

FUTURE PROSPECTS FOR THE UNITED NATIONS  
CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES  
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Although the United Nations Convention on the Rights of Person with Disabilities (CRPD, or Convention) has enormous potential for transforming the lives of the six hundred and fifty million individuals with disabilities worldwide, this talk will focus on three areas in which the Convention will likely have the most immediate impact. These are the expressive value of disability-based human rights recognition; the dynamic of States Parties reflecting on previously neglected disability laws and policies; and the impetus towards social integration of persons with disabilities fostered by the CRPD's inclusive development mandate

*Triggering Expressive Value*

The Convention has expressive value because it signals the global community's recognition that persons with disabilities have equal dignity, autonomy, and worth. Expressive law explores the process whereby legal instruments affect preferences and behavior by altering social perceptions and conventions.<sup>1</sup>

Using these criteria to analyze the CRPD suggests that the treaty can precipitate belief changes by providing information to societies about the rights of persons with disabilities.<sup>2</sup> As such, its potential for altering social mores may be fully realized through the Convention's provisions supporting its use as an educational tool.<sup>3</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>4</sup>

The expressive methodology relates well to the understanding in constructivist scholarship of "deeply social" actors whose identities are shaped by institutionalized norms, values, and ideas of their social environments.<sup>5</sup> In combination, these notions comprehend the

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<sup>1</sup> For a literature review of expressive law, see Michael Ashley Stein, *Under the Empirical Radar: An Initial Expressive Law Analysis of the ADA*, 90 U. VA. L. REV. 1151 (2004).

<sup>2</sup> For an account of the expressive law value of human rights treaties, see Alex Geisinger & Michael Ashley Stein, *Rational Choice, Reputation, and Human Rights Treaties*, 106 U. MICH. L. REV. \_\_\_\_ (2008).

<sup>3</sup> See, e.g., CRPD, at 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..."). In this regard, the tools of human rights education may assume an important role in fostering the expressive value of the CRPD. See, e.g., Janet E. Lord, et al, *Human Rights. YES!* (2007), available online at <<http://www1.umn.edu/humanrts/edumat/hreduseries/TB6/>>.

<sup>4</sup> CRPD, 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.").

<sup>5</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*

Convention as a process through which actor identities and interests are shaped and reconstituted.<sup>6</sup> Viewed this way, the CRPD is an instrument that recasts disability as a social construction, and accordingly enunciates disability-specific protections to enable disabled persons to fully enjoy their human rights.<sup>7</sup>

Such an understanding of disability rights is in sharp contrast to prior human rights instruments. Lacking the social model of disability, previous core treaties failed to connect the realization of rights with those barriers experienced by persons with disabilities in their communities. This is true in the core human rights conventions as set forth in Part I, and also for other United Nations instruments, including the Charter of the United Nations<sup>8</sup> and the Universal Declaration of Human Rights.<sup>9</sup> The same may be said of the otherwise commendable United Nations Millennium Development Goals (MDGs) aimed at helping citizens in the world's poorest countries to achieve a better life by the year 2015.<sup>10</sup> For although the central aims of this program are inextricably linked to disability<sup>11</sup> by targeting poverty alleviation,<sup>12</sup> increased health status,<sup>13</sup> and improved

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*International Law* (J.B. Scott, ed.) (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 MCDUGAL & FLORENTINO FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* (1961); HAROLD LASSWELL & MYRES MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY* (1992).

<sup>6</sup> On the understanding of international law as a process, see especially ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* (1994).

<sup>7</sup> See 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); Christian Reus-Smit, *Constructivism, in THEORIES OF INTERNATIONAL RELATIONS* 209, 218 (Scott Burchill et al. eds. 2001) (noting that “[i]nstitutionalized norms and ideas...condition what actors’ consider necessary and possible, both in practical and ethical terms.”).

<sup>8</sup> See, e.g., United Nations Charter, at art. 1(3). (expressing a core purpose of the UN to “achieve international cooperation in solving problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”).

<sup>9</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 (Dec. 12, 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>10</sup> The Millennium Development Goals (MDGs) were derived from the Millennium Declaration, adopted at the conference which has since become the centerpiece for achievement the goals of the Declaration. See *UN Millennium Declaration*, UN G.A. Res. 55/2 (2000), available online at <<http://www.unmillenniumproject.org/documents/ares552e.pdf>>. 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/>> [hereinafter MDGs].

<sup>11</sup> For a discussion of the MDGs and their implicit, but unstated, link to disability issues, see Janet E. Lord and Katherine N. Guernsey, *Inclusive Development and the Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of*

education,<sup>14</sup> the MDGs do not reference disability and do not animate the connections between disability and poverty.

The General Assembly's adoption by consensus of the CRPD, 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>15</sup>

### *Triggering National Action*

The CRPD will also trigger national level engagement with disability law and policy among States Parties (and one might argue non-States Parties due to the impact of customary international law).<sup>16</sup> Some forty nations have systemic disability rights laws,<sup>17</sup> many of which are outdated or of questionable utility.<sup>18</sup> Consequently, the vast majority of States need to develop or substantially reform their domestic legal and social policies regarding persons with disabilities.<sup>19</sup> Given this worldwide underdevelopment of disability laws and policies, the Convention will incent law making and law reform at an

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*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>12</sup> See MDGs, *supra* note 10, at Millennium Development Goal 1 (calling for the eradication of extreme poverty and hunger by 2017).

<sup>13</sup> See *id.* at Millennium Development Goal 6 (calling for efforts to combat HIV/AIDS, malaria and other diseases).

<sup>14</sup> See *id.* at Millennium Development Goal 2 (calling for the achievement of universal primary education).

<sup>15</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).

<sup>16</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).

<sup>17</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. 2002), provides a catalogue.

<sup>18</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." Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 *Hastings L.J.* 1203, 1203 (2007).

<sup>19</sup> To illustrate, Morocco has no comprehensive disability law, and 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 the Moroccan government and NGOs played major roles, has promoted national-level planning and prompted national-level legislative reform to remedy major gaps. See Secrétariat a'Etat Chargé de la Famille, de l'Enfance et des Personnes Handicapées, *Programme National de Réadaptation a Base Communautaire au Profit des Personnes Handicapées 2006-2008* (2006).

unprecedented level in modern human rights practice. It likewise presents considerable challenges for effective national-level implementation.

State engagement with its own domestic-level disability laws and policies will necessarily manifest on at least three interrelated levels. To begin with, each State must decide whether it will ratify the CRPD, and then adjust its own national level schemes (including the designation of focal points for monitoring and implementation)<sup>20</sup> accordingly;<sup>21</sup> fine-tune its national framework and then ratify;<sup>22</sup> or adopt some transitional measure.<sup>23</sup> Next, each State must assess its individual socio-legal circumstances and determine how to most expediently balance antidiscrimination prohibitions with equality measures.<sup>24</sup> Last, each State must resolve unsettled interpretations of existing disability-related principles (for instance, access to justice)<sup>25</sup>

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<sup>20</sup> See CRPD, at art. 33(1) (obligating States Parties to “designate one or more focal points within government” for “matters relating to the implementation of the 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>21</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>>.

<sup>22</sup> New Zealand, a leading country 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 (2007).

<sup>23</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>24</sup> Take, for example, the EU Framework Directive, 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). 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. 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.

<sup>25</sup> See, e.g., *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).

and also grapple with Convention rights not previously endorsed in domestic law (such as a right to mobility).<sup>26</sup>

As noted by the President of the General Assembly on the day of the CRPD's adoption, the treaty's consensus acceptance "is a great opportunity to celebrate the emergence of comprehensive guidelines the world so urgently needs."<sup>27</sup> Thus, the CRPD is likely to prompt unprecedented national-level action in the form of law and policy transformation on disability rights.

### *Triggering Social Integration*

Perhaps most immediately, the CRPD can trigger the social integration of persons with disabilities into their societies through its inclusive development mandate.<sup>28</sup> Current development practices by and large exclude people with disabilities,<sup>29</sup> and thereby increase already wide equity gaps between disabled and mainstream populations.<sup>30</sup>

The CRPD creates a framework for international cooperation to be implemented in accordance with its general principles. In requiring that technical assistance, development aid, and humanitarian efforts by States Parties conform with the Convention's general principles, inclusive development aid can improve the accessibility in developing countries of the physically constructed environment, as well as to the policies and procedures that aid-sponsored programs support.

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<sup>26</sup> CRPD, 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>27</sup> 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 (13 December 2006), available online at <http://www.un.org/ga/president/61/statements/statement20061213.shtml>.

<sup>28</sup> See CRPD, at art. 32 (1)-(a) (providing that States Parties "undertake appropriate and effective measures" in making sure that "international cooperation, including international development programmes, is inclusive of and accessible to persons with disabilities.").

<sup>29</sup> See Bill Albert, *Is Disability Really on the Development Agenda?: A Review of Official Disability Policies of the Major Governmental and International Development Agencies* 7 (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).> (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>30</sup> See generally 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>.

Trenchantly, increasing social participation helps make persons with disabilities more visible<sup>31</sup> and facilitates their enjoyment of other fundamental rights.<sup>32</sup> The CRPD's provisions can therefore lessen the identity of persons with disabilities as "other,"<sup>33</sup> promote greater familiarity with the group,<sup>34</sup> and manifest closer in reality the Vienna Declaration's oft repeated refrain that human rights are "indivisible, interrelated and interconnected."<sup>35</sup>

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<sup>31</sup> "People with disabilities were often virtually invisible citizens of many societies," and "have been marginalized in nearly all cultures throughout history." 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 23 (2002), available online at <<http://www.nhri.net/pdf/disability.pdf>>. See also MARK C. WEBER, DISABILITY HARASSMENT 6 (2007) ("Lack of daily contact at a level of true equality with persons with disabilities promotes and constantly reinforces stereotypes.").

<sup>32</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>33</sup> This is a standard sociological argument. The classic treatment is ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 5 (1963) (asserting that stigma manifests when "we believe the person with a stigma is not quite human").

<sup>34</sup> For an argument on this ground in favor of employing greater numbers of persons with psychosocial disabilities, see Michael E. Waterstone & Michael Ashley Stein, *Disabling Prejudice*, 102 NW. U. L. REV. \_\_\_\_ (2008).

<sup>35</sup> Vienna Declaration and Programme of Action, U.N. Doc A/CONF. 157/24, para. 63 (July 12, 1993), available online at <[http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En)>.