April 2015, Geneva.
to refer to NGOs who perform gatekeeping roles by being prescriptive about access to UN human rights bodies or related meetings, by controlling access and potentially preventing access to them. Other treaty bodies such as Committee on the Elimination of Discrimination Against Women do require that NGOs go through a gatekeeper NGO to engage with the Committee.63 The UPR also has a strong gatekeeper NGO in UPR-Info, which manages the NGO pre-sessions (briefings with embassies). Therefore whether treaty bodies are also more accessible in this regard depends on the individual treaty body and on whether it has a gatekeeper NGO.

As well as having more direct access to treaty body members, NGO recommendations can heavily influence treaty body concluding observations according to the documentary analysis in the Australian case study, and the international interviews. Five NGOs submitted reports in Australia’s last review by CERD in 2010, these were used in the documentary analysis. Recommendations from one of these reports, an NGO coalition report, had a clear link with CERD’s recommendations in concluding observations. The Committee made 21 recommendations to Australia,64 11 of which were a ‘specific match’ with the NGO coalition report, meaning that the same or very similar language was used. An example is provided in Table 1.

Table 1: Examples of Specific Match Recommendations from Documentary Analysis (Australian Case Study)

<table>
<thead>
<tr>
<th>UN Body Recommendation</th>
<th>Recommendation proposed by NGO Report</th>
</tr>
</thead>
<tbody>
<tr>
<td>CERD Committee</td>
<td>The Committee urges the State party to support the proper performance of the AHRC, through adequate financing and staffing, including through the appointment</td>
</tr>
</tbody>
</table>

63 Office of the High Commissioner for Human Rights staff member b), interviewee 8, interview conducted 30 April 2015, Geneva.
64 Committee on the Elimination of Racial Discrimination, Consideration of reports submitted by States parties under article 9 of the convention: Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia, 77th sess, UN Doc CERD/C/AUS/CO/15-17, (27 August 2010).
<table>
<thead>
<tr>
<th><strong>UPR (recommendation from United Kingdom of Great Britain and Northern Ireland)</strong></th>
<th>Extend the mandate of the Joint Parliamentary Committee on Human Rights to include the domestic consideration and oversight of implementation of recommendations from UN human rights mechanisms.</th>
<th>…extend the mandate of the Joint Parliamentary Committee on Human Rights to include the domestic consideration, follow-up and oversight of implementation of recommendations and views of UN human rights mechanisms.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>of a full-time Race Discrimination Commissioner. (^{65})</td>
<td>recurrent funding … so that it meets the standards for proper performance…(^{66})</td>
</tr>
</tbody>
</table>

Therefore, 52 per cent of the Committee’s recommendations appear to be influenced by NGOs. Another six of the Committee’s recommendations had a ‘general match’ with the NGO coalition report, meaning that different language was used but the issue or the meaning of the recommendation was the same. The overall match may be as high as 81 per cent.

In the UPR documentary analysis of the review of Australia in 2015, the match rate for NGO influence was lower than it was in CERD. However, it is important to note that the CERD Committee made 21 detailed recommendations in total, compared with 290 shorter recommendations made by States in the UPR - States tend to make multiple recommendations in the UPR, not all of which are accepted by the SuR. Therefore, there are differences in the level of detail and quantity of the recommendations from the two

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\(^{65}\) Ibid.


mechanisms, but looking at the NGO - recommendation match rate can be a useful indicator of NGO influence.

Of the 290 recommendations made by States in the UPR, only seven (2.4 per cent) were a specific match with NGO recommendations in the stakeholder summary report. An example is provided in Table 1. However, an additional 170 of the 290 recommendations made by States had a general match to NGO recommendations - bringing the overall match total to 61 per cent. There was often overlap between recommendations in the compilation of UN information report, recommendations made by NGOs, and recommendations made by the NHRI.\textsuperscript{69} Therefore, it was more difficult to suggest causality in the UPR. That there is less evidence of NGO influence on recommendations in the UPR fits with the picture of overall diminution of the NGO role in the UPR in comparison with treaty body State reporting.

b) Scope for NGO Voices to be Heard

Metaphorically, voice constitutes a social geography mapped and measured by the distance needed to create a sense of engagement. More literally, voice is about meaningful conversation and power… Power suggests that the conversation makes a difference: Our voices are heard and have some impact on the direction of the process and the decisions made.\textsuperscript{70}

The UPR has been heralded as creating increased opportunities for civil society engagement, presenting new and high profile opportunities for NGOs,\textsuperscript{71} to take part and influence the UPR process.\textsuperscript{72} It has been reported that the UPR’s unique multi-stakeholder and cooperative approach enables NGOs to engage with a government, UN, and other stakeholders on critical human rights issues.\textsuperscript{73} However, what emerged from interview data was that having the opportunity to have their concerns heard at an international level can be important for NGOs, something which treaty bodies provide to a greater extent than the UPR. Rather, the UPR redirects NGO engagement towards national level Government consultations. The Australian

\textsuperscript{69} NHRI recommendations are also contained in the stakeholder summary report, but in the documentary analysis, NGO and NHRI recommendations were input in separate columns in the worksheet.


\textsuperscript{71} Schokman and Lynch, above n 9, 126.

\textsuperscript{72} UPR-Info, \textit{Role of NGOs} <https://www.upr-info.org/en/how-to/role-ngos>.

\textsuperscript{73} Civicus, \textit{Enhancing the Effectiveness of the Universal Periodic Review: A civil society perspective} (2015).
case study suggests that consultations with NGOs already took place on UN human rights State reporting and other agendas prior to the establishment of the UPR, and so in some States, the UPR may not have been very consequential for Government – NGO dialogue.\textsuperscript{74} Although treaty bodies are also generally encouraging of consultation with civil society, consultation appears to have more momentum in the UPR:

Most national reports report about national consultations – 80 per cent of reports in second cycle talk about the national consultations that they had. So there is a recognition by the State that they have to do it and that NGOs are a legitimate actor in the process.\textsuperscript{75} In democratic States where NGOs do not fear reprisals for criticising Government, closer engagement with civil society can be a positive development. It has previously been established that treaty ratification often becomes more beneficial to human rights the more democratic the country is and the stronger its civil society is.\textsuperscript{76} In democracies, NGOs working on the ground are often best placed to advise on the implications of laws, policies and funding decisions and to assist with implementation and/or monitoring of implementation. Merry has also argued that NGOs can act as intermediaries so that international law can be adapted as a ‘localized globalism’.\textsuperscript{77} However, this apparent shifting of engagement from the international to the national level in the UPR can also be problematic. In some States, the Government actively discourages dissent from NGOs, in some cases planting Governmental Non-Governmental Organisations (GONGOs) to present a positive image of the Government in the international arena.\textsuperscript{78} In these cases, if consultation does take place it will be tokenistic at best. Even in democratic States, discussing the content of a national report is a fundamentally different exercise from presenting issues of concern to an international human rights body.

\textsuperscript{74} Australian Government Representative (a), above n 59.  
\textsuperscript{75} Chauville interview, above n 57.  
\textsuperscript{77} Sally Engle Merry, Human Rights and Gender Violence: Translating International Law into Local Justice (University of Chicago Press, 2006).  
\textsuperscript{78} CERD Committee Member b), interviewee 2, interview conducted 27 April 2015, Geneva. For a brief discussion of GONGOs, see Kerstin Martens, ‘Examining the (Non-) Status of NGOs in International Law’ (2003) 10(1) Indiana Journal of Global Legal Studies 8.
A strong theme from the interviews was that participating in reporting and briefing sessions to UN human rights bodies was worthwhile in terms of raising the issues at an international level. For example an interviewee from an Australian NGO working on Indigenous land rights stated:

> It does help to highlight issues of concern to Indigenous people. Whether word gets out to the broader community or not, I’m not quite sure, but certainly it helps our arguments with Government when we’re looking at legislative reform and policy development.\(^79\)

A CERD Committee member also commented on the benefits of international engagement:

> ... when the US was before us [CERD], over 500 NGOs came, so I think they view it as useful to their advocacy if only because it raises the profile of the issues that they’re focused on and it shines a light on those issues at the international level and they can use the reports in their domestic advocacy… My perception is that it helps to bring an international focus.\(^80\)

NGO interviewees felt that having the opportunity to brief UN human rights treaty bodies directly gave them a sense of finally being heard.\(^81\) Aboriginal elders’ experience of appearing before a UN treaty body was reported by one NGO interviewee as ‘very powerful for them and they said they felt heard for the first time’.\(^82\) These findings resonate with Lederach’s definition of ‘voice’, presented at the start of this section, and with Ball’s research on individual complaints to UN treaty bodies.\(^83\) Ball’s hypothesis is that whether treaty bodies’ views are implemented or not, they bear witness to violations and offer validation, dignity, self-respect and moral support to petitioners. In the words of an interviewee from an Australian NGO, ‘It was an important opportunity for us to record what was happening. It’s on record, whether action is taken by the government or not.’\(^84\)

\(^79\) National Native Title Council, interviewee 22, interview conducted 5 October 2015, Cannington, Western Australia.
\(^80\) CERD Committee Member b), above n 79.
\(^81\) Anonymous, domestic NGO, interviewee 20, interview conducted 10 September 2015, telephone interview.
\(^82\) Ibid.
\(^83\) Olivia Ball, All the way to the UN: is petitioning a UN human-rights treaty body worthwhile? (PhD Thesis, Monash University, 2014).
\(^84\) Anonymous, domestic NGO, above n 82.
Therefore, engaging in consultations with the Government of the SuR as a possible alternative to briefing a UN human rights body, cannot fulfil individuals’ and communities’ quest for validation, dignity and self-respect – to have their voices heard. Furthermore, in the Australian case study, NGOs expressed frustration that their input on the Government report was not taken on board following consultations: ‘The Australian Government’s report was due a couple of months after ours and they provided an advance copy… and NGOs provided detailed comments on that. Unfortunately not many of those recommended changes were taken on board.’

Simultaneously, the Government representative was feeling frustrated that NGO representatives did not all seem to be cognisant of the constraints the relevant Department was under in terms of word limits and not being able to include everything suggested by NGOs. The interviewee found engagement with some NGOs unhelpful as they wanted to challenge Government policy on asylum seekers, rather than make constructive comments on the draft report:

> When I’m working within a very clear and well-established Government policy, like Operation Sovereign Borders, it can be very unhelpful to suggest that in Australia’s national report we would distance ourselves from Operation Sovereign Borders. Those are decisions that are made well above my pay grade in the political sphere… I can think of many examples in the course of preparing the national report where people would stand up in open fora and just spend 15 minutes telling me that Operation Sovereign Borders was illegal and we shouldn’t do it and that we were ignoring our non-refoulement obligations... I appreciate those views and all of that but it’s not something that’s going to be reflected in the national report.

Put simply, NGOs wanted to discuss the asylum policies such as mandatory detention and boat turn backs, whereas Government representatives wanted to finalise their report, which was clearly not going to challenge Government policy, and as such there was a critical mismatch in expectations. To use Lederbach’s understanding of ‘voice’ in engaging with

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85 Amanda Alford, National Association of Community Legal Centres, interviewee 25, interview conducted 26 May 2016, telephone interview.
86 Australian Government representative (c), interviewee 24, interview conducted 20 May 2016, telephone interview.
communities, voices must be heard and have some impact on the direction of the process and the decisions made.

It is also clear that not all NGOs have a voice in national consultations. What emerged from an analysis of several of the interviews with both Government and NGOs was that through the consultation process, more ‘malleable’ NGOs can become somewhat co-opted, while others become marginalised if they were not seen by Government as ‘constructive’. Yet, NGO engagement at a national rather than international level is strongly encouraged in the UPR. The lead international NGO facilitating engagement between stakeholders and the UPR, UPR-Info, does not advocate for change in this regard:

We are not necessarily in favour of NGOs speaking during the working group. For us at the Geneva level it is fine (I mean the space for NGOs and the UPR modalities in general). What we are more interested in seeing is a stronger civil society engagement space at the national level for NGOs to be engaged with their governments, to be consulted before the review... 87

c) NGO Engagement with Peer-Review Versus Independent Expert Review

Many interviewees, particularly NGOs but also one Government representative, felt that treaty bodies’ independent experts carry out a more in-depth review with more detailed recommendations and that they bring more legal, technical and thematic expertise. The UPR on the other hand was seen as a slightly more superficial review, skimming lightly over many topics. Covering a wide range of human rights issues in the UPR has an impact on how NGOs work and network. Some NGOs operate in clearly defined thematic areas, such as children’s rights, Indigenous rights, or the rights of persons with disabilities, for example. Whilst they may have developed coalitions within those thematic areas or across thematic areas for the purposes of treaty body reporting, the fact that all human rights obligations of the SuR can be considered in the UPR and that working in coalitions is encouraged, means that there is more of an impetus to form cross-thematic coalitions in the UPR. It can be advantageous for NGOs to work in coalition in terms of sharing resources and expertise,

87 Chauville interview, above n 57.
increasing credibility and enabling a longer-term focus on implementation; however, it can also mean that minority issues could be overlooked.

Another difference between treaty body reporting and the UPR of relevance to NGOs, is that for the UPR, NGOs have had to develop lobbying skills which they may not previously have had. The lack of opportunities to brief the UPR working group has meant that NGOs have found alternative ways to engage, through UPR-Info pre-sessions and bilateral lobbying in the SuR and in Geneva. States will not necessarily take up an issue because of its gravity or because it is well supported by evidence but rather because it fits with their strategic priorities, is in their interests, and is non-threatening in terms of reciprocity. This evidence of State-centricity in the UPR resonates with traditional State-centric theories including the realist and rational functionalist perception of States as single rational actors driven by self-interest. As this domestic NGO representatives explained:

Some [missions in Geneva] were quite aware of the political nature of the UPR and of bilateral relationships – that their UPR would come up next and if they were too harsh of a particular policy or Government, then when their time came the favour might be returned. So swings and roundabouts.

This brings us to one of the most significant differences in treaty body reporting and the UPR – the politicised nature of the UPR. This was a strong theme in the interview data with most interviewees commenting that the two mechanisms were very different and that the UPR was inherently political in nature. For interviewees, the political nature of the UPR seemed to be closely associated with it being a peer-review mechanism. The interviewers’ perception was that for many interviewees, particularly NGOs and those working closely with treaty bodies, describing the UPR as political was a negative descriptor. These same interviewees were more positive about treaty bodies, using language such as ‘independent’ and ‘human rights experts’. Indeed, the independence and impartiality of treaty body members, chosen as ‘individuals of high moral standing serving in their personal capacity’ is seen as essential by

88 Schokman and Lynch, above n 9, 133.
89 This had been the experience of an Australian NGO – National Native Title Council, above n 80.
90 Schokman and Lynch, above n 9.
91 Australian Government Representative (a), above n 59.
92 Camp-Keith, above n 16, 355.
93 Alford, above n 85.
the UN General Assembly. An NGO interviewee contrasted the two mechanisms as follows: ‘It’s [the UPR] very different because it’s political, you are talking to diplomats and not to human rights experts.’ An OHCHR staff member made the following contrast: ‘I wouldn’t say formal collaboration, I mean there are some links but the UPR is a political process and the treaty bodies are independent and we generally avoid mixing the two.’

Others however, saw the peer-review and more politicised nature of the UPR as a reality and even as a strength. The most commonly cited advantage was that States were seen to engage positively with the UPR as a result. A State representative from the UPR Working Group made the following observation: ‘The intergovernmental mechanism is diplomatic and you will engage with people outside of the review, unlike treaty bodies. All States play both roles in the UPR, this is a good way to keep all States engaged. It is very unique.’

President of the Australian Human Rights Commission, Professor Gillian Triggs, also saw the advantages of the peer-review and politicised nature of the UPR: ‘But, in the world of real politics, as you say, States are much more comfortable with peer review… So if the UPR can be something that moves along and persuades States, then obviously I’d see it as an advantage.’

Interviewees’ consistent labelling of the UPR as political is partly due to the opportunity for State bias in their engagement with each other, whereas treaty body constructive dialogues are a quasi-judicial process and as such are presumed to be impartial and above politics. The view that the UPR is political is somewhat problematic given that it was designed so that all States would be considered ‘without distinction of any kind and in a fair and equal manner’, to avoid the politicisation that led to the demise of the HRC’s predecessor, the UN

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95 Payot, above n 60.
96 Office of the High Commissioner for Human Rights staff member c), interviewee 7, interview conducted 29 April 2015, Geneva.
97 Government representative (non-Australian) a), interviewee 15, interview conducted 3 November 2016, Geneva.
98 Prof. Gillian Triggs, President of the Australian Human Rights Commission, interviewee 10, interview conducted 13 May 2016, Perth, Australia.
99 UN General Assembly Resolution 60/1, 16 September 2005, para. 158.
Commission on Human Rights. Nonetheless, international politics in an international peer-review mechanism is inevitable. Some would argue that international law is situated within international politics, rather than the more traditional view of international law as an alternative to international politics. It has already been noted that clear regional patterns exist in the UPR and that southern states in Asia and Africa take a softer approach with each other.

NGOs can become embroiled in the politics of the UPR as States looking for critical material for their statement on the SuR can rely on NGO reports. An observation from Australia’s 2015 UPR was that some States were harsher than others and that the most hostile in tone, Russia, relied on statistics from NHRI and NGO reports to criticise Australia’s record of implementing recommendations from the previous UPR. The Russian delegate asserted that Australia’s progress in implementing the previous UPR recommendations from 2011 had been poor, citing an implementation rate of only 10 per cent, while the Australian government claimed to be ‘progressing implementation of’ or to have fully or partially implemented at least 130 of its previous 137 recommendations. It has been suggested that the biggest challenge of the UPR for NGO engagement is its inherently political nature, but as this example demonstrates, it also presents an opportunity for NGOs.

Whether due to the peer-review or politicised nature, or both, that States prefer the UPR was a clear theme from interviews and one worth considering from an NGO perspective. States’

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106 Schokman and Lynch, above n 9, 144.
willingness to engage is key to effectiveness in a system with weak enforcement mechanisms. One interviewee from the Australian Government felt that treaty body constructive dialogues feel quite adversarial but that this was not the case for the UPR. An OHCHR staff member commented on this same topic:

Maybe that’s also a mistake that some of the treaty bodies make, that they are too accusatory in their approach, because it should be a constructive dialogue. Their recommendations are not legally binding and sometimes they over-estimate their own authority. It’s important to strike this balance between the legal application of the Convention and also at the same time to maintain a constructive dialogue and engage the State party rather than…. (Interviewer: ‘alienate?’) yeah.  

**d) Monitoring and Implementation**

Influencing recommendations of UN human rights bodies is one measure of NGO effectiveness, but of course NGOs’ ultimate objective is for States to subsequently take the recommendations on board and work towards their implementation. As an interviewee from one international NGO commented in relation to treaty bodies:

We can prove that the recommendations from NGOs are well taken into account by the Committees – there is no doubt – it is even a copy paste. The influence on them is huge… The impact is huge, on the selection of the concluding observations and on the priorities for follow up. NGOs who are well organised will do this. Now, in terms of the implementation on the ground, in terms of what is achieved, I think that’s very difficult to prove.  

It is easier to assess the efficacy of the UPR in this regard. The UPR takes place on schedule, every four and a half years and to date all States have co-operated. Conversely, treaty bodies have a more *ad hoc* schedule, a factor being addressed by the treaty body strengthening agenda.  

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107 Office of the High Commissioner for Human Rights staff member b), above n 63.  
108 Patrick Mutzenberg, Director CCPR Centre, interviewee 17, interview conducted 10 November 2015, Geneva.  
109 See for example UN General Assembly, Strengthening and enhancing the effective functioning of the human rights treaty body system, GA Res A/68/L.37, 68th sess, 9th April 2014; United Nations
years to five years depending on the treaty, treaty bodies sometimes combine two reporting
periods to allow more time for implementation.\textsuperscript{110} Also, States sometimes submit reports late
or not at all and treaty bodies face a backlog, meaning that the review may be scheduled
months or years after the report is submitted.\textsuperscript{111} Although some progress has been made in
addressing these deficiencies in recent years,\textsuperscript{112} the treaty bodies’ State reporting mechanisms
lack the regularity, predictability and levels of compliance of the UPR. These are factors
NGOs should consider regarding the effectiveness of the two mechanisms. The \textit{ad hoc}
nature of treaty body State reporting can be problematic for NGOs who do not have clear
deadlines to work towards as a result, contrasted with the clear schedule in the UPR.

The increased use of statistics in the UPR also contributes to facilitating better monitoring of
implementation rates. A report by UPR-Info concluded that almost half of all UPR
recommendations had been either fully or partially implemented by SuRs only 2.5 years after
their UPR.\textsuperscript{113} Data collection and analysis in the UPR is primarily due to the efforts of the
NGO, UPR-Info, and its maintenance of a global database of recommendations made to each
SuR, which State made the recommendations and whether they were accepted by the SuR.
This database is publicly available on the UPR-Info website,\textsuperscript{114} enabling NGOs to target
States for lobbying by using their previous recommendations to determine States’ areas of
interest. It also enables NGOs and other stakeholders to easily establish which
recommendations have been accepted and noted by each SuR.

The availability of data in the UPR is in contrast with treaty body State reporting where there
is no equivalent data collection mechanism. An analysis of the Committee members’
curriculum vitae suggests that Committee members have specific areas of expertise – this
could be used to target those Committee members who might be more interested in a

\textsuperscript{110} Morten Kjaerum, ‘State Reports’ in Gudmunder Alfredsson and Jakob Th. Möller (eds),
\textit{International human rights monitoring mechanisms essays in honour of Jakob Th. Möller} (Martinus

\textsuperscript{111} United Nations reform: measures and proposals, UNGAOR, 66\textsuperscript{th} sess, Agenda item 124, UN Doc A/66/860 (26 June
2012).

\textsuperscript{112} Status of the human rights treaty body system: Report of the Secretary General, 71\textsuperscript{st} sess, UN Doc
A/71/118 (18 July 2016).

\textsuperscript{113} UPR-Info, \textit{Beyond Promises: the Impact of the UPR on the Ground} (2014) 5.

\textsuperscript{114} UPR-Info, \textit{Beyond Promises: the Impact of the UPR on the Ground} (2014) 5.
particular human rights issue. The interest areas of each Committee member could also be ascertained based on the questions they ask in the constructive dialogue. As recommendations in the concluding observations are not linked to any one particular Committee member, only note-taking during attendance at reviews or webcasts, or analysis of the summary record, might elicit this data. A number of treaty bodies have NGOs working closely with them and facilitating NGO engagement with them, but there is no evidence these NGOs currently perform this in-depth analysis. Most domestic NGOs would not have the resources to collect and analyze this data, but there are some limited examples where this has been done.115 One difficulty is that unlike the UPR, where States may have some clear priority areas, the Committee members are independent experts who do not represent their States. If their four-year term ends and they leave the Committee, this analysis is no longer useful.116

In terms of data to monitor implementation, this is also less developed in treaty body State reporting as there is no single, coherent system of monitoring. Some treaty bodies such as the Human Rights Committee apply an implementation status to each concluding observation.117 Other treaty bodies have no empirical way of assessing the implementation of the previous concluding observations, other than drawing conclusions from follow-up rapporteur activities, State reports and NGO and NHRI reports.

e) Complementarity Between Treaty Body State Reporting and the UPR

Having established differences in the two mechanisms, this final part of the section will demonstrate that there is also complementarity between them, as envisaged by General Assembly Resolution 60/251 which provided that the UPR should complement, rather than duplicate the work of the treaty bodies, particularly State reporting.118 Several interviewees referred to States’ recommendations in the UPR drawing on or reiterating treaty body

115 See, eg, American Civil Liberties Union Foundation, Guidebook on Members of the UN Committee on the Elimination of Racial Discrimination (CERD) Review of The United States of America 85th Session of the Committee on the Elimination of Racial Discrimination (2014).
116 Experts are elected for four years, as provided for by Article 8 (5) (a) of ICERD, above n 11.
117 Mutzenberg, above n 108.
118 General Assembly Human Rights Council UNGA Res. A/RES/60/251, 60th sess. (3 April 2006); see also Gaer, above n 5, 121.
concluding observations. In that way, the systems were generally seen as complementary: ‘I think it’s useful definitely because it gives additional weight to the treaty body recommendations. Firstly because they are being reiterated but also because they are being taken up by States and so it adds some political weight.’

Some interviewees expressed concern about this practice for two reasons. The first reason for concern was that diplomats rather than independent experts develop the UPR recommendations and often rephrase the treaty body concluding observations. In doing so, it was suggested that this sometimes weakens them. The second reason for concern was that a recommendation that had been made by a treaty body and cannot be rejected, can subsequently be presented by a State in the UPR and can then be rejected (or ‘noted’) by the SuR. It was felt that these practices might undermine treaty body recommendations. These findings from the interview data confirm some of the concerns identified during the discussion of proposals for the UPR, including the risk that treaty body concluding observations would be re-evaluated and re-prioritised in the UPR.

Despite these concerns, NGOs can use the complementarity in the two mechanisms to their advantage. As discussed in the previous section, States engage well with the UPR and the Government representative interviewees expressed a preference for the UPR over treaty bodies. Focusing on longer-term human rights issues, NGOs can use the more accessible treaty bodies, with more opportunities to have NGO voices heard and more likelihood of influence, to plant the seeds of recommendations which may later be used in the UPR. The Australian case study showed some evidence of NGO recommendations being channelled through the two mechanisms in this way. The documentary analysis found that the compilation of UN information report had a general or specific match with 197 of the 290 recommendations made by States, (68 per cent). This compares with the 61 per cent match with NGO recommendations, meaning that UN information was more influential than NGO

119 Office of the High Commissioner for Human Rights staff member a), interviewee 6, interview conducted 28 April 2015, Geneva; Chauville, above n 57; CERD Committee Member a), above n 32; CERD Committee Member d), above n 32; Komatsu above n 62, Payot, above n 60; Office of the High Commissioner for Human Rights staff member b), above n 63.
120 Office of the High Commissioner for Human Rights staff member b), above n 63.
121 Office of the High Commissioner for Human Rights staff member a), above n 119.
122 Office of the High Commissioner for Human Rights staff member a), above n 119.
123 See: Gaer above n 5, 125.
information. The documentary analysis also showed that treaty body concluding observations were the primary source of most of the UN-influenced recommendations and that some of these could be traced back to NGO reports to the treaty body. What this means is that the Australian case study provides some evidence that treaty bodies and the UPR are working in a complementary way. It also means that NGOs seeking to influence the UPR may also need to engage with treaty bodies in order to be most effective.124

V. The Future of NGO Engagement with Treaty Body State Reporting and the UPR – Opportunities and Risks

Two key considerations for the future of the two mechanisms arose - opportunities for increased co-operation and mutual learning, and the risk that the UPR will colonise treaty body State reporting. Some aspects of these related directly to the NGO role, others are more general considerations, relevant for NGOs in planning their engagement with treaty body State reporting and the UPR.

The co-existence of the two UN human rights State reporting mechanisms presents opportunities. The evidence of complementarity so far is promising and suggests that closer co-operation between the two mechanisms could be beneficial for NGOs seeking to maximise their impact in the international human rights arena. It emerges from the interview data and documentary analysis that there are opportunities for increased co-operation between treaty bodies and the UPR Working Group. These include determining how best to use concluding observations in UPR recommendations without weakening them, and how best to incorporate UPR Working Group reports into treaty body State reporting. A previous study found little evidence of the UPR’s impact on treaty body concluding observations, although as it was published only three years after the introduction of the UPR, it may have been too soon for UPR recommendations to have been taken up by treaty bodies.125

There are also opportunities for mutual learning between the mechanisms in relation to the NGO role. UPR practices that treaty bodies could adopt include introducing word limits for

124 Where the SuR has ratified the relevant treaty / treaties.
NGO reports in order to manage the volume of information received. Changes to treaty body State reporting are achievable – for example as part of treaty body reform the Common Core document for States was introduced in order to streamline State reports and improve consistency.126 Ideally such change would take place across treaty bodies through the medium of the meeting of the Chairs of Treaty Bodies. Treaty bodies could also benefit from better data collection and analysis and a standardised monitoring system to determine levels of implementation, which would help NGOs in their role of holding States to account. Conversely, the UPR Working Group could learn from treaty bodies by acknowledging the intangible benefits of allowing NGO briefings in the way that the treaty bodies have done. Giving adequate voice to NGOs in the UPR would facilitate validation, dignity and self-respect for those who have witnessed human rights violations, or advocate on their behalf. There is the risk that further NGO engagement would make the UPR less palatable to some States but as it begins to be well embedded, minor dissent could be managed by strong leadership, as the recent experience of the UN Special Rapporteur on Sexual Orientation and Gender Identity indicates.127

As well as providing opportunities, the UPR also presents a risk to the future of treaty bodies. Several interviewees identified this risk and the potential for colonisation of treaty bodies by the UPR. All five Government interviewees (two non-Australian, three Australian) were more positive about the UPR than treaty body State reporting. Some also saw the mechanisms as duplicative,128 for example:

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127 The new Special Procedure was established by resolution of the Human Rights Council, Protection against violence and discrimination based on sexual orientation and gender identity, UN Doc A/HRC/RES/32/2, 15 July 2016, but there were attempts by several States to retrospectively block the creation of the Special Procedure, which were eventually unsuccessful. See: Office of the High Commissioner for Human Rights, ‘Deep concern’ at bid to block UN human rights expert <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20902&LangID=E#sthash.Ucepiqn7.dpuf >.
128 Government Representative (non-Australian) b), interviewee 16, interview conducted 11 November 2015, Geneva; Australian Government representative (b), interviewee 23, interview conducted 7 January 2016, telephone interview.
Certainly we feel that there is duplication and it’s quite a concern for us and for our country because we are already discussing and thinking of ways in which this whole process can be streamlined because monetary-wise it’s a heavy burden for our country and human resource-wise, we do not have that kind of expertise.  

Significantly, some Australian Government interviewees were quite clear that the UPR should ultimately either partially or entirely replace treaty body State reporting, for example:

My personal thought on that would be that by the fourth cycle of UPR, the treaty body reporting will be gone… if not replaced, then certainly become clearly the primary and central mechanism for human rights reporting and review. States need to choose where to invest their effort. Right now, to be perfectly honest, the Australian Government will invest their effort in the UPR, because we see that being much more meaningful.  

Other interviewees had already begun to notice a reduction in NGO engagement with treaty bodies, and reported that NGOs had expressed a preference for the ‘political visibility’ of the UPR because of the exposure it can bring. Two interviewees did not forecast the demise of treaty bodies but instead saw the excitement around the UPR as a passing phase, although these interviewees were in the minority. They felt that NGOs had strayed somewhat from treaty bodies in favour of the UPR but that this trend would be reversed when the initial novelty wore off. The Director of the CCPR Centre, working closely with the Human Rights Committee commented that he had seen some NGOs switching focus to the UPR: ‘I think it’s just a question of trend. Certainly in two or three years we will get back to the treaty bodies and they will see that the results of the UPR are not so great.’

Many NGO interviewees saw a need to use both the UPR and treaty body mechanisms but

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129 Government Representative (non-Australian) b), above n 128.
130 Australian Government representative (b), above n 128; Australian Government representative (c), above n 86.
131 Australian Government representative (c), above n 86.
132 Mutzenberg, above n 108; Office of the High Commissioner for Human Rights staff member a), above n 119; CERD Committee Member d), above n 33; CERD Committee Member b), above n 79.
133 Office of the High Commissioner for Human Rights staff member a), above n 119.
134 CERD Committee Member a), above n 32; Mutzenberg, above n 108.
135 Mutzenberg, above n 108.
recognised that they may be privileged in having that choice. They felt that where resources were limited, NGOs might choose to engage only with one mechanism – either treaty bodies, or, more commonly, the UPR. Reporting fatigue for both NGOs and States was also seen as a factor in this regard. Some NGOs remain undecided, for example:

Whether we continue to engage with both treaty bodies and the UPR is an open question at the moment, or even how much time we will spend on treaty body and UPR reporting. The treaty bodies are in a difficult period of reform and are also grappling with their place in light of the UPR, so it’s a period of change for them anyway.

VI. Conclusion

It’s good to have different mechanisms, treaty bodies provide more conclusive findings and it’s not political but because it’s not political, it can be less powerful. Personally, I find it very good that there are two tracks.

The UN human rights State reporting mechanisms of the UPR and treaty bodies have some similarities in terms of NGO engagement. NGOs can submit reports and brief representatives in order to raise human rights issues of concern relating to the SuR. NGOs have a number of factors to consider when choosing where to direct their resources in terms of State reporting. The UPR offers a broader review with more regularity of reporting, compliance, and implementation rates. The broad nature of the review presents opportunities to develop wider coalitions and networks than before. International NGO UPR-Info supports robust data collection and analysis on the UPR which is useful to NGOs. The peer-review and political nature of the UPR presents both challenges and opportunities for NGOs, including adapting to lobbying as a key strategy. However, it is posited here that the NGO role is more limited in scope in the UPR than it is in treaty body State reporting, and that the UPR encourages national consultations more than international engagement.

136 Alford, above n 85; CERD Committee Member a), above n 32; CERD Committee Member d), above n 32; Payot, above n 60; Office of the High Commissioner for Human Rights staff member a), above n 119.

137 Emily Howie, Director of Advocacy, Human Rights Law Centre, Domestic NGO, interviewee 21, interview conducted 23 September 2015, telephone interview.

138 Payot, above n 60.
Treaty bodies offer a more impartial, in-depth review and more extensive opportunities for NGO engagement and for NGO voices to be heard. The documentary analysis from the Australian case study provides some evidence that NGOs can have a more extensive influence on the treaty body concluding observations than they do on the UPR recommendations. NGOs advanced their role in treaty bodies but the UPR has been somewhat of a retreat from that progress. It remains to be seen whether NGOs might well bring the same flexibility and tenacity to bear on expanding their role in the UPR to ensure NGO voices are heard.

The UPR was designed to complement rather than duplicate treaty body State reporting. This would mean that NGOs would engage with both types of mechanism and benefit from said complementarity. The documentary analysis from the Australian case study provided some indication of complementarity; however, further analysis is required on the extent to which the mechanisms are complementary and on how they should co-exist in the longer-term. Concomitantly, more attention must be paid to the risk that States’ preference for the UPR could lead to colonisation of treaty body State reporting, the demise of treaty bodies and a gradual decline into irrelevance of the foundations of the international human rights framework, carefully negotiated and crafted since 1945.

This chapter is a journal article which was submitted to the Journal of Human Rights Practice in June 2017 and is under review.
Abstract
Despite growing awareness of the importance of the role of Non-governmental Organisations (NGOs) in monitoring international human rights law, there is as yet little analysis of the heterogeneous nature of NGOs and of the relationships between NGOs. Focusing on the NGO role in State reporting to United Nations (UN) human rights bodies, this article analyses, problematises and maps the NGO role and presents a functional taxonomy with seven categories of NGOs, including international facilitative, gatekeeper, domestic self-sufficient, and Governmental Non-governmental Organisations (GONGOs). It also offers a preferred NGO model of engagement according to those in the UN receiving NGO reports. The socio-legal analysis was drawn from 26 interviews with key stakeholders across the UN, Governments and NGOs. Overall, NGOs play a pragmatic role in addressing limitations of the UN human rights system, and a normative role in contributing to global democratisation and governance.

1. Introduction
There is an ever-increasing awareness of the importance of the role of Non-governmental Organisations (NGOs) in monitoring international human rights law, but as yet little understanding of the variety of roles they play and the relationships between them. From having a very limited consultative role provided for in Article 71 of the United Nations (UN) Charter,1 NGOs have evolved as key actors in the UN human rights system. An area where they make an essential contribution is in State reporting to UN treaty bodies and to the Human Rights Council’s Universal Periodic Review (UPR).2 The UN Office of the High Commissioner for Human Rights (OHCHR) has noted that the work of some of the UN human rights bodies is: ‘…inconceivable without civil society input, which adds to the

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1 Charter of the United Nations, 4 October 1945, 1 UNTS XVI.
relevance and credibility of the conclusions and recommendations resulting from the experts’ deliberations.\(^3\)

However, NGOs are not homogenous and also have various functions within these State reporting mechanisms, which this article maps in a functional taxonomy. A preferred model of engagement, based on interviews with those receiving reports, is presented also. To complement these pragmatic understandings of the NGO role, the theories and rationale underpinning the NGO role in these mechanisms is discussed – why in a State-centric system have NGOs become such important actors?

The coining of the term ‘non-governmental organisations’ is most commonly linked to Article 71 of the UN Charter which mandated the UN Economic and Social Council to make ‘suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence’.\(^4\) Although the UN more commonly uses the umbrella term ‘civil society’,\(^5\) this article focuses solely on NGOs and their role in UN human rights State reporting mechanisms. Despite being a commonly used term, there is a lack of consensus on the definition of NGO.\(^6\) This is not surprising given the heterogeneous nature of NGOs. For the purposes of this article, NGOs of interest are NGOs that engage with UN human rights State reporting mechanisms and the definition of NGO used by the UN Department of Public Information provides a working definition: ‘…a non-profit,

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\(^3\) Human Rights Council, *Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary General. Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Practical recommendations for the creation and maintenance of a safe and enabling environment for civil society, based on good practices and lessons learned*, Thirty second session Agenda items 2 and 3. UN Doc A/HRC/32/20, para 53. General Assembly, 11 April 2016.

\(^4\) Charter of the United Nations, above n 1.


voluntary citizens’ group which is organized on a local, national or international level…. Some are organized around specific issues, such as human rights, the environment or health.\(^7\)

The key role played by NGOs in UN human rights State reporting mechanisms is the provision of information and contributing to the development of relevant, appropriate recommendations.\(^8\) In their role of providing critical information, NGOs hold Governments to account on their human rights obligations. As the Human Rights Council observes: ‘Allowing voices to be heard, even when they express criticism or unpopular views, is key to holding decision makers to account and to ensure that policies are reviewed, lessons learned and improvements made.’\(^9\)

NGOs perform this role in a variety of ways and there is a lack of homogeneity in NGOs as organisations. This article maps and problematises the variety of roles played in UN human rights State reporting mechanisms, proposes a functional taxonomy with seven categories of NGO and discusses the rationale for the NGO role. The findings presented in this article emerged from research comparing the extent and influence of the NGO role in the well-established UN human rights treaty bodies, with the more recent Human Rights Council’s (HRC) UPR. The research included international context and an Australian case study. Drawing on data from 26 semi-structured interviews, what emerged in the process of that research were observations on how NGOs function and the complexity of, and variety in, NGO roles. Existing literature offered theories and models relevant to the NGO role, but these did not adequately relate to UN human rights State reporting mechanisms.

In this article, Section two briefly establishes the empirical methodology used in this study. This is followed in Section three by an overview of the previous literature and theories on NGOs. Section four introduces the NGO functional taxonomy with seven categories of NGOs as follows: (a) international facilitative, (b) gatekeeper, (c) imperialist, (d) domestic self-sufficient, (e) domestic dependent, (f) Governmental Non-governmental Organisations (GONGOs), and (g) National Human Rights Institutions (NHRIs). The functions and characteristics of each category are presented and the relationships between them are

\(^8\) Mcgaughey, above n 2; see also Forsythe, above n 2, 203-204.
\(^9\) Human Rights Council, above n 3, para 20.
explored. Issues of representation of ethnic minority groups and Aboriginal and Torres Strait Islander peoples which arose in the Australian case study are discussed. Section five discusses broader considerations around the expectations of the NGO role in UN human rights State reporting, including their roles in democratising and governance. Section six concludes and identifies opportunities for future research to further develop understanding of the NGO role.

2. Methodology

The need for empirical research in understanding the NGO role in international human rights law has been well established. As such, this socio-legal study was based on empirical data from 26 semi-structured interviews carried out in 2015 and 2016 with stakeholders identified as relevant to the NGO role in UN human rights State reporting using a purposeful sampling approach. 17 of these were international interviewees based in Geneva, including staff in the UN Office of the High Commissioner for Human Rights (OHCHR), State representatives, treaty body independent experts and international NGOs. The findings presented in this article are largely drawn from the international interviews. As the research included an Australian case study, the remainder of the interviews were conducted with Australian interviewees including representatives from Government, domestic NGOs and the NHRI. The interviews were conducted in accordance with the ethics requirements for the project, which included the option of anonymity – selected by some interviewees. The interviews were transcribed, then codified and analysed using NVivo qualitative analysis software. The author also used observational methodology during trips to the UN in Geneva in April 2015, November 2015 and August 2016 to observe sessions of treaty bodies and the UPR. As a qualitative study, a constructivist approach was deemed to be most suitable. From an

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10 Aboriginal and Torres Strait Islanders is the preferred term for Australia’s First Peoples, (Australian Human Rights Commission, Aboriginal and Torres Strait Islander Peoples Engagement Toolkit, 2012, 6). ‘Indigenous peoples’ is a term also used in this article as it is the commonly used in international law.


12 Ethics approval was granted by the University’s Human Research Ethics Committee.

epistemological perspective, a constructivist approach assumes that reality is socially constructed - the researcher constructs knowledge from a variety of views, rather than discovering it.\textsuperscript{14}

State reporting has been selected for analysis here as a cornerstone of the UN human rights system. It has a broad scope compared with individual complaints mechanisms under the treaties, mechanisms which are sometimes not widely used.\textsuperscript{15} Moreover, the HRC’s adoption of a State reporting mechanism by way of the UPR as the cornerstone of its institution building package has brought a renewed focus to the importance of State reporting.\textsuperscript{16}

3. Existing Literature on NGOs

International law was traditionally seen as the law primarily governing relations among States and States have traditionally been viewed as the primary, if not only, actors in, and subjects of, international law.\textsuperscript{17} A key limitation of traditional State-centric theories is in understanding the role of non-State actors, including NGOs.\textsuperscript{18}

NGOs began as minor actors in the UN system, both in scope and in quantity, but the number of NGOs has rapidly increased since the UN was established in 1945. There were an

\textsuperscript{18} Pearson, above n 16, 87.
estimated 330 international NGOs in 1914, rising to 2,300 NGOs by 1970.19 The 60s and 70s saw the establishment of some of the most high-profile human rights NGOs such as Amnesty International and Human Rights Watch, which were established in 1961 and 1978 respectively.20 By 2017, there were 69,282 international non-profit organisations, including national NGOs with an international focus.21 Smith attributes the rapid increase in NGOs to three things – the rise of new actors and issues on the international agenda post-cold war, developments in technology that enabled information exchange and travel, and the increased resources available to NGOs.22 The increase in NGOs also coincided with the adoption of new UN human rights treaties and associated monitoring opportunities for NGOs. Several authors point to the high-profile involvement of NGOs in UN human rights world conferences in the 1990s as an important turning point in NGOs’ role within the UN system,23 and much of the literature post-dates this.24 Studies of NGOs in international human rights law really only began to emerge in the late 1990s. Not only was there high participation by NGOs, there were also a significant number of more grass-roots level NGOs, rather than international NGOs, for the first time.25 Smith comments that ‘One of the most dramatic transformations in international politics across the last century is the exponential growth in the number of NGOs operating both within and across state borders.’26

Concomitant with this growth of NGOs was the challenge to traditional State-centric theories of international law, including the challenges brought by globalisation.27 Literature and

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21 Brill Yearbook of International Organizations <http://ybio.brillonline.com/ybio/>
22 Smith, above n 19, 112.
23 Peter Willetts, ‘From ‘Consultative Arrangements’ to ‘Partnership’: the Changing Status of NGOs in Diplomacy at the UN’ (2000) 6(2) Global Governance, 191, 194.
25 Willetts, above n 23, 196.
26 Smith, above n 19, 111.
27 See, eg, Anne-Marie Slaughter, A New World Order (2004). She posits that we do in fact have a ‘new world order’, reimagines State sovereignty as a disaggregated sovereignty, and argues that the concept of the unitary State is a “useful myth”. See also, Pearson, above n 16, 92.
theories relating to non-State actors and international civil society developed.\textsuperscript{28} Theories such as transnationalism were used to explain NGO behaviour and relationships.\textsuperscript{29} Transnationalism refers to economic, social and political linkages between people or institutions across the borders of nation-states.\textsuperscript{30} A type of transnational theory relevant to this article is Koh’s transnational legal process theory - a dynamic process by which public and private actors, including States, international organisations and NGOs, interact in domestic and international fora to make, interpret, enforce and internalise international law.\textsuperscript{31} This theory departs from previous State-centric theories and is identified by Koh as non-traditional and non-Statist.\textsuperscript{32}

Transnationalism also emerged in social sciences modelling of transnational advocacy networks in the 1990s to explain international NGO behaviour and relationships.\textsuperscript{33} These models demonstrated that international human rights norms are used by networks of transnational and domestic activists who effectively socialise States to accept and comply with such norms. Risse-Kappen proposed a transnational model to explain NGO behaviour, focusing on international NGOs and networks but with less recognition of domestic NGOs.\textsuperscript{34}

This emphasis on international networks and NGOs mirrors the initial focus at the UN, which was on engagement with international NGOs as reflected in Article 71 of the UN Charter.\textsuperscript{35} There was pressure from NGOs to change this, and a recognition of the important role played by more grass-roots level NGOs at the early 1990s World Conferences.\textsuperscript{36} As a result, ECOSOC Resolution 1996/31 Consultative relationship between the United Nations and non-governmental organizations, recognised in its preamble ‘the need to take into account

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{29} Camp Keith, above n 11, 357.
\item \textsuperscript{30} See, eg, Steven Vertovec, Transnationalism (Routledge / Taylor & Francis Group, 2009).
\item \textsuperscript{32} Ibid, 184.
\item \textsuperscript{34} Risse-Kappen, above n 33.
\item \textsuperscript{35} Charter of the United Nations, above n 1, Article 71.
\item \textsuperscript{36} Willetts, above n 23, 196.
\end{itemize}
\end{footnotesize}
the full diversity of the non-governmental organizations at the national, regional and international levels’. Resolution 1996/31 also provided for a three-level hierarchy of NGO status for accreditation purposes and specified the nature of activity in which each level could engage. The highest level of accreditation is ‘general consultative status’, reserved for large international NGOs who have substantial and sustained contributions to make and are closely involved with the economic and social life of the peoples of the areas they represent. They tend to have broad geographical reach; examples include: Commission of the Churches on International Affairs of the World Council of Churches, Greenpeace International, and Oxfam International. Therefore, although a wider range of NGOs were included by Resolution 1996/31, a hierarchy was also introduced, with international NGOs at the top.

The focus in the literature on international NGOs and transnational advocacy networks changed as more domestic NGOs emerged and engaged with the UN system. Following the transnational model, two subsequent models were significant in academic literature – the spiral model and the boomerang model. First published in 1999, the spiral model still remains influential in human rights research. In the spiral model, diffusing international human rights norms depends on domestic and transnational networks using international regimes to bring issues to the attention of Western governments and citizens. The spiral has five phases which can be summarised as follows. Firstly, a human rights abuse occurs and the transnational network is triggered, using human rights norms to put pressure on the State to make concessions. In the second phase, the State relies on non-intervention and rejects human rights norms but in phase three, as a result of pressure, the State makes tactical concessions to the transnational network. In the fourth phase, the State’s own rhetoric and

38 Ibid, para 22.
42 Risse, Ropp and Sikkink, above n 33.
concessions cause a gradual liberalisation or a regime change. In the fifth and final phase, the State accepts international human rights norms. Keck and Sikkink’s boomerang model was perhaps less widely adopted by scholars than the spiral model, but is more cognisant of the role of domestic NGOs.\footnote{Keck and Sikkink, above n 33.} It uses the boomerang as a metaphor for the interaction between domestic NGOs and INGOs, who put pressure on the government in question. Using the boomerang model, networks of transnational and domestic NGOs and other actors ‘bring pressure ‘from above’ and ‘from below’ to accomplish human rights change’\footnote{T. Risse and K. Sikkink, “The Socialization of International Human Rights Norms into Domestic Practices: Introduction,” in Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (eds), \textit{The Power of Human Rights, International Norms and Domestic Change} (Cambridge University Press, 1999) 18.}.

None of these models and theories - boomerang, spiral and transnational legal process – engage directly and specifically with the UN human rights State reporting mechanisms. As such, as a way of understanding the functions and behaviours of NGOs in these mechanisms, they do not resonate closely with the author’s findings and observations – hence the development of the functional taxonomy presented in this article. Nonetheless, elements of the models and theories summarised above are evident in the NGO role in State reporting and provide good explanations for some aspects of the role. For example, using UPR State reporting to bring issues to the attention of Western governments resonates with the fundamental concept of the spiral model. In the boomerang model, the interaction between international and domestic NGOs is reflected in the functional taxonomy of NGOs and the relationships between them, as presented in this article. Koh’s transnational legal process also includes elements relevant to the current research, such as the actors’ roles in enforcing and internalising international law and the concept of a ‘repeated process of interaction and internalization’ through which international law acquires its ‘stickiness’.\footnote{Koh,above n 31, 198.} The cyclical nature of State reporting to UN treaty bodies and to the UPR is a ‘repeated process’.

However, Koh’s perception of the NGO role appears to be litigation focused, rather than cognisant of the NGO role in UN human rights State reporting \textit{per se}, and the spiral and boomerang models resonate more with the ‘naming and shaming’ work of NGOs, rather than the State reporting role.
More recent literature has questioned some of the underlying assumptions about the concept of global civil society, and the importance of transnational networks. Both Simmons and Merry have proposed that whilst transnational networks may be critical in the case of a repressive regime, in most States; domestic actors are the most significant. This has been borne out by recent research which has found that coalitions of domestic NGOs can be most influential in UN State reporting mechanisms. Merry also argues that NGOs can act as intermediaries so that international law can be adapted as a ‘localized globalism’. Again, elements of these theories are relevant to the NGO role in State reporting, such as their understanding of the importance of the role of domestic NGOs, reflected in the functional taxonomy presented in this article.

4. NGOs in UN State Reporting – What and How? A Functional Taxonomy

Based on the author’s observation of the NGO role in UN State reporting, interview data, and relevant literature and reports, the following functional taxonomy of NGOs was developed. It offers a way of better understanding and analysing NGOs and their roles and relationships with each other based on a number of factors including function(s), capabilities and behaviours. The seven categories of NGO will each be discussed in turn in the context of NGO engagement with UN human rights State reporting (treaty bodies and the UPR), predominantly at an international level, but occasionally drawing on data from the Australian case study by way of illustration. A preferred model of engagement, based on interviews with those receiving reports, is presented in Diagram 2.

47 Sally Engle Merry, Human Rights and Gender Violence: Translating International Law into Local Justice (2006); B. Simmons, Mobilizing for Human Rights: International Law in Domestic Politics (University of Chicago Press, 2006).
48 McGaughey, above n 2.
49 Merry, above n 47.
50 The categories and functions proposed here arose from broad agreement among interviewees. Individual interviewees are referenced where there is a quotation, or a minority opinion or dissent.
51 Sometimes NGOs fit into more than one category, and/or perform functions that can be identified with more than one category. Although the words ‘domestic’ and ‘international’ are used in the taxonomy, these could sometimes be interchanged with the word ‘regional’.
International facilitative NGOs play a useful role, both for UN bodies, and for domestic NGOs. These NGOs often have a presence in Geneva where the HRC and treaty bodies sit in session. They use their expertise, knowledge of the system, and networks to facilitate engagement between domestic NGOs and the UN bodies. They may provide training to domestic NGOs, arrange interpreting and set up meetings with Committee members in the case of treaty bodies, or Government representatives in the case of the UPR. Sometimes they can provide resources such as report drafting or editing, and financial support and resources to domestic NGOs. They are mostly used by domestic dependent NGOs (e), although some domestic self-sufficient NGOs (f) are aware of the benefits of collaborating with international facilitative NGOs.

Examples of international facilitative NGOs, interviewed for this research, include the Centre for Civil and Political Rights (CCPR Centre), International Service for Human Rights (ISHR), the International Movement Against all forms of Discrimination and Racism.
(IMADR), Minority Rights Group, and Edmund Rice International. Some of these NGOs work more closely with specific UN bodies; for example the CCPR Centre works with the UN Human Rights Committee. Others work on thematic issues such as minority rights, women’s rights or children’s rights and so may work more closely with the most relevant treaty body but will also engage with other treaty bodies and the Human Rights Council. For example, ISHR has a particular focus on supporting human rights defenders and engages with the UPR, treaty bodies, and other UN and regional human rights bodies.\(^\text{52}\) The CERD Committee members and OHCHR staff interviewed had a positive perception of the role played by these NGOs:

I think the very important role that the international NGOs, for example the Minority Rights Group, can fulfil is bringing together across continents and countries, issue-based groups… those organisations do it in a way that is respectful of national contexts and fully integrates them. So yes, I think the role of international NGOs has changed significantly.\(^\text{53}\)

It is worth considering that their role may be diluting due to advances in technology and communications and increased capacity of regional, national and local NGOs. A CERD Committee member interviewee’s analysis was as follows:

Traditionally international NGOs were about relating through the national NGOs to the international system and by now, with the sorts of communications we have available, and with the capacity that exists with most national, if not local NGOs… beyond some initial orientation, a lot of that is no longer required.\(^\text{54}\)

In some cases, international facilitative NGOs will speak on behalf of a domestic NGO without disclosing their identity, where speaking out would put that NGO at risk of reprisals. However, what is clear is that international facilitative NGOs do not speak on behalf of domestic NGOs without their consent, nor do they manage, control or restrict the engagement of domestic NGOs. This is what differentiates them from either Gatekeeper (b) or Imperialist (c) NGOs. International facilitative NGO representatives were clear in interviews that they


\(^{53}\) CERD Committee Member 1, interview conducted Geneva 27 April 2015.

\(^{54}\) Ibid.
are experts on how the UN system works, but not on the human rights situation in-country and as such they rely on domestic NGOs:

… for some of the very technical questions, we think it is important for the Committee to have direct contact with the affected communities, and if it is a very technical question, I am not at all an expert in all of these countries. And so the people from the country need to speak about that and I can help them to understand what it is all about and to prepare. But then they are the main source of information and not just information but analysis too in terms of what could be helpful for recommendations.\(^{55}\)

The ethos and *modus operandi* of international facilitative NGOs emerges as the preferred option for most interviewees, particularly those at the UN receiving NGO information and engaging with NGOs. The preferred model is illustrated in Diagram 2 and discussed further below. Some OHCHR staff and treaty body members expressed a preference for domestic NGO input being channelled through an international NGO as they felt this brought added legitimacy and credibility. This was reiterated by international facilitative NGOs, for example:

I should mention that we… are a big NGO and we are known to them. So when we work with a partner, just by giving a stamp, it’s just a way to give credibility. You know the NGO world, you have a lot of crazy people going around, you have a lot of political NGOs, and biased stuff going on, so if we were to analyse that, I would say that that is one of our main roles here. Because we are not first-hand providers of information because we have to rely on partners – we do have missions I mean we are on the ground too but we have to find local partners, to train them to put in shape what they know, to use human rights vocabulary.\(^{56}\)

\(^{55}\) Glenn Payot, Minority Rights Group, interview conducted Geneva 29 April 2015.

\(^{56}\) Ibid.
Diagram 2: Preferred Model

Preferred model

(b) Gatekeepers

Gatekeeper NGOs can at times play a role similar to the international facilitative NGOs (a) but differ in that they exercise more control over other NGOs within UN human rights State reporting mechanisms. In particular, they can act as a gatekeeper by being prescriptive about access to UN human rights bodies or related meetings, by controlling access and potentially preventing access to them.

One example of a gatekeeper NGO in the case of treaty bodies is International Women’s Rights Action Watch (IWRAW) which acts as gatekeeper for the Committee on the Elimination of Discrimination Against Women (CEDAW). According an interview with an OHCHR staff member, IWRAW can provide some financial support for NGOs to travel to Geneva. IWRAW also provide compulsory training for engagement with the CEDAW Committee and allocate speaking time among NGOs. It was reported that those NGOs who are not funded by IWRAW or do not feel they require training are still obliged to attend as that is how speaking times are allocated and IWRAW ensures there will not be duplication in

57 OHCHR Staff member 3, interview conducted Geneva 30 April 2015.
presentations. Some UN treaty bodies, such as CERD, do not have a gatekeeper NGO. In this case, an internal body such as the Secretariat within the OHCHR plays a gatekeeper role by liaising with NGOs, potentially filtering out NGO information and arranging informal NGO briefings.

Gatekeepers, whether NGOs or part of the UN system, arise out of a perceived need. As noted above, there has been an exponential growth in the number of NGOs over the past seventy years, many of them seeking to engage with the UN system and there is a practical need to manage this engagement. OHCHR staff and treaty body interviewees consistently referred to the deluge of information they receive from NGOs, which is impossible for them to read. This is better managed in the UPR where the Secretariat selects input from civil society reports for inclusion in the Stakeholder Summary Report they prepare for the UPR Working Group on each State under review and in allocating NGO speaking times at the adoption of the UPR report. This makes the logistics of the exercise easier but there could be disadvantages, such as certain human rights concerns being omitted, or simplified.

It can also be argued that gatekeeping arises due to the lack of regulation of the NGO sector. Although the Economic and Social Council has a system of NGO accreditation, it is not generally required for NGO engagement with human rights State reporting mechanisms, with the exception of the two minute speaking opportunity at the adoption of the UPR working group report.

An example of a gatekeeper NGO in the UPR is UPR-Info. UPR-Info acts as gatekeeper NGO for its own pre-sessions where NGOs and other civil society actors are brought together with representatives from States’ Permanent Missions to present on the human rights situation of States prior to their UPR. Similar to IWRAW, UPR-Info takes expressions of interests for speaking slots at these pre-sessions and manages the format, duration and

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58 The information on the IWRAW website implies NGOs can co-operate, not that they must co-operate.
60 See, for example, International Service for Human Rights, Simple Guide to Treaty Bodies (2010).
61 Although the specific emphasis here is on NGOs, the UPR Secretariat and Secretariats of the treaty bodies also play a gatekeeper role in terms of selecting input, allocating speaking times, and so forth.
logistics of the sessions. The pre-sessions and UPR-Info’s management of the associated logistics were seen as useful by Government representatives, for example: ‘The pre-sessions are extremely useful because they come simultaneously and it gives you ample opportunity to verify information, even with the State under review on a bilateral basis and to prepare well in advance.’

However, a domestic self-sufficient NGO (d) interviewee found the co-ordination by UPR-Info a little frustrating, particularly when the domestic NGOs were well organised and working in coalitions. They would have preferred to manage their own presentation, rather than be managed by UPR-Info. Nonetheless, it was acknowledged that UPR-Info plays a useful role:

There was a vast number of permanent missions and ambassadors and representatives present, which was fantastic, and I can imagine that in countries where they did not have the kind of coalition we did, it would be incredibly useful in marshalling that and bringing people together… They didn’t appear to have any kind of advocacy role, it was more of a functional role in terms of providing the format and being an information conduit, which I think is important. (c) Imperialist

A number of interviewees expressed concern about what the author terms imperialist NGOs in the functional taxonomy. These are the international NGOs who present information on the human rights situation within a given State, often without domestic NGO permission or adequate consultation with them. They are often Western NGOs and do not necessarily have a presence in the State under review. The risk of international legal imperialism in international civil society has previously been identified, and is a critique of many popular civil society movements, including feminism which has been described as steeped in the story

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64 Amanda Alford, National Association of Community Legal Centres, Australia, telephone interview conducted 26 May 2016.
65 Ibid.
of imperialism and its racial assumptions.67 The concept of imperialist NGOs is more acknowledged in the international development sector than in the human rights sector.68 ‘Donors have gained the power to set the development agenda and NGOs have slowly become Trojan horses for global neo-liberalism.’69

In some cases, international facilitative (a) and imperialist NGOs (c) can play a similar role. For example, international NGOs may be required in some areas of the UN where they have more access due to having ECOSOC general consultative status.70 Also, where there is weak civil society in a State both international NGOs fill that gap by submitting a report based on their research.

As discussed above, initially there was a strong focus on international NGOs in the UN system and there were fewer domestic NGOs with the capacity to engage with the UN system, but this is less often the case now. One CERD Committee member expressed scepticism of imperialist NGOs, stating: ‘…these globalised entities have secured a position for themselves in a space between NGOs and States… where international NGOs persist in trying to fill that hole, I’m not convinced it’s useful.’71 Another had seen a similar trend: ‘…you know there are very big NGOs and you know some of them are international NGOs and when you are a small NGO, you can be frightened, sometimes they want to take you under their wing, but I think the NGOs also need to be independent.’72

Interviewees were generally reluctant to name any one particular NGO in the imperialist category but large high profile international NGOs appeared to be examples. Limited cooperation with other NGOs is one of the features of imperialist NGOs. One domestic NGO

67 Antoinette Burton, Race, Empire, and the Making of Western Feminism (2016).
69 Glen W. Wright, ‘NGOs and Western hegemony: causes for concern and ideas for change’ (2012) 22(1) Development in Practice 123.
70 Economic and Social Council, above n 37.
71 CERD Committee Member 1, above n 53.
72 CERD Committee Member 4, interview conducted Geneva 30 April 2015.
interviewee explained that a large international NGO working in Australia ‘will do its own report and their internal bureaucracy doesn’t lend itself to working in coalitions.’

There is evidence of the existence of imperialist NGOs in the UPR. Baird, analysing the involvement of international NGOs in the UPRs of Pacific States, found that their submissions were more plentiful than local and regional NGOs and that they focused on formal limitations of rights rather than actual violations. She urged such international NGOs to ensure that they are not distorting the authentic local NGO voices but rather to support national Pacific NGOs to ensure their concerns are reflected in the UPR. In other words, she was urging them to behave more like international facilitative NGOs (a) than imperialist NGOs (c).

(d) Domestic Self-sufficient

Many interviewees, including Government representatives, the Australian National Human Rights Institution and international NGOs, attested to the expertise of some domestic NGOs. These NGOs are both experts in the domestic human rights issues and are experienced in using the UN human rights bodies. They actively engage with UN human rights State reporting mechanisms. They generally have (or can source) the funds to travel to Geneva and recognise the benefits of using international networks, such as international facilitative NGOs, although they are not reliant on them. Domestic self-sufficient NGOs may lead or play an active role in domestic NGO coalitions. Although they could submit their own reports, they recognise the benefits of working in coalitions – such as the UN’s preference for coalition reports, the added legitimacy it brings, and the longer term benefits of developing networks and partnerships for advocacy work. From the Australian case study, the Human Rights Law Centre and the National Association of Community Legal Centres (NACLC) are examples of such NGOs.

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73 Emily Howie, Human Rights Law Centre, Australia, telephone interview conducted 23 September 2015.
75 Ibid.
Even where domestic NGOs are self-sufficient, they may have to co-operate with gatekeeper NGOs (b) or may have their views heard more effectively by liaising with an international facilitative NGO (a):

All the information is coming from domestic NGOs, all the credible information is coming from domestic NGOs or individuals and… it is often funnelled appropriately through an international NGO which just happened to have the presence and the skills.76

(e) Domestic Dependent

International interviewees spoke about domestic dependent NGOs – those who require other NGOs to assist them in engaging with the system. They can work with domestic self-sufficient NGOs (d) and / or with international facilitative NGOs (a) in coalitions, or they can use international facilitative NGOs (a) to engage directly with the UN. The international facilitative NGOs interviewed identified that domestic dependent NGOs often require training and assistance to engage with UN bodies. For example, the groups experiencing discrimination and human rights abuses may have a number of access barriers, such as lower levels of education, less funding and less language skills. International facilitative NGOs will also sometimes help draft or edit the domestic dependent NGO’s reports to UN human rights bodies.

Where this assistance has not been available or availed of, and domestic dependent NGOs have submitted reports directly to the UN body, this can be a source of frustration. This was commented on by OHCHR staff and treaty body members interviewed. One interviewee gave an example of receiving three NGO reports ‘each quite long and not very good, sometimes confusing’.77 In these cases, in the absence of any supports from the UN bodies due to their lack of funding, engaging with domestic self-sufficient NGOs (d) and international facilitative NGOs (a) can be mutually beneficial. With increasing technology and access to information and networks, the number of domestic dependent NGOs can be expected to decrease, or they could quite rapidly become domestic self-sufficient (d).

76 OHCHR Staff member 2, interview conducted Geneva 29 April 2015.
77 CERD Committee Member 5, interview conducted Geneva 30 April 2015.
An issue that arose in interviews in relation to domestic NGOs was the lack of representation of Aboriginal and Torres Strait Islander peoples and other ethnic minority groups. Although such NGOs could fit the (d) ‘domestic self-sufficient’ category, NGOs in category (d) are described as actively engaging with UN human rights State reporting mechanisms and possibly leading or play an active role in domestic NGO coalitions. Therefore, this discussion is included the category (e) ‘domestic dependent’ as it relates to exclusion.

One Australian NGO representative felt that some issues of concern to Aboriginal communities are not adequately reflected in the NGO coalition reports. Also, Australian Government interviewees expressed concern at the lack of representativeness of those who engaged with their 2015 process of consultation with civil society organisations for the next CERD report. They explained that although their Department has a database of around 80 civil society organisations, only about 15 actively engaged in the combined consultations on the Government’s draft reports to CERD and the Committee on Economic Social and Cultural Rights (CESCR): ‘… to be honest what did strike us at the time was that we had a group of peak bodies and human rights bodies but around the table there were no Indigenous groups, we didn’t have ethnic community groups, CALD community groups…’

This is despite being the very groups to whom these Conventions would be most applicable as groups who experience racial discrimination, and some of whom experience socio-economic inequality. Another Australian Government Department representative described consulting initially with a wide group of NGOs before narrowing down to a core group in order to finalise the Government report to the UPR. The author asked whether that core group included representatives from Aboriginal and Torres Strait Islander communities:

No, I think the answer’s no to that. That’s probably reflective of the relationship we’ve had with some of the Indigenous NGOs in the past and that some of the representatives of some of those organisations, I’m thinking of the First Nations

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78 Civil Society Representative 1, Australian, telephone interview conducted 10 September 2015.
79 Those nominated for interview had not been involved in the 2010 report and so spoke only of their experience with the current report and of the UPR.
80 Term used by some Australian Government agencies, meaning ‘culturally and linguistically diverse’. Terms such as ethnic minorities are used in some other jurisdictions.
81 Australian Government Interviewee 2, telephone interview conducted 7 January 2016.
Congress, have not been the most productive and tend to, even in the open sessions, tend to be the more adversarial and generally less constructive.\(^{82}\)

The implications of this representation gap are discussed further in Section 5 (Discussion).

\__(f)\ Governmental Non-Governmental Organisations (GONGOs)\__

Two interviewees referred to ‘fake NGOs’ in their interviews.\(^{83}\) For example, a treaty body interviewee said: ‘One problem is you sometimes get NGOs who are basically co-opted by the States as well.\(^{84}\) We had NGOs from one particular South American country which were more supportive of the government than the government themselves were!’\(^{85}\)

The interviewees gave the impression that this was not a regular occurrence and that where such NGOs did present information, treaty body members simply filtered it out. Therefore GONGOs appear to be an occasional irritant in treaty body reporting and their content can be easily identified by the independent experts and promptly disregarded.

GONGOs are not quite so easily dismissed in the more politicised UPR environment. Billaud writes that in Venezuela’s first UPR, 80 per cent of ‘civil society’ contributions came from Communal Councils praising Government policies.\(^{86}\) Rather than dismiss these, the Secretariat grouped them together so they could be referred to collectively in various sections of the stakeholder summary report. This is concerning for two reasons. Firstly, including these GONGO-like inputs in the stakeholder summary report undermines the purpose of this report, which is to provide credible and reliable information on the human rights situation in the State under review, highlight the main issues of concern and suggest recommendations. These elements of the stakeholder summary report could, of course, be ignored by recommending States who may be able to identify that the sources may not be independent.

\(^{82}\) Australian Government Interviewee 3, telephone interview conducted 20 May 2016.

\(^{83}\) In particular CERD Committee Member 2, interview conducted Geneva 28 April 2015 and Government representative 1, member of Human Rights Council, interview conducted Geneva 10 November 2015.

\(^{84}\) For a brief discussion of GONGOs, see Kerstin Martens, ‘Examining the (Non-) Status of NGOs in International Law’ (2003) 10(1) Indiana Journal of Global Legal Studies 8.

\(^{85}\) CERD Committee Member 2, above n 84.

\(^{86}\) Billaud, above n 59, 70.
However, it has already been established that States may protect their allies in the UPR. Drawing on favourable information from the official UN stakeholder summary document provides a film of legitimacy for this tactic.

(g) National Human Rights Institutions (NHRIs)

Just as GONGOs are not actually NGOs, nor are NHRIs. One (the GONGO) postures as an NGO and the other (the NHRI) does not, but arguably plays a similar role to that of NGOs in UN human rights State reporting by providing critical information to supplement that provided by the Government. NHRIs therefore warrant consideration in the functional taxonomy but have not been included in the diagrams here as they are not formally part of the NGO networks.

NHRIs are gaining importance as stakeholders in international human rights law, including in State reporting mechanisms. It has been even suggested that NHRIs have been ‘steadily supplementing’ the NGO role in reporting procedures in recent years. If they are in fact encroaching on the role of NGOs, this may be problematic if, as discussed further below, NGOs are contributing to global governance and democratisation. Many NGOs are grassroots organisations and many are membership organisations. NHRIs are not, and whilst they should be independent of Governments according to the Paris Principles, they are nonetheless Government funded and often a State or semi-State agency or similar.

During the course of this research specifically on the role of NGOs in monitoring international human rights law, the topic of NHRIs and their relationship with NGOs was ubiquitous in interviews. This was surprising as NHRIs had, in fact, been deliberately excluded from the remit of the project in order to necessarily limit the scope. Nonetheless, as

the author adopted a constructivist approach, as outlined in the Methodology section, the ubiquitous nature of interview data on NHRIIs led to the inclusion of NHRIIs in the functional taxonomy.

While the Australia case study presented a very harmonious and complementary relationship between NGOs and the NHRI, some international interviewees indicated that this was not always the case. One CERD Committee member interviewee made the following observation:

There is a galloping race to relate to NHRIIs, and I think sometimes that needs a little bit of a breathtaking and I believe very strongly that particularly in the North, the role of NHRIIs has not been sufficiently thought out or articulated where there are already strong NGOs articulating human rights issues. I think that’s quite problematic because in effect, the same way as international NGOs can compete with domestic NGOs, the NHRI can be competing with national NGOs.\(^{91}\)

Therefore, the role of NHRIIs vis-à-vis NGOs in monitoring international human rights law also requires further analysis.\(^{92}\)

5. NGOs in UN State Reporting – Why?

Having established the ‘what and how’ of NGO engagement with UN human rights State reporting mechanisms, it then remains to consider ‘why’ NGOs have a role in this system. Why, in a State-centric system, in which there is little legal basis for an NGO role, are NGOs nonetheless important actors? Two accounts of the NGO role will be posited here and the two are not mutually exclusive. The first is a pragmatic account. Fundamentally, as an under-resourced system, the key role of NGOs is to provide critical information to UN human rights bodies and in that regard, NGOs fill a gap in the system. Many interviewees saw the NGO role as one of holding governments to account, proving information on the human rights situation on the ground and helping to develop suitable recommendations. The NGO role increased for a number of reasons, including the fact that once the UN human rights

\(^{91}\) CERD Committee Member 1, above n 53.

\(^{92}\) Another area requiring further consideration is the role of moral entrepreneurs operating within NGOs or sometimes outside NGOs, some evidence of which also emerged from interviews and observation.
framework had begun to become established, the scrutiny of treaty bodies moved from a more linear analysis of whether legislation had been put in place to give effect to treaty obligations, to a more nuanced examination of whether the laws were effective and whether people ‘on the ground’ had enjoyment of their rights. This is where NGOs make an important contribution.

The second account is a normative one. It is based on the expectation that involving NGOs contributes to a democratisation of the UN human rights system and is a form of governance. This is not necessarily separate from the first account. An independent expert from one of the treaty bodies in their interview described the NGO role as a form of ‘participative democracy’. 93 The HRC in resolution 27/31 recognised the ‘crucial importance of the active involvement of civil society in promoting good governance, including through transparency and accountability, which is indispensable for building peaceful, prosperous and democratic societies.’ 94 These are high expectations of NGOs. Willetts has previously argued that the expansion of the NGO role in the UN system led to a conversion from a system of interstate diplomacy to one of pluralist governance, 95 and Falk described civil society networks as a form of global governance. 96 Rather than represent a form of global governance, it is proposed here that they participate in global governance as part of a network of actors. Ku sees this as an element of governing in a global environment:

States no longer govern alone in the global environment; they are assisted by IOs [International Organisations] and NGOs in discharging their responsibilities. In fact, the global governing environment is one where major actors work together to leverage their capacities by working with other actors— even actors quite different from themselves. 97

93 CERD Committee Member 1, above n 53.
95 Peter Willetts, ‘From ‘Consultative Arrangements’ to ‘Partnership’: the Changing Status of NGOs in Diplomacy at the UN’ (2000) 6(2) Global Governance, 191.
97 Charlotte Ku International Law, International Relations and Global Governance (Routledge 2013) 131.
If NGOs *are* to contribute to democratisation and governance of UN human rights systems, they must be representative. In particular, they must be representative of the groups experiencing human rights abuses. As discussed above, a gap in this regard arose from the research - namely the representation of Aboriginal and Torres Strait Islander peoples and other ethnic minority groups. This emerged predominantly from the Australian case study interviews with Government representatives and domestic NGOs, where there were pockets of concern over adequate representation. This aligns with research which finds that minority groups are under-represented in consultations. At an international level also, an OHCHR interviewee was aware that some groups could be excluded. They identified that it is a challenge to make sure that no domestic NGOs are ‘locked out’ of that system by not being part of a coalition, concluding ‘I suspect there are some domestic NGOs who don’t get a voice in the system’.

Consultation has been identified as an important institutionalised means for members of minority communities to participate in public policymaking, providing a forum for them to voice their concerns and not just participate as individuals in an electoral process skewed towards majority representation. Therefore the lack of representation is problematic from a human rights perspective, and in terms of the democratisation and governance expectations of NGOs, described above. It is acknowledged that there is a lack of minority representation in politics and Government, therefore ensuring adequate representation in non-Governmental networks is particularly important.

A diverging opinion by some scholars is that Indigenous NGOs engaging with the UN can become colonised. Corntassel posits that by engaging with the UN, groups begin to limit their other political activities and conform to the dominant norms of UN structures, becoming

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99 OHCHR Staff member 2, above n 76.
a part of the system, removed from their grassroots movements. An NGO interviewee here made a similar point, arguing that Indigenous leaders who became very engaged with the UN were no longer in touch with local communities and so could not purport to represent them.

In addition, some international literature acknowledges that the NGO concept is a Western one in origin and may be foreign to many Indigenous communities and in many developing countries. Whilst some authors have explored concepts such as Indigenous social movements, and Indigenous engagement with the UN, Indigenous peoples’ engagement with mainstream UN human rights reporting mechanisms, and associated national consultations and NGO coalitions, remains underexplored.

6. Conclusion
This article has presented a functional taxonomy and network of NGO engagement with UN human rights State reporting mechanisms, illustrating the heterogeneous nature of NGOs and the relationships between them. Emerging from a socio-legal study including 26 semi-structured interviews with stakeholders engaged with treaty bodies and the UPR, was a spectrum of NGOs. There are those which criticise Governments and hold them to account, namely: international facilitative NGOs (a), imperialist NGOs (c), domestic self-sufficient NGOs (d) and domestic dependent NGOs (e). At the other end of the spectrum are those which are co-opted by systems and Governments, namely GONGOs (f) and gatekeeper NGOs (b). The anomaly is NHRIs (g), which of course are not NGOs but in terms of a functional taxonomy, play a similar role to domestic self-sufficient NGOs (d).

The article has also mapped the engagement, or lack thereof, between the various categories of NGOs in the functional taxonomy as a way of enhancing our understanding of NGO roles and relationships. It has identified the preferred model for NGO engagement with UN human

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103 Civil Society Representative 1, above 78.
104 Antonio Donini ‘The bureaucracy and the free spirits: Stagnation and innovation in the relationship between the UN and NGOs’ (1995) 16(3) Third World Quarterly 421.
rights State reporting by those in the UN receiving the information as coalitions of domestic self-sufficient NGOs (d) and domestic dependent NGOs (e), channelling information through international facilitative NGOs (a) or gatekeeper NGOs (b), where these exist.

In terms of why the NGO role in UN human rights State reporting exists, it is posited that there are two complementary accounts of the NGO role – it addresses limitations of the UN human rights system and contributes to global democratisation and governance. A number of opportunities for future research spring from this article, including further analysis of Indigenous representation in NGO coalitions and Government consultations, and further exploration of the role of NHRI vis-à-vis NGOs. Whether, and how, the functional taxonomy might be applied to NGO activity in other mechanisms within the UN human rights system and indeed to other areas of international law, presents opportunities to further our understanding of NGOs:

The role of NGOs and INGOs seems to offer a tremendous opportunity for future study, but researchers need to reach beyond simple counts of organizational membership to examine empirically the processes and contexts through which these organizations influence compliance.107

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107 Camp Keith, above n 11, 372.
Chapter Seven: Conclusions
7.1 Introduction
This thesis has charted the influence of NGOs, from their lobbying to include the phrase ‘human rights’ in the UN Charter, to carving out an essential role for themselves in treaty body monitoring – from which they were initially completed excluded. They also play an important, although less salient, role in the more recent and State-centric UPR. NGOs provide information and contribute to developing recommendations, partly addressing limitations of the UN human rights system. They also participate in global governance as part of a network of actors. The role, influence and heterogeneous nature of NGOs have been explored, together with an analysis of the relationships between them and other actors.

The thesis title refers to monitoring international human rights law ‘from above’ or ‘from below’. From below’ can refer to domestic NGOs and there is certainly evidence of their influence in the Australian case study and an openness to hearing from them among UN staff, CERD Committee members and Governments in the Human Rights Council. ‘From above’ can refer to the UN and there is evidence from interviews with Government representatives that their preference is for a State-centric monitoring of human rights compliance by way of the UPR. ‘From above’ could also refer to international NGOs, which sometimes play an important role, depending on the context and on their modus operandi as either international facilitative, imperialist, or gatekeeper. National Human Rights Institutions (NHRIs) may also be seen to monitor from below and the thesis included some analysis of the role of NHRIs due to the ubiquitous nature of commentary on NHRIs in the interviews.

This chapter synthesises the conclusions from the previous chapters of the thesis in response to the research questions (Section 7.2), identifies future research directions (Section 7.3.) and finishes with some parting words (Section 7.4).

7.2 Revisiting the Research Questions
The subheadings below use the research question (Section 7.2.1) and sub-questions (7.2.2 - 7.2.4) as stated in the introduction. Conclusions from the individual thesis chapters will be discussed under these headings, noting that not all chapters addressed each research question.
7.2.1 What is the role and influence of NGOs in monitoring international human rights law using UN State reporting mechanisms?

Overall, NGOs play a pragmatic role in addressing limitations of the UN human rights system, and a normative role in contributing to global democratisation and governance. It is clear from this thesis that the role of NGOs in UN human rights State reporting mechanisms is primarily to provide ‘on the ground’ information to balance the reports provided by the State. In this regard, they are also influential in developing suitable recommendations and may play an intermediary role between the global and the local – glocalisation.

The literature review in Chapter Two indicated that NGOs had been heralded for their role in treaty body State reporting, generally without supporting empirical data – qualitative or quantitative. There is less literature on the UPR but the emerging literature that does exist suggests that NGOs, or civil society organisations more broadly, had influence on the recommendations in the UPR, drawing on quantitative data. There was limited qualitative data in the existing UPR literature and less analysis of the fact that the NGO role in the State-centric UPR was in many ways quite limited.

Chapter Three on the NGO role in treaty body monitoring, specifically the CERD Committee, concluded that the NGO role is informal in nature but fills a gap in the UN treaty body State reporting system. Namely, NGOs provide critical information to supplement the information provided by Governments and are important for developing recommendations. OHCHR (Office of the High Commissioner for Human Rights) staff and CERD Committee members strongly value the NGO role and all saw it as ranging from ‘important’ to ‘absolutely crucial’. In the Australian case study, domestic NGOs working in a coalition were most influential on the recommendations of the Committee. It is posited that domestic NGOs may be more influential in Western European and Others Group (WEOG) States – aligned with both Simmons and Merry who proposed that whilst transnational networks may be critical in the case of a repressive regime, in most States domestic actors are the most significant.¹

¹ Sally Engle Merry, Human Rights and Gender Violence: Translating International Law into Local Justice (University of Chicago Press, 2006); Beth Simmons, Mobilizing for Human Rights: International Law in Domestic Politics (Cambridge University Press, 2009).
Influence of NGOs can be diluted in reporting to CERD in two key ways. Firstly, there was evidence of filtering out of NGO information by the Secretariat if it was considered to be lacking in substance or politically motivated and biased. Secondly, there was some scepticism and caution among OHCHR and CERD Committee member interviewees of the NGO role, particularly where the NGO’s credibility or legitimacy was in question. NGO influence could be surmised from the findings from the documentary analysis of Australia’s last review in 2010. There were strong similarities between an NGO coalition report and 11 out of the 21 recommendations of the Committee. Three possible factors for this NGO report’s success in influencing the Committee were presented – the quality of the report, the legitimacy derived from the large NGO coalition, and the fact that it was driven by domestic NGOs. At a practical level, this means that domestic NGOs in WEOG States should work in coalitions to achieve maximum influence on UN human rights State reporting mechanisms.

Chapter Four on the NGO role in the UPR concluded that in this State-centric peer review, NGOs are recognised as a legitimate stakeholder and play an important, albeit limited role. The States-under-Review (SuRs) are encouraged to consult with NGOs, and other Governments display a willingness to hear their concerns. NGOs also provide information and there is evidence of their influence on recommendations made by States. More influential than NGOs, however, was the UN compilation report. There was a slightly closer correlation between the UN compilation report and the recommendations made by States (197 recommendations out of 290), than there was with NGO recommendations (177 recommendations out of 290), or NHRI recommendations (148 recommendations out of 290) in Australia’s last UPR in 2015. Therefore, in the UPR, NGOs play less of a ‘gap-filler’ role due to the availability of information from another, more legitimate source (from a State perspective).²

² Since Chapter Four was submitted for publication, the Australian Government has committed to ratifying the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Ratification of OPCAT was a key recommendation in Australia’s UPR as discussed in Chapter Four and was strongly reflected in the UN compilation report. See, Minister for Foreign Affairs, The Hon Julie Bishop MP and Attorney-General Senator the Hon George Brandis QC, ‘Improving oversight and conditions in detention’ (9 February 2017) <https://www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Improving-oversight-and-conditions-in-detention.aspx>.
Chapter Five, which compared the NGO role in treaty body monitoring (CERD) and the UPR, concluded that the two mechanisms have some similarities in terms of NGO engagement. In particular, NGOs can submit reports and make informal oral presentations in order to raise human rights issues of concern relating to the SuR in both mechanisms.

Chapter Six presented a functional taxonomy of NGOs and conceptualised NGOs as on a spectrum, ranging from those which publicly criticise Governments and hold them to account - to those which are co-opted by systems and Governments. In terms of understanding the NGO role, it posited that the most persuasive theoretical framework is one that understands the NGO role as two-fold: addressing limitations of the UN human rights system and contributing to global democratisation and governance.

7.2.2 How and why do NGOs engage with key stakeholders and each other in reporting to the well-established UN treaty body State reporting and the more recent UPR?

Chapter Three noted that NGOs engage with the CERD Committee so that they can bring issues to international attention in the hope that Governments would be influenced. Opportunities for NGO informal engagement with the Committee were also discussed. These engagements are the weekly formal-informal briefings for all NGOs on all SuRs that week, the informal lunchtime briefings with the Committee, the less-used opportunity for videoconference engagement, and other ad hoc informal meetings with one or more Committee members. In terms of why and how NGOs engage with each other, evidence of strong coalitions, and the effectiveness of such coalitions was referenced in existing literature and supported by the interview data and the documentary analysis in the Australian case study. The relationship between domestic and international NGOs in engaging with CERD was analysed, concluding that International NGOs (‘INGOs’) can bring added legitimacy, expertise and credibility. They can also be important where NGOs are at risk of reprisals and INGOs can speak on their behalf. Nonetheless, a coalition of domestic NGOs emerged as most influential in the documentary analysis. This validates the trend in both international human rights law and in the literature towards recognising the importance of domestic NGOs in holding Western democratic Governments to account. Therefore, both domestic NGOs and INGOs play their own distinct role with respect to the CERD Committee. The former
bring ‘on the ground’ information and the latter facilitate their engagement if required, and in some cases protect their identity or give them credibility in the eyes of the Committee.

Engagement by way of submitting reports was also discussed in Chapter three, and several interviewees from OHCHR staff and the CERD Committee acknowledged difficulties with the volume of NGO information received and lack of co-ordinated NGO engagement with the Committee. The chapter concluded with proposing word limits on NGO reports and the possibility of a gatekeeper INGO to address these issues. The role of gatekeeper NGOs was elaborated upon in the functional taxonomy in Chapter 6, in particular their practical benefits in managing the logistics of engagement with UN bodies.

**Chapter Four**, through the Australian case study on the UPR shows that there are benefits of working in coalitions – again, a coalition of domestic NGOs had most influence on State recommendations. Recommendations with a unique match to NGO content were also more likely to be accepted by the Australian Government. The author concluded as a result of this, and triangulated with interview data, that in democratic States the unique understanding and expertise of domestic NGOs means that they may suggest more suitable solutions to address local human rights issues. They are also best placed to engage in monitoring implementation of recommendations on an ongoing basis. One practical recommendation emerging from this study is that domestic NGOs should be given priority speaking rights at the adoption of the UPR report.

The Chapter also identified a few themes less explored in previous literature, including the benefits of NGO-NHRI co-operation. The documentary analysis found that NHRI influence on recommendations was less than that of NGOs. It was noted that there was a strong and effective working relationship between the NGOs and the Australian NHRI – a relationship not always without tensions according to international interviewees. Other novel themes included inadequate representation of Indigenous peoples throughout the system - with acknowledgement of concerns of neo-colonisation, and NGOs’ need to navigate gatekeepers.

The functional taxonomy and network of NGO engagement in **Chapter Six** closely addressed this research question on how and why NGOs engage with stakeholders and each other. It proposed seven categories of NGO and found that the preferred model of international NGO
is the international facilitative NGO but that there may be logistical drivers for having gatekeeper NGOs. Problematic categories of international NGOs were imperialist NGOs and Governmental NGOs (‘GONGOs’). Clearly GONGOs are not real NGOs. Neither are NHRIs but it became clear that NHRIs can play a similar role to NGOs and so were included in the taxonomy. Domestic NGOs were categorised as either self-sufficient or dependent. The chapter also mapped the engagement, or lack thereof, between the various categories of NGOs in the functional taxonomy as a way of enhancing our understanding of NGO roles and relationships. It identified a preferred model for NGO engagement with UN human rights State reporting by those in the UN receiving the information. This model is as follows: coalitions of domestic self-sufficient NGOs and domestic dependent NGOs, channelling information through international facilitative NGOs or gatekeeper NGOs, where these exist.

Chapter Four also considers why NGOs have a role in this system. It posited that from a pragmatic perspective, as an under-resourced system, the key role of NGOs is to provide critical information to UN human rights bodies. In that regard, NGOs fill a gap in the system. From a normative perspective, there is an expectation articulated in the literature and by interviewees that involving NGOs contributes to a democratisation of the UN human rights system and is a form of governance.

7.2.3 Have NGOs been significant in influencing the recommendations from each of these State reporting mechanisms?

This question was also addressed in Section 7.2.1 above. Specifically on the question on NGO influence on recommendations, the answer is in the affirmative – NGOs have been significant in both mechanisms. This finding is supported by existing literature, interviews and the Australian case study. However, it is important to note that in the documentary analysis, not all NGO reports were significant in influencing recommendations. In fact, most were not significant and some NGOs which allocate time and resources to producing NGO reports may question whether it has been a useful exercise. Even those NGO reports which were influential did not have all of their issues and recommendations taken on board. A clear conclusion must be that NGO influence is by no means absolute. The interview data indicates that to be influential, NGOs should work in a co-ordinated way or as part of a coalition, have recommendations that are ‘precise, specific and implementable’ and produce ‘usable’, evidence-based professional reports with an executive summary. The perceived
legitimacy and credibility of the NGO, or of their network, is also a factor in their level of influence.

**Chapter Five** concluded that NGO recommendations can heavily influence treaty body concluding observations according to the documentary analysis in the Australian case study, and the international interviews. Although some NGOs are more influential than others, as discussed in Chapters Three and Four; in particular a coalition of domestic NGOs emerged as most influential in both the CERD and UPR Australian case studies.

Chapter five summarised the key findings in this regard as follows. Recommendations from the NGO coalition report had a clear link with the CERD’s recommendations in concluding observations in 2010. The Committee made 21 recommendations to Australia, 11 of which were a ‘specific match’ with the NGO coalition report, meaning that the same or very similar language was used. Therefore, 52 per cent of the Committee’s recommendations appear to be influenced by NGOs. Another six of the Committee’s recommendations had a ‘general match’ with the NGO coalition report, meaning that different language was used but the issue or the meaning of the recommendation was the same. The overall match may be as high as 81 per cent.

In the UPR documentary analysis of the review of Australia in 2015, the match rate for NGO influence was lower than it was in CERD.³ Of the 290 recommendations made by States in the UPR, only seven (2.4 per cent) were a specific match with NGO recommendations in the stakeholder summary report. However, an additional 170 of the 290 recommendations made by States had a general match to NGO recommendations - bringing the overall match total to 61 per cent. There was often overlap between recommendations in the compilation of UN information report, recommendations made by NGOs, and recommendations made by the NHRI. Therefore, it was more difficult to suggest causality in the UPR. Also, the compilation of UN information report had a general or specific match with 197 of the 290 recommendations made by States, (68 per cent) and was therefore more influential than

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³ However, it is important to note that the CERD Committee made 21 detailed recommendations in total, compared with 290 shorter recommendations made by States in the UPR - States tend to make multiple recommendations in the UPR, not all of which are accepted by the SuR. Therefore, there are differences in the level of detail and quantity of the recommendations from the two mechanisms, but looking at the NGO - recommendation match rate can be a useful indicator of NGO influence.
NGOs. That there is less evidence of NGO influence on recommendations in the UPR fits with the picture of overall diminution of the NGO role in the UPR in comparison with treaty body State reporting.

**7.2.4 What are the differences in their role and influence in the two mechanisms and what does this mean for the future?**

In addition to the differing levels of influence of NGOs on recommendations, discussed in the previous section, there are other differences in the NGO role in the two mechanisms. In comparing the two mechanisms, Chapter Five concluded that NGOs have a number of factors to consider when choosing where to direct their resources in terms of State reporting.

On the one hand, the UPR offers a broader review with more regularity of reporting, compliance, and implementation rates. The broad nature of the review presents opportunities to develop wider coalitions and networks than before. The international NGO - UPR-Info supports robust data collection and analysis on the UPR, which is useful to NGOs. The peer-review and political nature of the UPR presents both challenges and opportunities for NGOs. For example, NGOs need to be able to lobby, a skill they may not previously have had. However, the NGO role is more limited in scope in the UPR than it is in treaty body State reporting.

Treaty bodies offer a more impartial, in-depth review and more extensive opportunities for NGO engagement. Lacking alternative information sources, such as fact-finding missions, treaty bodies are quite reliant on NGO information. NGO reports to treaty bodies generally do not have strict word limits and there is no formal regulation of the NGO sector, in the absence of the use of ECOSOC accreditation. These factors, compounded by the general challenges facing treaty bodies including delays in reporting, failure to report, backlogs and an ad hoc schedule as a result, paint a picture of a system under strain.

The UPR by comparison appears to operate like a well-oiled machine but a machine less reliant on the NGO ‘cog’. In terms of NGO oral presentations, the only opportunity to brief the UPR working group is a short two minute slot when the recommendations have already been made. A particular limitation of the UPR for NGOs therefore, is the opportunity to have their concerns heard at an international level. This can be important for NGOs, according to
interviewees, and is something which treaty bodies provide to a greater extent than the UPR. Rather, the UPR redirects NGO engagement towards national-level Government consultations. However, interview data and existing scholarship by Ball suggests that this can be problematic.\textsuperscript{4} In particular, engaging in consultations with the Government of the SuR as a possible alternative to briefing a UN human rights body cannot fulfil individuals’ and communities’ quest for validation, dignity and self-respect – to have their voices heard.

There is evidence of complementarity between the two mechanisms, which can assist NGOs in pursuing their agenda. For example, NGOs can influence treaty bodies, and other UN bodies such as the Special Procedures, and these recommendations can be reflected in the UPR recommendations. The UPR was designed to complement rather than duplicate treaty body State reporting, which would mean that NGOs should engage with both types of mechanism and benefit from said complementarity. Chapter five also concluded that there were opportunities for mutual learning between treaty bodies and the UPR, both in general and in relation to NGO engagement.

Going forward, there were clear indications from Government interviewees that a reduced role for treaty bodies, if not the entire demise of treaty bodies, is on their agenda and that there is a risk that the UPR will colonise treaty body State reporting. This is made more likely by the fact that the treaty body system is a system under strain as evidenced by the extensive scholarship and grey literature on treaty body strengthening. This strain was also really striking in interviews with some CERD Committee members and OHCHR staff. Were the demise of treaty bodies to become a reality, it would weaken monitoring of international human rights law and reduce the current opportunities for NGO engagement with UN human rights State reporting mechanisms considerably.

7.3 Where to From Here?
As a distinct piece of research with a necessarily limited scope, this thesis engaged with the topic of the NGO role in monitoring international human rights law using UN State reporting mechanisms. A number of themes emerged which indicated a need for future research.

\textsuperscript{4} Olivia Ball, \textit{All the way to the UN: is petitioning a UN human-rights treaty body worthwhile?} (PhD Thesis, Monash University, 2014).
Some of these have been mentioned in the thesis chapters, including the need for more focus on follow-up on treaty body and UPR recommendations.

It was outside the scope of this thesis to evaluate the internal structures of the Australian Government with respect to UN human rights bodies, but this is a topic which future research might address. It emerged from the analysis of interview data that a flaw in the Australian Government’s approach to their international human rights obligations is the current allocation of responsibilities to various departments. One way in which this is manifested is that there is a gap between the departments responsible for reporting to UN human rights treaty bodies, vis-à-vis departments who should be implementing treaty body obligations or UN recommendations. The other example of this is the fact that the Attorney General’s (AG) Office has responsibility for reporting on most UN human rights treaties, but some, such as CERD are the responsibility of the Department of Foreign Affairs and Trade (DFAT). Both the AG’s office and DFAT have responsibilities in UPR reporting. The thesis has noted that the Australian Government has in the past disagreed with the views of treaty bodies and displayed a lack of willingness to implement recommendations; however there may also be a failure to progress recommendations that the Government might be open to, simply due to structural problems with the allocation of responsibilities. NGO engagement and consultation could also be more seamless if one Government department was responsible for UN human rights reporting across the board.

Another Australian-specific finding requiring further analysis, although one that the literature suggests could resonate in other States, was some reported lack of inclusion of Aboriginal and Torres Strait Islander groups in NGO coalitions, Government consultations and speaking opportunities at the UPR. Taking into account the serious critique of the UN by some Aboriginal authors, the question of Indigenous participation requires careful and nuanced analysis.

Turning then to methodology, the case study approach was a useful way of gathering in-depth quantitative and qualitative data to enable a comprehensive analysis of a particular state –

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Australia in this case. The thesis made a modest but unique contribution to existing literature, and future research could use the same methodology to further analyse the NGO role across these and other mechanisms. Further case studies would be useful in producing more generalisable findings, particularly since it has been posited that domestic NGOs may be more influential in WEOG States but some of the international interviewees in this research, and previous scholarship, suggest that transnational networks may be critical in the case of a repressive regime. However, a limitation of the documentary analysis method was its very laborious and manual nature, particularly for the UPR. Using technology by building on existing ‘find match query’ functionality could greatly enhance the opportunities for researchers, and potentially NGOs themselves, to gauge NGO influence on recommendations.

Further research could adapt the functional taxonomy of NGOs and preferred model of engagement with UN human rights bodies to assess its potential to apply more broadly to NGO engagement with UN bodies more generally, and potentially other international organisations. It could also consider the wider range of global civil society actors, including the growing role of businesses in human rights.

Finally, this thesis has mapped some of the changes in international human rights law, in particular changes to the NGO role which was initially limited but gradually increased in scope through the development of the first UN human rights treaty body - CERD. The NGO role is somewhat more restricted in the most recent State reporting mechanism, the UPR. These changes are indicative of some adaptability and fluidity in the international human rights system. They are also evidence of shifting boundaries, which could mean that types of colonisation can occur. For example, there were some suggestions in the interviews that the increasing role of NHRI - more State-centric in their ontology - could encroach on the territory of NGOs. There was also evidence of some crossing of boundaries between the UPR and treaty bodies – a complementarity between the two mechanisms. This thesis considered the complementarity primarily through the lens of NGO influence and drawing on international interviews and the documentary analysis of one state. The question of the

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6 Sally Engle Merry, Human Rights and Gender Violence: Translating International Law into Local Justice (University of Chicago Press, 2006); Beth Simmons, Mobilizing for Human Rights: International Law in Domestic Politics (Cambridge University Press, 2009).
complementarity of the two mechanisms as anticipated by Resolution 60/251\textsuperscript{7} and subjected to some preliminary analysis by Gaer before the UPR become operational,\textsuperscript{8} now requires a dedicated analysis. The extent to which the mechanisms are complementary and how they should co-exist in the longer-term requires attention. Concomitantly, more research and discussion is required on the risk that States’ preference for the UPR could lead to colonisation of treaty body State reporting, the very foundations of the international human rights framework.

7.4 Parting words
To conclude, the monitoring of international human rights law must be done from both above and below. NGOs play an essential role, as do States, UN experts, NHRI\textsuperscript{s} and other actors. Despite some interviewees’ caution regarding the NGO role with reference to their legitimacy and credibility, and the peripheral threats from some States, the evidence from this thesis is clear that NGOs are generally recognised by stakeholders as playing a significant role. It is also clear that they use this role to influence the recommendations of UN human rights bodies by bringing information on the human rights situation on the ground to the attention of the international community. As such, they are a critical component of the international human rights legal machinery. NGOs may even have exceeded the expectations of Eleanor Roosevelt who predicted they would play an indispensable role as the ‘curious grapevine’ that would enlighten people about their rights and channel information about human rights violations to the world.\textsuperscript{9}

\textsuperscript{7} General Assembly Resolution 60/251, Human Rights Council, UN Doc A/RES/60/251, 3 April 2006;
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