

# Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities

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On December 13, 2006, the General Assembly adopted the United Nations Convention on the Rights of Persons with Disabilities (CRPD, or Convention)<sup>1</sup> along with its Optional Protocol<sup>2</sup> by general consensus.<sup>3</sup> The CRPD opened for signature on March 30, 2007, and entered into force on May 3, 2008.<sup>4</sup> As such, the Convention is the first human rights treaty of the twenty-first century, as well as the first legally enforceable United Nations instrument specifically directed at persons with disabilities.<sup>5</sup>

This chapter provides an overview of the background to the Convention's adoption, summarizes the contents of the CRPD, and then assesses its future

<sup>1</sup> Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (2007) [hereinafter CRPD].

<sup>2</sup> Optional Protocol to the Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (2007) [hereinafter Optional Protocol].

<sup>3</sup> See *General Assembly Adopts Groundbreaking Convention, Optional Protocol on Rights of Persons with Disabilities: Delegations, Civil Society Hail First Human Rights Treaty of Twenty-First Century*, GA/105554 (United Nations Department of Public Information December 13, 2006), available online at <<http://www.un.org/News/Press/docs/2006/ga10554.doc.htm>>.

<sup>4</sup> The CRPD text, along with its drafting history, resolutions, and updated list of States Parties is posted on the United Nations Enable website, available online at <<http://www.un.org/esa/socdev/enable/rights/convtexte.htm>>.

<sup>5</sup> The CRPD required ratification by twenty States Parties to enter into force and trigger the establishment of a monitoring Committee on the Rights of Persons with Disabilities. See CRPD, *supra* note 1, at art. 45(1) ("The present Convention shall enter into force on the thirtieth day after the deposit of the twentieth instrument of ratification or accession."); *id.* at art. 45(2) ("For each State or regional integration organization ratifying, formally confirming or acceding to the Convention after the deposit of the twentieth such instrument, the Convention shall enter into force on the thirtieth day after the deposit of its own such instrument."); Optional Protocol, *supra* note 2, at art. 13(1) ("Subject to the entry into force of this Convention, the present Protocol shall enter into force on the thirtieth day after the deposit of the tenth instrument of ratification or accession.").

prospects for improving the lives of the six hundred and fifty million individuals with disabilities worldwide.<sup>6</sup> When looking forward we focus on three areas where we believe the Convention will have the most immediate impact, beginning with more abstract notions that include reconceptualizing disability as a human rights issue and moving thereafter towards more concrete results.<sup>7</sup>

## 1 *Toward a Disability Human Rights Convention*

From the time of its establishment in the wake of World War II through the end of the last century, the United Nations promulgated seven core human rights conventions.<sup>8</sup> Each of these treaties contains legal obligations that theoretically apply to persons with disabilities, but they are rarely applied in practice.<sup>9</sup> To

<sup>6</sup> Gerard Quinn & Theresia Degener, *Human Rights and Disability: The Current use and Future Potential of United Nations Human Rights Instruments in the Context of Disability 1* (2002), *available online at* <<http://www.nhri.net/pdf/disability.pdf>>.

<sup>7</sup> For earlier accounts that were drawn upon for this chapter, see Janet E. Lord & Michael Ashley Stein, *The Committee on the Rights of Persons with Disabilities*, in *The United Nations and Human Rights: A Critical Appraisal* \_\_\_\_\_ (Philip Alston & Frédéric Mégret eds., forthcoming Oxford University Press); Michael Ashley Stein, *Disability Human Rights*, 95 Cal. L. Rev. 75 (2007).

<sup>8</sup> Prior to the adoption of the CRPD, which represents the eighth UN hard law treaty, the core human rights treaties include: International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16 at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16 at 49, U.N. Doc. A/6316 (1966) [hereinafter ICESCR]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Annex, Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984) [hereinafter CAT]; Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1981) [hereinafter CEDAW]; International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. GAOR, Supp. No. 14, at 47, U.N. Doc. A/6014 (1966) [hereinafter CERD]; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158 of 18 December 1990 [hereinafter ICRMW]; Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 16, U.N. Doc. A/44/49 (1989) [hereinafter CRC]. A ninth core convention has also recently been adopted but not yet entered into force: International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, 20 December 2006.

<sup>9</sup> For example, in the decade 1994–2003, seventeen disability-related complaints were asserted under the seven core United Nations instruments, but thirteen were declared inadmissible by their respective monitoring committees. The website maintained by the Office of the High Commissioner for Human Rights (OHCHR) contains detailed information on the operation of the United Nations human rights treaty bodies, and is *available online at* <<http://www.ohchr.org/english/bodies/>>. The general comments of the human rights treaty bodies and other work

invoke protection under any of these core instruments, a disabled person must either fall under a universal provision that by inference includes her as a person, or possess a separately protected characteristic in addition to her disability.<sup>10</sup> The principal difficulty with this approach is that existing human rights obligations are not tailored to address the specific barriers faced by persons with disabilities in the realization of their human rights. As such, human rights obligations have not been effectively utilized to address the situation of persons with disabilities, for example, regarding their access to justice or non-discrimination in the workplace.

Specifically, the International Covenant on Civil and Political Rights (ICCPR),<sup>11</sup> the International Covenant on Economic, Social, and Cultural Rights (ICESCR),<sup>12</sup> and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)<sup>13</sup> are each universal in scope and so implicitly include persons with disabilities within their purview.<sup>14</sup> By comparison, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),<sup>15</sup> Convention on the Elimination of All Forms

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product may be accessed through the OHCHR website, as well as the Netherlands Institute of Human Rights web page, *available online at* <<http://sim.law.uu.nl/sim/Dochome.nsf>>.

<sup>10</sup> See generally Gerard Quinn, *The International Covenant on Civil and Political Rights and Disability: A Conceptual Framework*, in Human Rights and Disabled Persons 69 (Theresia Degener & Yolán Koster-Dreese eds., Kluwer Academic Publishers 1995) [hereinafter Human Rights and Disabled Persons]; Philip Alston, *Disability and the International Covenant on Economic, Social, and Cultural Rights*, in Human Rights and Disabled Persons, *supra*, at 94; Manfred Nowak & Walter Suntinger, *The Right of Disabled People Not to be Subjected to Torture, Inhuman and Degrading Treatment or Punishment*, in Human Rights and Disabled Persons, *supra*, at 117.

<sup>11</sup> See, e.g., ICCPR, *supra* note 8, at pmb. (averring that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”).

<sup>12</sup> See, e.g., ICESCR, *supra* note 8, at art. 2, para. 2 (the rights enumerated in the ICESCR “will be exercised without discrimination of any kind as to race, colour . . . or other status”).

<sup>13</sup> See, e.g., CAT, *supra* note 8, at art. 1(1) (implicitly covering disability-based discrimination within its definition of torture which is “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of committing, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.”) [emphasis added].

<sup>14</sup> For a discussion of the application of existing human rights obligations to persons with disabilities, see National Council on Disability, *A White Paper – Understanding the Role of an International Convention on the Human Rights of People with Disabilities* (Janet E. Lord, principal author, Washington DC, June 12, 2002), *available online at* <[http://www.ncd.gov/newsroom/publications/2002/unwhitepaper\\_05-23-02.htm](http://www.ncd.gov/newsroom/publications/2002/unwhitepaper_05-23-02.htm)>.

<sup>15</sup> See, e.g., CERD, *supra* note 8, at art. 1 (implicitly prohibiting discrimination against persons with disabilities who face racial discrimination defined as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose

of Discrimination against Women (CEDAW),<sup>16</sup> the Convention on the Rights of the Child (CRC),<sup>17</sup> and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPMW),<sup>18</sup> each target a specific identity characteristic that can overlap with an individual also having a disability,<sup>19</sup> but otherwise are not directed toward persons with disabilities.<sup>20</sup>

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or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”)

<sup>16</sup> See, e.g., CEDAW, *supra* note 8, at arts. 1–2 (implicitly covering discrimination against women with disabilities insofar as Article 2 of CEDAW provides that “States Parties condemn discrimination against women in all its forms” and defines the term “discrimination against women” in Article 1 as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”)

<sup>17</sup> See, e.g., CRC, *supra* note 8, at art. 2 (providing that the rights of the child in the CRC are to be respected and ensured “without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”). While its non-discrimination clause identifies disability as a specific prohibited ground of discrimination, Article 23 of CRC addresses the rights of the disabled child, recognizing in art. 23(1) “that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community.”)

<sup>18</sup> See, e.g., ICRMW, *supra* note 8, at art. 7 (providing that the rights of “all migrant workers and members of their families” should be respected and ensured “without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.”)

<sup>19</sup> These provisions can be seen as a mixed blessing. They provide an added avenue of protection for disabled persons experiencing multiple forms of discrimination. For example, a person may suffer prejudice as a result of having a disability and due to aboriginal heritage. Yet, these instruments only protect those individuals encountering serial discrimination. And because disability is almost uniformly relegated to the universal “other” status, disability-specific rights are frequently overlooked. An example of such disregard is the Declaration that proceeded from the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance that was convened in Durban, South Africa. See World Conference Against Racism, Racial Discrimination, Xenophobia & Related Intolerance, Aug. 31–Sept. 8, 2001, Durban Declaration and Programme of Action, U.N. Doc. No. A/CONF.189/12, *available online at* <<http://www.unhchr.ch/pdf/Durban.pdf>>. The Declaration encouraged the General Assembly to enact disability-specific human rights protection but did not itself include disability among the otherwise inclusive catalog of identity statuses it deemed to suffer discrimination. See *id.* at para. 180. Consequently, individuals whose rights are violated “solely” due to their disability identity receive no added protection.

<sup>20</sup> The CRC alone among these identity-specific treaties contains a distinct disability-related article. See CRC, *supra* note 8, at art. 23, para. 1. (States Parties must recognize the rights of

While some progress was made in the formulation of international standards relating to disability and the placement of disability issues on the international agenda, these efforts did not culminate in legally binding measures. Early initiatives include the adoption of the Declaration on the Rights of Mentally Retarded Persons<sup>21</sup> and the Declaration on the Rights of Disabled Persons during the 1970s.<sup>22</sup> These were significant steps in terms of raising awareness about the human rights of people with disabilities, but they reflected medical and charity models of disability and were heavy-laden with paternalism.

Significant progress was made during the 1980s with designations of the International Year of the Disabled in 1981<sup>23</sup> and the International Decade of Disabled Persons from 1982–1991.<sup>24</sup> In 1982, the General Assembly adopted a World Programme of Action Concerning Disabled Persons<sup>25</sup> to encourage national level programs aimed at achieving equality for people with disabilities.<sup>26</sup> In 1993,

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children with disabilities to enjoy “full and decent” lives and participate in their communities.). However, this obligation is tempered by the relative financial constraints of States Parties, and also does not mandate that children with disabilities be treated or considered equal to children without disabilities. *See id.* at art. 23, paras. 1–3 (“[T]he disabled child has effective access to and receives education, training...preparation for employment and recreational opportunities in a manner conducive to the child’s achieving the fullest possible social integration and individual development...”). *See generally* Thomas Hammarberg, *The Rights of Disabled Children – The UN Convention on the Rights of the Child*, in *Human Rights and Disabled Persons*, *supra* note 10, at 147.

<sup>21</sup> Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856 (XXVI), U.N. GAOR, Supp. No. 29 at 93, U.N. Doc. A/8429 (1971). This document soon came under heavy criticism by the disability community for qualifying the scope of rights for people with intellectual disabilities both in providing that “the mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings” and in terms of its goal for societies which is to promote “their integration as far as possible in normal life.” *Id.* at art. 1; preamble para. 5.

<sup>22</sup> Declaration on the Rights of Disabled Persons, G.A. Res. 3447 (XXX), U.N. GAOR, Supp. No. 34 at 88, U.N. Doc. A/10034 (1975).

<sup>23</sup> International Year of Disabled Persons, G.A. Res. 36/77, U.N. GAOR, 36th Sess., Supp. No. 77 at 176, U.N. Doc. A/RES/36/77 (1981).

<sup>24</sup> Implementation of the World Programme of Action Concerning Disabled Persons, G.A. Res. 37/53, U.N. GAOR, 37th Sess., Supp. No. 53 at 186–87, para. 11, U.N. Doc. A/RES/37/53 (1982).

<sup>25</sup> World Programme of Action Concerning Disabled Persons, G.A. Res. 37/52, U.N. GAOR, 37th Sess., Supp. No. 51 at 185, U.N. Doc. A/RES/37/52 (1982).

<sup>26</sup> *Id.* The World Programme of Action identifies the general situations of persons with disabilities across the full spectrum of life and articulates proposals aimed at implementing a full range of programming to integrate disabled people into their communities. For proposals identifying national level action, see *id.* at paras. 87–90 (providing, *inter alia*, that “Member States should urgently initiate national long-term programmes to achieve the objectives of the World Programme of Action; such programmes should be an integral component of the nation’s general policy for socio-economic development.”).

the United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities<sup>27</sup> were adopted as a blueprint for policy-making and to provide a basis for technical and economic cooperation among states. The Standard Rules establish a monitoring mechanism through the appointment of a Special Rapporteur who reports to the Commission on Social Development.<sup>28</sup>

The drawbacks to these initiatives are that they lack legally binding character, and also set forth an outmoded, medical and charity-based understanding of disability.<sup>29</sup> Consequently, prior to the adoption of the CRPD, the human rights of persons with disabilities were in theory covered by human rights treaty obligations and addressed in non-binding resolutions and declarations, but in practice were protected by neither. This situation led Special Rapporteur Leandro Despouy to caution that in the absence of specific treaty protection, human rights abuses against disabled persons likely would continue without redress.<sup>30</sup>

Acting on previous proposals to address the lack of specific human rights protection for disabled persons,<sup>31</sup> in December 2001 the General Assembly established an Ad Hoc Committee to consider enacting a disability-based human

<sup>27</sup> Standard Rules on the Equalization of Opportunities for Persons With Disabilities, G.A. Res. 48/96, at 202, U.N. GAOR, 48th Sess, Supp. No. 49 at 68, U.N. Doc. A/RES/48/96 (1993) [hereinafter Standard Rules].

<sup>28</sup> See generally United Nations Enable, The Special Rapporteur on Disability of the Commission for Social Development, available online at <<http://www.un.org/esa/socdev/enable/rapporteur.htm>>. For an insider's perspective on the role of the Special Rapporteur, see Bengt Lindqvist, *Standard Rules in the Disability Field – A New United Nations Instrument*, in Human Rights and Disabled Persons, *supra* note 10, at 63.

<sup>29</sup> Whether human rights treaties are actually enforceable is the subject of heated academic debate. Compare, e.g., Oona A. Hathaway, *The Cost of Commitment*, 55 Stan. L. Rev. 1821 (2003) (maintaining that traditional understandings of treaty ratification do not adequately account for the likelihood of State compliance); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 Yale L.J. 1935 (2002) (asserting that some number of States ratify human rights treaties as a means of avoiding observance), with Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 Duke L.J. 621 (2004) (arguing that international human rights treaties encourage domestic legal norm changes); Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 13 Euro. J. Int'l. L. 171 (2003) (same, while also critiquing the empirical evidence upon which Hathaway based her conclusions). For a harmonizing approach, see Alex Geisinger & Michael Ashley Stein, *A Theory of Expressive International Law*, 60 Vand. L. Rev. 77 (2007).

<sup>30</sup> Leandro Despouy, Report on Human Rights and Disabled Persons paras. 280–81 (1993), available online at <<http://www.un.org/esa/socdev/enable/dispaperdes0.htm>> (noting that “persons with disabilities are going to find themselves in a legal disadvantage in relation to other vulnerable groups” because “unlike the other vulnerable groups, they do not have an international control body to provide them with particular and specific protection”).

<sup>31</sup> Notably, in 1987, Italy proffered a convention draft during the forty-second session of the General Assembly. See U.N. GAOR, 42nd Sess., 16th mtg., U.N. Doc. A/C.3/42/SR.16 (Oct. 19,

rights instrument.<sup>32</sup> The Ad Hoc Committee in turn established a working group to draft a foundational text that would form the basis of future negotiations.<sup>33</sup> On January 16, 2004, the working group issued draft CRPD articles for consideration beginning with the next, third, Ad Hoc session; on August 25, 2006, the last day for negotiating and amending the proposed Convention at the eighth session, the Ad Hoc Committee adopted the CRPD.<sup>34</sup>

## 2 *An Overview of the Convention*

The CRPD is modeled after recent United Nations human rights conventions, and especially the CRC, in two significant substantive ways.<sup>35</sup> Adhering to the central objective of the human right to development,<sup>36</sup> the Convention holistically

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1987). Sweden did the same two years later at the General Assembly's forty-fourth session. See U.N. GAOR, 44th Sess., 16th mtg., U.N. Doc. A/C.3/44/SR.16 (Oct. 24, 1989).

<sup>32</sup> Comprehensive and Integral International Convention to Promote and Protect the Rights and Dignity of Persons with Disabilities, G.A. Res. 56/168, U.N. GAOR, 56th Sess., Supp. No. 168, U.N. Doc. A/RES/56/168 (Dec. 19, 2001). A detailed description of the political process behind the United Nations decision to go forward with a disability human rights convention is set forth in the National Council on Disability, Newsroom, *UN Disability Convention – Topics at a Glance: History of the Process*, available online at <[http://www.ncd.gov/newsroom/publications/2003/history\\_process.htm](http://www.ncd.gov/newsroom/publications/2003/history_process.htm)>.

<sup>33</sup> Ad Hoc Comm. on a Comprehensive and Integral International Convention on the Prot. & Promotion of the Rights & Dignity of Pers. with Disabilities, Report of the Working Group to the Ad Hoc Committee, U.N. Doc. A/AC.265/2004/WG.1 para. 1 (Jan. 27, 2004). The working group included twelve nongovernmental organizations (“NGOs”). See *id.* at para. 2. The inclusion of NGOs at this stage was unprecedented in the normal course of treaty development at the United Nations, and can be interpreted as acquiescence to NGOs’ assertion of “nothing about us without us.”

<sup>34</sup> The Ad Hoc Committee held eight sessions in total, in addition to the January 2004 Working Group meeting. The sessions ran from 2002 until August 2006, after which the adopted draft Convention was submitted to a technical drafting committee to be reviewed and “cleaned” and made ready for submission to the entire General Assembly. The Convention was officially adopted by the General Assembly on Dec. 13, 2006. More on each session of the Ad Hoc Committee sessions is available online at: <<http://www.un.org/esa/socdev/enable/rights/adhoccom.htm>>.

<sup>35</sup> See generally Henry J. Steiner & Philip Alston, *International Human Rights in Context: Law, Politics, Morals* 136–322 (2d ed., Oxford University Press 2000).

<sup>36</sup> The General Assembly’s Declaration on the Right to Development established development as a human right in 1986. See Declaration on the Right to Development, G.A. Res. 41/128, Annex, U.N. GAOR, 41st Sess., Supp. No. 53 at 183, U.N. Doc. A/RES/41/128 (1986). Subsequently, the 1993 Vienna Declaration proclaimed the right to development was “a universal and inalienable right” as well as “an integral part of fundamental human rights.” World Conference on Human Rights, June 14–25, 1993, Vienna Declaration and Programme of Action, U.N. Doc A/CONF. 157/23, para. 10 (July 12, 1993), available online at <<http://www>

melds civil and political rights with economic, social, and cultural rights.<sup>37</sup> Put another way, the CRPD aspires to manifest the mandate that human rights are “indivisible, interrelated and interconnected.”<sup>38</sup> It also emulates the CRC by articulating a comprehensive catalog of human rights obligations within the circumstances of a particular group, here, persons with disabilities.<sup>39</sup>

With a few notable variances, the structure of the CRPD likewise is similar to that of the CRC.<sup>40</sup> The Convention’s articles are introductory,<sup>41</sup> of general application,<sup>42</sup> enumerate substantive rights,<sup>43</sup> set forth implementation and monitoring provisions,<sup>44</sup> and promulgate rules to govern the operation of the Convention.<sup>45</sup> An Optional Protocol governs communications and procedures of inquiry.<sup>46</sup>

Significant for a human rights treaty, the CRPD sets forth its explicit purpose.<sup>47</sup> Article 1 declares the Convention’s objective is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”<sup>48</sup> It conceives of disability as being inclusive of, but not limited to “long-term physical,

.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En> [hereinafter Vienna Declaration]. See generally Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 Harv. Hum. Rts. Y.B. 3 (1988); Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 Rutgers L. Rev. 435 (1981).

<sup>37</sup> See Stein, *supra* note 7, at 94–98; Michael Ashley Stein & Penelope J. S. Stein, *Beyond Disability Civil Rights*, 58 Hastings L.J. 1203, 1212–14 (2007).

<sup>38</sup> Vienna Declaration, *supra* note 36 at para. 63.

<sup>39</sup> Beginning in the mid-1960s, the United Nations considered the disadvantage experienced by certain populations to human rights abuses that were not addressed with any degree of specificity in existing international human rights law and initiated human rights treaty drafting in respect of specific groups. See NCD White Paper, *supra* note 14, at Part II.

<sup>40</sup> For instance, a separate article that announces its purpose, see CRPD, *supra* note 1, at art. 1, and the absence of a formal explanation of the protected class in the definition article, see *id.* at art. 2.

<sup>41</sup> See CRPD, *supra* note 1, at preamble, arts. 1–2.

<sup>42</sup> See *id.* at arts. 3–9.

<sup>43</sup> See *id.* at arts. 10–30.

<sup>44</sup> See *id.* at arts. 31–40.

<sup>45</sup> See *id.* at arts. 41–50.

<sup>46</sup> See Optional Protocol, *supra* note 2.

<sup>47</sup> Articulation of general principles are a common feature of international environmental agreements, see e.g., United Nations Framework Convention on Climate Change, 9 May 1992, entered into force 24 March 1994, reprinted in 31 I.L.M. 849 (1992), Article 4(1)(i), and other framework conventions, for instance the WHO Framework Convention on Tobacco Control, UN Doc. A56/8. Geneva: WHO, 2003 art 3, available online at <[http://www.who.int/tobacco/framework/WHO\\_FCTC\\_english.pdf](http://www.who.int/tobacco/framework/WHO_FCTC_english.pdf)>.

<sup>48</sup> CRPD, at art. 1.

mental, intellectual or sensory impairments.”<sup>49</sup> Moreover, it firmly grounds the disability classification in the social model of disability by stating that as a condition it arises from “interaction with various barriers may hinder their full and effective participation in society on an equal basis with others” rather than as an inherent limitation.<sup>50</sup> Because these conceptual norms are set forth in the purpose article, it follows that States cannot enter permissible reservations to the normative contents of this article.<sup>51</sup>

“Disability” is not directly defined in Article 2.<sup>52</sup> Instead, Article 1 of the Preamble affirms the social construction of disability in which limitations arise from a person’s interaction with environmental barriers rather than as the consequence of an individualized impairment.<sup>53</sup> Article 2 broadly defines the terms “communication,”<sup>54</sup> “language,”<sup>55</sup> and “universal design,”<sup>56</sup> and takes an expansive approach to two disability-specific terms central to the interpretation of non-discrimination principles as they apply to persons with disabilities. Accordingly, discrimination that ensues “on the basis of disability” includes “any distinction, exclusion or restriction on the basis of disability” that “has the purpose or effect

<sup>49</sup> *Id.*

<sup>50</sup> See CRPD, at art. 1

<sup>51</sup> Article 19 of the Vienna Convention on the Law of Treaties prohibits a State from entering a reservation to a treaty, *inter alia*, where the “reservation is incompatible with the object and purpose of the treaty.” Vienna Convention on the Law of Treaties, G.A. Res. 2166 (XXI) of 5 December 1966 and 2287 (XXII) of 6 December 1967, 1150 U.N.T.S. 331.

<sup>52</sup> The same holds true for the European Union’s employment discrimination directive. See Council of Europe Directive Establishing a Framework for Equal Treatment in Employment and Occupation, 200/78/EC (27 November, 2000) [hereinafter EU Framework Directive]; Lisa Waddington, *Implementing the Disability Provisions of the Framework Employment Directive: Room for Exercising National Discretion*, in *Disability Rights in Europe: From Theory to Practice* 107, 109 (Anna Lawson & Caroline Gooding eds., Hart Publishing 2005) (“EC directives set goals which Member States are obliged to achieve within a given period, but leave Member States free to select the most appropriate means of achieving those goals.”).

<sup>53</sup> See CRPD, *supra* note 1, at preambular para. (e) (“Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others”) (emphasis in original).

<sup>54</sup> See *id.* at art. 2 (defining communication to include “languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology”).

<sup>55</sup> See *id.* (defining language to include “spoken and signed languages and other forms of non spoken languages”).

<sup>56</sup> See *id.* (defining universal design as “the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design” and not to “exclude assistive devices for particular groups of persons with disabilities where this is needed.”).

of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms.”<sup>57</sup> As such, the prohibition likely will extend both to individuals perceived as having a disability, as well as to non-disabled individuals associated with disabled persons.<sup>58</sup> Discrimination is also considered to include the “denial of reasonable accommodation,”<sup>59</sup> and is thus organically linked to the non-discrimination concept and so immediately applicable. Further, the CRPD defines the notion of reasonable accommodation as a “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden” that can ensure to disabled persons “the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”<sup>60</sup>

Article 3 enunciates the Convention’s general principles as including respect for individual dignity, autonomy, and independence;<sup>61</sup> respect for difference and acceptance of disability as human diversity;<sup>62</sup> non-discrimination;<sup>63</sup> equal opportunity;<sup>64</sup> complete and meaningful social participation;<sup>65</sup> accessibility;<sup>66</sup> sexual equality;<sup>67</sup> respect for children’s rights and support of their evolving capabilities.<sup>68</sup>

Article 4 sets forth the general obligations of States Parties to undertake measures aimed at ensuring the promotion and full realization of all human rights and fundamental freedoms under the CRPD for all persons with disabilities,<sup>69</sup> and to achieve these goals without discriminating in any way on the basis of disability.<sup>70</sup> States Parties must take measures to realize economic, social and cultural rights progressively to the maximum extent of their available resources.<sup>71</sup> Specifically, Article 4 enumerates the obligations of States Parties to: (i) adopt

<sup>57</sup> *Id.*

<sup>58</sup> *See, e.g., Equal Treatment Commission (Commissie Gelijke Behandeling) 1.NL.117, Opinion 2004–67.*

<sup>59</sup> *See CRPD, supra note 1, at art 2.*

<sup>60</sup> *Id.*

<sup>61</sup> *See id.* at art. 3(a).

<sup>62</sup> *See id.* at art. 3(d).

<sup>63</sup> *See id.* at 3(b).

<sup>64</sup> *See id.* at 3(e).

<sup>65</sup> *See id.* at 3(c).

<sup>66</sup> *See id.* at 3(f).

<sup>67</sup> *See id.* at 3(g).

<sup>68</sup> *See id.* at 3(h).

<sup>69</sup> *See id.* at art. 4.

<sup>70</sup> *See id.* at art. 4(1).

<sup>71</sup> *See id.* at art. 4(2).

legislative, administrative and other measures to implement the Convention;<sup>72</sup> (ii) abolish or amend existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;<sup>73</sup> (iii) adopt an inclusive approach to protect and promote the rights of persons with disabilities in all policies and programmes;<sup>74</sup> (iv) refrain from conduct violative of the Convention and ensure that the public sector respects the rights of persons with disabilities;<sup>75</sup> (v) take measures to abolish disability discrimination by persons, organizations or private enterprises;<sup>76</sup> (vi) undertake research and development of accessible goods, services and technology for persons with disabilities and to promote others to undertake such research;<sup>77</sup> (vii) provide accessible information about assistive technology to persons with disabilities;<sup>78</sup> (viii) promote professional and staff training on Convention rights for those working with persons with disabilities on the Convention;<sup>79</sup> and (ix) consult with and involve persons with disabilities in developing and implementing legislation and policies and in decision-making processes concerning rights under the CRPD.<sup>80</sup>

States Parties are required by Article 5 to ensure the equality of persons with disabilities and to prohibit all forms of discrimination “on the basis of disability.”<sup>81</sup> To achieve this goal, the CRPD provides broad mandates. Article 5 requires recognition by States Parties “that all persons are equal before and under the law” and thus entitled “to the equal protection and equal benefit of the law” free of any discrimination.<sup>82</sup> States Parties also must “prohibit all discrimination on the basis of disability” while guaranteeing that persons with disabilities have “equal and effective legal protection” versus all forms of discrimination.<sup>83</sup> At the same time, in order “to promote equality and eliminate discrimination,”

<sup>72</sup> *See id.* at art. 4(1)(a).

<sup>73</sup> *See id.* at art. 4(1)(b).

<sup>74</sup> *See id.* at art. 4(1)(c).

<sup>75</sup> *See id.* at art. 4(1)(d).

<sup>76</sup> *See id.* at art. 4(1)(e).

<sup>77</sup> *See id.* at art. 4(1)(f) & (g).

<sup>78</sup> *See id.* at art. 4(1)(h).

<sup>79</sup> *See id.* at art. 4(1)(i).

<sup>80</sup> *See id.* at art. 4(3).

<sup>81</sup> *Id.* at art. 5. For a discussion of the three main normative theories of equality (and by implication, non-discrimination) that are applied to the disability context, see Quinn & Degener, *supra* note 6, at 16–18. For different conceptions of disability-based equality within the context of the Americans with Disabilities Act, see Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy (Anita Silvers et al. eds., Rowman & Littlefield Publishers 1998).

<sup>82</sup> CRPD, at art. 5(1).

<sup>83</sup> *See id.* at art. 5(2).

States Parties are required to “take all appropriate steps to ensure that reasonable accommodation is provided.”<sup>84</sup> Article 5, moreover, provides that any specific measures that “are necessary to accelerate or achieve de facto equality of persons with disabilities” may not themselves be construed as discriminatory.<sup>85</sup> Last, by prohibiting discrimination against “any person” on the basis of disability, rather than as only against individuals with disabilities, the CRPD empowers the CRPD to receive and consider complaints by individuals who have been discriminated against because they have mistakenly been regarded as having a disability,<sup>86</sup> or due to their association with a disabled person.<sup>87</sup>

Next among the articles of general application, and equally intended to be horizontally integrated across the CRPD, are provisions that especially underscore the rights of women with disabilities,<sup>88</sup> and children with disabilities.<sup>89</sup> By contrast, other individuals with disabilities subject to multiple forms of discrimination are acknowledged in the Preamble.<sup>90</sup>

Rounding out the articles of general application, Article 8 addresses some of the underlying determinants of disability discrimination by requiring States Parties to raise public awareness,<sup>91</sup> in support of which it provides a non-exhaustive list of

<sup>84</sup> *Id.* at art. 5(3).

<sup>85</sup> *See id.* at art. 5(4).

<sup>86</sup> This is one form of protected coverage under the Americans with Disabilities Act. *See generally* Michelle A. Travis, *Perceived Disabilities, Social Cognition, and “Innocent Mistakes,”* 55 *Vand. L. Rev.* 481, 489–490 (2002).

<sup>87</sup> *See, e.g., Equal Treatment Commission (Commissie Gelijke Behandeling) Opinion 2004–67, 1.NL.117; see also Cases, Materials and Text on National, Supranational and International Non-Discrimination Law 166–67 (Dagmar Schiek et al. eds., Hart Publishing 2007).*

<sup>88</sup> *See CRPD, supra* note 1, at art. 6.

<sup>89</sup> *See id.* at art. 7.

<sup>90</sup> “Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status.” *Id.* at Preamble (p) (emphasis in original).

<sup>91</sup> Such measures are identified in the Standard Rules as a condition precedent to the equalization of opportunities of persons with disabilities. *See Standard Rules, supra* note 27, at para. 1. They also are reflected in other human rights conventions addressing racial and other forms of discrimination. *See, e.g., CEDAW, art. 5, supra* note 8 (“States Parties shall take all appropriate measures” in order to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”); ICERD, *supra* note 8 at art. 7 (“States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination.”).

illustrative measures.<sup>92</sup> Article 9 seeks to dismantle barriers hindering the effective enjoyment of rights by persons with disabilities by addressing a broad spectrum of accessibility concerns<sup>93</sup> within both the public and private spheres.<sup>94</sup>

As a comprehensive human rights treaty, the CRPD's substantive articles cover the spectrum of life activities of persons with disabilities. In doing so, the Convention clarifies, within the context of disability, the human rights that all persons are entitled to under existing international human rights law instruments as well as under customary international law.<sup>95</sup> These elemental human rights include fundamental freedoms such as the right to life,<sup>96</sup> freedom from torture,<sup>97</sup> the right to education,<sup>98</sup> employment,<sup>99</sup> political participation,<sup>100</sup> legal capacity,<sup>101</sup> access to justice,<sup>102</sup> freedom of expression and opinion,<sup>103</sup> privacy,<sup>104</sup> participation in cultural life, sports and recreation,<sup>105</sup> respect for home and family,<sup>106</sup> personal integrity,<sup>107</sup> liberty of movement and nationality,<sup>108</sup> liberty and security of the person,<sup>109</sup> and adequate standard of living.<sup>110</sup>

<sup>92</sup> States Parties are directed to take "immediate, effective, and appropriate measures" to "raise awareness throughout society," to "combat stereotypes, prejudices and harmful practices relating to person with disabilities", and to "promote disability awareness." *Id.* at art. 8(1).

<sup>93</sup> *See id.* at art. 9. These include physical, technological, information, communication, economic and social accessibility. *See id.*

<sup>94</sup> *See id.* at art. 9(1) (obligating that public and private products or services be "open or provided to the public.").

<sup>95</sup> The right to non-discrimination, among other well-established human rights obligations, and its application to persons with disabilities may be considered part of customary international law. In that regard, the Convention codifies this fundamental disability rights obligation. Other, more progressive concepts set forth in the Convention may in time contribute to the crystallization of customary international law in this context.

<sup>96</sup> *See* CRPD, *supra* note 1, at art. 10.

<sup>97</sup> *See id.* at art. 15.

<sup>98</sup> *See id.* at art. 24.

<sup>99</sup> *See id.* at art. 27.

<sup>100</sup> *See id.* at art. 29.

<sup>101</sup> *See id.* at art. 12.

<sup>102</sup> *See id.* at art. 13.

<sup>103</sup> *See id.* at art. 21.

<sup>104</sup> *See id.* at art. 22.

<sup>105</sup> *See id.* at art. 30.

<sup>106</sup> *See id.* at art. 23.

<sup>107</sup> *See id.* at art. 17.

<sup>108</sup> *See id.* at art. 18.

<sup>109</sup> *See id.* at art. 14.

<sup>110</sup> *See id.* at art. 28.

Parenthetically, it bears noting that several articles appear at first blush to reflect newly created rights, but in fact were included for the purpose of clarifying the means through which other CRPD rights are realized.<sup>111</sup> For example, the articles on living independently,<sup>112</sup> personal mobility,<sup>113</sup> and habilitation and rehabilitation<sup>114</sup> are intrinsic to the attainment of historically recognized human rights.<sup>115</sup>

Implementation and monitoring measures are set forth in ten subsequent articles<sup>116</sup> and in the Optional Protocol.<sup>117</sup> Specially innovative for human rights treaties are provisions allowing the treaty monitoring body to receive collective complaints (and thus target systemic deficiencies as well as individual grievances),<sup>118</sup> elicit the expertise and input of NGOs<sup>119</sup> and UN specialized agencies and organs,<sup>120</sup>

<sup>111</sup> A recurrent theme echoed throughout the Convention negotiations was the notion that the draft text did not reflect “new” rights but instead articulated existing human rights within the specific context of disability. This view is summarized by the United Nations Department of Economic and Social Affairs in its question and answer resource on the Convention which states: “The convention does not create any ‘new rights’ or ‘entitlements.’ What the convention does, however, is express existing rights in a manner that addresses the needs and situation of persons with disabilities.” Convention on the Rights of Persons with Disabilities: Why a Convention?, available online at <<http://www.un.org/disabilities/convention/questions.shtml#one>>

<sup>112</sup> See CRPD, *supra* note 1, at art. 19.

<sup>113</sup> See *id.* at art. 20.

<sup>114</sup> See *id.* at art. 26.

<sup>115</sup> See generally Stein & Stein, *supra* note 37.

<sup>116</sup> See CRPD, *supra* note 1, at arts. 31–40.

<sup>117</sup> See Optional Protocol, *supra* note 2.

<sup>118</sup> See *id.* at art. 1(1) (authorizing the Committee on the Rights of Persons with Disabilities to accept and deliberate upon individual and group complaints and communications regarding alleged violations of the CRPD).

<sup>119</sup> See CRPD, *supra* note 1 at art. 4(3). Article 4(3) of the Convention makes consultations with disabled persons and their representative organizations a general obligation and is reinforced by the inclusion of participation as a general principle of the Convention in Article 3. NGO participation is implicitly provided for in the monitoring process, insofar as the Convention requires States Parties to include civil society in the monitoring process at the national level. *Id.* at art. 33(3). Moreover, Article 34(3) calls on States Parties to consider consultations with NGOs in the formulation of Committee member nominations as well as in the preparation of reports (Article 35(4)).

<sup>120</sup> *Id.* at art. 38(a) (mandating that UN specialized agencies and other UN organs “shall be entitled to be represented” during the course of considering implementation of Convention provisions “within the scope of their mandate.”). See also *id.* (allowing the Committee on the Rights of Persons with Disabilities to “invite specialized agencies and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities.”). One body that might prove of especial utility is the newly formed Inter-Agency Support Group (IASG) on the Convention on the Rights of Persons with Disabilities.

conduct proactive inquiries,<sup>121</sup> and procedures to better manage reporting deadlines<sup>122</sup> and conduct Conferences of States Parties.<sup>123</sup>

The CRPD's final provisions address rules governing the operation of the Convention, including, *inter alia*, its entry into force, amendments, and the official languages in which the Convention is to be considered equally authentic.<sup>124</sup>

### 3 *Future Prospects for the Convention*

To assess the future prospects of the CRPD for improving the lives of the six hundred and fifty million individuals with disabilities worldwide, we focus on three areas where the Convention can have a more immediate impact, beginning with abstract rights notions and moving towards more concrete results.

The effects we identify include the expressive value of acknowledging disability-based human rights; the impact of requiring States Parties (and non States Parties) to reflect upon and engage with domestic-level disability laws and policies; and advances in social integration by persons with disabilities that will be facilitated through the CRPD's inclusive development mandate.

#### 3.1 *The Convention as an Expressive Value Trigger*

The CRPD has expressive value insofar as it constitutes an acknowledgement by the global community of the equal dignity, autonomy, and worth of persons with disabilities.<sup>125</sup> The emerging field of expressive law explores the process

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<sup>121</sup> See Optional Protocol, *supra* note 2, at art. 6 (providing for a procedure of inquiry to allow the Committee to initiate an inquiry on receipt by the Committee of "reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention.").

<sup>122</sup> See CRPD, *supra* note 1, at 35(4) (providing that "[a] State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports, repeat information previously provided.).

<sup>123</sup> See *id.* at art. 40 (providing that "States Parties shall meet regularly in a Conference of States Parties in order to consider any matter with regard to the implementation of the present Convention.").

<sup>124</sup> See *id.* at arts. 41–50.

<sup>125</sup> See Statement by H. E. Sheikha Haya Rashed Al Khalifa, President of the United Nations General Assembly, at the Adoption of the Convention on the Rights of Persons with Disabilities, United Nations Headquarters, New York, New York, 13 December 2006, *available online at*: <<http://www.un.org/ga/president/61/statements/statement20061213.shtml>> ("The adoption of this Convention is a great opportunity to celebrate the emergence of comprehensive guidelines the world so urgently needs. It is an opportunity to reaffirm our universal commitment to the rights and dignity of all people without discrimination. The Convention can also provide the much needed impetus for wider cultural changes in the way that the world perceives disabled people.").

whereby law can influence behavior by altering broader social perceptions and conventions.<sup>126</sup> Such lines of inquiry reveal how law carries with it a symbolic social meaning, and so influences the nexus between law, norms, and societal mores.<sup>127</sup> An expressive law analysis of the CRPD indicates that the treaty has the potential to legislate a belief change regarding persons with disabilities by better informing societies about persons with disabilities.<sup>128</sup> This approach relates well to the understanding in constructivist scholarship of actors who are “deeply social” and whose identities are shaped by the institutionalized norms, values and ideas of the social environment in which they act.<sup>129</sup>

These notions create the point of departure for understanding the Convention itself as a process<sup>130</sup> through which actor identities and interests may be shaped and reconstituted.<sup>131</sup> Viewed in this context, the CRPD should be understood as

<sup>126</sup> See, e.g., Robert Cooter, *Expressive Law and Economics*, 27 J. Legal Stud. 585 (1998) (describing the role of law in the development of social norms, and socioeconomic law and economics, which seeks to inject psychological and social factors related to wealth and race into otherwise “neutral” economic analyses); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 Or. L. Rev. 339 (2000) (highlighting the power of the approval or disapproval of law in shaping behavior); see also Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943 (1998); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021 (1996).

<sup>127</sup> See generally Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 Iowa L. Rev. 35 (2002). According to Geisinger, law impacts on an individual’s certainty regarding the consequences of her actions either by providing additional information about that action, or through its influence on an individual’s “inferential reasoning process.” *Id.* at 63–65. This may occur because people were ambivalent about particular conduct, and the law’s passage has now “tipped” those fence-sitters towards an equilibrium, or because individuals with little information regarding an activity have now updated their knowledge and beliefs subsequent to the law’s passage. *Id.* at 68–69.

<sup>128</sup> For an account of the expressive law value of human rights treaties, see Geisinger & Stein, *supra* note 29. For an account of the expressive law value of the Americans with Disabilities Act, see Michael Ashley Stein, *Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 U. Va. L. Rev. 1151 (2004).

<sup>129</sup> International legal scholars, going back to Hugo Grotius, have long understood the international system as a social system. Hugo Grotius, *De Jure Belli ac Pacis: Libre Tres* (1625) in *Classics of International Law* (J. B. Scott, ed., Oxford University Press 1925). Moreover, the view of law as a social process is the particular foundation upon which the highly influential New Haven School of international law rests. See, e.g., Myres McDougal & Florentino Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (Yale University Press, 1961); Harold Lasswell & Myres McDougal, *Jurisprudence for a Free Society* (New Haven Press, 1992).

<sup>130</sup> On the understanding of international law as a process, see especially Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, 1994).

<sup>131</sup> Alexander Wendt, *Constructing International Politics*, 20 Int’l. Security 71, 73 (1995) (positing that systems of shared ideas, beliefs and values work to influence social and political action within and across multilateral law-making processes). See also Christian Reus-Smit, *Constructiv-*

an instrument that seeks to recast disability as a social construction and articulates protections in specific application to the situation that disabled persons face in relationship to their human rights enjoyment. Previous human rights instruments that did not reflect a social model of disability, nor expressly link barriers in the realization of rights to the barriers experienced by persons with disabilities in their communities, were blunt instruments.

Moreover, while persons with disabilities were in theory possessed of full and equal human rights under existing United Nations core human rights treaties, recall that in practice these protections were only rarely asserted and even more rarely recognized.<sup>132</sup> The same may be said of other United Nations instruments, including the Charter of the United Nations<sup>133</sup> and the Universal Declaration of Human Rights.<sup>134</sup> It is equally true of the much vaunted, well lauded, United Nations Millennium Development Goals (MDGs).<sup>135</sup> Although the central aims of this program – poverty alleviation,<sup>136</sup> increased health status,<sup>137</sup> and improved

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*ism*, in *Theories of International Relations* 209, 218 (Scott Burchill et al. eds., 2d ed. Palgrave MacMillan, 2001) (noting that “[i]nstitutionalized norms and ideas...condition what actors’ consider necessary and possible, both in practical and ethical terms.”).

<sup>132</sup> See discussion *supra*, Part I.

<sup>133</sup> See, e.g., United Nations Charter, at art. 1(3). (expressing a core purpose of the UN to “achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”).

<sup>134</sup> See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A (III), arts. 1–2, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) (proclaiming that “all human beings are born free and equal in dignity and rights” and are “entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

<sup>135</sup> The Millennium Development Goals, or “MDGs” were developed within the framework of the Millennium Development Summit in 2000 in which 89 member states of the United Nations agreed to help citizens in the world’s poorest countries to achieve a better life by the year 2015. The MDGs were derived from the Millennium Declaration, adopted at the conference which have since become the centerpiece for achievement the goals of the Declaration. See *UN Millennium Declaration*, UN GA res. 55/2 (2000), available online at <<http://www.unmillenniumproject.org/documents/ares552e.pdf>> [hereinafter Millennium Declaration]. The official UN website for the MDGs sets forth all eight MDGs as derived from the Millennium Declaration and identifies key targets and benchmarks, along with successes and is available online at: <<http://www.un.org/millenniumgoals/>>. For the perspective of the Chair of the MDGs, from which disability also is absent, see Jeffrey D. Sachs, *The End of Poverty: Economic Possibilities for Our Time* (Penguin Press, 2005).

<sup>136</sup> See MDGs, *supra* note 133, at Millennium Development Goal 1 (calling for the eradication of extreme poverty and hunger by 2017).

<sup>137</sup> See *id.* at Millennium Development Goal 6 (calling for efforts to combat HIV/AIDS, malaria and other diseases).

education,<sup>138</sup> among others – are inextricably linked to disability,<sup>139</sup> the MDGs do not reference disability.<sup>140</sup>

The General Assembly's adoption of the CRPD and the Optional Protocol by consensus, along with the subsequent signature and ratification of the Convention by States Parties, sends a signal that the international community recognizes the place of disability within the human rights canon.<sup>141</sup> Moreover, the CRPD should be regarded as an educative tool insofar as it can serve to teach mainstream society about the life circumstances of persons with disabilities, by providing information regarding their relative position. Its potential may be fully realized provided the provisions in the Convention supporting its use as an educational tool are fully implemented by both State and non-State actors.<sup>142</sup> In this respect, the CRPD's narrative regarding the unnecessary and amenable nature of the historical exclusion of persons with disabilities across societies can serve a vital function beyond the particular implementation of its substantive obligations in law and policy.<sup>143</sup> And where the Convention's expressive value is

<sup>138</sup> See *id.* at Millennium Development Goal 2 (calling for the achievement of universal primary education).

<sup>139</sup> For a discussion of the MDGs and their implicit, but unstated, link to disability issues, see Janet E. Lord & Katherine N. Guernsey, *Inclusive Development and the Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* (IDDC Task Group in the UN Convention, January 2005), available online at: <<http://www.un.org/esa/socdev/enable/rights/ahc5docs/ahc5iddc.doc>>

<sup>140</sup> See MDGs, *supra* note 133. Notably, disability was not mentioned in the most recent treatment by the Secretariat, cf. Report: Mainstreaming disability in the development agenda (E/CN.5/2008/6).

<sup>141</sup> See *Lauding Disability Convention as "Dawn of a New Era," UN urges Speedy Ratification* (UN Press Release 13 Dec. 2006), available online at: <<http://www.un.org/apps/news/story.asp?NewsID=20975&Cr=disab>> (summarizing statements made on the adoption of the Convention and heralding its significance for persons with disabilities and for the development of international human rights law. See also UN Secretary General Kofi Annan Statement, *Secretary-General Hails Adoption of Landmark Convention on Rights of Persons with Disabilities*, 13 Dec. 2006, UN Doc. SG/SM/10797 HR/4911 L/T/4400, available online at: <<http://www.un.org/News/Press/docs//2006/sgsm10797.doc.htm>> ("This Convention is a remarkable and forward-looking document. While it focuses on the rights and development of people with disabilities, it also speaks about our societies as a whole – and about the need to enable every person to contribute to the best of their abilities and potential.").

<sup>142</sup> See, e.g., CRPD, *supra* note 1, art. 8 (requiring States Parties "to adopt immediate, effective and appropriate measures... [t]o raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities...")

<sup>143</sup> *Id.* at prml. para. k (expressing concern that "persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world.").

made manifest in societal change, this stands to support, and be supported by, national level law and policy change.

### 3.2 *The Convention as a National Action Trigger*

The CRPD is designed to trigger among States Parties (and one might argue non-Parties due to the impact of customary international law),<sup>144</sup> national level engagement with disability law and policy.<sup>145</sup> Only some forty States have systemic disability rights laws,<sup>146</sup> of which many are outdated or of questionable value.<sup>147</sup> Consequently, the vast majority of States will be required to develop or substantially reform legal and social policies towards their respective domestic populations of persons with disabilities.<sup>148</sup> Given this underdevelopment of disability law and policy worldwide, the Convention is anticipated to serve as the impetus for law making and law reform that is unprecedented in modern human rights law. While this presents a remarkable opportunity, it likewise poses considerable challenges for effective national-level action.

State engagement with domestic-level disability laws and policies will necessarily manifest on at least three interrelated levels. First, each State must make

<sup>144</sup> The essence of this argument is that States that do not enter into international treaties nonetheless can become bound by the precepts of those instruments when they reflect a codification of customary international law or where they, over time, acquire such status. See Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 Am. U.L. Rev. 1, 16–17 (1982). See also Gerald J. Postema, *Custom in International Law: A Normative Practice Account*, in *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* 279 (Amanda Perreau-Saussine & James Bernard Murphy eds., Cambridge University Press 2007); John Tasioulas, *Customary International Law and the Quest for Global Justice*, in *id.* at 307.

<sup>145</sup> The Convention's provisions on national-level implementation are quite novel among the core international human rights conventions. See CRPD, *supra* note 1 at art. 33.

<sup>146</sup> Theresia Degener & Gerard Quinn, *A Survey of International, Comparative and Regional Disability Law Reform*, in *Disability Rights Law and Policy: International and National Perspectives* 3 (Mary Lou Breslin & Sylvia Yee eds. Transnational Publishers 2002), provides a catalogue.

<sup>147</sup> For example, Morocco, like the majority of States, has no comprehensive disability law. Legislation dating to 1982 applies only to a limited number of rights in respect of persons with visual impairments, but not to persons with other types of disabilities. The Convention process, in which Morocco played a major role (both its government as well as NGOs) has promoted national-level planning and prompted national level legislative reform within the Government to remedy major gaps in national law and policy. See Secrétariat à l'Etat Chargé de la Famille, de l'Enfance et des Personnes Handicapées, *Programme National de Réadaptation à Base Communautaire au Profit des Personnes Handicapées 2006–2008* (2006).

<sup>148</sup> "Unfortunately, the continuing economic inequities and social exclusion of disabled persons worldwide severely calls into doubt the efficacy of these efforts. It also begs the question of whether any country adequately protects their disabled citizens." Stein & Stein, *supra* note 37, at 1203.

an independent judgment as to whether it will ratify the CRPD and Optional Protocol, and then adjust its own national level schemes (including the designation of focal points for monitoring and implementation)<sup>149</sup> accordingly,<sup>150</sup> adjust its national framework first, followed by ratification,<sup>151</sup> or adopt some intermediary measure.<sup>152</sup> Second, every State will need to reflect on its individual socio-legal circumstances to determine how best to balance antidiscrimination prohibitions with positive action.<sup>153</sup> Third, each State must resolve outstanding but unclear interpretations of disability-related principles (e.g., reasonable

<sup>149</sup> See CRPD, *supra* note 1, at art. 33(1) (obligating States Parties to “designate one or more focal points within government” for “matters relating to the implementation of the present Convention”); art. 33(2) (requiring States Parties to “maintain, strengthen, designate or establish” one or more independent mechanisms to “promote, protect and monitor implementation” of the CRPD); and art. 33(1) (further requiring States to “give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.”).

<sup>150</sup> Thus, Jamaica, the first State to ratify the Convention, has not acted to align its domestic legal framework with the Convention and remains a disability rights violator in a number of other areas. See US Department of State, Bureau of Democracy, Human Rights, and Labor Country Reports on Human Rights Practices (Washington, DC, March 6, 2007), *available online at*: <<http://www.state.gov/g/drl/rls/hrrpt/2006/78897.htm>> (emphasizing in the section entitled “Persons with Disabilities” that “[t]here were no laws prohibiting discrimination against persons with disabilities nor any laws mandating accessibility for persons with disabilities, and such persons encountered discrimination in employment and denial of access to schools.”). *Id.*

<sup>151</sup> New Zealand, one of the leading countries in the treaty negotiations, has some notably progressive domestic disability practices, but its legal framework remains underdeveloped in the comprehensive sense mandated by the Convention. See Anne-Marie Mooney Cotter, *This Ability: An International Legal Analysis of Disability Discrimination* 100–20 (Ashgate, 2007).

<sup>152</sup> Mexico’s Senate, for example, ratified the CRPD but made a declaration that it would not apply Article 12 because its domestic law on legal capacity exceeded the Convention’s requirements. After well-publicized statements by two experts, the Senate acquiesced to reconsider its position. See Katia D’Artigues, *Mexico, Farol de la Calle, Oscuridad en Casa?*, *El Universal* (26 Oct. 2007), at A19 (describing the critiques offered by Professors Gerard Quinn and Michael Stein to the General Assembly of Human Rights Institutions of the Americas).

<sup>153</sup> Take, for example, the EU Framework Directive, *supra* note 52, prohibiting discrimination in employment on the basis of disability. The Directive requires individual employers to take “appropriate measures” to provide reasonable accommodations. However, it is neutral as to whether Member States may support disabled employment through “specific measures” (i.e., equity modifiers). *Id.* at Article 7. An undetermined issue is how Member States with pre-existing programs – such as the employment quota system operated in Germany – will respond to the Directive’s purely antidiscrimination mandate. See generally Waddington, *supra* note 52 (setting forth the Directive’s requirements and assessing its implementation); Fiona Geist, et. al., *Disability Law in Germany*, 24 *Comp. Lab. L. & Pol’y J.* 563 (2003). The same dynamic is at play in Japan, where the government is under pressure by disability rights groups to supplement or supplant the existing quota system with anti-discrimination laws. See Stein & Stein *supra* note 37, at 1231–33.

accommodation<sup>154</sup> and access to justice)<sup>155</sup> and also grapple with rights that are implicit in the Convention and/or domestic law, but not previously endorsed (such as a right to mobility).<sup>156</sup>

An inherent danger in this process is that the pace of domestic law reform, in the haste to ratify the CRPD and the Optional Protocol or to bring national laws into alignment following ratification, may compromise both the quality of the process as well as the ultimate result. If the Convention is to realize its expressive value, domestic change must occur in a transparent and participatory process, one that necessarily is time intensive and not particularly efficient. In addition, the Convention does not foresee a made-to-measure legislative grafting according to which a particular template may be applied to all country contexts. And yet law reform processes, particularly those supported by the international donor community, all too frequently follow this perilous path.

The Convention's inclusive-development mandate offers opportunities for donor governments seeking to facilitate Convention implementation in less developed countries to do so responsibly, and in step with legal and cultural contexts whilst seeking alignment with the Convention framework and obligations. Successive adoptions of disability policies by donor governments suggests that technical assistance programming may well improve inclusion, not only in terms of fostering disability law reform projects, but also in terms of facilitating meaningful inclusion across the development spectrum in line with local participation and needs. Programming across development sectors must be made disability inclusive, whether in democracy and governance, environment, health, education, infrastructure, humanitarian emergencies or other programming.<sup>157</sup>

<sup>154</sup> CRPD, *supra* note 1 at art. 2 (defining reasonable accommodation as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”).

<sup>155</sup> *Id.* at art. 13 (providing that “States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.”). *See also* *Tennessee v. Lane*, 541 U.S. 509 (2004) (holding that one particular individual had a right to physically access one particular court, but leaving open the question of whether any other persons with disabilities could gain relief when denied access to other justice elements, for example, as witnesses or jurors).

<sup>156</sup> CRPD, *supra* note 1, at art. 20 (providing that “States Parties shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities.”).

<sup>157</sup> For a study of the slow but increasing emergence of disability policies among donor governments, see Bill Albert, *Is Disability Really on the Development Agenda?: A Review of Official Disability Policies of the Major Governmental and International Development Agencies* (September 2004), available online at: <[http://www.disabilitykar.net/pdfs/disability\\_on\\_the\\_agenda.pdf](http://www.disabilitykar.net/pdfs/disability_on_the_agenda.pdf)>

### 3.3 *The Convention as a Social Integration Trigger*

The CRPD does offer an opportunity to trigger the social integration of persons with disabilities into society through its mandate of inclusive development.<sup>158</sup> Current development practices have by and large excluded people with disabilities from their schemes,<sup>159</sup> thereby increasing an already wide equity gap between disabled and mainstream populations.<sup>160</sup>

By requiring that technical assistance, development aid, and humanitarian efforts by States Parties conform to the rest of the CRPD's principles, inclusive development aid – and especially that of the European Union, the world's largest donor<sup>161</sup> – can compel great strides towards making the socially constructed environment more accessible to disabled individuals in developing countries.

<sup>158</sup> See CRPD, *supra* note 1 at art. 33 (providing that “States Parties recognize the importance of international cooperation and its promotion, in support of national efforts for the realization of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States... [which] measures could include... [e]nsuring that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities.”).

<sup>159</sup> See Albert, *supra* note 155, at 7 (detailing the historical disregard of inclusive development practice among donor governments in their development assistance programming). See also Amy T. Wilson, *The Effectiveness of International Development Assistance from American Organizations to Deaf Communities in Jamaica*, 150 Am. Annals of the Deaf 292, 298 (2005) (describing how USAID, in working “on behalf” of deaf-based development, did not work in conjunction with the local deaf community).

<sup>160</sup> See *British Council of Disabled People's International Committee Improving DFID's Engagement with the UK Disability Movement*, report prepared for the Department for International Development 4 (March 2005), available online at: <<http://www.dfid.gov.uk/pubs/files/bcodp-dfid-disability.pdf>> (emphasizing that “[t]he disability movement in the UK has been concerned for some time about DFID's approach to disability” and detailing the following areas of concern: (i) “disability is not afforded the importance it merits nor is it mainstreamed within DFID”; (ii) “DFID does not have disabled people represented in its work force”; (iii) “DFID does not have policies and procedures to ensure that disability is included either in its HR or development practice”; (iv) “where it is included, disability is addressed without the engagement of the disability movement and the involvement of disabled people from both the North and the South”; (v) “without the meaningful inclusion of these disabled people and their organisations as well as a more deliberate approach to disability issues it is unlikely that the MDG's, particularly the headline goal of poverty reduction, will be met.”).

<sup>161</sup> Donor governments are beginning to adopt inclusive development policies. See, e.g., U.S. Agency for International Development, *USAID Disability Policy Paper* (1997) available online at <[http://pdf.dec.org/pdf\\_docs/PDABQ631.pdf](http://pdf.dec.org/pdf_docs/PDABQ631.pdf)>. See also U.S. Agency for International Development, *USAID Disability Policy – Assistance* (2004), available online at <[http://www.usaid.gov/about\\_usaid/disability/](http://www.usaid.gov/about_usaid/disability/)>; U.S. Agency for International Development, *USAID Acquisition and Assistance Disability Policy Directive* (2004), available online at <[http://www.usaid.gov/about\\_usaid/disability/](http://www.usaid.gov/about_usaid/disability/)>; U.S. Agency for International Development, *USAID Acquisition and Assistance Policy Directive (Disability Policy on New Construction)* (2005), available online at:

Experience has shown that increasing social participation to the physically constructed environment, as well as to the policies and procedures that aid-sponsored programs enact, can help make persons with disabilities more visible,<sup>162</sup> and thereby facilitate the enjoyment of other fundamental rights.<sup>163</sup> The CRPD's provisions may therefore serve to lessen the identity of persons with disabilities as "other,"<sup>164</sup> increase non-disabled familiarity with the group,<sup>165</sup> and manifest closer in reality the Vienna Declaration's oft repeated refrain that human rights are "indivisible, interrelated and interconnected."<sup>166</sup>

#### 4 Conclusion

This chapter provided an overview of the Convention's background, summarized its substantive content, and considered some of the more immediate ways that the CRPD may positively impact the lives of persons with disabilities worldwide. The three areas we identified as potential catalysts for progressive change include the Convention's ability to trigger expressive value, prompt national level action, and advance the social integration of persons with disabilities in society through its inclusive development mandate.

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<[http://www.usaid.gov/about\\_usaid/disability/](http://www.usaid.gov/about_usaid/disability/)>; U.K. Department for International Development, *Disability, Poverty and Development*, (London, UK, February 2000), *available online at*: <<http://www.dfid.gov.uk/pubs/files/disability.pdf>>.

<sup>162</sup> "People with disabilities were often virtually invisible citizens of many societies," and "have been marginalized in nearly all cultures throughout history." Quinn & Degener, *supra* note 6, at 23. *See also* Mark C. Weber, *Disability Harassment 6* (NYU Press 2007) ("Lack of daily contact at a level of true equality with persons with disabilities promotes and constantly reinforces stereotypes.").

<sup>163</sup> National Council on Disability, *The Impact of the Americans with Disabilities Act: Assessing the Progress Toward Achieving the Goals of the ADA* (July 26, 2007), *available online at*: <[http://www.ncd.gov/newsroom/publications/2007/pdf/ada\\_impact\\_07-26-07.pdf](http://www.ncd.gov/newsroom/publications/2007/pdf/ada_impact_07-26-07.pdf)>.

<sup>164</sup> This is a standard sociological argument. The classic treatment is Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* 5 (Prentice-Hall, 1963) (asserting that stigma manifests when "we believe the person with a stigma is not quite human"); *see also* Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy For People With Disabilities*, 40 *UCLA L. Rev.* 1341 (1993) (identifying intolerance and discrimination as part and parcel of the reasons for excluding people with disabilities' equal social participation).

<sup>165</sup> For an argument on this ground in favor of employing greater numbers of persons with psycho-social disabilities, see Michael E. Waterstone & Michael Ashley Stein, *Disabling Prejudice*, 102 *NW. U. L. Rev.* \_\_\_\_ (2008) .

<sup>166</sup> Vienna Declaration, *supra* note 36 at para. 63.

Ultimately, the extensive rights catalogue contained in the Convention will only manifest with commitments from individual States Parties to alter the historical treatment of persons with disabilities in their respective societies, along with support from a proactive and long-viewed CRPD monitoring Committee.<sup>167</sup> Such efforts must be supported by an equally vigorous commitment from civil society – disabled peoples organizations and their allies – and individual advocates alike to educate and advocate within the rights-based framework offered by the Convention.

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<sup>167</sup> See Lord & Stein, *supra* note 7.