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# Towards a Human Rights Based Global Compact for Safe, Orderly and Regular Migration:

## Paper #3: Implementation, Monitoring and Accountability Mechanisms

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This paper is part of QUNO's paper series, "Towards a Human Rights Based Global Compact for Safe, Orderly and Regular Migration," a set of contributions to the global compact on migration process. The previous two papers are:

- Paper #1: Initial Input to Discussions on the Modalities Resolution for a Global Compact on Safe, Orderly and Regular Migration
- Paper #2: Expectations following the Agreement of Modalities Resolution

To access these papers, please visit: [www.quno.org/resources/Refugees-and-Migrants](http://www.quno.org/resources/Refugees-and-Migrants).

## Human Rights & Refugees

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QUNO's belief in the inherent worth of every individual leads us to work for the promotion and protection of human rights for all. Our Human Rights & Refugees programme raises up the concerns of marginalized groups, so they are better understood by international policy makers, which leads to stronger international standards.

Frontline organizations can use these strengthened international standards as a tool to limit suffering, improve lives and challenge the root causes of injustice. Our work focuses on children of prisoners, children of parents sentenced to death or executed, conscientious objectors to military service, Indigenous peoples and refugees.

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## Introduction

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*This paper presents examples of implementation, monitoring and accountability mechanisms under six multilateral agreements that we believe can be learnt from in considering how to achieve an effective global compact for safe, orderly and regular migration. The examples draw on a range of international agreements from different areas of policy and range from long-standing UN mechanisms to very recent agreements for which the specific means of implementation are still under negotiation. This paper hopes to assist stakeholders in considering some of the potential options for effective implementation of this new international agreement.*

Called for in the 2016 New York Declaration for Refugees and Migrants, States are currently engaged in a process towards developing a new international agreement on migration, the ‘global compact for safe, orderly and regular migration’. The State-led process will culminate in a General Assembly intergovernmental conference on international migration in 2018. This agreement looks set to be a significant step forwards for international governance on cross-border migration and will shape international discussion of this topic in the years to come.

QUNO sees this process as a significant opportunity to improve global governance on migration and improve the treatment of migrants around the world. We are supportive of an outcome that is ambitious, effective, people-centred and human rights based.

The content and legal nature of a ‘global compact’ remain unclear, but from discussions so far, it appears unlikely that a binding treaty will emerge from the negotiations in 2018. In order to make an impact on the ground, the global compact on migration should not be simply a declaration on a declaration and there looks to be broad agreement on this. Therefore, if the agreement is to be non-binding, it is essential that it contains at least an outline of how commitments made by States will be implemented and monitored over time. States have already made significant commitments

under international law regarding migration and treatment of migrants, most recently in the New York Declaration itself. In examining potential models for implementation, monitoring and accountability mechanisms, we therefore ask stakeholders to consider mechanisms that can help the global compact build on existing standards and contribute to implementation and encourage positive action at international, national and local levels.

Implementation, monitoring and accountability mechanisms can be some of the most challenging and contentious areas to secure consensus on. Because of this, we feel it is important that all stakeholders begin considering this aspect of the agreement early on in the process. QUNO’s cross-cutting work means that we can draw on experience and expertise from a range of different areas of international policy. This paper is our contribution to encourage stakeholders engaged in the global compact process to help guide and support their work towards an effective agreement that is ambitious, people-centred and human rights based.

The agreements covered by this paper are:

- **Implementation of ILO standards** (page 4)
- **Human Rights Treaty Bodies** (page 6)
- **The Convention on Biological Diversity** (page 8)
- **The Aarhus Convention** (page 11)
- **The Sustainable Development Goals** (page 14)
- **The Paris Agreement** (page 17)

This is intended as a discussion paper, therefore comments are welcome and can be sent to us via the contact details on page 2.

## Part I: Review of Existing Follow Up, Monitoring and Accountability Mechanisms

*This section of the paper contains a review of six examples of follow up, monitoring and accountability mechanisms drawn from across the UN. Two are systems that apply to several agreements (the International Labour Organisation's supervisory system and the human rights treaty bodies) and four are specific agreements each with their own process for follow up.*

### I. International Labour Organisation Supervisory System

*The International Labour Organisation (ILO) develops and maintains a system of international labour standards with the central aim of promoting opportunities for decent and productive work, in conditions of freedom, equity, security and dignity. As the organisation was created in 1919, it has had time to develop a range of different implementation and monitoring mechanisms.*

#### Binding Conventions and Non-Binding Guidelines

International labour standards take the form of either Conventions, which are legally binding, or recommendations, which are non-binding guidelines, often providing supplementary detail to Conventions. Conventions and recommendations are drawn up by representatives of Governments, employers and workers. Member States must submit a new standard to their competent authority (usually Parliament) for consideration, or ratification, if it is a Convention. The ILO has eight "fundamental" conventions, and another four "priority" conventions, which are considered to be particularly important to apply.

#### Tripartite model

The ILO is the only UN agency to have a tripartite structure with government, employer and worker representatives taking part in the drafting and monitoring of standards. This is premised on the understanding that workers

and employers have an important role as partners in setting and maintaining labour standards. Trade unions and employers' organisations are regarded by the ILO as essential for the organisation's functioning, along with State parties. As well as their role in developing standards, all three play a part in monitoring and implementation, including:

- Directly receiving and commenting on Government reports
- Provision of information directly to the ILO
- Initiate representations and file complaints against member States.

Under the Tripartite Consultation Convention, State Parties agreed to hold national tripartite consultations on various aspects of their interactions with the ILO system. Including those directly involved in regulating conditions of work and labour disputes in international decision-making on these issues has largely been highly effective.<sup>1</sup>

Tripartism in the ILO has faced difficulties, as the balance of power between employers and workers has changed over time.<sup>2</sup> In 2012, an institutional challenge arose around a long-standing disagreement between the ILO employers and workers' groups regarding the existence of a right to strike. Subsequent review processes of the supervisory mechanism and the standards review mechanism were undertaken. Attempts to consolidate tripartite consensus on the supervisory system and improve the standards review mechanism are underway through the 'standards initiative', which is one of ILO's package of seven 'Centenary Initiatives', being undertaken ahead of the organisation's 100-year anniversary in 2019.

<sup>1</sup> W. R. Simpson, The ILO and tripartism: some reflections, *Monthly Labor Review*, Vol. 117, No. 9, pp. 40-45.

<sup>2</sup> C. La Hovary, The ILO, its standards and their supervision: difficult times? *Volkerrechtsblog*, (2015): <http://voelkerrechtsblog.org/the-ilo-its-standards-and-their-supervision-difficult-times/>.

## Regular system of supervision

The ILO examines implementation of standards through two kinds of supervisory mechanism, a regular system of supervision and a special procedures mechanism. The regular system of supervision is a reporting mechanism, where a committee examines periodic reports submitted by States on measures taken to implement the Conventions. Every two years, States must submit reports on application of the eight fundamental and four priority Conventions. Other Conventions must be reported on every five years. Reports can also be requested at shorter intervals. Copies of reports must be submitted to employers' and workers' organisations, who can comment on the reports and send comments on implementation of the Conventions directly to the ILO.

A Committee of Experts on the Application of Conventions and Recommendations reviews the reports. Set up in 1926, it is composed of 20 jurists, who are appointed by the Governing Body. Advice is of a technical and impartial nature. The Committee can make two kinds of comments on State practice: observations and direct requests. Observations are raised in relation to the application of a particular Convention by a State, whereas direct requests are more technical questions or asking for information. Comments are published in the Committee's annual report, whereas direct requests are communicated only to the Government in question.

The Committee's annual report is submitted to the International Labour Conference, for examination by the Conference Committee of the Application of Standards. This Committee is made up of delegates from Government, employers and workers, who select observations from it for discussion. Governments referred to in the comments are invited to respond before the Committee. The Conference Committee often draws conclusions and recommendations to Governments, and these are published in its report.

## Special procedures

The special procedures enable representations and complaints to be made on situations of alleged non-

compliance. Associations of employers or workers can make representations to the ILO Governing Body in regard to any Member State which, in its view, "has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party".<sup>3</sup> A three-member tripartite committee of the Governing Body can be set up to examine the representation and the Government's response to it, before reporting back to the Governing body. If the Government's response is not considered to be satisfactory, the Governing Body can publish the representation and the response.

The highest level of investigation, a complaint, can be made in the case of non-compliance and can be filed by another member State, a delegate to the International Labour Conference, or the Governing Body. The Governing Body can form a Commission of Inquiry into the complaint which can then make recommendations of measures to be taken to address the problem. This tends to be used in situations of serious and persistent violations where the State has refused to address them. There have been 11 COIs created to date. A further provision allows for the Governing Body to 'recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.' This provision has only been used once.

## Committee on Freedom of Association

A specific Committee on Freedom of Association (CFA) was established in 1951 to examine complaints about violations of freedom of association. It was established to close gap following a decision that that the principle of freedom of association and collective bargaining needed an additional supervisory procedure ensuring compliance, including countries that had not ratified the relevant conventions. Employers' and workers' organisations can bring complaints against member States. The CFA can establish dialogue with the Government concerned. If a violation is found, a report is issued to the Governing Body, which can make recommendations. Governments must report on the implementation of these recommendations. Where a country has ratified

<sup>3</sup> ILO Constitution, Art. 24.

the relevant instruments, specific aspects of the case can be referred to the Committee of Experts for legislative opinion. The CFA can also initiate a ‘direct contacts’ mission to the State concerned, engaging directly with all the actors involved in country. There have been over 3,000 cases reviewed by the CFA, with over 60 countries acting on recommendations issued by it.

Despite the inclusion of special procedures provisions in the ILO structure, these provisions have been used much less than was originally intended when the ILO was founded. The “regular” supervision is the main mechanism which is used.<sup>4</sup> The strength of the ILO system is that it offers a continuum of procedures, offering different tools for responding to different challenges faced in implementation. There is also a coherence in that all ILO standards fall under the same mechanisms and so different areas of labour standards can be given the same level of scrutiny.

## 2. The Human Rights Treaty Body System

*The human rights treaty bodies are committees of independent human rights experts, who monitor the implementation of the UN’s binding human rights treaties. There are ten human rights treaty bodies, of which nine monitor the core human rights treaties and one, the Subcommittee on the Prevention of Torture (SPT), monitors the Optional Protocol to the Convention Against Torture.<sup>5</sup> These Committees have different tools at their disposal in their interactions with Member States regarding compliance. Each convention contains the details of its own implementation monitoring body. The first treaty body was established in 1970 when the Convention on the Elimination of Racial Discrimination came into force. The most recent development was the entry into force of the third Optional Protocol to the Convention on the Rights of the Child which enables*

*the Committee on the Rights of the Child to receive individual complaints.*

Each treaty body has a Committee with a mandate defined in the treaty it oversees. Every Committee is made up of experts who are nominated and elected by State parties for fixed renewable terms of 4 years. Members must be ‘of high moral standing’ or ‘of acknowledged impartiality’. Committee members are expected to serve in their personal capacity and carry out their duties with absolute impartiality and objectivity.<sup>6</sup> Attempts by some States to put forward proposals for a ‘code of conduct’ for members was seen to compromise members’ independence, and have so far been resisted. All Committee decision-making is based on consensus.

### Reporting and guidance

When States become party to one of the international human rights treaties, they are obliged to submit an initial report, followed by periodic reports, outlining their progress in implementation of the treaty. There has been increasing emphasis over time on the importance of a broad, multi-stakeholder approach to the preparation stages of the State report, which are intended to serve as an opportunity to assess and debate human rights issues in country, identifying areas of concern, before the review stage. NGOs and other stakeholders can submit a report of their own to the treaty bodies to be read alongside the State party report, and can also submit written information to assist the committee in drawing up the list of issues which are sent to the State in advance and guide the review. The importance of civil society input into the treaty body process has been widely recognised, giving an alternative picture of the human rights situation on the ground.

States reports are reviewed by the Committee in Geneva. A pre-sessional working group is convened prior to the main session of some of the treaty bodies<sup>7</sup>, aimed at

4 C. La Hovary, ‘Tripartism in difficulty: another crisis at the ILO or business as usual?’ (2015): <http://eprints.gla.ac.uk/111479/5/111479.pdf>

5 For full list of treaties see: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>.

6 The Addis Ababa Guidelines on the independence and impartiality of members of the human rights treaty bodies set out a series of principles and practical steps for ensuring the neutrality of committee members.

7 CEDAW, CESCR, CRC, CRPD.

drafting a list of issues and questions.<sup>8</sup> State responses to the list of issues can then give more information if needed, therefore giving the Committee more time and scope to request any missing information from the report. The treaty body then reviews the country report in the plenary session, which is aimed at providing a ‘constructive dialogue’, in a non-judgemental manner, between the State and the experts aimed at identifying issues, possible solutions, good practices, and further areas for implementation of the treaty. The output of this session and culmination of this reporting cycle is the Committee’s development and issuing of concluding observations and recommendations to the State. These are made public and often identify good practice, problematic areas, and recommend steps to take towards implementation of the treaty. Wide dissemination of these at national levels is encouraged to promote engagement and interest of other stakeholders to support implementation. These concluding observations may be considered the most important aspect of the treaty body functions, as they provide authoritative guidance on the state of human rights within a country, and can stimulate action in country where it is most needed.

As the treaty body system has expanded, challenges have included delays in submissions and/or consideration of reports, non-reporting and duplication of reporting requirements.<sup>9</sup> Many States have fallen behind in submitting reports, and some have never submitted their initial reports. All of this has led to significant delays in the full reporting cycle. In addition, the resources provided to the treaty bodies have not been sufficient to prevent major work backlogs accumulating for some of the Committees. Reporting rules have been amended to meet the challenges faced by States in meeting their reporting deadlines, and by Committees in managing reporting cycles. Some of the outcomes of the review process include allowing as exceptional measures, States

to submit one combined report for the entire period for which reports are outstanding, and for the Committee to consider several State reports at one time. If a State fails to submit a report, the Committee can review the State in question without a report.

### Individual communications

Most treaty bodies have additional functions, including the ability to consider individual complaints. Individual ‘communications’ regarding alleged violations by States can be submitted to these treaty bodies providing they have accepted this aspect to the treaty (usually done so by ratifying the relevant protocol or submitting a declaration to the treaty).<sup>10</sup> The Convention on Migrant Workers’ individual complaints mechanism has not yet entered into force. Despite some procedural variations between the different mechanisms, they operate in a largely similar way.

Individuals must exhaust domestic remedies before making a communication to a treaty body. The Committee reviews the case in a closed session and can then issue a decision regarding each communication. Decisions present an authoritative interpretation of the treaty and whilst the treaty bodies are not courts they carry considerable legal weight. Decisions contain recommendations for States to take action based on the case. Where a violation has taken place, the State must then provide information, within 180 days, of actions taken to implement the recommendations. In particularly serious situations, the Committee can issue a request to the State party to implement “interim measures”, to prevent harm to the author or victim in a case. Committees then monitor follow up, and case remains open until satisfactory measures are considered to have been taken.

### Inquiries

Six of the Committees may also initiate country inquiries based on information indicating serious, grave or systematic violations of a Convention,

<sup>8</sup> These are usually held in private, except for CESCR, which is public and open to NGO participation. NGOs that have made written submissions on the States under review may be invited to participate in the pre-sessional working group of the CRC, and for CEDAW and CRPD, NGOs can brief committee members during the pre-session.

<sup>9</sup> See: <http://www2.ohchr.org/english/bodies/treaty/reform.htm>

<sup>10</sup> CCPR, CERD, CAT, CEDAW, CRPD, CED, CMW, CESCR and CRC.

giving them additional powers to review State practice.<sup>11</sup> This is a confidential procedure, creating dialogue with the State concerned and may include a visit to the State. After examining the findings, a Committee transmits these to the State, along with comments and recommendations.

Some of the treaties allow for States to initiate a procedure against another state party.<sup>12</sup> These are in practice rarely used at the international level although at a regional level, the European Court of Human Rights has examined cases of this kind between State parties to the European Convention on Human Rights.

### Technical Guidance: General Comments

All the treaty bodies can develop general comments on the interpretation the treaty they monitor, which interpret the scope of a particular provision or provide guidance on specific issues. The authoritative interpretation that general comments provide can be updated by issuing a new general comment on a subject previously covered.

The first Human Rights Treaty Body (CERD), was established in 1970, and so there have been opportunities to reflect on challenges facing these bodies and make improvements over time. Reform was called for by the UN Secretary General in 2002, known as the Agenda for Further Change. A process called the ‘Dublin Process’ was established in 2009 for stakeholders to put proposals to the UN to improve the treaty body system, and a separate intergovernmental process was also set up and was concluded in 2014. The focus of the concluding resolution was largely aimed at improving consistency across the bodies, generalising good practice, methodologies and standard working methods, and improving the state reporting process. Despite major challenges and inconsistencies between the bodies, a 2005 proposal by the UN High Commissioner for Human Rights to create a single unified human rights treaty body was not supported,

for fears of losing emphasis on the rights of particular groups. Challenges persist and initial steps are being undertaken towards review of the treaty bodies by the General Assembly in 2020.<sup>13</sup>

## 3. Convention on Biological Diversity

*The UN Convention on Biological Diversity (CBD) was adopted at the Earth Summit in Brazil on 5 June 1992 and entered into force on 29 December 1993. It is a legally binding treaty that addresses conservation of biological diversity, its sustainable use and equitable sharing of benefits that arise from it. The treaty gained rapid and widespread acceptance after coming into force and now has 196 State Parties.*<sup>14</sup>

### Overarching Goal

The CBD was an important step forward, creating a binding international treaty that recognised conserving biodiversity as a matter of survival because of its importance “for maintaining the life-sustaining systems of the biosphere”, and noting its economic benefits because of its “critical importance for the food, health and other needs of the growing world population”.<sup>15</sup> It treated biodiversity, for the first time, as a whole of government issue to be tackled across sectors and recognised the need for a permanent financial mechanism to conserve biodiversity through financing activities in developing countries.

The scope of the Convention was initially intended to focus mainly on conservation, but the negotiators broadened out to looking at development and equity considerations.<sup>16</sup> Technology transfer, financial

11 CESCR, CAT, CEDAW, CRPD, CED, and CRC.

12 CCPR, Article 41; CAT, Article 21; CERD, Article 11.

13 For more information, see: <https://www.geneva-academy.ch/our-projects/our-projects/un-human-rights-mechanisms/detail/16>

14 CBD Secretariat, ‘How the Convention on Biological Diversity promotes nature and human well-being’ (2000): <https://www.cbd.int/doc/publications/cbd-sustain-en.pdf>

15 CBD, preamble.

16 S. Bragdon, *Foundations of Food Security: Ensuring support to small-scale farmers managing agricultural biodiversity*. Quaker United Nations Office, (2017): <http://quono.org/re->



resources and access and benefit sharing aspects of the treaty became contentious issues.

### Permanent Funding Mechanism

Whilst controversial at first, it was recognised that developing countries would need support to implement the treaty. The Convention deals with this issue by creating a permanent funding mechanism, and including a provision that recognises that developing countries' implementation is dependent on developed countries adhering to their financial and technology transfer obligations.

### Supplementary Agreements

Supplementary agreements were designed after the Convention's text was adopted to take forward contentious issues that were not agreed on during its negotiation. For example, a working group was established to develop a set of guidelines that became the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity. By leaving space for additional and subsidiary agreements, the Convention's scope has developed and expanded considerably over time.

### Cooperative, Technical Approach

The CBD's follow-up mechanisms take a cooperative, expertise sharing approach, with a focus on providing guidance to State Parties and a forum for discussion of technical expertise.

#### Technical Expertise

Given the technical nature of some of the issues surrounding biodiversity, a key element of the Convention is expertise sharing between States and other actors involved in biodiversity. The Conference of the Parties

is supported by several technical and expertise sharing bodies that are established by the Convention:

- Subsidiary Body on Scientific, Technical and Technological Advice
- A clearing house mechanism
- Ad hoc committees or mechanisms established by the Conference of the Parties (COP)<sup>17</sup> as needed, for a Working Group on Biosafety.

#### Secretariat

The treaty is serviced by a secretariat based in Montreal. The Secretariat performs various functions: arranges and services meetings of the, COP performs functions assigned to it by any protocol, prepares reports on the execution of its functions for the COP, coordinates with other relevant international bodies and performs any other functions as may be determined by the COP (Article 24). The Convention also created a global forum, where governments, civil society, academics, and others meet and share ideas.

The technical bodies established by the Convention are recognised as significantly assisting States with this complex area of policy, promoting technical expertise sharing on cross-cutting issues and linking disciplines.<sup>18</sup> The Convention thereby serves as a meeting place for scientific and technical responses to conservation, and encourages innovation in these areas. Another feature is the creation of a national focal point for each Party to the Convention, assisting communication between the Convention's bodies and national governments.

### National Biodiversity Strategies and Action Plans

The main intention of the treaty is to encourage and support national level action on biodiversity,

<sup>17</sup> The governing body of the treaty.

<sup>18</sup> P. Cochrane, 'Innovation in conservation and the Convention on Biological Diversity / Peter Cochrane', in P. Figgis, J. Fitzsimons and J. Irving (eds.), *Innovation for 21st century conservation*, (Sydney, 2012).

[source/2017/3/foundations-food-security-%E2%80%93-ensuring-support-small-scale-farmers-managing](https://www.un.org/development/desa/poverty/data-inequality/2017/3/foundations-food-security-%E2%80%93-ensuring-support-small-scale-farmers-managing).

as States are required to develop their own national biodiversity strategies and action plans (NBSAPs), and to integrate these into their broader national plans for the environment and development. The creation of NBSAPs are one of only two unqualified (therefore mandatory) commitments in the Convention, (the other being article 26 to report on implementation of the Convention). The COP sets guidance for the NBSAPs. There has been an impressive compliance with this requirement, with 189 of 196 (96%) of State parties developing their own NBSAP.<sup>19</sup> In addition, in 2015, a working group was established to initiate a voluntary peer review mechanism for implementation of NBSAPs. This was established with the intention of improving peer learning and strengthening accountability. Progress towards this is still underway.

Interestingly, the understanding and content of NBSAPs has changed over time, with the second generation moving away from single fixed planning documents, and towards more of a planning process, incorporating laws and administrative procedures, scientific research agendas, programmes and projects, education and public awareness activities, etc. These are more aimed at being ‘living processes’ rather than static policy documents. Because the Convention asks Parties to ensure that their national strategy on biodiversity is incorporated into other areas of Government, this form of national strategizing should mainstream implementation of the Convention more effectively across sectors at the national level. Mainstreaming has its limits however, as many countries report the integration of biodiversity into the tourism, forestry and agricultural sectors and into climate change adaptation and mitigation but integration of biodiversity into other sectors is less common.<sup>20</sup>

19 See: <https://www.cbd.int/nbsap/>.

20 Secretariat of the CBD, Updating National Biodiversity Strategies and Action Plans in line with the Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets Training Package (Version 2.1), Module 1: An Introduction to National Biodiversity Strategies and Action Plans: <https://www.cbd.int/doc/training/nbsap/b1-train-intro-nbsap-revised-en.pdf>.

## Developing a new target-based framework

In 2010, attention was drawn to the failure to achieve CBD’s target ‘to achieve by 2010 a significant reduction of the current rate of biodiversity loss at the global, regional and national level,’ nearly two decades on from the Convention’s entry into force. At this time no government claimed to have fully met the target at the national level, and around one-fifth stated explicitly that it had not been met.<sup>21</sup> The CBD’s executive secretary at the time blamed this on the failure to mainstream biodiversity concerns into all parts of Government: ‘Above all biodiversity concerns must be integrated across all parts of government and business, and the economic value of biodiversity needs to be accounted for adequately in decision-making.’<sup>22</sup> Based on this noted failure, the COP’s strategy has since been geared towards quantifying the commitments in the Convention, making them measurable for States towards better implementation. In 2011, the COP set an overarching aspirational framework on biodiversity, known as the Aichi Biodiversity Targets, intended to support the Convention in this way. These have a timeline and are divided into goals, targets and indicators, with the flexibility to be adapted to local needs and aimed at involving the entire UN system, States and other stakeholders.

The COP has since requested updated NBSAPs from State Parties to take the targets into account in developing their new NBSAPs. So far most of the Parties (129 out of 196) have taken them into account. However, NBSAPs with quantitative targets, or targets that are closely linked to the 2010 biodiversity target, are still a minority.<sup>23</sup>

21 D. Ritter, ‘Convention on Biological Diversity a Ten Year Failure’, *Global Policy*, (2010): <http://www.globalpolicyjournal.com/blog/26/08/2010/convention-biological-diversity-ten-year-failure>.

22 J. Jowit, ‘International failure to meet target to reduce biodiversity decline’, *The Guardian*, (2010): <https://www.theguardian.com/environment/2010/apr/29/international-failure-biodiversity-decline>.

23 Secretariat of the CBD, Updating National Biodiversity Strategies and Action Plans in line with the Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets Training Package (Version 2.1), Module 1: An Introduction to National Biodiversity Strategies and Action Plans: <https://www.cbd.int/doc/training/nbsap/b1-train-intro-nbsap-revised-en.pdf>

Worryingly, of the States that have set plans based on the Aichi Targets, 90% of the targets they set for themselves fall short of the 20 global benchmarks.<sup>24</sup> Moreover, the mid-term report on progress towards the Aichi targets showed severe lack of progress, noting that despite some positive progress, and State Parties making concrete commitments, the ‘average risk of extinction for birds, mammals, amphibians and corals shows no sign of decreasing’.<sup>25</sup> Lack of progress is not easy to attribute to particular causes, but the main issues reported include limited financial, technical and human resources and capacities, limited information, lack of political will, lack of coordination between ministries, poverty, low awareness level of biodiversity issues and limited incentives for biodiversity conservation and sustainable use.<sup>26</sup> Evidently, there are still challenges in ensuring that Parties take implementation of the Convention seriously across Government. The lack of a mechanism for non-compliance exacerbates this.

#### 4. Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

*The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, known as the Aarhus Convention, (adopted by the UN Economic Commission for Europe in 1996, entered into force 2001) protects a number of*

*rights of the public with regards to the environment. It was adopted in the Danish city of Aarhus at the Fourth Ministerial Conference in the 'Environment for Europe' process. It has 47 State Parties, all of which are in Europe and Central Asia, although it is in principle open for signature by States from outside the region. Despite its regional status, it has significance globally, with proposals that it could serve as the global model for implementation of Principle 10 of the Rio Declaration on Environment and Development, taking this declaratory principle as the foundation for a binding treaty.*<sup>27</sup>

#### A binding treaty

The Aarhus Convention’s origins lie in Principle 10 of the Rio Declaration on Environment and Development, which was initially taken up and developed through non-binding Guidelines known as the Sofia Guidelines.<sup>28</sup> The Convention is unique in seeking to protect the rights of the public and empower people to have a say in decisions which affect their environment.<sup>29</sup> The Convention’s three pillars in relation to environmental matters are:

- access to information,
- public participation in decision making
- and access to justice.

Parties to the Convention are obligated to ensure that public authorities (at national, regional and local level) uphold these rights.<sup>30</sup> Parties are also legally required

24 A. Coghlan, ‘Biodiversity betrayal as nations fail miserably on co’Biodiversity betrayal as nations fail miserably on conservation’, New Scientist. (2016): <https://www.newscientist.com/article/2115585-biodiversity-betrayal-as-nations-fail-miserably-on-conservation/>.

25 Secretariat of the CBD: Global Biodiversity Outlook 4: A mid-term assessment of progress towards the implementation of the Strategic Plan for Biodiversity 2011-2020, (2014): <https://www.cbd.int/gbo/gbo4/publication/gbo4-en-hr.pdf>.

26 Secretariat of the CBD, Updating National Biodiversity Strategies and Action Plans in line with the Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets Training Package (Version 2.1), Module 1: An Introduction to National Biodiversity Strategies and Action Plans: <https://www.cbd.int/doc/training/nbsap/b1-train-intro-nbsap-revised-en.pdf>

27 In February 2009 the UNEP governing council proposed the extension of similar principles internationally.

28 UNECE Aarhus Convention Secretariat, The role of the Aarhus Convention in promoting good governance and human rights, Submission, (2012): [ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/ECONOMIC\\_COMMISSION\\_FOR\\_EUROPE.pdf](https://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/ECONOMIC_COMMISSION_FOR_EUROPE.pdf)

29 Opening remarks by Mrs. Brigita Schmögnerová, Executive Secretary, United Nations Economic Commission for Europe, First Meeting of the Parties to the Aarhus Convention, Lucca, Italy, 21-23 October 2002.

30 The three principle rights outlined in the agreement are: the right of everyone to receive environmental information that is held by public authorities, the right to participate in environmental decision-making and the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general.

to promote the application of the principles of the Aarhus Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment. The Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums develop this principle further and have been influential in encouraging increased public participation in other fora.

The Aarhus Convention was an innovative process and its adoption was regarded as an ambitious step forward in international environmental law, with the then Secretary General, Kofi Annan describing it as ‘the most ambitious venture in the area of “environmental democracy” and ‘a giant step in development of international law’<sup>31</sup>.

At the time of its adoption, there were a number of important areas that could not be agreed upon and were left open for future development. This included the specific details of the Compliance Committee and the exact form of public participation in decision-making on genetically modified organisms (GMOs). Working Groups were set up to examine these areas, eventually leading to an amendment being adopted on GMOs and the establishment of the Compliance Committee in 2002 (described later). The text in the Convention on Compliance was left intentionally open in order to encourage States to join the Convention, while at the same time allowing space to progress towards agreement on the shape and form of the compliance mechanism.<sup>32</sup>

### Transparency and participation

The subject matter of the Convention meant that transparency and participation were key features of the process towards its adoption, and in the thinking behind its implementation. There was an unprecedented level

of involvement by non-governmental organizations (NGOs) in its development and drafting.<sup>33</sup> NGOs were invited to form a coalition and take a place at the negotiating table. NGO observers had their own ‘flag’ by which to identify themselves, and the right to request the floor at each stage of the negotiating process. The openness of the environment led to language being taken up directly by diplomats engaged in the process.<sup>34</sup> NGOs were heavily involved in securing the ratifications needed for the treaty to enter into force. NGO representatives were active participants in the subsequent Meeting of the Parties (MoP). Civil society continues to play a major role in the functioning of the Convention. For example, at the annual Working Group of the Parties in Geneva there is space allocated in the agenda for civil society to make presentations on relevant themes to the Parties.

### Reporting and expertise sharing

Implementation and compliance under the Convention are established through reporting on national implementation and a compliance mechanism. State Parties must report regularly (at least every three or four years) on their implementation of the Convention.<sup>35</sup> Parties are required to prepare their national reports through a transparent and consultative process.<sup>36</sup> The Convention calls for ‘a floor, not a ceiling’ approach, establishing minimum standards to be achieved by the State parties but encouraging States Parties go beyond these minimums.<sup>37</sup> In light of the Convention’s commitment to transparency, reporting is expected to be transparent and State Parties should offer opportunities for public participation extend to the drafting of national reports where possible. In practice, the quality of reporting varies and levels of public engagement in the report-preparation process vary in particular. Despite

31 Kravchenko, S., *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements* (2007), *Colorado Journal of International Environmental Law and Policy*, 18. 1.

32 UNECE, *The Aarhus Convention, An Implementation Guide* (2014): [http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf)

33 See: [http://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/ECONOMIC\\_COMMISSION\\_FOR\\_EUROPE.pdf](http://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/ECONOMIC_COMMISSION_FOR_EUROPE.pdf).

34 Kravchenko, S., *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements* (2007), *Colorado Journal of International Environmental Law and Policy*, 18. 1.

35 Art. 5, para 4.

36 MoP Decision 1/8 on “Reporting Requirements”.

37 Art. 3, para 5.

some delays initially, reporting has improved over time, with fewer States missing deadlines.<sup>38</sup> To assist with expertise sharing between States, under the treaty there is a Clearing House that attempts to bring together information on relevant laws and processes.

## Compliance Committee

The compliance model in the Aarhus Convention is explicitly “non-confrontational, non-judicial and consultative nature”.<sup>39</sup> As such, indirect pressure and fear of suspension are the main methods it uses to ensure compliance. The principle body tasked with assessing a State Party’s adherence to the Convention is the Compliance Committee. The Compliance Committee is regarded as an innovative model of an accountability mechanism. As indicated above, this element of the Convention was developed over time, with the Convention itself merely requiring that the arrangements be of a “non-confrontational, non-judicial and consultative” and include “appropriate public involvement”.<sup>40</sup> The Compliance Committee serves as an advisory body, which reports to the MoP. Although it only has advisory powers, the Compliance Committee has a number of features, including:

- providing advice,
- making recommendations,
- requesting a time-bound strategy,
- and reporting to the MoP.

The Committee’s recommendations to the MoP are of a non-binding nature. At the MoP, States have the final say on a decision and can act on non-compliance in a variety of ways, including providing advice

and recommendations, issuing declarations of non-compliance or cautions and suspension of a Party.

All Committee members are independent experts rather than representatives of State Parties, and they cannot be removed or replaced by the Party. This model has been seen to be effective in delivering a continuity of expertise over time, and quicker, less politicised decision-making.<sup>41</sup> Committee members are elected on a rotary scheme, so that at each session, the MoP elects four or five members. NGOs can nominate experts for election to the Committee, an unusual feature. Another interesting feature is that the Committee’s meetings are generally open to the public and NGOs often participate as observers, offering comments on cases. Their positions are taken into account by the Committee in their deliberations.<sup>42</sup> Public access to information related to complaints and their resolution is almost unrestricted through the publication of Committee documents online and the openness of the Committee’s meetings.

## Cases

There have been a number of cases brought before the Committee, which are seen to have advanced standards and contributed to significant long-term positive procedural and substantive change. In some cases, the reporting of the Compliance Committee directly initiated positive policy or legislative change by State Parties. In one case, a State Party expressed gratitude to the Committee for assisting with improving its legalisation, indicating that such a compliance tool can be seen as supportive rather than punitive.<sup>43</sup> Yet some State Parties have been less collaborative, sometimes failing to show willingness to address their non-compliance, or in certain cases, making changes that

38 S. Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements* (2007), *Colorado Journal of International Environmental Law and Policy*, 18. 1.

39 S. Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements* (2007), *Colorado Journal of International Environmental Law and Policy*, 18. 1.

40 Art. 15.

41 Kravchenko, S., *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements* (2007), *Colorado Journal of International Environmental Law and Policy*, 18. 1.

42 S. Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements* (2007), *Colorado Journal of International Environmental Law and Policy*, 18. 1.

43 M. Dellinger, *Ten Years of the Aarhus Convention: How Procedural Democracy is Paving the Way for Substantive Change in National and International Environmental Law*, (2011): <https://ssrn.com/abstract=2004513>

were ineffective or actively detrimental to the situation. Where cautions have been issued, they have not always resulted in positive change, and often the changes made have been weak, partial and extremely slow to implement. In addition, there have been many more cases from eastern than western Europe.<sup>44</sup>

### Public communications

The most innovative element, and unique in international environmental law, is that a member of the public or NGO can file a non-compliance communication directly with the Committee. The mechanism follows the logic behind the treaty itself, enabling direct public participation in the compliance aspect of the Convention. This takes its inspiration from human rights treaty body mechanisms, however unlike these, there is no requirement for absolute exhaustion of domestic remedies before making a complaint. The notion of accepting communications from the public was subject to intense discussion and opposition from several States. In order to assuage some of these concerns, an opt-out clause was decided upon by the first MoP through which a State may announce that it would not accept communications from the public for a period of up to four years after ratification. No country has used this opt-out clause so far, but this was seen as necessary in gaining the support needed for the Committee's creation at the time.<sup>45</sup>

The public complaint mechanism is widely praised for democratising the agreement, giving procedural rights to the public. The Committee itself has also noted that the public complaint mechanism allows 'a unique and valuable channel of information on matters relevant to compliance, which would otherwise not necessarily come to its attention or

to that of the Meeting of the Parties.<sup>46</sup> One noted benefit of the public participation mechanism is that it has initiated and empowered civil society to work collaboratively with legal systems and Governments on both procedural and substantive change.<sup>47</sup> However, there have been some concerns about the nature of 'public participation', particularly who is involved in complaints processes and how representative some of the NGOs are. In cases brought by the public before the Committee, the first five cases were brought by well-established organizations with paid, professional staffing, rather than individuals, community or volunteer groups.<sup>48</sup> Despite the challenges faced, the Compliance Committee serves at the very least as an alternative legal venue where domestic measures have proven unsuccessful.<sup>49</sup>

## 5. Sustainable Development Goals

*Adopted in September 2015 at the UN Sustainable Development Summit, the Sustainable Development Goals (SDGs) are a non-binding set of 17 economic, social and environmental goals to be achieved by 2030 as part of the 2030 Agenda for Sustainable Development, aimed at ending poverty, fighting inequalities and tackling climate change. They are universal, unlike their predecessors, the Millennium Development Goals (MDGs). The framework is separated into goals, targets and indicators, breaking the aspirational goal down into directly measurable components. The process benefitted in many ways from learning valuable lessons from the MDGs, whilst also having a high profile compared to other international agreements.*

<sup>46</sup> Aarhus Compliance Committee Report to Second Meeting, supra note 91, 56, 248.

<sup>47</sup> M. Dellinger, Ten Years of the Aarhus Convention: How Procedural Democracy is Paving the Way for Substantive Change in National and International Environmental Law, (2011): <https://ssrn.com/abstract=2004513>.

<sup>48</sup> S. Kravchenko, The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements (2007), Colorado Journal of International Environmental Law and Policy, 18, 1.

<sup>49</sup> M. Dellinger, Ten Years of the Aarhus Convention: How Procedural Democracy is Paving the Way for Substantive Change in National and International Environmental Law, (2011): <https://ssrn.com/abstract=2004513>.

<sup>44</sup> S. Kravchenko, The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements (2007), Colorado Journal of International Environmental Law and Policy, 18, 1.

<sup>45</sup> S. Kravchenko, The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements (2007), Colorado Journal of International Environmental Law and Policy, 18, 1.

## Multi-stakeholder process

Following its inclusive process towards adoption<sup>50</sup> and reflecting a broader shift in international agreements, implementation of the Sustainable Development Goals is designed to be a multi-stakeholder process, locally-adapting the framework to suit national and local needs.

## Non-binding, but implementation focussed

The SDGs, whilst non-binding, are clearly intended to be actionable and not solely declaratory. As a non-binding framework, implementation of the SDG framework is completely voluntary, and there are no measures outlined in the adopted text for non-compliance. Instead, the framework envisions change through diplomatic peer pressure, as well as States' sharing good practice and encouraging a race to the top, with a multitude of other actors taking an active role in implementation and ultimately being responsible for holding States to account in their progress.

The MDG framework was heavily criticised for its lack of accountability and accountability within the SDGs was contentious from the start. Some States tried to stop use of the word 'accountability' entirely further into the process, and warned against 'finger-pointing' and 'naming and shaming'.<sup>51</sup> Despite intense advocacy efforts, observers noted a significant watering down of initial proposals by the end of the process, where the "politics of accountability" influenced significant compromises in the "follow-up and review framework" that was eventually decided upon.<sup>52</sup> Some States called for more robust accountability arrangements, but there was no consensus on this.<sup>53</sup> The main accountability

processes, including the follow-up and review framework and the indicators were left until after the text was signed, and even the suggestion that countries conduct a review of their progress at least every four years was removed from the text.

## Indicators and measurability

The SDGs are divided into goals, targets and indicators, which translate the aspiration (goal) into a timebound, measurable outcomes (target) and metrics to measure progress towards the target (indicator).<sup>54</sup> The detail of the indicators was not included in the agreement. Member states mandated the UN Statistical Commission to work on the development of the indicators, based on significant consultation with a wide range of stakeholders. States are also expected to develop their own national indicators. Having targets and indicators linked to the goals serves as a management tool, to assist countries in developing their own priorities, implementation strategies, and assess where resources should be allocated. Much was learnt from the recognised inadequacies of the data and metrics available in the MDGs.<sup>55</sup> The measurable and timebound elements of the framework have been widely praised, as they can be used to assess national progress, which in turn gives power to other stakeholders to follow progress and to hold States to account. Without this measurable component, the goals would simply be aspirational, without any connection to local situations, or local actors.

Whilst the emphasis on a quantitative, measurable framework has been celebrated, there have also been concerns with this approach. One is that the expanded goals, targets and indicators framework creates a large amount of work for States. Capacity is needed at a national level, for example having statistical analysis

50 Unlike the MDGs, the development of the SDGs was extremely open, as the UN conducted its largest ever consultation process before inter-State negotiations decided the final framework.

51 K. Donald, Promising the World: Accountability and the SDGs, *Heath and Human Rights Journal* (2016): <https://www.hhr-journal.org/2016/01/promising-the-world-accountability-and-the-sdgs/>.

52 K. Donald and S. Way, Accountability for the Sustainable Development Goals, A lost opportunity? *Ethics and International Affairs* (2016): <https://www.ethicsandinternational-affairs.org/2016/accountability-sustainable-development-goals-lost-opportunity/>.

53 K. Donald, Promising the World: Accountability and the

SDGs, *Heath and Human Rights Journal* (2016): <https://www.hhr-journal.org/2016/01/promising-the-world-accountability-and-the-sdgs/>.

54 For example, Indicator 31: Percentage of children (36-59 months) receiving at least one year of a quality pre-primary education program.

55 G. Schmidt-Traub, Why data and metrics are essential for future development goals to be met, *The Guardian* (2014): <https://www.theguardian.com/global-development/poverty-matters/2014/jul/04/data-metrics-millenni-um-sustainable-development-goals>.

tools and expertise to create national indicators.<sup>56</sup> To manage some of these challenges, technical support available to States, including from the UN Statistical Division.<sup>57</sup> There are wider concerns that the quantitative approach leads to technical and siloed interventions, such as ‘vertical’ interventions in global health, focusing on specific diseases, as opposed to developing health systems more holistically.<sup>58</sup> Moreover, the logic behind the SDGs of ‘simplicity, concreteness and quantification’ could leave out the most difficult and contentious issues, thereby failing to address the structural issues hampering sustainable development. As some have argued, quantification of aspirational goals must not come at expense of the need to address the underlying factors which prevent progress.<sup>59</sup>

## Follow up and review

Monitoring progress towards the SDGs at the international level takes place at the High Level Political Forum (HLPF), which meets every 4 years under the General Assembly and every year under ECOSOC. It is tasked with:

- taking stock of overall progress towards the SDGs and providing political leadership;
- reviewing a selection progress towards the Goals each year,<sup>60</sup>
- ensuring the integration of the goals holistically, by reviewing progress under overarching themes.

The HLPF is also the setting for voluntary peer reviews. Voluntary national reviews serve as markers of progress overall, reviewed by the HLPF in a multilateral setting. The aim is for States to lead by example, encouraging

a race to the top. The forum is intended to provide a space for sharing good practice and mutual learning between States. The mechanism thereby allows for the identification of champions through reporting, which can then inspire action by others. It is perhaps too early to indicate whether this mechanism has been a success or not. Initially, there were concerns about a lack of urgency particularly when only 22 States submitted national reviews to the first HLPF. However, the process is developing more quickly now, with 44 States now signed for review in 2017.<sup>61</sup> Without a set guideline for how often States should report, it is likely that engagement will be variable. Setting a frequency for reporting was a contentious issue during the negotiations and ultimately States were unable to agree to commit to having a set number of voluntary reviews per State over the 15-year period.

## National and local accountability

A central ambition of the SDGs was to decentralise and democratise the framework, shifting power to the national and local level (not just local government but also communities, business, civil society etc.), and to encourage a multitude of actors to take responsibility for their implementation. States are expected to use the SDGs to guide their national policies, and are encouraged to establish ‘country-led and country-driven’ national and regional policy reviews, prioritising target areas for reform and developing their own national indicators. All stakeholders: governments, civil society, the private sector, and others, are expected to contribute to the realisation of the agenda, with their involvement in the creation of national strategies and national indicators.<sup>62</sup> In this way, the SDGs can be measured more effectively at the national level, keeping a focus on States’ progress and holding them to account. This localization also allows actions under the global framework to be tailored to specific contexts, driving change where it is needed, by actors who are closest to the issues concerned.

56 UN DESA, Statistics Division, Third Meeting of the Inter-Agency and Expert Group on the Sustainable Development Goal Indicators, Mexico City, Mexico, 30 March – 1 April 2016, 26.4.16, ESA/STAT/AC.318/L.3.

57 <https://unstats.un.org/sdgs/>

58 S. Fukuda-Par and D. McNeill, ‘Post 2015: A New Era of Accountability?’, *Journal of Global Ethics*, (2015), 11.1: 10-17.

59 S. Fukuda-Par and D. McNeill, ‘Post 2015: A New Era of Accountability?’, *Journal of Global Ethics*, (2015), 11.1: 10-17.

60 All goals are reviewed every 4 years.

61 See: <https://sustainabledevelopment.un.org/hlpf>.

62 See: <http://un.org/sustainabledevelopment/development-agenda/>.



Whether this localisation has worked in practice is not yet clear and it is perhaps too early to assess. Compared to other international agreements, there is unprecedented public awareness and sense of ownership of the SDGs and demand for public inclusion in decision-making. However, progress is patchy. Just over a year after their adoption, at least 50 countries had taken tangible policy action, and 50 more were in the process of doing so, albeit with less demonstrable evidence.<sup>63</sup> Some countries have publicly adopted the 2030 Agenda and initiated discussions on implementation, and have set established National Councils for Sustainable Development or similar bodies, designed to engage stakeholders in the process of creating national strategies.<sup>64</sup> Yet national efforts towards implementation have been very varied, and civil society inclusion, influence and impact varies widely.<sup>65</sup> Fully inclusive efforts have been an exception.<sup>66</sup> However, the SDGs are still in their early stages of development, and the expectation is that progress towards localising them will improve over time.

Moreover, civil society lacks any concrete tools under the framework to hold Governments to account for lack of action. If a State does not initiate a national process for implementation, and does not invite other stakeholders to participate, little can be done. Civil society has created innovative approaches where it can, for example by creating national civil society reports, to shadow State reporting.<sup>67</sup> It has been argued that a framework so lacking in accountability mechanisms is only workable because of its high-profile nature and the tendency amongst States to feel that the SDGs cannot be ignored.<sup>68</sup>

63 T. Trotta, A year of Agenda 2030: the progress and challenges of the SDGs so far, Euractiv (2016): <http://www.euractiv.com/section/development-policy/news/a-year-of-agenda-2030-the-progress-and-challenges-of-the-sdgs-so-far/>.

64 See: [http://www.sustainablegoals.org.uk/wp-content/uploads/2016/03/094-096\\_SDG\\_Implementation\\_2016\\_24-02-1.pdf](http://www.sustainablegoals.org.uk/wp-content/uploads/2016/03/094-096_SDG_Implementation_2016_24-02-1.pdf).

65 CIVICUS, Learning by Doing: Civil Society Engagement in the High Level Political Forum's National Review Process (2016): <http://www.civicus.org/images/CivilSociety.HLPF.NationalReviewProcess.pdf>

66 R. Bissio, Reports from the bottom up: "The road is hazy and full of obstacles", in Spotlight on Sustainable Development, Report by the Reflection Group on the 20130 Agenda for Sustainable Development, (2016): [reflectiongroup.org/sites/default/files/contentpix/spotlight/pdfs/Agenda2030\\_engl\\_160708\\_WEB.pdf](http://reflectiongroup.org/sites/default/files/contentpix/spotlight/pdfs/Agenda2030_engl_160708_WEB.pdf).

67 See: [2030spotlight.org/en/national-civil-society-reports](http://2030spotlight.org/en/national-civil-society-reports).

68 R. Bissio, Reports from the bottom up: "The road is hazy

There are signs that the SDG framework is reflective of a broader trend away from top-down models of accountability to network-like monitoring by multiple actors. Ultimately this new model situates responsibility for implementation of international agreements with a multitude of actors, not just States. This 'polycentric' approach rightly recognises the importance of multiple actors, and means that if one actor fails in its responsibility, other layers in the system can address the task.<sup>69</sup> However, this gives rise to concerns about governance and who exactly is accountable<sup>70</sup> and if frameworks like this ultimately reduce the responsibility of States. Coupled with this are concerns that this type of implementation framework may not be able to prevent conflicts of interests, in light of increased power of business interests in the SDG framework.<sup>71</sup>

## 6. The Paris Agreement

*Agreed on 12<sup>th</sup> December 2015 by the 21<sup>st</sup> Conference of the Parties to the UN Framework Convention on Climate Change (UNFCCC), the Paris Agreement is a universal and legally binding agreement that brings together all States to address the root causes of anthropogenic climate change and adapt to its effects, supporting developing countries in particular to do so. It builds on the UNFCCC, agreeing a maximum global temperature goal and a framework for support to developing countries on climate change adaptation,*

and full of obstacles", in Spotlight on Sustainable Development, Report by the Reflection Group on the 20130 Agenda for Sustainable Development, (2016): [reflectiongroup.org/sites/default/files/contentpix/spotlight/pdfs/Agenda2030\\_engl\\_160708\\_WEB.pdf](http://reflectiongroup.org/sites/default/files/contentpix/spotlight/pdfs/Agenda2030_engl_160708_WEB.pdf).

69 J. Espey, et al, Follow-up and review of the SDG: fulfilling our commitments, Sustainable Development Solutions Network, (2016): <http://unsdsn.org/wp-content/uploads/2015/12/151130-SDSN-Follow-up-and-Review-Paper-FINAL-WEB.docx.pdf>

70 S.H. Olsen, et al, Implementing the Sustainable Development Goals (SDGs): An Assessment of the Means of Implementation (MOI), ISAP Conference Paper, (2014): [http://www.iges.org/ij/isap/2014/PDF/IPSS\\_SDGs\\_conference\\_paper.pdf](http://www.iges.org/ij/isap/2014/PDF/IPSS_SDGs_conference_paper.pdf).

71 S. Prato, 'Beyond the current means of implementation' in Spotlight on Sustainable Development, Report by the Reflection Group on the 2030 Agenda for Sustainable Development, (2016): [http://www.reflectiongroup.org/sites/default/files/contentpix/spotlight/pdfs/Agenda2030\\_engl\\_160708\\_WEB.pdf](http://www.reflectiongroup.org/sites/default/files/contentpix/spotlight/pdfs/Agenda2030_engl_160708_WEB.pdf).

*financing, technology transfer and capacity-building. Currently, 148 States are Party to the agreement, of 197 Parties to the UNFCCC. The Paris Agreement Entered into force on 4<sup>th</sup> November 2016.*

## **An Overarching Goal**

The Paris Agreement contains an ambitious overarching goal to hold a global mean surface temperature rise this century to ‘well below 2 degrees Celsius above pre-industrial levels and to pursue further efforts to limit temperature increase to 1.5 degrees Celsius’. To achieve the overall temperature goal, the Agreement includes a long-term goal on global emissions reduction, providing a framework for States to create voluntarily defined national targets, which must be progressively developed.

## **Universality**

The Paris Agreement is unique because it is a universal agreement involving all States in a joint effort to reduce greenhouse gas emissions due to human activities, and to support States’ adaption to the effects of climate change. The Kyoto Protocol, a previous climate agreement under the UNFCCC, focused on reducing developed country emissions, an important step for fairness, but was not sufficient to prevent dangerous warming as developing country emissions rose, and several significant developed country emitters either refused to participate or withdrew. In response, the lead up to Paris Agreement focussed on consensus building between all States in order to move from separate legal frameworks for developed and developing countries to a single and flexible framework for all. Within this agreement all State Parties must submit Nationally Determined Contributions (NDCs) every 5 years, take steps towards their implementation and undergo an international review.

## **A Hybrid: Binding and Non-binding**

The issue of whether it would be a binding treaty or not was highly contentious. Some States sought to create binding emission reduction commitments, with resistance from others. The final Agreement is a hybrid, composed of binding and non-binding elements, maintaining

certain different obligations for developing and developed countries. The primary binding elements of the Agreement are related to procedural duties upon States, thus making implementation and follow up the strongest part of the Agreement. For example, States are bound to “prepare, communicate and maintain” Nationally Determined Contributions (NDCs) and to ‘pursue domestic mitigation measures’ but they are not bound to meet their NDCs.

Unlike previous climate agreements, the emissions targets and financial commitments are voluntarily and nationally determined. This is believed to have enabled a universal agreement and contributed to the agreement entering into force sooner than expected.

## **Nationally Determined Contributions**

Nationally Determined Contributions are at the core of operationalising the Agreement. All Parties are required under Article 4 paragraph 2 to develop successive “nationally determined contributions” (NDCs). The exact composition of the NDCs was the source of major debate during negotiations, but NDCs must include a mitigation goal, and can include an adaption component too. There are guidelines for States on the information they ‘may include’ in their NDC. Every 5 years, States must update their NDCs, with commitments that are more ambitious than the previous ones. This ‘ratcheting up’ principle was a major achievement of the Agreement. All Parties must report regularly on their emissions and on implementation efforts.

NDCs will reflect “common by differentiated responsibilities and respective capabilities, in the light of different national circumstances.”<sup>72</sup> Developed countries therefore have different obligations from developing countries under the Agreement, with an expectation that they will take greater steps towards mitigation, including “economywide absolute emission reduction targets.”<sup>73</sup> It also takes a benchmark approach, but leaves States open to taking more ambitious steps if they wish to do so. State Parties’ NDCs have so far been hugely variable, in ambition and in format, in part

72 Art. 4.3.

73 Art. 4.4.

because Parties are still trying to define a common NDC framework in which comparative and global stocktakes are possible. There is concern that transparency and accountability will be difficult if NDCs are not easily comparable.<sup>74</sup>

## Ongoing Negotiation

Many of the details of how the Agreement will be implemented and how the reporting and review processes will function were held over for negotiation and agreement at a later stage. The 22<sup>nd</sup> Conference of the Parties to the UNFCCC (COP22) in Marrakesh served as the first meeting of the Parties to the Paris Agreement and was nicknamed the ‘implementation COP’. States agreed in Marrakesh to finalize the Paris Agreement ‘rulebook’ by 2018, detailing how the Agreement will be implemented. Certain areas of implementation remained particularly contentious at COP22 and were identified as needing further discussion. These relate to how developed countries will support and assist developing States with mitigation and adaptation. There remain, therefore, major challenges in balancing developed and developing countries’ obligations and this requires more time to reach agreement.

## Reporting and Review

There are three types of review process outlined in the Agreement:

- Review of implementation through an ‘enhanced transparency framework’ (Article 13)
- Compliance mechanism, allowing for a compliance review (Article 15)
- A ‘global stocktake’ in 2023 to ‘assess the collective progress towards achieving the purpose of [the] agreement’ (Article 14).

<sup>74</sup> C. . Martini, *Transparency: The Backbone of the Paris Agreement*, Yale University, (2016): <http://envirocenter.yale.edu/transparency-the-backbone-of-the-Paris-Agreement>.

## Enhanced Transparency Framework

The specifics of the “enhanced transparency framework” remained contentious during the negotiations and as such, the Agreement contains only a basic outline of how it will work. The reporting and review mechanisms referred to in the Agreement include:

- national communications
- biennial reports and biennial update reports
- international assessment and review
- international consultation and analysis<sup>75</sup>

All countries are required to submit information on national practice related to adaptation, mitigation and financial, technological and capacity-building support, as well as reporting on their Nationally Determined Contributions (NDCs). The reporting requirements are aimed to ensure that national commitments are communicated properly and therefore can be tracked by other stakeholders to encourage implementation. This is particularly important given the non-binding nature of State’s commitments. There will then be both a “technical expert review” and “multilateral facilitative consideration of progress”, as outlined in article 13 of the Agreement.

It is also evident that the Paris Agreement transparency mechanism will provide countries with some flexibility, depending on their status as developed, developing, least developed or small-island states. This is due to concerns that some developing States will lack the technical institutions and expertise to be able to monitor and report on progress at a national level in the same way as developed States.<sup>76</sup> The Agreement therefore recognises that some States with limited capacity will be unable to implement their transparency agreements to the same degree as others, paying ‘particular attention to the respective national

<sup>75</sup> Art. 13.4

<sup>76</sup> C. . Martini, *Transparency: The Backbone of the Paris Agreement*, Yale University, (2016):: <http://envirocenter.yale.edu/transparency-the-backbone-of-the-Paris-Agreement>.

capabilities and circumstances of Parties<sup>77</sup>. However, all States are expected to improve their transparency requirements over time. Just how far this differentiated approach for developed and developing nations will be taken remains a key question for the ongoing negotiations.

### Compliance Committee

The compliance committee, established in article 15, 'shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive.'<sup>78</sup> Again, the details are still to be worked out. Given its framing as non-adversarial and non-punitive the compliance committee is likely to take an approach which emphasises supporting implementation of States' NDCs. The committee will not be able to review or take action on compliance with a State's NDC, as this aspect of the Agreement is not binding. It could, however, function to ensure that parties meet their obligations in relation to preparing, communicating, maintaining, and updating their NDCs, or in meeting their reporting obligations.<sup>79</sup> In this way, it could also serve to measure progress on implementation over time.

### **Technical support**

The UNFCCC has subsidiary bodies which provide support to States in regard to the Convention, and now elements of the Paris Agreement, for example:

- the Subsidiary Body for Scientific and Technological Advice (SBSTA),
- the Subsidiary Body for Implementation (SBI)
- and the Technology Mechanism (TEC)

There is a provision in the Agreement to set up additional subsidiary bodies where needed.

<sup>77</sup> Art. 15.2

<sup>78</sup> Art. 15.

<sup>79</sup> A. Abeyasinghe and S. Barakat, *The Paris Agreement: Options for an effective compliance and implementation mechanism*, IIED (2016): <http://pubs.iied.org/pdfs/10166IIED.pdf>

The Intergovernmental Panel on Climate Change (IPCC) is the international body established in 1988 to 'assess scientific, technical, and socioeconomic information that is relevant in understanding human-induced climate change, its potential impacts, and options for mitigation and adaptation.'<sup>80</sup> IPCC Reports provide UNFCCC negotiators and decision makers with evidence-based assessments on which to develop effective and sufficient climate action policies. Hundreds of leading scientists and experts from a wide range of backgrounds help collate published scientific literature to produce both the IPCC Assessment Reports and Special Reports. The assessments are not intended to be policy prescriptive (i.e. tell policymakers what actions to take) but instead to inform the policy-making process. Considerable importance has been attached to ensuring that rigorous scientific research feeds into the political processes in this way. It can be argued that scientific findings from IPCC Reports played a critical role in the level of ambition reflected in the Paris Agreement.

Despite the emphasis on follow up and review, there is unlikely to be a mechanism under the Agreement for situations in which a State fails to set a target in their NDC by a specific date, and no enforcement in situations where a target is not reached. Accountability will remain heavily reliant on external attention and monitoring by other stakeholders outside the UN, who may challenge a State's non-compliance. The high-level attention paid to the Paris Agreement overall and widespread recognition of the urgency of the situation mean that significant political weight has been and will continue to be essential to ensure the agreement achieves its goal.

<sup>80</sup> See: <http://www.ipcc.ch/ipccreports/tar/wg2/index.php?idp=22>.

## Part II: Analysis and Conclusions—Elements of Effective Implementation, Monitoring and Accountability Mechanisms

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Despite major differences across these agreements, there are some important similarities in approaches to implementation, monitoring and accountability from different areas of international policy, as well as lessons that can be learned about what is most effective. Below, we share some general observations and some elements drawn from analysis of these mechanisms that we believe are useful for consideration in the development of a global compact on migration.

### General Observations

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1. There appears to be a trend towards soft law frameworks that include implementation and follow-up mechanisms. This includes an increasing interest in goals-based frameworks, with measurable targets and indicators. Recent examples, such as the SDGs, have not had sufficient time to prove their success or otherwise. Whilst these agreements can help enable global consensus, create significant momentum on an issue and establish a measurable plan of action, there remain concerns about their lack of tools to deal with situations of slow progress or non-compliance. Under non-binding agreements, well-considered and effective follow-up mechanisms are important in enhancing the capacity of the agreement to make a positive impact.
2. Some binding agreements that have significant implementation gaps have been reinvigorated by developing follow up frameworks. This was the case for the Aichi Biodiversity Targets, giving new momentum to the CBD through a target based framework. Similarly, the Paris Agreement, responded to a previous non-universal agreement. The Optional Protocol to the Convention Against Torture can also be seen in this light, creating procedural duties based on existing legal commitments under human rights treaties. Through these initiatives, the existing agreed standards were used as baselines, and provided the overall framing for what could be considered as workplans or roadmaps for their implementation. In this vein, the Global Compact for Migration can be seen as an opportunity to increase momentum around existing international standards, revitalising and strengthening implementation of existing standards on migration such as on labour and human rights. An alternative is also possible, as seen with the Aarhus Convention which builds a binding agreement to enhance the implementation of a commitment from a declaration.
3. At the time of adoption, some agreements left the specifics of implementation, monitoring and accountability mechanisms open, with further negotiation at a later stage (sometimes with an agreed timetable). This can be necessary where agreement cannot be reached on these mechanisms at the time of adoption. However, the impact of leaving an agreement open-ended, without including detail on the specifics of mechanisms, may also be to weaken its overall strength and create space for tensions to develop later. Under both the SDGs and the Paris Agreement, development of these mechanisms will take time.
4. Many of the agreements reviewed in this paper also left particularly contentious areas open to further development and negotiation at the time of adoption. This allowed agreements to progress more quickly overall, rather than be stalled by a lack of convergence on a particular aspect. At the same time, some areas of agreements developed into binding subsidiary agreements after adoption of the initial text, for example the Optional Protocols to the Convention on the Rights of the Child. Ensuring flexibility within the initial agreement is therefore

helpful in enabling continued progress towards consensus on areas of divergence and development of stronger standards on areas of convergence.

5. Mixed models may be considered where there are tensions around whether an agreement should be binding. Given the importance of follow-up tools in non-binding agreements, a non-binding goal-based framework can be combined with a binding follow-up mechanism, so that emphasis is placed on ensuring progressive implementation. Making follow-up the strongest part of the agreement can help ensure States review their policies periodically, whilst giving them freedom to decide the content. For example, the Parties to the Paris Agreement must produce Nationally Determined Contributions periodically, improving them each time, but the specific content and progress towards targets are not binding.
6. Expert advice from independent sources was a feature of all agreements reviewed, but their role was more prominent in older, binding agreements. In older models reviewed, expert bodies had greater capacities to seek further information and provide additional guidance to States. These models were envisaged as offering support and assistance to States with their implementation. However, where a review function or quasi-judicial role is coupled with the expert advice function (as with many of the treaty bodies) these are perceived as more confrontational. For all States, support and assistance is needed, but especially for those with fewer resources. How States can be supported through such mechanisms may be especially important as the trend towards indicators increases the detail required for reporting on implementation of international agreements.
7. There is an interest in decentralisation and democratisation of international agreements, which in turn increases the roles and responsibilities of non-State actors as implementers of agreements. Transparency and participation were of central importance to the non-binding agreements

reviewed, especially in the implementation, monitoring and accountability mechanism created. In addition, without binding compliance mechanisms, the role of civil society actors becomes more important in measuring progress towards an agreement, and as such, significant investment may be needed to ensure continuing public awareness of such agreements.

8. Follow-up and accountability mechanisms that were designed around the people and organisations most affected by the agreement were better equipped to receive information about situations on the ground and to engage local actors responsible for implementation. The Aarhus Convention, ILO system and Human Rights Treaty Bodies best reflected the utility of this, particularly through reporting and complaints mechanisms with these actors in mind. For the purposes of an agreement on migration, it is worth considering how migrants themselves, as well as other groups who will be affected by the agreement (and those who will be direct implementers of it), such as civil society organisations (especially migrant led-organisations), trade unions, employers and local governments will be involved in developing such mechanisms and in the structures themselves.

## Elements of effective implementation, monitoring and accountability mechanisms

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Where possible, a range of different methods should be combined under one agreement, as this allows a range of tools to be used by different actors, enabling States to gain assistance from a variety of sources.

1. **National Strategies** on national implementation enable the aims and commitments of the agreement to be translated into deliverable action plans. These can include guidance/review mechanisms and be supported by a technical expert body. Where they are prepared and developed in consultation with

a wide range of different actors they can assist in delivering a whole of government response and building support from the public. Where agreements need to engage different areas within government, a **national focal point** may help. A schedule for reporting is helpful, and it can be required that strategies include progressive targets, creating a ‘ratcheting up’ effect, ensuring positive progress over time. National strategies can be considered as active processes rather than static documents.

2. **Participation and transparency tools**, that enable those most affected by an agreement to be involved directly in implementation and accountability mechanisms. These include shadow reporting, individual or collective inquiries or complaints and the ability of civil society actors to contribute to and/or comment on decisions taken. Membership of civil society actors in decision-making bodies could be considered. Individual complaints mechanisms can be an important safeguard where access to justice is not possible through national channels. Agreements supported by transparent information and resources enable greater awareness and understanding of an agreement and help build capacity to support implementation and respond to failures to implement.
3. **An independent technical advisory body** to offer impartial, non-politicised research and guidance and facilitate dissemination of good practice and which can contribute to technical assistance. Expertise can be drawn from a wide range of experts and affected communities and can be compiled into periodic reports, providing a global stocktake of achievements towards the aims of an agreement.
4. **A forum for practice sharing and cooperation** in a multilateral setting to allow a peer-peer exchange. This enables States to share good practice, as well as challenges and ways that these have been overcome, with a mutually supportive approach towards implementation. Opening out this exchange to non-State actors can improve the

link between multilateral and local discussions on implementation.

5. **Regular Review** of implementation in a **multilateral** setting and/or by an **independent expert body** with tools at its disposal for enabling dialogue, providing recommendations and raising concerns with States. Scheduled reviews ensure an equal level of scrutiny for all States. A multilateral forum can help promote a ‘race to the top’ on implementation. Review by an independent, expert, legal or quasi-judicial body can assist States with implementation by giving cooperative support. This is particularly important to ensure that States are compliant with existing international standards, as well as new agreements. Concrete outputs such as recommendations and concluding observations give authoritative guidance to assist implementation at national level. A combination of approaches is most effective.
6. **A mechanism for non-compliance, including a forum for State-to-State mediation and dialogue** that has tools to engage the State Parties to bring about a resolution of a situation. A mechanism of this nature should have the tools to take action where situations are particularly grave or require additional attention. Mechanisms can be created so that they report to a body of States before action is taken. Such a mechanism could be utilised for non-compliance with a State’s reporting requirements and/or the lack of progress towards a particular target or goal. Due to the inherently cross-border nature of migration, a mechanism concerning State-State relationships and duties, allowing for dialogue and mediation, may be worth consideration.

We would also recommend considering not just what can be learnt from existing mechanisms but also how existing mechanisms could be used to follow up on global compact for safe, orderly and regular migration.

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