



## **Legal Reports No. 2**

# **Treaty Interpretation and the United Nations Convention on the Rights of Persons with Disabilities**

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## Preface

This report by Dr Jean Allain, Reader in Public International Law in the School of Law, Queen's University Belfast, on Treaty Interpretation and the UN Convention on the Rights of Persons with Disabilities is the second in a Series of Legal Reports being produced by the Centre on Human Rights for People with Disabilities.

These Reports are aimed at increasing understanding of:

- the principles underlying;
- the implications of;
- possible methods of working with

legal means and instruments for the protection and promotion of the human rights of people with disabilities.

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## **Treaty Interpretation and the UN Convention on the Rights of Persons with Disabilities**

This Report sets out the manner in which the 2006 Convention on the Rights of Persons with Disabilities is to be interpreted in line with international law.

The decentralised nature of international law means that, in general terms, States are left to ‘auto-interpret’ the law; more often than not, in their own favour.<sup>1</sup> As with a number of other human rights treaties, where the Convention on the Rights of Persons with Disabilities is concerned, auto-interpretation has been tempered by an independent third-party in the guise of a Committee. This Committee makes suggestions and general comments or recommendations on giving effect to the provisions of a treaty. In this manner, the Committee on the Rights of Persons with Disabilities provides, as a result of its make-up (its Members being of “high moral standing and recognized competence and experience in the field covered by the present Convention”) an authoritative interpretation of the Convention on the Rights of Persons with Disabilities. Thus, while any one State may seek to provide an interpretation of the Convention, the Committee is best placed to give the authoritative expression of the manner in which the Convention should be interpreted.

The Committee on the Rights of Persons with Disabilities will, in seeking to interpret the Convention on the Rights of Persons with Disabilities, look to the rules of interpretation of international law to assist States in giving effect to the provisions of the Convention.

### **Treaty Interpretation in International Law**

Section 3 of the 1969 Vienna Convention on the Law of Treaties sets out the rules of treaty interpretation; it is within these parameters that the provisions of the Convention on the Rights of Persons with Disabilities are to be understood.

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<sup>1</sup> See Leo Gross, “States as Organs of International Law and the Problem of Autointerpretation”, Essays on International Law and Organizations, Vol. 1, 1984, pp. 367-397.

It should be emphasised that the International Law Commission, in drafting the provisions of interpretation which appear in the Vienna Convention considered that these should be read not in a formalistic manner, but holistically. While there is an inherent logic to treaty interpretation, the International Law Commission considered that the various element in any given case should be “thrown into a crucible, and their interaction would give the legally relevant interpretation”.<sup>2</sup>

Article 31 of the Vienna Convention sets out the general rule of treaty interpretation as follows. The ‘crucible’ approach mandates that weight be given to each of these four elements thus “allowing them to work together”.<sup>3</sup>

A treaty is to be interpreted:

- 1) **in Good Faith:** central to effective international relations is that States are to act in good faith. This notion is translated into the fundamental principle of treaty law: pacta sunt servanda, which is spelled out in Article 26 of the Vienna Conventions as “every treaty in force is binding upon the parties to it and must be performed by them in good faith”.
- 2) with regard to its **Ordinary Meaning:** in interpreting a treaty one should not seek to read into the text what is not there. That words or phrases, as an original drafter of the Vienna Convention has noted, “are to be given their normal, natural, and unstrained meaning”.<sup>4</sup>
- 3) **in Context:** a word or phrase is not to be read in isolation but in reference to the section it finds itself in, as well as the overall treaty including its preamble and any annexes; thus mandating that a treaty be interpreted as a whole.
- 4) **in Light of the Object and Purpose:** emphasis here is to give effect to what the treaty is meant to achieve. This teleological approach

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<sup>2</sup> As quoted in Richard Gardiner, Treaty Interpretation, 2008, p. 9.

<sup>3</sup> Richard Gardiner, Treaty Interpretation, 2008, pp. 37-38.

<sup>4</sup> Sir Gerald Fitzmaurice, International Law Commission Rapporteur on the Law of Treaties, as reproduced in Malgosia Fitzmaurice, “The Practical Working of the Law of Treaties”, Malcolm Evans (eds) International Law, 2006, p. 198.

gives more weight to the intentions of the negotiators than the specific wording of the text.<sup>5</sup>

In seeking to interpret a treaty, a consideration in good faith of the ordinary meaning of a provision would be considered a textual reading of a convention; amounting to what, on paper, the Convention on the Rights of Persons with Disabilities (CRPD) says. This should be considered the fundamental pillar of interpretation.

Where 'in context' is concerned, it should be understood that when an article consists of more than one paragraph – where, for instance such paragraphs are separated into alpha- or numerical sub-paragraphs – there is a requirement to read and interpret the article as a whole. Thus for instance, with regard to Article 33 of the CRPD on National Implementation and Monitoring. Sub-paragraph (1) related with establishing a governmental focal point for implementation, would need to be considered in relation to sub-paragraph (2) related to establishing an independent mechanism to monitor implementation. Both of these sub-paragraphs would also have to be read in conjunction with the obligation of Article 33(3) which requires that “Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process”.

That said, the requirements to interpret a treaty 'in context' creates a unique situation where the CRPD is concerned. Interpreting 'in context' requires that one read the specific provision in light of the overall treaty. Where the CRPD is concerned, its unique character mandates an approach which turns to the 'object and purpose' as these are given voice, in part, through Article 3 which set out the Convention's 'General Principles', as follows:

- (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity;

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<sup>5</sup> Article 31(1) of the Vienna Convention on the Law of Treaties reads: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

- (f) Accessibility;
- (g) Equality between men and women;
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

This is so as Article 3 read in conjunction with Article 4, which sets out 'General Obligations' wherein the Convention establishes that "States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability", establishes the object of the CRPD. The Convention also makes plain its purpose as Article 1, which states:

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

Thus, with regard to the CRPD, the negotiating States sought to give voice to a reading of the Convention which gives more emphasis to the teleological (read: the study of design or purpose) approach to treaty interpretation by requiring a reader of the Convention to, after having taken into consideration the ordinary meaning of the a word or phrase, to move directly to consider via Articles 1, 3, and 4, the 'object and purpose' as contextualising one's interpretation, that is as reading the text 'in context'.

As a result, the overall emphasis of interpretation where the Convention on the Rights of Persons with Disabilities is concerned is different than previous UN human rights treaties. An interpretation of this Convention, must continuously have recourse to the aim of fulfilling the *purpose* of "promoting, protecting and ensuring the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and promoting respect for their inherent dignity"; with a look to the general principles of Article 3 and general obligation of Article 4 as setting out the *object* of the Convention.

Turning to further rules of treaty interpretation, the general rules of treaty interpretation as set out in the Vienna Convention also require, beyond the provisions of a treaty, the taking into consideration of "any subsequent agreement between the parties" as to interpretation and "any subsequent practice in the application of the treaty". Where the

CRPD is concerned, subsequent practice may be manifest in the jurisprudence and general recommendations set down by the Committee on the Rights of Persons with Disabilities (ComRPD).

If, in utilising these general rules of treaty interpretation, the meaning of a provision of a treaty is left “ambiguous or obscure”, or “leads to a result which is manifestly absurd or unreasonable”, Article 32 of the Vienna Convention allows for recourse, as “a supplementary means of interpretation”, consideration of the legislative history of the treaty (the so-called; travaux préparatoires), that is: “the preparatory work of the treaty and the circumstances of its conclusion”<sup>6</sup>.

Article 33(4) of the Vienna Convention puts forward one final item to take into consideration when there appears to be a discrepancy in the wording of treaties which are produced in more than one language. In such a case, “when a comparison of the authentic texts discloses a difference of meaning [...] the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted”.

For its part, Article 50 of the CRPD establishes that the “Arabic, Chinese, English, French, Russian and Spanish texts [...] shall be equally authentic”.

This provision is very important where human rights treaties are concerned as, on balance, it requires that differences in language be reconciled in favour of the individual as the object and purpose of such treaties is to promote and protect human rights. With regard to the CRPD, it may be said in general terms that the object and purpose of the Convention is to “ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability”.<sup>7</sup> As such, where a discrepancy may arise in one language of the text, that discrepancy will not hold if in any of the other authentic texts a reading

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<sup>6</sup> Where the Convention on the Rights of Persons with Disabilities is concerned, the travaux préparatoires were developed by 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 and are available at: <http://www.un.org/esa/socdev/enable/rights/adhoccom.htm>.

<sup>7</sup> See Article 4, Convention on the Rights of Persons with Disabilities, 2006.

of a provision is better reconciled with the object and purpose of the CRPD.

Where there may be a disagreement in such a case, the Committee on the Rights of Persons with Disabilities will be best placed to make a determination as to which interpretation is to be adopted. Where disagreement persists, States Parties would have little recourse but to turn to Article 47 of the Convention and request the UN Secretary-General call an extraordinary Conference of the States Parties with the aim of amending the CRPD. This is an unlikely scenario for three reasons: the fact the discrepancy appears in some languages and not others, while the Vienna Convention set out the manner in which such discrepancies are to be settled; the high procedural threshold required to successfully amend the CRPD; and finally the political capital which would have to be spent to gain an amendment appears to outweigh the nominal returns which might be had in seeking to mobilise the international community to act (this bears out in fact, as such a situation has never transpired).

## **Obligations of States Parties under the Convention**

The first place to turn in considering obligations to the CRPD is Article 4 which sets out the 'General Obligations' of the Convention. When reading any provision of the Convention, Article 4 will provide interpretative 'context' in the sense that these general obligations will attach themselves to the provision under consideration to which States Parties are bound.

### **Hard and Soft Obligations**

When considering any international treaty, there is often discussion of 'hard law' and 'soft law'.<sup>8</sup> On the other hand, consideration here turns to 'hard' obligations which are mandatory while 'soft' obligations couch States Parties' requirements in less strict terms by including adjectives and/or vague terms which qualify the obligation.

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<sup>8</sup> The Hard Law/Soft Law dichotomy is considered generally as the difference between binding and non-binding instruments. Thus the CRPD would be hard law, while the 1948 Universal Declaration on Human Rights or the 1975 Declaration on the Rights of Disabled Persons would be considered soft law.

Thus if we look at the CRPD, the provisions dealing with the Committee on the Rights of Persons with Disabilities are, by and large, mandatory “There shall be established a Committee ...”, (Art. 34(1)); “Each State Party shall submit to the Committee” (Art. 35(1)); and “Each State Party shall cooperate with the Committee and assist its members in the fulfilment of their mandate” (Art. 37). Beyond these procedural requirements, there are a number of substantive provisions which are mandatory: “States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds” (Art. 5(2)); and “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation” (Art. 15(1)).

Yet the use of the term ‘shall’ is no guarantee that an obligation is mandatory as the verb ‘shall’ can be qualified and modified. That modification may raise the level of obligation or lower it. Thus Article 13(1) Access to Justice, not only requires that States Parties shall ensure access to justice for persons with disabilities; instead it requires that “States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others”. In such a case, the requirement is not simply access to justice, but “effective access to justice”, which would then need to be read in light of object and purpose of the Convention so as to ascertain what effective means – thus, looking to Article 4 which requires the ensuring and promoting of “the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability”.

More apparent in the CRPD is the qualification which leaves it to a State Party to determine the extent of the obligation to be undertaken. Thus “States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion” (Art. 21); or “States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects” (Art. 16(1)).

This notion of ‘appropriate’ is also found in provisions of Article 4. Article 4 sets out the General Obligations of the CRPD. States Parties have undertaken the obligation, for instance to “adopt all appropriate

legislative, administrative and other measures for the implementation of the rights recognized in the present Convention”; to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities”; or to “take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise”.

What is meant by ‘appropriate’? It will be for the States Parties to decide in the first instance; though under the scrutiny of the ComRPD, which will consider State Reports and make suggestions as to “the measures taken to give effect to [a State’s] obligation” of the CRPD (Art. 35). For its part, the Committee of Economic, Social and Cultural Rights (CESCR) has stated that “the ultimate determination as to whether all *appropriate* measures have been taken remains one for the Committee to make”.<sup>9</sup>

In considering the nature of a treaty obligation, be it ‘soft’ or ‘hard’, it should never be presumed that a provision – be it an article or even a sub-paragraph of an article – will have only one type of obligation. Consider Article 12 – Equal Recognition before the Law. Article 12(2) is a hard obligation: “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”; while Article 12(3) is a rather soft: “States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”. While Article 12 (5) creates, within one subparagraph, both soft and hard obligations, first noting softly that States Parties “shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property”, but then goes on to say in harder terms that States Parties “shall ensure that persons with disabilities are not arbitrarily deprived of their property.

### **Obligations flowing from Economic, Social and Cultural Rights**

The CRPD maintains the distinction which is found within the International Covenants wherein civil and political rights have obligations which are to be given immediate effect; while certain economic, social

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<sup>9</sup> See Committee of Economic, Social and Cultural Rights, The Nature of States Parties Obligations, General Comment 3, 14 December 1990, para. 4. Emphasis added.

and cultural rights are to be progressively realised. Article 4(2) speaks to this distinction:

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

It is only certain provisions of the International Covenant on Economic, Social and Cultural Rights which allow for the possibility of progressive realisation, it having been noted by the Committee on Economic, Social and Cultural Rights (CESCR), that the Covenant “also imposes various obligations which are of immediate effect”<sup>10</sup>, not least of which are related to issues of discrimination.

Within the CRPD, reference to economic, social and cultural rights should be understood as being applicable to elements of Articles 24 – Education; 25 – Health; 26 – Habilitation and Rehabilitation; 27 – Work and Employment; 28 – Adequate Standard of Living and Social Protection; 30 – Participation in cultural Life, Recreation, Leisure and Sport.

It should be emphasised that it is only certain elements of these articles which will be allowed to be realisable in a progressive manner. For instance, Article 25 – Health, may allow a State Party to the CRPD to provide “the right to the enjoyment of the highest attainable standard of health” to “the maximum of its available resources” with a view to achieving this right progressively, moving toward the full realization of these rights. Yet there is very little else in that Article which can be deemed to be progressively realisable. With immediate effect, a State Party to the CRPD must ensure that “the right to the enjoyment of the highest attainable standard of health” is provided “without discrimination on the basis of disability”. As a result, the requirement to “provide persons with disabilities with the same range, quality and standard of free or affordable health care”; the providing of “those health services needed by persons with disabilities specifically because of their

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<sup>10</sup> See Committee of Economic, Social and Cultural Rights, The Nature of States Parties Obligations, General Comment 3, 14 December 1990, para. 1.

disabilities”; the requirement of health professionals to provide care of the same quality to persons with disabilities”, the prohibitions of discrimination in the provision of health insurance, and the prevention of “discriminatory denial of health care or health services or food and fluids on the basis of disability” will be placed upon a State Party with immediate effect.

Turning now to the obligation “to take measures to the maximum of its available resources [...] with a view to achieving progressively the full realization of these rights”. To understand what is required by States Parties of such an obligation, one should turn to the General Comment Number 3 of the CESCR, which states that the nature of such obligations is to act “within a reasonably short time” after a State becomes party to – in the case at hand – the CRPD, by taking measures towards the goal of full realisation of the economic, social and cultural rights and that such “steps should be deliberate, concrete and targeted as clearly as possible with the aim of moving towards meeting the obligation recognised”.<sup>11</sup>

Reference should also be made to General Comment Number 5 of the Committee on Economic, Social and Cultural Rights which is entitled: ‘Persons with Disabilities’. That General Comment, though it predates the CRPD by more than a decade, provides some detail as to the obligations flowing from specific rights established by the Covenant Economic, Social and Cultural Rights which are, in turn, reproduced in the Convention on the Rights of Persons with Disabilities.<sup>12</sup>

## **Prescribed Obligations**

The CRPD is unique as a human rights treaty in the manner in which it prescribes the obligations which States Parties are to undertake. Those obligations, in general terms, are spelled out in Article 4, but are then given voice through the provisions of the Convention. While leaving it to States to take ‘appropriate measures’, the Convention calls on States Parties to:

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<sup>11</sup> See Committee of Economic, Social and Cultural Rights, The Nature of States Parties Obligations, General Comment 3, 14 December 1990, para. 2. Emphasis added.

<sup>12</sup> Committee of Economic, Social and Cultural Rights, Persons with Disabilities, General Comment 5, 9 December 1994.

- **adopt legislation** (Arts. 4(1)(a) – General Obligation; 15(2) – Freedom from Torture or Cruel, Inhuman or Degrading Treatment or Punishment; 16(1 and 5) – Freedom from Exploitation, Violence and Abuse; 27(1) – Work and Employment);
- **repeal legislation** (Art. 4(1)(b) – General Obligation);
- **mainstream protection and promotion** (Art. 4(1)(c) – General Obligation);
- **train personnel** ((Arts. 4(1)(i) – General Obligation; 9(1)(c) – Accessibility; 13(1) – Access to Justice; 20 (c) – Personal Mobility; 24(4) – Education; 25(d) – Health; and 26(2) – Habilitation and Rehabilitation);
- **provide specific services and/or assistance** ((Arts. 4(1)(h) – General Obligation); 7(3) – Children with Disabilities; 9(1) and 9(2)(e and f) – Accessibility; 16(2 and 4) – Freedom from Exploitation, Violence and Abuse; 19(b) – Living Independently and Being included in the Community; 20(b) – Personal Mobility; 21(c) – Freedom of Expression and Opinion, and Access to Information; 23(2) – Respect for Home and the Family; 25 – Health; 26 – Habilitation and Rehabilitation; 27(1)(e) – Work and Employment; 28(2) (a and c) – Adequate Standard of Living and Social Protection; 29(a)(iii) – Participation in Political and Public Life; 30(1)(c) and (5) (e)– Participation in cultural Life, Recreation, Leisure and Sport; and 32(1)(d) – International Cooperation);
- **consult with representative organisations of persons with disabilities** (Art. 4(1)(c) – General Obligation);
- **develop effective awareness campaigns** (Art. 8(2)(a) – Awareness-Raising);
- **modify infrastructures** (Art. 9(1)(a) – Accessibility); employ certain skilled personnel (Art. 24(4) – Education);
- **involve persons with disabilities and their representative organisations in monitoring** (Art. 33 – National Implementation and Monitoring).

## **Obligations in Times of Emergency**

Article 11 of the CRPD requires States Parties to take “all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters”. This Article further requires that States Parties do so “in accordance with their obligations under international law including international humanitarian law and international human rights law”.

Where international humanitarian law is concerned<sup>13</sup>, it should be noted that Article 3 common to the four 1949 Geneva Conventions sets out the minimum requirements to be applied in any armed conflict.<sup>14</sup> Of these requirements what may be of relevance to persons with disabilities is that those persons not actively involved in a conflict are in “all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria”. Common Article 3 makes plain that a number of acts “are and shall remain prohibited at any time and in any place

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<sup>13</sup> International humanitarian law is not to be confused with international human rights law. International humanitarian law is the law applicable in times of armed conflict, also termed the ‘laws of war’ or the ‘laws of armed conflict’.

<sup>14</sup> Common Article 3 to the 1949 Geneva Conventions reads:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. [...]

whatsoever”; these include “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” as well as “outrages upon personal dignity, in particular, humiliating and degrading treatment”.

Where international human rights law is concerned, it may be said that a hierarchy exists as between those human rights which may be suspended in times of emergency and those which cannot. Treaty-based rights which can not be suspended in times of emergency are termed ‘non-derogable rights’.<sup>15</sup> The Convention on the Rights of Persons with Disabilities makes no provision for derogation and thus the States Parties to the CRPD are not allowed to suspend any of the rights in the Convention at any time, even in times of emergency.

Beyond the treaty-based hierarchy of non-derogable rights, international law recognises peremptory norms (also termed norms of jus cogens). Such norms, most often associated with protecting the physical integrity of the person, are set apart from other provisions of international law as they do not foresee the possibility of legitimate justification for their violation. This ‘strict liability’ means that any breach of the right will be deemed a violation of an obligation. No justification, be it necessity or national interest (raison d’état), will preclude the wrongfulness of the act.<sup>16</sup> Where this may be of relevance with regard to CRPD, is that its provisions may help in creating or crystallising peremptory norms of customary international law which would preclude even non-States Parties from being able legally to rest on any justification for a violation.<sup>17</sup> The strongest candidate for a future status of jus cogens would appear to be the normative elements of Art. 16 – Freedom from Exploitation, Violence and Abuse.

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<sup>15</sup> See for instance, Article 4 of the 1966 International Covenant on Civil and Political Rights.

<sup>16</sup> Peremptory norms finds voice in the both the 1969 Vienna Convention on the Law of Treaties and the 2001 Articles on State Responsibility.

<sup>17</sup> The threshold for this would be rather high as it would not only require State practice but a double opinio juris: 1) that the act or omission was deemed to be undertaken because there was a legal obligation to do so and 2) that this obligation was recognised as being peremptory.

## **Rights of Persons with Disabilities under the Convention**

While certain States have put forward the proposition that ‘no new rights’ are to be found in the CRPD, it should be recalled that such auto-interpretation may not be consonant with the views of the CommRPD the body of experts established to supervise the application of the CRPD and establish authoritative pronouncements as to the manner in which the Convention is to be interpreted. The Committee, in making its determinations, will look to the pronouncements of other UN treaty-bodies, international human rights tribunals, and domestic courts for guidance and authoritative pronouncements.

The CRPD is unique in its complexity as it encompasses both civil and political rights, and economic, social and cultural rights; it includes provisions found in previous instruments, but develops new ones; and it provides various levels of precision and depth to the rights included.

### **Affirmation of Rights**

The Convention on the Rights of Persons with Disabilities affirms a number of rights already recognised through established human rights instruments, including:

- the right to life (Art. 10);
- equality before the law (Art. 12);
- liberty and security of the person (Art. 14);
- freedom from torture (Art. 15);
- freedom of movement (Art. 18);
- freedom of expression (Art. 21);
- right to privacy (Art. 22);
- education (Art. 24);
- health (Art. 25);
- housing (Art. 26);
- work (Art. 27);
- adequate standard of living (Art. 28);
- political participation (Art. 29).

The CRPD assists the reader in being able to identify pre-existing rights by utilising the terms ‘reaffirm’ or ‘recognize’, such as in Article 12 (“States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law”) or Article 25 (“States Parties recognize that persons with disabilities have the right to the

enjoyment of the highest attainable standard of health without discrimination on the basis of disability”).

The affirmation of rights is a clear articulation that these rights are applicable to persons with disability. Where guidance may be sought as to the interpretation of these rights reference may be made to the pronouncements of the Human Rights Committee (HRC) of the International Covenant on Civil and Political Rights and the CESCR of the International Covenant on Economic, Social and Cultural Rights as a means of assisting in interpreting the like-provisions found in the CRPD. For instance, the CESCR has developed General Comments on education, health, and housing; while the HRC has General Comments on the right to life, torture, liberty, freedom of expression, freedom of movement, and privacy.<sup>18</sup> Further, reference may be made to monitoring bodies of the Conventions on the Elimination all forms of Racial Discrimination and the Conventions on the Elimination all forms of Discrimination against Women and their pronouncements as to like provisions of CRPD dealing with equality and non-discrimination (Arts. 5-7) or specific rights which include equality clauses such as Article 28 which reads, in part:

States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.

It might also be worthwhile to recall, when interpreting the provisions of the CRPD ‘in context’, that non-discrimination is a general principle of the Convention as noted in Article 3(b).

### **Extension of Rights**

The Convention on the Rights of Persons with Disabilities extends the rights established by previous international instruments, by prescribing, in detail, the content of the right and the obligations required of States Parties. In this manner the ability of States Parties to give content to

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<sup>18</sup> For the International Covenant on Economic, Social and Cultural Rights, see General Comments 7 and 11-14; for the International Covenant on Civil and Political Rights see General Comments 6, 8, 10, 16, 20, 27,

abstract rights through interpretations is circumscribed by the manner in which CRPD sets out the extension of rights and the obligations required of States Parties. For instance, Article 12 recognising equality before the law. First, Article 12(1) sets out the pre-established right: “States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law”; the Article then mandates that States “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”. Yet the provisions of Article 12 do not stop there, they are quite prescriptive and detailed in seeking to safeguard the exercise of legal capacity in order to prevent abuse as well as to the protect property of persons with disabilities. Article 12(5) requires States:

take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Likewise a right to privacy, found at Article 22, sets out the right in a manner which goes beyond the abstract, as its speaks to the specific needs of persons with disabilities: “No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy”. In the same vein, Article 23 related to respect for home and family life, states that it is a right for all persons with disabilities to marry and “to decide freely and responsibly on the number and spacing of their children”.

Article 27 goes into great detail in extending the right to work and the obligations which States have to undertaken (though, as an Economic, Social and Cultural Right, it should be recalled that the obligations are tempered by the ability of States Parties to move progressively, within its maximum available resources). This extension of rights includes, among others, the “effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training”; the promoting of “opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one’s own business”; and the ensuring that “reasonable accommodation is provided to persons with disabilities in the workplace”.

Further Articles of the CRPD which extend rights and create new obligations on States Parties are:

- Right to Liberty and Security of the Person (Art. 14);
- Freedom of Expression and Opinion, and Access to Information (Art. 21);
- Education (Art. 24);
- Health (Art. 25);
- Adequate Standard of Living and Social Protection (Art. 28).

## **New Rights**

A new set of rights appear in the Convention on the Rights of Persons with Disabilities, which escape the paradigm of human rights as protection from the State and take into consideration the lived experience of persons with disabilities in both the private sphere and within society.

Consider, for instance Article 16 – Freedom from Exploitation, Violence and Abuse. The State has a positive obligation to take measures to protect persons with disabilities “both within and outside the home, from all forms of exploitation, violence and abuse”. This provision is revolutionary in the first instance as it suggests that the locus of ‘exploitation, violence and abuse’ in the first instance is the home and not at the hands of the State. Further, the notion or notions of ‘exploitation, violence and abuse’ is/are nowhere defined within the CRPD. While one could read these terms in their ordinary meaning – for instance ‘exploitation’ is given content as the purpose of human trafficking in identical terms by the 2000 UN Palermo Protocol and the 2005 Council of Europe Convention on Action against Trafficking in Human Beings as follows:

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

Though ‘violence’ and ‘abuse’ have little currency in international human rights law, Frédéric Mégret for his part, suggests that ‘exploitation, violence and abuse’ can better be understood as a phenomenon, one which is unusually amorphous, even all-pervasive”, which “manage to capture structures of oppression that lie behind the rights violations”.<sup>19</sup>

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<sup>19</sup> Frédéric Mégret, “The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?”, Human Rights Quarterly,

Beyond this specific right, the Convention sets out a number of general principles which, when read with other rights of the CRPD, create new rights. Consider, for instance, the general principles set out in Article 3 (a) “respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons” and Article 3(d) “full and effective participation and inclusion in society”; as pointing to an overarching right to autonomy . Again, reading these provisions, in context, with a look to the object and purpose of the Convention on the Rights of Persons with Disabilities makes it rather difficult to see how such provisions do not in practice create obligations on States and rights which individual can demand to hold.

Where autonomy is concerned, Article 9 requires States Parties to take appropriate measures to “ensure to persons with disabilities access, [...] to the physical environment, to transportation, to information and communications”, with a look to enabling persons with disabilities to live independently and participate fully in all aspects of life”. Likewise Article 19 requires States “facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community”; while Article 20 requires the promotion of personal mobility “with the greatest possible independence”. Autonomy gains its fullest expression in Article 26 – Habilitation and Rehabilitation – which requires States Parties to “enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life”.

## **Conclusion**

The 2006 Convention on the Rights of Persons with Disabilities is sui generis, the fact that it sets out in Articles 3 and 4 both General Principles and General Obligations means that these two provisions must permeate the whole of the Convention. When interpreting the Convention, even where the ordinary meaning is clear, one must always remember that the intention of the International Law Commission was that the context in light of the object and purpose were also to be thrown into the crucible to determine the legally relevant interpretation. The CRPD requires that via the context which points to the object and

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Volume 30, 2008, p. 508. Note also, Agustina Palacios and Maria Walls, “Changing the Paradigm – the Potential Impact of the United Nations Convention on the Rights of Persons with Disabilities”, Irish Yearbook of International Law, Volume 1 (2006), 2008, pp. 121-166.

purpose that those interpreting the Convention not lose sight of the overarching obligations of States and the rights of persons with disabilities.

The Convention extends both obligations and rights in new and as yet not fully understood ways. While non-governmental organisations can also ‘auto-interpret’ the Convention; this, like the interpretation of States will only be opinion. Emphasis should be made to ensure that cogent arguments – set out with reference to the rules of treaty interpretation established in international law and international human rights law – are put forward to assist the Committee on the Rights of Persons with Disabilities in allowing it to develop its authoritative pronouncements with at the forefront the fact that:

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

## Glossary of Terms

**compromissory clauses:** a provision for the settlement by adjudication of disputes which may arise in regard to the interpretation or application of the particular treaty in which the clause appears;

**lex ferenda:** law as it should be;

**lex lata:** law as it is;

**lex specialis:** the law related to a specific issue;

**lex posterior legi priori derogat:** The legal idiom that prescribes that more recent law supercedes older laws;

**lex specialis legi generali derogat:** the legal idiom, which states that specific law should override general laws;

**mutatis mutandis:** The necessary changes being made;

**pacta sunt servanda:** Agreements are binding and must be implemented in good faith;

**rebus sic stantibus:** As things remain standing; doctrine that a treaty is binding as long as there is no fundamental change in the facts or circumstances which led to the conclusion of that treaty;

**reservation:** a unilateral statement made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty;

**stare decisis:** To abide by, or adhere to, decided cases. Policy of courts to stand by precedent and not to disturb a point settled in law;

**States Parties:** Those States which have given consent to be bound to the CRPD, as distinct from only signing the Convention;

**sui generis:** specific to a particular situation or regime. For instance, a sui generis legal situation is one which is unique, which does not follow the typical rules which would normally hold; and

**travaux préparatoire:** Preparatory work; preliminary drafts, minutes or conferences and the like, relating to the conclusion of a treaty.

## **Appendix: Section 3 of the Vienna Convention on the Law of Treaties**

### **Article 31 -- General rule of interpretation**

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

### **Article 32 -- Supplementary means of interpretation**

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

### **Article 33 -- Interpretation of treaties authenticated in two or more languages**

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

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