

Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities

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Abstract

On 13 December 2006, the General Assembly of the United Nations adopted the Convention on the Rights of Persons with Disabilities (CRPD) and an associated Optional Protocol. The formulation of the CRPD has been hailed as a great landmark in the struggle to reframe the needs and concerns of persons with disability in terms of human rights. The CRPD is regarded as having finally empowered the world's largest minority to claim their rights, and to participate in international and national affairs on an equal basis with others who have achieved specific treaty recognition and protection. This essay interrogates the intellectual antecedents of the CRPD and its continuity and discontinuity with 25 years of international law and its struggles with disability and human rights. It then explores the text of the CRPD, critically examining its potential contribution to the realisation of the rights of persons with disability.

1. Introduction

On 13 December 2006, the General Assembly (GA) of the United Nations (UN) adopted the Convention on the Rights of Persons with Disabilities (CRPD) and an associated Optional Protocol (CRPD Optional Protocol).¹

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1 The CRPD and the CRPD Optional Protocol were adopted during the 61st Session of the General Assembly: see GA Res. 61/611, 13 December 2006, A/61/611; 15 IHRR 255.

The CRPD is the first United Nations human rights treaty to be adopted in the 21st century² and is reputed to be the most rapidly negotiated ever.³ The international community has also received the CRPD with unprecedented early enthusiasm. Eighty-one states and the European Union⁴ signed the CRPD at its opening ceremony on 30 March 2007—the highest number of opening signatures recorded for any human rights treaty.⁵ Forty-four states also signed the Optional Protocol. As at the end of December 2007, 120 states had signed the CRPD and 67 states had signed its Optional Protocol.⁶ The CRPD will enter into force 30 days after the twentieth instrument of ratification is lodged with the Secretary-General, and its Optional Protocol will enter into force 30 days after its tenth is lodged, provided of course that the CRPD is already in force.⁷ As at the end of December 2007, 14 instruments of ratification had been deposited in relation to the CRPD and seven instruments of ratification had been deposited in relation to its Optional Protocol.⁸

A. *The Significance of the CRPD*

The formulation of the CRPD has been hailed as a great landmark in the struggle to reframe the needs and concerns of persons with disability in terms of human rights. The Secretary-General of the United Nations, noting that the date of the CRPD's adoption fell, in the Western Christian calendar, on the day

See Disabilities—Handbook on the Convention on the Rights of Persons with Disabilities and its Optional Protocol. (Geneva: OHCHR, 2007), available at: <http://www.ohchr.org/english/about/publications/docs/ExclusionEqualityDisabilities.pdf> [last accessed 13 November 2007].

- 2 The International Convention on the Protection of All Persons from Enforced Disappearance 2006, GA Res. 61/177, 20 December 2006, A/61/488, was adopted by the GA one week later.
- 3 Official Statement of the UN Secretary-General, Secretary General Hails Adoption of Landmark Convention on Rights of People with Disabilities, 13 December 2006, SG/SM/10797, HR/4911, L/T/4400, available at: <http://www.un.org/News/Press/docs/2006/sgsm10797.doc.htm> [last accessed 13 November 2007].
- 4 The CRPD and its Optional Protocol are the first UN human rights treaties to be signed by the European Union. Under Article 44 of the CRPD and Article 12 of its Optional Protocol the European Union may act on behalf of its members in relation to the treaties to the extent of its mandate, which must be the subject of a formal declaration, deposited with the Secretary-General. While the European Union may also ratify the treaties, only the direct ratifications of its member States count towards the treaties coming into force.
- 5 Report of the Secretary-General as to the Status of the Convention on the Rights of Persons with Disabilities and the Optional Protocol, 14 August 2007, A/62/230, at para. 4, available at: <http://www.ohchr.org/english/issues/disability/docs/A.62.230.en.doc> [last accessed 13 November 2007]. See also UN Press Release, Record number of countries sign UN treaty on disabilities on opening day, 30 March 2007, available at: <http://www.un.org/apps/news/story.asp?NewsID=22085&Cr=disab&Cr1=> [last accessed 13 November 2007].
- 6 The United Nations maintains an up-to-date register of nations that have signed and ratified the treaties on its UN Enable website, available at: <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> [last accessed 13 November 2007].
- 7 Article 45, CRPD and Article 13, CRPD Optional Protocol respectively.
- 8 Jamaica ratified the CRPD at its Signature Opening Ceremony on 30 March 2007. Since then the CRPD has been ratified by Panama, Hungary, Croatia, Gabon, Cuba and India. So far, Panama, Hungary and Croatia have ratified the Optional Protocol, see supra n. 6.

of St Lucy, patron saint of blindness and light, claimed that it heralded the 'dawn of a new era—an era in which disabled people will no longer have to endure the discriminatory practices and attitudes that have been permitted to prevail for all too long.'⁹ The President of the European Disability Forum, speaking for the International Disability Caucus (IDC),¹⁰ returned to the metaphor of light emerging from darkness at the CRPD's Signature Opening Ceremony, quoting Bertolt Brecht:

*Some there are who live in darkness
While the others live in light
We see those who live in daylight
Those in the darkness out of sight.
This is a convention to bring those in darkness into light.*¹¹

Re-iterating the claim made many times by national and non-government delegations in the course of CRPD negotiations, Ambassador MacKay, Chairman of the Ad Hoc Committee that developed the CRPD text, characterised the CRPD as embodying a 'paradigm shift' away from a social welfare response to disability to a rights-based approach.¹² The UN High Commissioner for Human Rights has also characterised the CRPD as enshrining this paradigm shift in attitudes. She has conceptualised the CRPD as rejecting the 'view of persons with disabilities as objects of charity, medical treatment and social protection' and as affirming persons with disability as 'subjects of rights, able to claim those rights as active members of society'.¹³

The paradigm shift also involves the perceived centrality of persons with disability and their representative organisations in the CRPD negotiation process. The CRPD negotiations are reputed to have involved the highest level of participation by representatives of civil society, overwhelmingly that of

9 Statement of the UN Secretary-General, *supra* n. 3.

10 The International Disability Caucus was a coalition of international, regional and national non-government organisations (principally disabled peoples' organisations) accredited as observers to the GA Ad Hoc Committee responsible for the development of the CRPD. It claimed a participating membership of more than 70 such organisations.

11 UN Press Release, *supra* n. 5, quoting Yannis Vardakastanis for the International Disability Caucus. These words are an English translation of lines from 'The Ballad of Mack the Knife' from *The Threepenny Opera*, 1928.

12 Ambassador Don MacKay, Permanent Representative of New Zealand in the UN and Chair of the Ad-Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Commentary at a High-Level Dialogue held in association with the Signature Ceremony of the Convention, From Vision to Action: The Road to Implementation of the Convention on the Rights of Persons with Disabilities, New York, 30 March 2007, available at: <http://www.un.org/disabilities/default.asp?id=160> [last accessed 13 November 2007].

13 Statement by Louise Arbour UN High Commissioner for Human Rights on the Ad Hoc Committee's adoption of the International Convention on the Rights of Persons with Disabilities, 5 December 2006, available at: <http://www.ohchr.org/English/issues/disability/docs/statementhcdcc06.doc> [last accessed 13 November 2007].

persons with disability and disabled persons organisations, of any human rights convention in history.¹⁴ Indeed, the formulation and future implementation of the CRPD has been framed repeatedly both by governmental and non-governmental actors as a continuing partnership between the UN and disabled persons throughout the world, based on the principle of ‘nothing about us without us’.¹⁵ The CRPD is regarded as having finally empowered the ‘world’s largest minority’¹⁶ to claim their rights, and to participate in international and national affairs on an equal basis with others who have achieved specific treaty recognition and protection.¹⁷

Perhaps it is not unusual for new human rights treaties to be drenched in hyperbole and hopefulness. Even so, the claims made in relation to the CRPD seem extraordinary by any standard. In this essay, we explore the text of the CRPD, critically examining its potential contribution to the realisation of the rights of persons with disability. We introduce our discussion by interrogating the intellectual antecedents of the CRPD and its continuity and discontinuity with 25 years of international law and its struggles with disability and human rights. While we see no reason to be pessimistic about the CRPD’s prospects, we hope our analysis will begin to bring a level of realism and strategy to what will no doubt be an ongoing interpretive and implementation dialogue.

- 14 Many officials made this point in addresses to the Opening for Signature Ceremony, and in the associated Press Conference. For example, Juan Manuel Gomez Robledo, Mexico’s Under-Secretary for Multilateral Affairs and Human Rights, said ‘the negotiating process had been unprecedented in the history of the United Nations because disability-rights activists and representatives of non-governmental organisations had participated in the talks on a nearly similar footing as Member States.’ See UN Press Release, Press Conference by High Commissioner for Human Rights on Signing of Convention, 30 March 2007, available at: <http://www.un.org/News/briefings/docs//2007/070330.Disabilities.doc.htm> [last accessed 13 November 2007].
- 15 See, for example, Statement by Hon Ruth Dyson, Minister for Disability Issues, New Zealand Mission to the UN, for Formal Ceremony at the Signing of the Convention on the Rights of Persons with Disability, 30 March 2007: ‘Just as the Convention itself is the product of a remarkable partnership between governments and civil society, effective implementation will require a continuation of that partnership.’ The negotiating slogan ‘Nothing about us without us’ was adopted by the International Disability Caucus, available at: <http://www.un.org/esa/socdev/enable/documents/Stat.Conv/nzam.doc> [last accessed 13 November 2007].
- 16 The UN estimates that there are 650 million persons with disability in the world. This estimate is based on a population incidence of 10%. Reported population incidence varies widely from <1% (eg Yemen 0.5%) to more than 30% (eg Norway 33% in urban population and 39% in rural populations), see DISTAT, The United Nations Disability Statistics Database, Human Functioning and Disability, available at: <http://unstats.un.org/unsd/demographic/sconcerns/disability/disab2.asp> [last accessed 13 November 2007].
- 17 See, for example, statements made by the High Commissioner for Human Rights, Louise Arbour, and the Permanent Representative of New Zealand and Chair of the Ad-Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Ambassador Don Mackay, at a Special Event on the Convention on Rights of Persons with Disabilities, convened by the UN Human Rights Council, 26 March 2007, available at: [http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear.en\)/7444B2E219117CE8C12572AA004C5701?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear.en)/7444B2E219117CE8C12572AA004C5701?OpenDocument) [last accessed 13 November 2007].

2. Sources of Light: The Intellectual Antecedents

Central to contemporary concepts of disability is the notion of systemic disadvantage, according to which persons with disability are discriminated against by social structures that segregate or exclude them from participating fully in society. 'Disability' is understood and experienced as oppression by social structures and practices. This oppression works both on the individual, denying or diminishing personhood,¹⁸ and systemically, on those who share the label 'disabled', denying or diminishing citizenship and civic participation.¹⁹

This analysis is a different way of looking at the experiences of persons with disability to that with which most people are familiar. Historically, persons with disability have been treated as objects of pity and as burdens on their families and societies. According to this view, disability is a 'personal tragedy'. Persons with disability are victims of great misfortune who are variously perceived as socially dead or better off dead, as passively coming to terms with a condition that will forever limit their activities, or as bravely and triumphantly overcoming these limitations by great mental or physical effort.²⁰ The focus is on the 'affliction' caused by the particular condition or impairment and the provision of cure, treatment, care and protection to change the person so that they may be assimilated to the social norm.²¹ This is broadly referred to as the medical model of disability, which has arguably been the most powerful influence on the conceptualisation of disability in modern history.²² As one

18 For example, in popular culture persons with disability may be referred to as 'vegetables', 'monsters', and 'freaks'.

19 For example, in many countries persons with intellectual and psycho-social impairments have been, and may still be, denied democratic voting rights.

20 See generally Oliver, *Understanding Disability: From Theory to Practice* (Hampshire: Macmillan, 1996); and Finkelstein, *Attitudes and Disabled People: Issues for Discussion* (New York: World Rehabilitation Fund, 1980), available at: <http://www.leeds.ac.uk/disability-studies/archiveuk/finkelstein/Reflections%20on%20the%20Social%20Model%20of%20Disability.pdf> [last accessed 13 November 2007].

21 Michael Oliver locates the origins of disability as a socially constructed category at the beginning of the Industrial Revolution. He argues that one of the most important differences between the pre- and post-industrial revolution is the replacement of the notion of impairment as something conferred by an external, often supernatural, force with rational and scientific explanations. The Industrial Revolution resulted in a classification of people according to their ability to contribute to the forces of production. The boundaries of the concept of *normal* were restricted by the individual's capacity to participate in economic life. Impaired persons were seen as unproductive with little social value or individual human worth and were exiled from the productive centre into institutions and an existence outside society where their only claim to social resources was in the charity of others. This resulted in an environment constructed on an able-bodied, productive norm. See Oliver, *supra* n. 20; and Finkelstein, *supra* n. 20.

22 The medical model views disability as a deficiency or deviation from the norm, located in the individual, and carries an action implication to treat or change the person so that they can conform to existing social processes and structures. This treatment is typically provided in service systems and settings isolated from the general community. The medical model is not

commentator has observed, the medical model:

... has guided and dominated clinical practice with the resulting assumption that both problems and solutions lie within people with disabilities rather than within society.²³

These ‘images of disability’ (as Michael Oliver terms them) strongly reinforce the idea that it is the impairment itself that causes the limitation, without recognising the role of the social environment in disabling persons with impairments. These images have dominated policy responses to persons with impairments, resulting in a disabling culture that perpetuates negative attitudes and discriminatory practices that ultimately oppress and exclude persons with impairments.²⁴

By contrast, the social model of disability locates the experience of disability in the social environment, rather than impairment, and carries with it the implication of action to dismantle the social and physical barriers to the participation and inclusion of persons with disability. The social model of disability is a generic term for a broad theory of disability that began to emerge from the mid 1960s principally from within the disability rights movement in the United Kingdom.²⁵ It involved disability activist academics reinterpreting ‘disability’ as social oppression,²⁶ and radically refocusing the agenda away from cure, treatment, care and protection to acceptance of impairment as a positive dimension of human diversity, and to the problematisation and rejection of a social norm that results in exclusion. Social model concepts were rapidly

confined to the health domain, but for many persons with disability, has pervaded all areas of life. Examples include institutional residential services, special education systems and sheltered employment.

23 French, ‘What is Disability?’, in French (ed), *On Equal Terms - Working with Disabled People* (Oxford: Butterworth-Heinemann, 1994) at 4.

24 Finkelstein and Stuart, ‘Developing New Services’, in Hales (ed.), *Beyond Disability: Towards an Enabling Society* (London: Sage Publications, 1996) at 175–6.

25 The concept emerged in the mid 1960s through the reflections and writings of Paul Hunt, a British disability rights activist. It crystallised in 1976, when Hunt and his colleagues within the UK organisations Union of the Physically Impaired Against Segregation (UPIAS) and The Disability Alliance published *Fundamental Principles of Disability – Being a Summary of the Discussion Held on 22 November 1975, November 1976*, available at: <http://www.leeds.ac.uk/disability-studies/archiveuk/UPIAS/fundamental%principles.pdf> [last accessed 14 November 2007], which claimed that disability is ‘the disadvantage or restriction of activity caused by a contemporary social organisation which takes little or no account of people who have physical impairments and thus excludes them from participation in the mainstream of social activities.’ See also Finkelstein, *Reflections on the Social Model of Disability: The South African Connection*, 13 April 2005, available at: <http://www.leeds.ac.uk/disability-studies/archiveuk/finkelstein/Reflections%20on%20the%20Social%20Model%20of%20Disability.pdf> [last accessed 13 November 2007].

26 See Oliver, supra n. 20 and n. 21; Finkelstein, supra n. 20; Barnes, *Disabled People in Britain and Discrimination* (London: Hurst and Co, 1991); Abberley ‘The Concept of Oppression and the Development of a Social Theory of Disability’, (1987) 2 *Disability, Handicap and Society* 5; and Quinn, ‘The Human Rights of People with Disabilities under EU Law’, in Alston, Bustelo and Heenan (eds), *The EU and Human Rights* (Oxford: Oxford University Press, 1999) at 281.

popularised²⁷ and internationalised, and have become a dominant frame of reference both for disability studies and disability rights advocacy. This duality of the social model as a theory of disability and as a disability rights manifesto has important implications.

As a theory of disability, the social model is continuing to evolve, particularly under the influence of critical disability studies, which have drawn attention to the shortcomings of its classical formulation as a heuristic for explaining the total experience of disability. Its core thesis—that limitations result from disability not impairment—has been critiqued for its failure to recognise and address the genuine issues that individuals face due to impairment, and not disability, in terms of health, well-being and individual capacity.²⁸ However, this critique has been controversial within the broader disability rights movement,²⁹ and, consequently, it has had little impact on the social model as a disability rights manifesto. Indeed, the social model as disability rights manifesto appears to have moved in an opposite direction theoretically, closer to a radical social constructionist view of disability, in which impairment has no underlying reality.³⁰ As we shall discuss later, the social model has had an enormous influence in the development of the CRPD. However, it is important to understand that the primary influence has come from this populist conceptualisation of the social model as a disability rights manifesto and its tendency towards a radical social constructionist view of disability, rather than from its contemporary expression as a critical theory of disability.³¹

- 27 The very simplicity of the idea that 'people are disabled by society' has been enormously effective in highlighting systemic discrimination and mobilising political action for social change.
- 28 See Shakespeare and Watson, 'The Social Model of Disability: An Outdated Ideology?', (2002) 2 *Research in Social Science and Disability* 9, available at: <http://www.leeds.ac.uk/disability-studies/archiveuk/Shakespeare/social%20model%20of%20disability.pdf> [last accessed 13 November 2007]; and Corker and Shakespeare (eds), *Disability/Postmodernity: Embodying Disability Theory* (London: Continuum, 2002).
- 29 See, for example, Light, 'Social Model or Unsociable Muddle?' at Disability Awareness in Action web site, available at: www.daa.org.uk/socialmodel.html [last accessed on 26 October 2007], where critical disability studies are positioned as 'harmful,' 'repeated attacks' on the social-model, as offering 'no acceptable alternative' to persons with disability, and critical scholars are accused of forgetting that the 'social model originated with us [that is, disabled persons], and that we still have use for it.'
- 30 This was particularly evident in the Ad Hoc Committee debate concerning a definition of disability. As we shall discuss later in this paper, on a number of occasions the International Disability Caucus intervened in the debate claiming the right to 'self-determine' a disability identity, and rejecting 'externally imposed definitions.' The implication of this view is that there are no intrinsic, objectively ascertainable characteristics upon which to base a definition: Kicki Nordstrom, former President, World Blind Union, Intervention in debate on behalf of the International Disability Caucus with respect to Article 2: Definitions, 7th Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Rights and Dignity of Persons with Disabilities, 31 January 2006, authors' direct observation.
- 31 This is most evident in the outcome of the drafting of Article 12 and Article 17, CRPD—which border on a complete denial of instrumental limitations associated with cognitive impairments.

The social model assists to illuminate the limitations of traditional theories of equality in relation to persons with disability. The fundamental purpose of equality measures is to challenge the equation of difference with inferiority. Originally, this produced formal equality measures that aimed to free individuals from discrimination based on their membership of a particular social group. Formal equality measures pursued a colour blind and gender-neutral society, where merit was assessed without regard to irrelevant characteristics, and individuals could thrive free from stereotypical assumptions.³²

However, by requiring that everyone be treated the same, formal equality entrenches pre-existing patterns of social disadvantage in a number of fundamental ways.³³ In particular, as Fredman explains, formal equality fails to recognise that much discrimination cannot be attributed to individual acts by specific perpetrators 'but flows, instead, from the institutions and structures of society'. It also assumes that individual merit can be quantified in an objective way, abstracted from the social context in which it is located, when 'in fact, of course, merit is itself a social construct'.³⁴ In other words, formal equality assumes a benign social norm, and focuses on the elimination of perverse personal behaviour. It does not seek to change the fundamental structure of the norm. The central premise of formal equality—the disregard of difference—is particularly problematic in a disability context for another reason. Perhaps more so than for any other disadvantaged group, treatment of persons with disability 'equally' will often require specific recognition and accommodation of their difference; that is, 'different' treatment.

Substantive equality attempts to remedy these problems by compensating for historical disadvantage, and by requiring alteration of the norm to better reflect human diversity. Key substantive equality measures include the designation of quotas or institution of affirmative action policies to increase minority group participation in education or employment, and the imposition of a requirement to make structural adjustments to accommodate personal needs (for example, flexible work hours to accommodate family responsibilities). Essentially, substantive equality underpins contemporary non-discrimination law in the area of disability in the United Kingdom, Canada and the United States (as examples).³⁵

32 Fredman, 'Disability Equality and the Existing Anti-Discrimination Paradigm - European Discrimination Law', in Lawson and Gooding (eds), *Disability Rights in Europe: From Theory to Practice* (Oxford: Hart Publishing, 2005) at 211.

33 Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide', (2005) 21 *South African Journal of Human Rights* 163.

34 Fredman, *supra* n. 32 at 204.

35 The Australian Disability Discrimination Act 1992 also has some substantive equality elements, but it is essentially based on a formal equality model: *Purvis v State of New South Wales* (2003) 217 CLR 92 per Gummow, Hayne and Heydon JJ (in the majority) at para. 203; see also Gleeson CJ (in the majority) at para. 8, and Kirby and McHugh JJ (dissenting) at para. 104.

In the disability context, the obligation to make reasonable accommodations for impairment and disability-related needs³⁶ is a crucial substantive equality measure. Although it is individually referenced (in that the obligation operates on a bilateral basis between the person to be accommodated and the person or institution required to make the accommodation), reasonable accommodation has the potential to result in fundamental structural transformations of the norm. For example, in an Australian case, the obligation to adjust the 2000 Olympics website so that it was accessible to a blind person who uses screen-reading software has stimulated revision of many other websites providing public information in both the government and private sectors.³⁷ Similarly, the obligation to provide a Telephone Typewriter (TTY) as an alternative to a regular telephone handset in one case resulted in TTYS being made available without additional cost to all persons who required them.³⁸ However, in spite of its fundamental significance as a disability equality measure, the obligation to make accommodations is typically constrained, in practice, by a 'hardship' defence or limit on the obligation,³⁹ which may be negative or diminish its structural impact. If the threshold at which the obligation ceases is set too low or if the obligation is easily evaded, reasonable accommodation may result in little or only marginal changes to an exclusionary norm.

The approach to achieving substantive equality reflected in contemporary disability non-discrimination law is what Fredman refers to as a 'minority rights approach'.⁴⁰ It involves the identification of a class of persons entitled to protection from discrimination and to special measures to compensate for disadvantage. This approach also has a number of other fundamental problems. First, it assumes it is possible and desirable to identify the class of persons entitled to the benefits conferred. In fact, defining disability has proved notoriously difficult and controversial.⁴¹ Second, a minority rights approach tends to pit the protected class against others in claims for scarce social resources, and may therefore be unable to overcome pre-existing power relationships. The individually referenced, bilateral nature of the obligation to make

36 This 'difference' may either result from impairment (for example, recognising and accommodating a person with diabetes who requires facilities and work breaks to inject insulin) or disability (for example, flexible work hours to accommodate mobility restrictions arising from inflexible personal care services or unreliable parallel transport systems).

37 *Maguire v Sydney Organising Committee for the Olympic Games* (2001) EOC 93–123. In fact, the *Maguire* decision was not adequately complied with, leading to a successful claim for damages. Nevertheless, the decision had extensive impact in improving the accessibility of web-based information in Australia.

38 *Scott v Telstra Corporation Limited and Another* (1995) EOC 92–717.

39 See 'unjustifiable hardship' section 11, Disability Discrimination Act 1992 (Cth, Aust); 'such steps as is reasonable'; section 6 and section 21, Disability Discrimination Act 1995 (UK); and 'undue hardship' section 101(10), Americans with Disabilities Act 1990 (USA).

40 Fredman, *supra* n. 32 at 204–5.

41 *Ibid.* at 206.

reasonable accommodation is particularly prone to this dynamic, and this tends to result in downward pressure on the threshold of obligation. A minority rights approach also tends to emphasise difference and deviance from the norm, rather than social diversity and membership of the whole.⁴²

The imposition of an obligation to take reasonable steps to accommodate impairment and disability-related needs was viewed as a critical foundation or pre-condition for the attainment of equality for persons with disability in CRPD negotiations. Indeed, the CRPD contains a web of duties to make such accommodations woven through both its general and specific obligations. However, notwithstanding the undoubted importance of the obligation to accommodate to the realisation of substantive equality for persons with disability, as we shall discuss later, these efforts may ultimately have fallen victim to the central problems with minority right approaches.

The limitations of traditional approaches to equality are stimulating the development of a new disability equality paradigm. The fundamental tenet of this formative approach is universalism, that of radical modification of the social norm to reflect human diversity.⁴³ The universalist approach is based on the concept of impairment as ‘an infinitely various but universal feature of the human condition.’⁴⁴ According to this view ‘no human has a complete repertoire of abilities, suitable for all permutations of the physical and social environment,’⁴⁵ or put another way, ‘the issue of disability for individuals . . . is not whether but when, not so much which one, but how many and in what combination.’⁴⁶ In particular, a universalist approach does not discriminate between individuals based on their intellectual or other ability or contribution. As Rioux explains:

. . . all persons of distinguishable groups have the same needs for equality;
 . . . the capacity to exercise a right is not a distinguishing characteristic for the purpose of recognising or denying that right; . . . equality is consequent on the equal value, benefit and rights possessed in differences from the norm, not on overcoming natural characteristics and becoming as much like the norm as possible.⁴⁷

42 Ibid. at 204–6.

43 In our view the universalist approach has enormous transformative potential for all persons who experience disadvantage and discrimination. Nevertheless, its Utopian aspirations may prove impossible to operationalise.

44 Bickenbach, ‘Minority Rights or Universal Participation: The Politics of Disablement’, in Jones and Basser Marks (eds), *Disability, Diver-Ability and Legal Change* (London: Martinus Nijhoff, 1999) at 101.

45 Ibid. at 111.

46 Zola, ‘Disability Statistics, What We Count and What It Tells Us: A Personal and Political Analysis’, (1993) 4 *Journal of Disability Policy Studies* 9.

47 Rioux, ‘Towards a Concept of Equality of Well-Being: Overcoming the Social and Legal Construction on Inequality’, in Rioux and Bach (eds), *Disability is Not Measles: New Research Paradigms in Disability* (Ontario: Roeher Institute, 1994) at 90.

A universalist approach to equality focuses on ensuring that legislation, social policies and environments reflect the full range of 'repertoires' that exist in society.⁴⁸ Laws and policies promote full participation in society by everyone, regardless of personal characteristics or group membership, challenging common stereotypes about group characteristics that can underlie law or government action.⁴⁹ Equality provisions are not activated by direct knowledge of personal characteristics but on the assumption that all characteristics will be encountered. Simply put, if formal equality was essentially about ignoring difference, a universalist approach is about expecting difference. As we shall see, this universalist approach has been particularly influential on the CRPD, especially with respect to its emphasis on the accessibility of the environment and in its mandate of universal design.

Also central to contemporary theories of disability and disability rights is the concept of citizenship.⁵⁰ Claiming citizenship, and the dignity and equality it entails, is viewed as fundamental to overcoming dehumanisation and exclusion. For persons with disability, the effective denial of citizenship is a continuing multidimensional wrong, which may include the explicit negation of democratic rights on the basis of impairment,⁵¹ as well as the denial of the opportunity,⁵² or an accessible means,⁵³ to participate in public policy formulation and decision-making that affects their lives. The effective exclusion of persons with disability from public policy formulation and decision-making processes has a profound distributive impact, denying them the opportunity to argue for their needs and rights in the contest for social resources, and for the reform of oppressive laws. This 'wrong' is intensified by the exercise of overt and covert executive power over the lives of many persons with disability by means of compulsory assistance (or coercive treatment),⁵⁴ or, more subtly,

48 Zola, *supra* n. 46.

49 Fredman, *supra* n. 33 at 163–4.

50 See Oliver, *supra* n. 20 at 43–77. Oliver demonstrates the ways in which persons with disability are excluded from and denied their citizenship rights in the British welfare state. See also Davis, 'Riding with the Man on the Escalator: Citizenship and Disability', in Jones and Basser Marks (eds), *supra* n. 44 at 65–74, discussing the ways in which persons with disability are prevented from exercising their social, civil and political rights, in an Australian context; and Abberley, 'Work, Utopia and Impairment', in Barton (ed.), *Disability and Society: Emerging Issues and Insights* (London: Addison Wesley Longman, 1996) at 61, who argues that participation in economic production is used to define social integration, identity, and 'incapacity', so that persons with disability are necessarily excluded as 'valid' citizens. See Oliver, *supra* n. 20 at 43.

51 For example, the right to vote is frequently explicitly denied on the basis of mental illness or intellectual impairment.

52 Persons with disability, for example, persons with intellectual impairment may be viewed as unable to contribute meaningful views on public policy questions.

53 Public policy information may not be available in accessible formats and public consultation processes may not make disability related adjustments.

54 For example, involuntary institutionalisation and involuntary administration of medication.

through effective control over the social resources that sustain persons with disability.⁵⁵

This history of disempowerment and paternalism has produced a deep mistrust of executive power and the demand for radical participation, which is encapsulated by the credo ‘nothing about us without us’: now a virtually universal claim of the disability rights movement internationally and fundamental to the disability equality paradigm. As we shall observe later, it has had an enormous influence in building the constituency for a disability rights convention, and in shaping the framework, process and outcomes of its negotiation. It will play an equally important role in the implementation and monitoring of the CRPD, to which we now turn.

3. Struggles in the Darkness: Twenty-five Years of International Law

Generally speaking, disability has been an invisible element of international human rights law. Campaign postcards distributed by non-government organisations during the first session of the Ad Hoc Committee attempted to persuade delegates that disability rights were a ‘missing piece’ of the human rights framework.⁵⁶ Persons with disability have not been explicitly recognised in the binding instruments of international human rights law. None of the equality clauses of any of the three instruments comprising the International Bill of Rights [Universal Declaration of Human Rights 1948,⁵⁷ the International Covenant on Civil and Political Rights 1966 (ICCPR),⁵⁸ and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)⁵⁹] mention persons with disability as a protected category. Nor, with one exception, do the thematic conventions.⁶⁰ The Convention on the Rights of the Child 1989 (CRC) does refer to ‘mentally and physically disabled’ children in Article 23.⁶¹ This Article sets out a range of obligations designed to ensure that children

55 For example, many persons with disability are compelled to live in residential institutions, not because they are legally required to do so, but because these are the only environments in which State assistance is available.

56 These postcards were produced by the Landmine Survivors Network (on file with authors).

57 GA Res. 217 A(III), 10 December 1948.

58 999 UNTS 171.

59 993 UNTS 3.

60 Other than the Convention on the Rights of the Child 1989 (CRC), 1577 UNTS 3, the thematic Conventions prior to the CRPD are the International Convention on the Elimination of All Forms of Racial Discrimination 1965, 660 UNTS 195; the International Covenant on the Elimination of All Forms of Discrimination Against Women 1979, 1249 UNTS 13; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, 2220 UNTS 93; 12 IHRR 269 (2005).

61 There is also a prohibition on discrimination on the ground of disability in Article 2, CRC.

with disability receive 'special care' in relation to their 'special needs' with a view to them 'achieving the fullest possible social integration and individual development'. However, there are significant difficulties in the formulation of this Article (particularly in its emphasis on 'special care', which ultimately derives from a medical model of disability, and its application only to 'mentally and physically disabled' children). Article 23 has also tended to be interpreted and applied as if it circumscribed State obligations to children with disability, inhibiting the mainstreaming of disability measures.⁶²

Up to the development of the CRPD, the United Nations system had attempted to deal with this visibility problem in two ways. First, by trying to interpret and apply existing core human rights instruments to persons with disability, and second, by developing a series of lesser policy and programmatic documents focused on the needs and rights of persons with disability.

In 1994, the Committee on Economic, Social and Cultural Rights (ESCR Committee) assumed responsibility for supervising disability issues within the area of its competence. In its General Comment No. 5,⁶³ the ESCR Committee recognised that while the ICESCR does not explicitly refer to persons with disability, Article 2(2) required that the rights 'enunciated . . . be exercised without discrimination of any kind', whether on the basis of certain specified grounds, 'or other status'. In the ESCR Committee's view, this clearly encompassed discrimination on the ground of disability. The ESCR Committee also noted that the Universal Declaration of Human Rights provides that '*all* human beings are born free and equal in dignity and rights' (emphasis added) and that this obviously included persons with disability.⁶⁴ General Comment No. 5 recognises that:

both 'de jure and de facto discrimination against persons with disability have a long history and take various forms'. They range from invidious discrimination, such as the denial of access to educational opportunities, to more 'subtle' forms of discrimination such as segregation and isolation achieved through the imposition of physical and social barriers.⁶⁵

General Comment No. 5 was also the first United Nations document to broadly define disability-based discrimination:

For the purposes of the Covenant, 'disability-based discrimination' may be defined as including any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has

62 In 2006, the Committee on the Rights of the Child (CRC Committee) issued General Comment No. 9: The rights of children with disabilities, HRI/GEN/1/Rev 8, Add.1 at para. 34, which attempts to address this problem by detailing recommended actions in relation to the full range of CRC obligations.

63 HRI/GEN/1/Rev 8, Add.1.

64 *Ibid.* at para. 34.

65 *Ibid.* at para. 15.

the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights.⁶⁶

Unlike the ESCR Committee, the Human Rights Committee has not issued a specific interpretive statement in relation to the application of the ICCPR to persons with disability. Nevertheless, in its General Comment No. 18,⁶⁷ which deals with the right to equality and non-discrimination under the ICCPR, the Human Rights Committee rejected the concept of formal equality in the human rights context in favour of substantive equality. It recognised that equal treatment does not always mean identical treatment, and that States have a duty to take steps to eliminate conditions that perpetuate discrimination.⁶⁸ For the reasons we have already discussed, this has important implications for achieving equality and non-discrimination in a disability context.

These initiatives have been important increments towards the broader recognition of the rights of persons with disability in the CRPD.⁶⁹ However, in and of themselves, they achieved very little by way of improving recognition and respect of the human rights of persons with disability. One of the principal reasons why this is so is that, to a significant extent, the traditional human rights paradigm is based on an ‘able-bodied’ norm. In most cases it is not self-evident how traditional human rights are to be interpreted and applied in a manner that will penetrate to the specific human rights violations to which persons with disability are subject.

Disability as an issue of law, both domestically and internationally, has traditionally been addressed as an aspect of social security and welfare legislation, health law or guardianship. Persons with disability were depicted not as subjects with legal rights but as objects of welfare, health and charity programmes.⁷⁰ The recognition of disability as a fundamental human rights issue has developed slowly from the early 1970s. Most developments in disability rights at the international level have been in non-binding, ‘soft-law’, and the early instruments still tend to reflect this medical/welfare approach. When the GA adopted the Declaration on the Rights of Mentally Retarded Persons 1971 (1971 Declaration)⁷¹ and the Declaration on the Rights of Disabled Persons 1975 (1975 Declaration),⁷² persons with disability may have become explicit subjects of international human rights law, but this status

66 Ibid.

67 10 November 1989, HRI/GEN/1/Rev 8, especially at para. 10.

68 Ibid. at para. 8.

69 For completeness, it should also be noted that in General Recommendation No. 18: Disabled Women, 10th Session, 1991, HRI/GEN/1/Rev 8 at 301, the Committee on the Elimination of Discrimination Against Women urges States to provide information on the status of disabled women in their periodic reports.

70 Degener and Quinn, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability*, 2002, HR/PUB/02 at 1.

71 GA Res. 2856/26, 20 December 1971, A/RES/2856.

72 GA Res. 3447/30, 9 December 1975, A/RES/3447.

was heavily qualified by the individual model of disability within which they were couched. As a result, these instruments tend to be paternalistic, and legitimise segregation through specialised services and institutions.⁷³

In 1982 the United Nations adopted the World Programme of Action concerning Disabled Persons (WPA), which established as one of its goals the equalisation of opportunities for people with disability. The WPA defined 'equalisation of opportunities' as:

... the process through which the general system of society, such as the physical and cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sports and recreational facilities, are made accessible to all.⁷⁴

This marked the beginning of a significant shift away from an individual/medical model of disability to a focus on rights and equality. In 1984, the UN followed the WPA with a comprehensive study on the relationship between human rights and disability, with the Sub-Commission on the Prevention of Discrimination and Protection of Minorities appointing a Special Rapporteur to conduct the research. In his 1993 report, the Special Rapporteur made it clear that disability is a human rights concern, in which the United Nations bodies should be involved.⁷⁵

In 1991, the GA adopted the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (Principles).⁷⁶ The Principles establish mental health care standards and procedural guarantees for the protection of persons with mental illness against human rights abuses in mental health facilities, such as excessive or prolonged use of physical restraint or involuntary seclusion, sterilisation on the grounds of mental illness, psychosurgery and irreversible treatment. However, the continued focus on treatment and protection has meant the Principles have been controversial, particularly among psychosocial impairment user groups, for their perpetuation of a medical model of disability.

During the 1980s there were three unsuccessful attempts to persuade the international community to develop a human rights convention in respect of persons with disability.⁷⁷ The reasons these initiatives failed are multifactorial,

73 For example, Article 4, 1971 Declaration, continues to provide qualified support for institutional accommodation for persons with disability; and Article 1, 1975 Declaration, incorporates a personal deficiency based conceptualisation of disability.

74 GA Res. 37/52, 3 December 1982, A/RES/37/51, 37th Session Supp. No. 51 at para. 12.

75 Report by Special Rapporteur, Leandro Despouy, of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Human Rights and Disabled Persons, 1993, E/CN.4/Sub.2/1991/31, available at: <http://www.un.org/esa/socdev/enable/dispaperdes0.htm> [last accessed 13 November 2007].

76 GA Res. 46/119, 17 December 1991.

77 Proposals were sponsored by Italy in 1982 and 1897 and by Sweden in 1989, see Degener and Quinn, *supra* n. 70 at 30.

but included the belief that the rights of persons with disability were adequately dealt with in universal human rights instruments; the inability to convince the international community that persons with disability experienced specific and aggravated forms of human rights violation; and, diminishing support for civil right-based approaches to human rights (in which these initiatives were framed), particularly among developing states.

As a compensatory alternative, the GA eventually adopted the non-binding United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities (Standard Rules) in 1993.⁷⁸ The Standard Rules firmly build on the WPA, and clearly accentuate equality, stating:

The principle of equal rights implies that the needs of each and every individual are of equal importance, that those needs must be made the basis for the planning of societies and that all resources must be employed in such a way as to ensure that every individual has equal opportunity for participation.⁷⁹

The Standard Rules developed the work of the WPA in situating impairment as an incident of human diversity and urged States to incorporate a disability perspective into policy and planning. The Standard Rules make very clear statements about the rights of persons with disability and promote an accessible environment in which these rights may be exercised. However, they still focus on medical treatment and (somewhat naively in terms of genetic testing), prevention, as preconditions for equal participation. This has been heavily criticised by disability activists for its failure to accept disability as part of human diversity, and to respect the inherent dignity of persons with disability.

In any event, irrespective of their textual strengths and weaknesses, these soft law instruments are not binding on States, and their impact has, overall, been very limited. This led disability activists to the view that a binding international instrument that set out a normative framework for the promotion and protection of the human rights of persons with disability was essential.⁸⁰ It was also argued that international law had to adjust to incorporate a disability rights paradigm. Proponents emphasised that a convention on the human rights of persons with disability would give shape to the nature of, and add

78 GA Res. 48/96, 20 December 1993, A/RES/48/96, Supp No. 49, Annex at 202–11, available at: <http://www.un.org/documents/ga/res/48/a48r096.htm> [last accessed 13 November 2007]. See Degener, 'Disabled Persons and Human Rights: The Legal Framework', and Lindqvist, 'Standard Rules in the Disability Field—A New United Nations Instrument', in Degener and Koster–Dreese (eds), *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments* (Dordrecht, Boston, London: Martinus Nijhoff, 1995) at 40 and 63 respectively.

79 Standard Rules, supra n. 79.

80 Many of the statements to the Ad Hoc Committee from the IDC and disabled persons organisations stressed the need for a binding instrument see, for example, Disabled Peoples International, Position Paper regarding a New International Human Rights Convention for Disabled People, 25 February 2003, available at: <http://www.un.org/esa/socdev/enable/rights/contrib-dpi.htm> [last accessed 14 November 2007].

specific content to, human rights as they apply to persons with disability, and in turn, provide a substantive framework for the application of rights within domestic law and policy.⁸¹

4. Towards the Dawn: The Mandate for a Convention

The constituency for an international convention on the rights of persons with disability developed in a unique international political environment for a human rights treaty. In 2001, the Government of Mexico spearheaded another campaign to secure a mandate from the GA to develop a human rights convention in relation to persons with disability. This campaign was framed in terms of social development and used as its backdrop the Millennium Development Goals (MDGs)⁸² formulated by the UN in 2000, which aim, among other things, to halve global extreme poverty by 2015. Persons with disability were not identified as a specific target group for action in the MDGs, even though this group is significantly over-represented amongst the world's so-called 'poorest of the poor'.⁸³ The basic thrust of the Mexican campaign was that in light of this omission a specific human rights instrument was required to ensure that persons with disability were not left behind in global development efforts.

This framing of the human rights agenda for persons with disability in terms of social development resulted in a groundswell of support from many of the world's developing and transitional economies, and even from countries that have not traditionally demonstrated a strong commitment to human rights.⁸⁴ When the issue was raised for debate at the 56th Session of the GA in December 2001, a resolution to develop a human rights instrument in relation to persons with disability was adopted by consensus, without a vote being necessary.⁸⁵

81 Degener and Quinn, *supra* n. 71.

82 See further Annan, UN Press Release, *We the Peoples: The Role of the United Nations in the 21st Century*, GA/9704, 3 April 2000, available at: <http://www.un.org/millennium/sg/report/ch2.pdf> [last accessed 13 November 2007].

83 The World Health Organisation (WHO) estimates that, of the 650 million persons with disability in the world, 80% live in the developing world: WHO, 'Global Programming Note 2006-2007: Call for Resource Mobilisation and Engagement Opportunities', (2006) *Disability and Rehabilitation*, available at: <http://www.who.int/nmh/donorinfo/vip.promoting.access.health.care.rehabilitation.update.pdf.pdf> [last accessed 13 November 2007].

84 Bolivia, Chile, Columbia, Congo, Costa Rica, Cuba, Democratic Republic of the Congo, Dominican Republic, Ecuador, El Salvador, Guatemala, Jamaica, Mexico, Morocco, Nicaragua, Panama, Phillipines, Sierra Leone, South Africa and Uruguay sponsored the Resolution on a comprehensive and integral international Convention to promote and protect the rights and dignity of persons with disabilities, GA Res. 56/168, 19 December 2001, A/56/583/Add.2, available at: <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/488/76/pdf/N0148876.pdf?OpenElement> [last accessed 13 November 2007].

85 *Ibid.*

In the same resolution, the GA established an Ad Hoc Committee to take negotiations forward.⁸⁶ The Ad Hoc Committee operated on an opt-in basis, allowing any member state with an interest to participate. The Economic and Social Council of the UN (not, interestingly, the Office of the High Commissioner for Human Rights) acted as the Committee's secretariat.⁸⁷ The Ad Hoc Committee met in eight 2–3-week sessions between its establishment in December 2001 and the adoption of the CRPD and its Optional Protocol in December 2006.

In its First and Second Sessions,⁸⁸ the Ad Hoc Committee considered and resolved tensions around its mandate and programme of work. A number of delegations interpreted the mandate as limited to considering whether a convention was required. Australia argued that a convention was not required in this area, as it would lead to duplication and confusion in the application of human rights. It suggested that the issues would be better dealt with in another Optional Protocol to the ICCPR.⁸⁹ The European Union also argued that it was open to the Committee to determine the type of instrument that ought to be recommended to the GA.⁹⁰ However most delegations considered this issue settled and took the view that the Ad Hoc Committee's mandate was to develop the text for a convention. This included Mexico, which provided a draft text for consideration at the opening of the First Session.⁹¹

At the end of its Second Session, the Ad Hoc Committee established a 'Working Group' to develop an initial draft text.⁹² It met in January 2004 and developed a draft text for the substantive elements of the convention. This document is known as the 'Working Group Draft Text'.⁹³ Over its next

86 The term 'Ad Hoc' simply means a specific purpose, time-limited committee to distinguish it from the many standing committees that operate under the GA.

87 This appears to be the result of the initial framing of the Convention in social development.

88 The First Session was held in July/August 2002 and the Second Session in June 2003.

89 The Australian delegation made several interventions to this effect in the First and Second Sessions of the Ad Hoc Committee.

90 Comprehensive and integral international Convention to promote and protect the rights and dignity of persons with disability: Position paper by the European Union, 2002, A/AC.265/WP.2, available at: <http://www.un.org/esa/socdev/enable/rights/adhocmeetaac265w2e.htm> [last accessed 13 November 2007].

91 Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities: Working paper by Mexico, 2002, A/AC.265/WP.1, available at: <http://www.un.org/esa/socdev/enable/rights/adhocmeetaac265w1e.htm> [last accessed 13 November 2007].

92 Report of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 3 July 2003, A/58/118 and Corr. 1, Part IV (15) 1, available at: <http://www.un.org/esa/socdev/enable/rights/a.58.118.e.htm> [last accessed 13 November 2007]. The Working Group was made up of 27 UN member State representatives divided proportionally between each UN region, 12 representatives of disabled persons' organisations, and one representative of national human rights institutions.

93 Report of the Working Group to the Ad Hoc Committee, Draft Articles for a comprehensive and integral international Convention on the protection and promotion of the rights and dignity of persons with disabilities, Annex I, A/AC.265/2004/WG/1, available at: <http://www.un.org/esa/socdev/enable/rights/ahcwgreport.htm> [last accessed 13 November 2007].

six sessions the Ad Hoc Committee undertook an extensive First and Second Reading of the Working Group Draft Text.⁹⁴ In October 2005, following the Sixth Session, the Chair of the Committee released a text that synthesised the proposals, known as the Chair's Draft Text, along with a detailed letter of commentary. This text then became the basis for negotiations from the Seventh Session.⁹⁵

In the course of the Seventh Session, the Chair also released a draft proposal for the convention's international monitoring framework.⁹⁶ The proposed international monitoring framework was one of the most challenging areas of negotiation. Some delegations strongly opposed the proposal to establish a new treaty body and separate monitoring framework for the convention on the basis that this was inconsistent with current treaty-body reform initiatives.⁹⁷ In an effort to resolve these tensions, the Mexican delegation led informal discussions. The result was a decision to disaggregate proposed individual complaint and inquiry procedures from the CRPD into a separate Optional Protocol.⁹⁸ At the end of the first sitting of the Eighth Session, the Ad Hoc Committee adopted the draft texts for the CRPD and Optional Protocol, subject to a technical review. In December 2006, following the technical review by the Drafting Group⁹⁹, the Ad Hoc Committee held a second sitting of the Eighth Session to formally adopt the proposed text for the CRPD and Optional Protocol. It then referred these documents to the GA for adoption.

94 The 3rd (May/June 2004), 4th (August/September 2004), 5th (January/February 2005), 6th (August 2005), 7th (January/February 2006) and 8th (August 2006).

95 Letter dated 7 October 2005 from the Chairman to all members of the Ad Hoc Committee on a comprehensive and integral international Convention to promote and protect the rights and dignity of persons with disabilities, 14 October 2005, A/AC.265/2006/1, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N05/555/12/PDF/N0555512.pdf?OpenElement> [last accessed 13 November 2007].

96 Revisions and amendments at the Seventh Session of the Ad Hoc Committee, Discussion Texts presented by the Chair, available at: <http://www.un.org/esa/socdev/enable/rights/ahc7discussmonit.htm> [last accessed 13 November 2007].

97 Australia, China, Russia, Sudan and the USA, among others, were notable objectors to a new treaty body: see Inclusion International, 8th Daily Updates, available at: <http://www.inclusion-international.org> [last accessed 13 November 2007].

98 A consensus was also developed that broader treaty-body reform efforts ought not to delay the entry into force of the convention, nor should they result in an inferior implementation and enforcement regime being established under the CRPD.

99 Draft Interim Report of the Ad Hoc Committee on a comprehensive and integral international Convention on the protection and promotion of the rights and dignity of persons with disabilities on its 8th Session, 1 September 2006, A/AC.265/2006/L.6. The drafting group was tasked with ensuring uniformity of terminology throughout the text of the draft Convention, harmonizing the versions in the official languages of the UN, available at: <http://www.un.org/esa/socdev/enable/rights/ahc8intreporte.htm> [last accessed 13 November 2007].

5. The Light Emerges: The CRPD Text

The GA mandate under which the CRPD was developed stipulated that the negotiating Committee was not to develop any new human rights, but was to apply existing human rights to the particular circumstances of persons with disability.¹⁰⁰ Accordingly, the Chairman of the negotiating Committee has conceptualised the CRPD as ‘an implementation convention’; one that ‘sets out a detailed code [for how existing rights] should be put into practice’ with respect to persons with disability.¹⁰¹ Consistent with this view, the United Nations CRPD online information continues to assure the reader that the CRPD does not create any new rights or entitlements, [rather it] express[es] existing rights in a manner that addresses the needs and situations of persons with CRPD disabilities.’¹⁰² Given that the *raison d’être* for the development of the was that existing human rights instruments have failed persons with disability, to say the very least, it is paradoxical to propose that these instruments nevertheless provide the necessary scope and content from which to derive a blueprint that will secure their rights in future. However, despite the logical incoherence of this proposition, this was the unchallenged¹⁰³ political/administrative framework within which the CRPD was developed.¹⁰⁴

The GA mandate under which the CRPD was developed called for proposals for a ‘comprehensive and integral international convention’, and indeed, these concepts featured in its working title up until the final stages of negotiation.¹⁰⁵ This initial working title for the convention incorporated important meanings. The word ‘comprehensive’ signified an instruction to the negotiating committee to take a holistic approach to the formulation of the convention, incorporating social development, human rights and non-discrimination elements. The word ‘integral’ signified an intention for the convention to become a core constituent of international human rights law, rather than a subsidiary of existing law. The CRPD therefore has the same status as the other core human rights conventions.

100 This point was made repeatedly in the course of negotiations, was a feature of the rhetoric associated with its adoption and opening for signature, and now also permeates formative implementation dialogue and planning.

101 UN Press Releases, ‘Chairman says draft convention sets out ‘detailed code of implementation and spells out how individual rights should be put into practice’, 15 August 2005, SOC/4680, available at: <http://www.un.org/News/Press/docs/2005/soc4680.doc.htm> [last accessed 13 November 2007].

102 Frequently Asked Questions regarding the Convention on the Rights of Persons with Disabilities, available at: <http://www.un.org/disabilities/default.asp?navid=22&pid=151#qq> [last accessed 13 November 2007].

103 Although both State and non-government observer delegations advanced many text proposals that were inconsistent with this constraint, none explicitly challenged it.

104 In reality, this constraint was only applied to ‘close’ controversial issues, like proposed extensions to the right to life that would have referred to pre-birth negative selection.

105 Resolution 56/168, supra n. 85. The reference to a ‘comprehensive and integral international convention’ is retained in para. (y), Preamble to the CRPD.

In spite of its professed adherence to a social model of disability, it will be immediately apparent that the CRPD perpetuates, and perhaps now irrevocably entrenches, the contemporary conceptual confusion between impairment and disability. As we have discussed, according to the social model, 'disability' is the limitation that results from discrimination and social oppression. Impairment is a characteristic, feature or attribute of an individual (for example, blindness, deafness, spinal cord injury). There is no deterministic relationship between persons with an impairment and disability, because a society free from discrimination and oppression can exist, at least theoretically. However, it is only persons with impairments who may be subject to disability. The CRPD typically uses the term 'persons with disabilities' where conceptually 'persons with impairments' is meant, and additionally, it uses the term 'disabilities' instead of 'disability', including in its title, which is incorrect from both an ontological and phenomenological perspective.¹⁰⁶ It is therefore difficult to construe the CRPD strictly in accordance with the social model.

It also logically means that the human rights protection provided by the CRPD is not triggered by impairment, but disability; that is, protection is post-facto—only available to those persons with impairments who are already subject to discrimination and oppression, rather than those persons who may be at risk of it. This latter group would logically include those persons with impairments who do not experience disability because of the nature of their present social environment or because appropriate adjustments are available to them. For example, Article 14 provides that 'disability shall in no case justify a deprivation of liberty'. Presumably, the intention is to prevent deprivation of liberty on the basis of a personal characteristic, such as intellectual impairment, whether or not that person is experiencing disability. Similarly, Article 23 provides that 'in no case shall a child be separated from parents on the basis of disability of either the child or one or both of the parents' where again, presumably, the intention must be to prevent family separation merely because of a personal characteristic, such as a parent's psycho-social impairment.

In part this conceptual problem arose because the Ad Hoc Committee sought to distinguish between impairment (which they conceptualised as 'disability') and a *characteristic* of impairment (such as an inability to control impulse, mood or maintain accurate perception that poses a risk of harm to others), which they incorrectly conceptualised as external to impairment and disability. They sought to prevent interference with the individual on the basis of impairment, while preserving the right of the State to intervene, if necessary, in relation to conduct perceived to be external to impairment. However,

106 Disability can only describe one form of oppression. However, persons with impairments may be subject to more than one form of oppression, for example, women may be subject to disability oppression and gender oppression.

correctly understood, such conduct is often the manifestation of impairment, or of the disability the person with impairment experiences in interacting with the social environment. For example, a person with brain injury may engage in violence towards others due to an inability to control impulse in the context of environmental factors that cause severe stress and frustration.¹⁰⁷

The drafting of these and other provisions therefore appears to achieve the opposite of that which was intended, failing to effectively protect from State interference persons with impairments who are not experiencing disability, and apparently preventing any form of State intervention in relation to persons with impairment engaging in conduct manifesting disability that may actually present a risk of harm to others. This is clearest in Article 23, where the Committee clearly sought to preserve the State's capacity to intervene in a family situation where the conduct of a parent presented a risk of harm to a child. However, a literal reading of the article suggests that a parent *can never* be separated from a child on the basis of disability, even if the result of that disability (used in its correct sense) is harm to the child.¹⁰⁸ It will therefore be necessary to take a broad purposive approach to the interpretation of provisions such as this, attempting to construe what the drafters intended, rather than what they wrote.

A. *The Text of the CRPD and its Optional Protocol*

The CRPD comprises of a Preamble and 50 Articles and its Optional Protocol comprises 18 Articles. While its Articles vary considerably in length, the CRPD is, overall, the densest exposition of human rights by the UN to date. In part as a response to this density, the CRPD is also the first United Nations human rights convention to contain titles for each Article as an aid to its accessibility.¹⁰⁹

The Preamble to the CRPD is especially detailed, comprising of 25 paragraphs ('a' to 'y'). Unlike the other parts of the CRPD, the Preamble does not contain binding legal obligations. However, it contains many elements that will play an important role in the interpretation of the CRPD, only a few of which can be noted here.¹¹⁰

107 This was a principal issue in *Purvis v State of New South Wales* (2003) 217 CLR 92.

108 One possible positive consequence of this drafting is that it places an absolute onus on States to provide the accommodations parents with disability may require to appropriately parent their children.

109 The Ad Hoc Committee made this decision during the first sitting of the 8th Session. The Optional Protocol does not incorporate Article titles.

110 On the use of preambles in interpreting treaties, see Article 31, Vienna Convention on the Law of Treaties 1969, 1155 UNTS 31.

The questions of a definition of 'disability' and 'persons with disabilities' were among the most controversial dealt with by the Ad Hoc Committee and ultimately could not be resolved.¹¹¹ Among State delegations, the principal reason for this was concern about the distributive impact of such definitions. Most participating non-governmental organisations and some States were determined to ensure that the convention applied to all persons with disability (by which they appeared to mean all impairment groups). A large number of States were concerned that this would 'open the floodgates' compelling them to recognise in domestic implementation efforts a large number of impairment groups not traditionally understood as persons with disability within their societies (such as persons with psycho-social disability and those with blood borne organisms causing disease (for example, persons with HIV/AIDS)).

However, it was not only State delegations that objected to a definition of disability being incorporated into the CRPD. The IDC also objected on the basis that any definition would inevitably derive from the medical model, and would be externally imposed and disempowering (at various points in the debate, IDC spokespersons sought to assert a right to 'self determine' identity as a 'disabled person.').¹¹² The IDC also argued that understanding of 'disability' as a social category is evolving over time, varied between societies, and that the incorporation of a definition of disability ran the risk of time-locking the CRPD, and of imposing a western view of disability on non-western cultural systems. In its first aspect, paragraph (e) of the Preamble accedes to the IDC's view of disability as an 'evolving concept'.

This view is affirmed by the description of persons with disability provided in Article 1 of the CRPD, or at least that appears to be its intention. Persons with disabilities (sic) are described as 'includ[ing] those who have long-term physical, mental, intellectual or sensory impairments . . .'. The taxonomy of impairment types is open-ended and indicative, rather than closed. This is reinforced by the first paragraph of Article 1 which asserts that the purpose of the convention is to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by *all* (emphasis added) persons with disabilities . . .'. Nevertheless, Article 1 does limit the application of the CRPD to persons who have 'long-term' impairments, which would certainly exclude those persons with short-term impairments arising from traumatic injuries and disease, and it may also exclude persons with episodic conditions (for example, mood disorders, asthma).

Additionally, while reference to *all* persons with disabilities (emphasis added) in paragraph 1 certainly has rhetorical power, it ultimately produces an element of circularity. Apart from the impairment categories listed, it is

111 The question of such definitions was discussed in the Ad Hoc Committee's 2nd, 4th, 7th and 8th Sessions, and in the Working Group.

112 *Supra* n. 30.

not self-evident what other impairment groups fall within the boundaries of the category. The treaty body will no doubt ultimately develop jurisprudence in this area, but, in the meantime, the boundaries of the category of persons to benefit from the CRPD will be determined domestically, potentially depriving some impairment groups of human rights protection.

One potential solution to this problem is to construe the category of persons protected by the CRPD by relying upon the International Classification of Functioning, Disability and Health (ICF).¹¹³ Certainly, the drafters of the ICF envisaged such a role.¹¹⁴ However, for reasons we will explain shortly, the relationship between the CRPD and the ICF is ambiguous to say the least, and any attempt to use the ICF to interpret the CRPD will inevitably be fraught with controversy.

Leaving the question of definition to one side, in its' second aspect, paragraph (e) of the Preamble makes it clear that disability is to be understood according to the precepts of the social model. 'Disability' is conceptualised as the product of the interaction of persons with impairments with environmental barriers that hinder their full and effective participation in society on an equal basis with others. This conceptualisation is also affirmed by the description of persons with disability in the second paragraph of Article 1, and in the virtually absolute emphasis placed by the substantive human rights Articles on the removal of barriers and provision of accommodations that will facilitate participation and inclusion of persons with disability within society. In fact, this is one of the most notable discontinuities between the CRPD and the United Nations' prior work in the areas of disability and human rights. With only one limited exception, the CRPD does not refer to prevention or treatment of impairment.¹¹⁵

Paragraph (f) of the Preamble brings into focus this issue of continuity and discontinuity of the CRPD with the United Nation previous expositions of the human rights of persons with disability and related programmatic activity. Despite its benign appearance, it is intensely politically charged. The World Programme of Action concerning Disabled Persons and the Standard Rules on the Equalisation of Opportunities of Persons with Disabilities are explicitly acknowledged as antecedents to the CPRD but the 1971 Declaration, the 1975 Declaration and the Principles are not. These omissions were intensely pursued by the IDC, which sought to negate any relationship between these instruments and the CRPD, and thereby to limit any future reliance upon them for the purposes of interpreting and applying CRPD rights. The IDC's

113 World Health Assembly Res. 54.21, 22 May 2001.

114 *Ibid.* at 6. The introduction to the ICF states that the '... ICF provides an appropriate instrument for the implementation of stated international human rights mandates and national legislation'.

115 Article 25(b), health, requires States to provide 'services designed to minimise and prevent further disabilities ...' (emphasis added).

objections were focused on these instruments' perceived derivation from the medical model and their approval or acceptance of institutionalisation, substitute decision-making, and the compulsory treatment of persons with disability.

Perhaps even more significantly, paragraph (f) also fails to refer to the ICF, in spite of its contemporary prominence as a statistical, analytical and planning tool, including within United Nations and other multilateral agencies. The IDC vehemently opposed reference to the ICF on the basis that it reflected a medical model of disability. From the IDC's point of view, the ICF was part of the human rights problem faced by persons with disability that the CRPD was to overcome through its exposition of the social model of disability. Consequently, any attempt to use the ICF to interpret the boundaries of the class of persons protected by the CRPD is likely to be extremely controversial, at least within the civil society movement of disabled persons. The future relationship between the ICF and the CRPD, and indeed the future of the ICF itself, are at this stage crucial unanswered questions.

B. Family Members

With very limited exceptions,¹¹⁶ the CRPD does not refer to family members and other associates of persons with disability, and it does not confer any rights upon them independent of those conferred on persons with disability. Even when the CRPD does refer to the family, it implicitly positions the person with disability in an instrumental rather than dependent role,¹¹⁷ or alternatively it imposes obligations on States to assist families in their effort to realise the human rights of persons with disability—the family member with disability is the primary beneficiary.¹¹⁸

The question of whether the CRPD should recognise the needs and rights of family members of persons with disability, and, if so, in what manner, were issues keenly argued in the Ad Hoc Committee. Ultimately, the central question was answered in the negative, on the basis that in most societies family needs and rights tend to be privileged above those of persons with disability and, notwithstanding the enormous importance and contribution of families to

116 Preamble (x), Article 16, freedom from exploitation, violence and abuse; Article 23(4), respect for home and the family; and Article 28(1), 2(c), adequate standard of living and social protection.

117 For example, in Article 23, respect for home and the family, persons with disability are accorded the instrumental role of making decisions concerning the founding a family and the number and spacing of their children.

118 Article 8(1)(a), awareness-raising; Article 23(5), respect for home and the family; and Article 28(1), 2(c), adequate standard of living and social protection. Article 8(1)(a), for example, specifically requires states to raise awareness at the family level of the rights and dignity of persons with disability, and their capabilities and contributions, to combat stereotypes and prejudices that reinforce the belief that persons with disability are a burden to their family and society.

the realisation of the rights and dignity of persons with disability it is sometimes family members who are principally responsible for, or collude in, human rights violations against them.¹¹⁹ The CRPD privileges the rights of persons with disability over those of family members, and challenges the construction of persons with disability as passive participants in family life and as 'burdens' on other family members.

Paragraph (x) of the Preamble delicately poises this issue. Consistent with previous instruments it affirms the family as the natural and fundamental group unit of society, and the entitlement of the family to protection by society and the state. However, it applies this principle in a way that recognises that *both* persons with disability *and* their family members should receive protection and assistance from the State. It clearly positions persons with disability as having an active, instrumental role in family life. It also makes it clear that the protection and assistance provided to families is for the purpose of enabling them to contribute to the realisation of the rights of persons with disability of the rights of persons with disability. Such assistance is not cast as compensation for the 'burden' of caring for a person with disability.

C. Interpretive Provisions

Articles 1 and 2 of the CRPD are interpretive. Article 1 sets out the general purpose of the convention, which is to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disability, and to promote respect for their dignity.' It sets out three levels of obligation in relation to CRPD rights with which States must ultimately comply: to promote (foster recognition), protect (prevent interference with) and ensure (enable the realisation of) the human rights and fundamental freedoms of persons with disability. Article 2 defines five key terms used repeatedly throughout the convention which have very specific meanings and implications for implementation of CRPD rights—'communication', 'language', 'discrimination on the ground of disability', 'reasonable accommodation' and 'universal design'.

D. Reasonable Accommodation

'Reasonable accommodation' is defined as 'necessary and appropriate modifications 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

119 For example, by arranging for the sterilisation on women and girls with disability, or by institutionalising persons with disability.

fundamental freedoms'. Importantly, the definition of discrimination on the basis of disability includes the 'denial of reasonable accommodation'. This is reinforced in Article 5 Equality and non-discrimination, which also requires states to ensure that reasonable accommodation is provided.¹²⁰

The incorporation of a State obligation to ensure that reasonable accommodations are made to facilitate the exercise by persons with disability of CPRD rights is perhaps the most fundamental instrumental element of the convention. Nevertheless, its formulation is very far from optimal. The obligation ceases at the point where the adjustment required constitutes a 'disproportionate or undue burden'. The terms 'disproportionate' and 'undue burden' appear to have been intended by the Ad Hoc Committee as alternatives, but have been drafted as additive, effectively creating a two element test that may allow the obligation to be evaded at the lower of either threshold (which may vary according to context). Moreover, the thresholds themselves appear insufficiently challenging to penetrate to the core of exclusionary practices affecting persons requiring significant structural adjustments. They appear more likely to produce results for persons who require relatively marginal changes to the prevailing social environment. It will also be observed that the terminology 'undue burden' is most unfortunate in that it activates precisely the construction of persons with disability as 'burdens' on the community that the CPRD otherwise attempts to overcome.

E. General Obligations

Articles 3 to 9 of the CRPD are general obligations. They contain overarching or crosscutting principles and measures to be applied in all aspects of the implementation of the convention. Article 3 enunciates the general (or normative) principles upon which the CRPD is based, which include respect for the inherent dignity of persons with disability, non-discrimination, and the full and effective participation of persons with disability in society. It provides what one senior commentator has referred to as the CRPD's 'moral compass'.¹²¹ Article 4 sets out the general obligations states assume on ratification or accession to the CRPD. This includes, for example, the obligation to incorporate the

120 This has very important implications for Australian disability discrimination law in light of the High Court of Australia's decision in *Purvis v NSW (Department of Education and Training)* (2003) ALR 133 to the effect that s5(2) (direct discrimination) of the Disability Discrimination Act 1992 (Cth) imposes no positive duty to provide reasonable accommodation: per Gummow, Hayne and Heydon JJ (in the majority) at paras 217-218 and per Kirby and McHugh JJ (dissenting) at para. 104.

121 Quinn, Key Note Address to German European Union Presidency Ministerial Conference: Empowering Persons with Disabilities, The UN Convention on the Human Rights of Persons with Disabilities: A Trigger for Worldwide Law Reform, Berlin, 11 June 2007, available at: <http://www.eu2007.bmas.de/EU2007/Redaktion/Deutsch/PDF/2007-06-12-rede-quinn.property=pdf.bereich=eu2007.sprache=de.rwb=true.pdf> [last accessed 13 November 2007].

terms of the convention into national laws, policies and programs, and to repeal national laws that are inconsistent with the convention. Article 6: Women with disabilities and Article 7: Children with disabilities require states to implement the CRPD in a manner that will ensure that women and children with disability are able to exercise and enjoy their human rights and fundamental freedoms on an equal basis with men and other children. These gender and age equality measures are reinforced in the CRPD's Preamble and at a number of key points in its' specific obligations.

Articles 8 and 9 present what are undoubtedly two of the greatest challenges to the international community. Article 8 requires states to promote a fundamental change in societal attitudes, by fostering respect for the rights and dignity of persons with disability and by combating stereotypes and prejudice. Article 9 requires states to ensure that the 'environment' is accessible to persons with disability so that they may live independently and participate fully in all aspects of life. It is important to observe that the environment is very broadly conceptualised, and not only includes built structures, but also transportation, information and communications (including the Internet). The Article also specifically adverts to a principle of geographic equity, requiring equivalent levels of environmental accessibility in both urban and rural areas. The principle of geographic equity also underpins a number of the CRPD's economic, social and cultural rights.

F. Specific Obligations

Articles 10 to 30 of the CRPD contain specific obligations. They set out, mostly in some detail, the specific human rights and fundamental freedoms recognised by the convention.

G. Civil and Political Rights

Broadly speaking, Articles 10 to 23 and Article 29 are based in civil and political rights. In some cases there are new or amplified applications or extensions of these rights. For example, Article 11 extends the right to life and survival to situations of emergencies. States are required to ensure the protection and safety of persons with disability in situations of risk, including armed conflict, humanitarian emergencies and natural disasters.¹²² Article 13 significantly extends the traditional right of equality before the law into a positive obligation

122 The CRPD was developed against a backdrop of unprecedented challenges in the international environment, which impacted in aggravated ways on persons with disability. This included the 11 September 2001 terrorist attacks on the United States of America, wars in Iraq, Israel-Palestine and Lebanon, the Asian Tsunami, severe earthquakes in south Asia, and hurricanes Katrina and Rita.

to ensure access to justice.¹²³ Article 16 extends the traditional right to freedom from torture or cruel, inhuman or degrading treatment to freedom from all forms of exploitation, violence and abuse.¹²⁴

Articles 17, 19 and 20 significantly extend the traditional right of liberty and security of the person in ways that are unexpected and difficult to predict. Article 17 is particularly directed towards non-interference with both the physical body and the mind, and is the product of very vigorous advocacy against compulsory treatment by activists with psycho-social impairments. It is the first time the concept of 'integrity of the person' has been included as a stand-alone Article in a core United Nations human rights treaty.¹²⁵ Article 19 equates the right to liberty with the right of persons with disability to live in and be a part of the community. It will operate as a prohibition on institutional models of supported accommodation for persons with disability, and require national investment in community based living options. Article 20 equates the right to liberty with the maximum personal mobility of persons with disability. It will also require national investment in mobility aids, assistive technologies, and forms of live assistance for persons with disability. From an implementation perspective, it is intriguing that these Articles are, despite their appearance, civil and political rights, subject to the standard of immediate realisation.¹²⁶

These Articles contain some extraordinary innovations and applications of civil and political rights to persons with disability. However, their formulation is not without disappointment. Despite considerable agitation of the issue by particular non-government observer delegations to the Ad Hoc Committee, Article 10: Right to life, remains silent on genetic science aimed at the elimination of impairment-related human diversity, and on pre-birth negative selection of foeti with identified or imputed impairment. The failure of the CRPD to speak directly to this and some other bioethical issues may come to be regarded as its' greatest failing.

Article 17 is also very disappointing. It was perhaps the single most contentious Article negotiated by the Ad Hoc Committee, and, in large part as a consequence of this, its text is the most limited of the substantive human rights Articles. The Article is confined to a simple statement of principle with no specific application of this principle to the human right violations it purports to

123 This is the first time access to justice has appeared as a substantive right in a UN human rights instrument. A more traditional formulation of the right to equality before the law is found in Article 12, CRPD.

124 This article also, or alternatively, derives from Article 19, CRC.

125 This concept does, however, appear in Article 3, Charter of Fundamental Rights of the European Union 2000, OJ (C 364) 1, 7 December 2000, available at: www.europarl.europa.eu/charter/default.en.htm [last accessed 13 November 2007].

126 This means that nations have an immediate obligation to respect and ensure these rights. Economic, social and cultural rights are subject to *progressive realisation*. See further, below p. 30.

address. At the urging of the IDC in general, and the World Network of Users and Survivors of Psychiatry (WNUSP) in particular, the Ad Hoc Committee abandoned an earlier proposal that would have required the strict regulation of compulsory treatment. The IDC and WNUSP sought the ultimate goal of the CRPD ‘outlawing’ all forms of compulsory assistance, but, when this proved impossible to achieve, they adopted the alternative lobbying stance that there ought to be no reference to compulsory treatment in the CRPD as this would provide it with legitimacy. Ultimately, this was the outcome of the Ad Hoc Committee’s deliberations, although this appeared to be more to avoid conflict with the IDC and WNUSP, than because of any underlying commitment to the principle on which this opposition was based. The result is that one of the most critical areas of human rights violation for persons with disability—the use of coercive State power for the purpose of ‘treatment’—remains without any specific regulation.

H. Economic, Social and Cultural Rights

Articles 24 to 28 and Article 30 are based in economic, social and cultural rights.¹²⁷ These Articles place over-riding emphasis on inclusion and participation by persons with disability in the mainstream education system and labour market, supported by the accommodations and other positive measures required by persons with disability to realise these rights. The right to health is particularly directed towards ensuring that persons with disability enjoy non-discriminatory access to comprehensive general and specialist health services in the local communities in which they live. Article 26 extends the traditional rights to health, work, education and social security to the right to habilitation and rehabilitation, which features for the first time in a core United Nations human rights treaty. It is directed to ensuring that persons with disability have access to developmental learning and rehabilitation programmes that will enable them to develop (or recover) their maximum potential. Again, the emphasis is on inclusion and participation of persons with disability in the community both during the process of habilitation and rehabilitation and as an outcome of it.

Article 28 deals with the right to an adequate standard of living and social protection. The concept of social protection is arguably significantly broader than the traditional right to social security. The Article also incorporates obligations in relation to poverty reduction, the provision of specialist disability services, and assistance with the extra costs of disability. Finally, Article 30 deals with the rights of persons with disability to participation in cultural life, recreation, leisure and sport. Again, primary emphasis is placed on access by

127 See generally, McCorquodale and Baderin (eds), *Economic and Social Rights in Action*, (Oxford: Oxford University Press, 2007).

persons with disability to cultural and leisure facilities, and their participation in cultural and leisure programmes and events on an equal basis with others, supported by the accommodations and other positive measures necessary for them to effectively realise these rights. However, the Article also recognises the specific cultural and linguistic identity of persons who are Deaf, and guarantees recognition of sign language and Deaf culture.

The overall thrust of these Articles, taken together, is to require States to incorporate a 'twin-track' approach to meeting the economic, social and cultural rights of persons with disability, which involves, first, incorporating disability sensitive measures into mainstream service delivery, and second, ensuring the provision of necessary specialist services and special measures in a manner that facilitates the inclusion and participation of persons with disability within the general community. The CRPD very specifically, and very comprehensively, de-legitimises segregated specialist service delivery to persons with disability.

I. Implementation and Monitoring

Articles 31 to 40 of the CRPD set out arrangements for implementation and monitoring of the convention at both the national and international levels. At the national level this includes the establishment of focal points and coordination mechanisms to facilitate cross-sectoral implementation measures. At the international level, it includes the establishment of a new treaty body to monitor implementation of the convention, and to receive complaints about violation of CRPD rights. Under the Optional Protocol the treaty body is also empowered to receive complaints about violations of CRPD rights from individuals and groups of individuals where they have exhausted domestic remedies.¹²⁸ The Optional Protocol also establishes an inquiry procedure in relation to gross violations of CRPD rights.¹²⁹

J. International Cooperation

Article 32: International cooperation was one of the most hotly contested Articles in the development of the CRPD and its inclusion remained subject to challenge up until almost the last moment of negotiations. Essentially, this controversy related to a concern among many developed countries (particularly the European Union) that the Article would give rise to an expectation from developing and transitional states of increased aid to implement the CRPD. Consequential to this was the further concern that the Article would facilitate

128 Article 1, CRPD Optional Protocol.

129 Article 6, CRPD Optional Protocol.

developing states adopting the stance that the CRPD could not be implemented domestically in the absence of additional aid. This controversy accounts for the rather tortured drafting of the chapeau of paragraph 1 of the article. In brief, Article 32 places a strong emphasis on national responsibility to realise the purpose and objectives of the CRPD, but recognises the importance of international cooperation in support of these national efforts.

Although Article 32 was forged around the issue of ‘north-south’ wealth transfer, it would be a serious mistake to interpret the article only in those terms. There is enormous scope and need for cooperation between developed states in the harmonisation of standards providing for accessibility, in the regulation of international non-state actors that impact on the lives of persons with disability, and in the elimination of structural barriers to equality that have an international dimension (for example, in civil aviation and copyright law). This is imperative in an in the context of increasingly globalised economic and social systems.

K. New Human Rights?

Despite what might be characterised as the ‘official fiction’ that the CRPD does not set down any new human rights, it would seem clear that it has, in fact, modified, transformed and added to traditional human rights concepts in key respects. The CRPD does contain entirely new or amplified formulations of human rights, including a number of collective or social group rights, such as the right to research and development,¹³⁰ awareness raising,¹³¹ social protection and poverty reduction,¹³² and to international cooperation, including co-operation in international development programmes,¹³³ (sometimes called ‘third-generation rights’). The CRPD also incorporates a number of ‘universal’ equality measures (such as the right to an accessible environment,¹³⁴ which has the potential to benefit many persons, not just persons with disability), which are sometimes conceptualised as ‘fourth-generation rights’. Article 30 also contains an extensive exposition of rights to leisure, tourism and recreation (sometimes conceptualised as ‘fifth-generation’ rights).

Additionally, the CRPD incorporates highly disability-specific interpretations of existing human rights, which transform formerly essentially non-interference based rights (or ‘negative’ rights) into positive state obligations. For example, the right of non-interference with personal opinion and

130 For example, Article 4 (1)(f) and (g). General Obligations, CRPD.

131 Article 8, Awareness-raising, CRPD.

132 Article 28 (2)(b), Adequate standard of living and social protection, CRPD.

133 Article 32, International Cooperation, CRPD, which is not a new concept in international human rights law (cf Article 45, CRC), but its expression in the CRPD supersedes pre-existing formulations.

134 Articles 3, General principles (f), and 9, Accessibility, CRPD.

expression is transformed into a positive state obligation to provide public information in accessible formats and to recognise sign languages, Braille, and augmentative and alternative communication.¹³⁵ Similarly, the non-interference based guarantee of equality before the law is extended or amplified into a positive obligation to ensure access to justice for persons with disability.¹³⁶ In these and other respects, the CRPD blends civil and political rights with economic, social and cultural rights, not only within its overall structure, but also within its individual articles. To this extent, the traditional distinction between those rights subject to immediate realisation and those subject to progressive realisation which is generally preserved in Article 4 of the CRPD, appears to be effectively abandoned.¹³⁷ It is also noteworthy that under the Optional Protocol all CRPD rights are potentially justiciable, not just its civil and political rights.

6. Concluding Comments

There is no doubt that the CRPD has transformative potential for the lives of the world's largest minority. Its passage into international law ought rightly to be a cause for celebration. By any measure, the CRPD is a high water mark not only in the area of disability rights, but also in the development of international human rights law concepts and implementation measures more generally. However, enthusiasm for the CRPD must be tempered with realism and strategy. The CRPD, like all international instruments, is ultimately a negotiated text. It is therefore unrealistic to expect it to reflect a fully coherent or comprehensive exposition of disability rights. Ultimately, the CRPD has been most influenced by an uncritical, populist, understanding of the social model of disability. At times this understanding approaches a radical social constructionist view of disability, in which impairment has no underlying reality. While the central tenet of the social model—disability as social oppression—has not been superseded, it has been heavily nuanced and qualified by the

135 Article 21, Freedom of expression and opinion, and access to information, CRPD.

136 Article 13, Access to justice, CRPD.

137 Article 4(2), CRPD retains the distinction between the basic obligations of State Parties to each of the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (see Article 2(i) of each Covenant). Whereas civil and political rights must be guaranteed immediately, the same is not generally the case with economic and social rights. Article 4(2) of the CRPD reads:

With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum extent of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realisation of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

last decade of critical disability studies, which has re-emphasised the realities of impairment as a dimension of the ontological and phenomenological experience of disability. If there is truly to be a shift to a coherent new disability rights paradigm in international law, it will be important that CRPD interpretation and implementation efforts penetrate beyond populist social model ideas to a more sophisticated understanding of impairment and disability in its social context. Additionally, it must be recognised that despite the CRPD's extensive exposition of disability rights, some crucial areas, including bioethics and compulsory treatment, are barely grazed by the CRPD text. The CRPD is therefore a crucial buttress and facilitator of a disability rights agenda, but it is not a proxy for that agenda. Some disability rights issues still remain untouched or undeveloped in international human rights law. Consequently, it will be important that disability human rights activists neither undervalue, nor overestimate, the role and scope of the CRPD and its potential contribution to securing the human rights of persons with disability into the future.