
Michael Ashley Stein & Janet E. Lord


This chapter provides an overview of the background to the Convention’s adoption, summarizes the contents of the CRPD, and then assesses its future prospects.
prospects for improving the lives of the six hundred and fifty million individuals with disabilities worldwide. 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.

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. Each of these treaties contains legal obligations that theoretically apply to persons with disabilities, but they are rarely applied in practice. To
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.10 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),11 the International Covenant on Economic, Social, and Cultural Rights (ICESCR),12 and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)13 are each universal in scope and so implicitly include persons with disabilities within their purview.14 By comparison, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),15 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),16 and Convention on the Rights of the Child (CRC)17 are each non-universal in scope and have specifically identified persons with disabilities as beneficiaries of their provisions.

11 See, e.g., ICCPR, supra note 8, at pmbl. (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”).
12 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”).
13 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].
15 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), the Convention on the Rights of the Child (CRC), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPMW), each target a specific identity characteristic that can overlap with an individual also having a disability, but otherwise are not directed toward persons with disabilities.

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.”

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.”)

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.”

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.”)

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.

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\(^\text{21}\) and the Declaration on the Rights of Disabled Persons during the 1970s.\(^\text{22}\) 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\(^\text{23}\) and the International Decade of Disabled Persons from 1982–1991.\(^\text{24}\) In 1982, the General Assembly adopted a World Programme of Action Concerning Disabled Persons\(^\text{25}\) to encourage national level programs aimed at achieving equality for people with disabilities.\(^\text{26}\) In 1993, 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.

---

21 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.


26 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 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.

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. 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.

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

---


30 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”).

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. Adhering to the central objective of the human right to development, the Convention holistically...
melds civil and political rights with economic, social, and cultural rights.  

Put another way, the CRPD aspires to manifest the mandate that human rights are “indivisible, interrelated and interconnected.” 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.

With a few notable variances, the structure of the CRPD likewise is similar to that of the CRC. 

The Convention’s articles are introductory, of general application, enumerate substantive rights, set forth implementation and monitoring provisions, and promulgate rules to govern the operation of the Convention. An Optional Protocol governs communications and procedures of inquiry.

Significant for a human rights treaty, the CRPD sets forth its explicit purpose. 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.” It conceives of disability as being inclusive of, but not limited to “long-term physical,
mental, intellectual or sensory impairments.” 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. 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.

“Disability” is not directly defined in Article 2. 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. Article 2 broadly defines the terms “communication,” “language,” and “universal design,” 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

---

49 Id.
50 See CRPD, at art. 1
53 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).
54 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”).
55 See id. (defining language to include “spoken and signed languages and other forms of non-spoken languages”).
56 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." 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. Discrimination is also considered to include the "denial of reasonable accommodation," 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."

Article 3 enunciates the Convention’s general principles as including respect for individual dignity, autonomy, and independence; respect for difference and acceptance of disability as human diversity; non-discrimination; equal opportunity; complete and meaningful social participation; accessibility; sexual equality; respect for children’s rights and support of their evolving capabilities.

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, and to achieve these goals without discriminating in any way on the basis of disability. States Parties must take measures to realize economic, social and cultural rights progressively to the maximum extent of their available resources. Specifically, Article 4 enumerates the obligations of States Parties to: (i) adopt

57 Id.
59 See CRPD, supra note 1, at art 2.
60 Id.
61 See id. at art. 3(a).
62 See id. at art. 3(d).
63 See id. at 3(b).
64 See id. at 3(e).
65 See id. at 3(c).
66 See id. at 3(f).
67 See id. at 3(g).
68 See id. at 3(h).
69 See id. at art. 4.
70 See id. at art. 4(1).
71 See id. at art. 4(2).
legislative, administrative and other measures to implement the Convention;\textsuperscript{72} (ii) abolish or amend existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;\textsuperscript{73} (iii) adopt an inclusive approach to protect and promote the rights of persons with disabilities in all policies and programmes;\textsuperscript{74} (iv) refrain from conduct violative of the Convention and ensure that the public sector respects the rights of persons with disabilities;\textsuperscript{75} (v) take measures to abolish disability discrimination by persons, organizations or private enterprises;\textsuperscript{76} (vi) undertake research and development of accessible goods, services and technology for persons with disabilities and to promote others to undertake such research;\textsuperscript{77} (vii) provide accessible information about assistive technology to persons with disabilities;\textsuperscript{78} (viii) promote professional and staff training on Convention rights for those working with persons with disabilities on the Convention;\textsuperscript{79} 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.\textsuperscript{80}

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.”\textsuperscript{81} 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.\textsuperscript{82} 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.\textsuperscript{83} At the same time, in order “to promote equality and eliminate discrimination,”

\textsuperscript{72} See id. at art. 4(1)(a).
\textsuperscript{73} See id. at art. 4(1)(b).
\textsuperscript{74} See id. at art. 4(1)(c).
\textsuperscript{75} See id. at art. 4(1)(d).
\textsuperscript{76} See id. at art. 4(1)(e).
\textsuperscript{77} See id. at art. 4(1)(f) & (g).
\textsuperscript{78} See id. at art. 4(1)(h).
\textsuperscript{79} See id. at art. 4(1)(i).
\textsuperscript{80} See id. at art. 4(3).
\textsuperscript{81} 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).
\textsuperscript{82} CRPD, at art. 5(1).
\textsuperscript{83} See id. at art. 5(2).
States Parties are required to “take all appropriate steps to ensure that reasonable accommodation is provided.”\textsuperscript{84} 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.\textsuperscript{85} 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,\textsuperscript{86} or due to their association with a disabled person.\textsuperscript{87}

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,\textsuperscript{88} and children with disabilities.\textsuperscript{89} By contrast, other individuals with disabilities subject to multiple forms of discrimination are acknowledged in the Preamble.\textsuperscript{90}

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,\textsuperscript{91} in support of which it provides a non-exhaustive list of
illustrative measures. Article 9 seeks to dismantle barriers hindering the effective enjoyment of rights by persons with disabilities by addressing a broad spectrum of accessibility concerns within both the public and private spheres.

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. These elemental human rights include fundamental freedoms such as the right to life, freedom from torture, the right to education, employment, political participation, legal capacity, access to justice, freedom of expression and opinion, privacy, participation in cultural life, sports and recreation, respect for home and family, personal integrity, liberty of movement and nationality, liberty and security of the person, and adequate standard of living.

92 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).
93 See id. at art. 9. These include physical, technological, information, communication, economic and social accessibility. See id.
94 See id. at art. 9(1) (obligating that public and private products or services be “open or provided to the public.”).
95 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.
96 See CRPD, supra note 1, at art. 10.
97 See id. at art. 15.
98 See id. at art. 24.
99 See id. at art. 27.
100 See id. at art. 29.
101 See id. at art. 12.
102 See id. at art. 13.
103 See id. at art. 21.
104 See id. at art. 22.
105 See id. at art. 30.
106 See id. at art. 23.
107 See id. at art. 17.
108 See id. at art. 18.
109 See id. at art. 14.
110 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. For example, the articles on living independently, personal mobility, and habilitation and rehabilitation are intrinsic to the attainment of historically recognized human rights.

Implementation and monitoring measures are set forth in ten subsequent articles and in the Optional Protocol. 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), elicit the expertise and input of NGOs and UN specialized agencies and organs.

111 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>

112 See CRPD, supra note 1, at art. 19.

113 See id. at art. 20.

114 See id. at art. 26.

115 See generally Stein & Stein, supra note 37.

116 See CRPD, supra note 1, at arts. 31–40.

117 See Optional Protocol, supra note 2.

118 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).

119 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)).

120 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 special utility is the newly formed Inter-Agency Support Group (IASG) on the Convention on the Rights of Persons with Disabilities.
conduct proactive inquiries\textsuperscript{121} and procedures to better manage reporting deadlines\textsuperscript{122} and conduct Conferences of States Parties.\textsuperscript{123}

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.\textsuperscript{124}

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.\textsuperscript{125} The emerging field of expressive law explores the process

\textsuperscript{121} See Optional Protocol, \textit{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.”).

\textsuperscript{122} See CRPD, \textit{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.”).

\textsuperscript{123} See \textit{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.”).

\textsuperscript{124} See \textit{id.} at arts. 41–50.

\textsuperscript{125} 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, \textit{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. 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. 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. 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.

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

---


127 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.


129 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: Libri 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 Laswell & Myres McDougal, *Jurisprudence for a Free Society* (New Haven Press, 1992).

130 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).

131 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. The same may be said of other United Nations instruments, including the Charter of the United Nations and the Universal Declaration of Human Rights. It is equally true of the much vaunted, well lauded, United Nations Millennium Development Goals (MDGs). Although the central aims of this program – poverty alleviation, increased health status, and improved
education, among others – are inextricably linked to disability, the MDGs do not reference disability.

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. 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.

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. And where the Convention’s expressive value is

---

138 See id. at Millennium Development Goal 2 (calling for the achievement of universal primary education).

139 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>

140 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).


142 See, e.g., CRPD, supra note 1, art. 8 (requiring States Parties “to adopt immediate, effective and appropriate measures . . . [to] raise awareness throughout society, including at the family level, concerning persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities . . . ”)

143 Id. at prmb. 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), national level engagement with disability law and policy. Only some forty States have systemic disability rights laws, of which many are outdated or of questionable value. 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. 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

---

144 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.

145 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.

146 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. 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 a’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).

147 “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) accordingly, adjust its national framework first, followed by ratification, or adopt some intermediary measure. Second, every State will need to reflect on its individual socio-legal circumstances to determine how best to balance antidiscrimination prohibitions with positive action. Third, each State must resolve outstanding but unclear interpretations of disability-related principles (e.g., reasonable

---

149 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.”).

150 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.

151 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).

152 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).

153 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 and access to justice 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).

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.

---

154 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.”).

155 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).

156 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.”).

157 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>
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. Current development practices have by and large excluded people with disabilities from their schemes, thereby increasing an already wide equity gap between disabled and mainstream populations.

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 – can compel great strides towards making the socially constructed environment more accessible to disabled individuals in developing countries.

---

158 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 . . . ensuring that international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities.”).

159 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).

160 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 organizations 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.”).

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, and thereby facilitate the enjoyment of other fundamental rights. The CRPD’s provisions may therefore serve to lessen the identity of persons with disabilities as “other,” increase non-disabled familiarity with the group, and manifest closer in reality the Vienna Declaration’s oft repeated refrain that human rights are “indivisible, interrelated and interconnected.”

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.
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. 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.

167 See Lord & Stein, supra note 7.