

This is a draft of a chapter that has been accepted for publication by Oxford University Press in the forthcoming book *The Convention on the Rights of Persons with Disabilities A Commentary* edited by Ilias Bantekas, Dimitris Anastasiou and Michael Stein due for publication in 2018.

Article 1

Purpose

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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.

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

1. Introduction

Article 1 sets out the purpose of the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD) and describes its target group. The CRPD is the only core UN international human rights convention to have a separate article entitled ‘purpose’,¹ and the second to include a description of its target group as an identifiable group in one of its articles.² Article 1 enshrines a ‘paradigm shift’ in approach to the concept of ‘disability’ in international human rights law: a shift from an approach underpinned by a ‘medical model of disability’ that views persons with disabilities as ‘objects’ of medical treatment and in need of charity; to a ‘social model of disability’, which views persons with

¹ Office of the High Commissioner for Human Rights (OHCHR), ‘The Core International Human Rights Instruments and their monitoring bodies’ (OHCHR 2017), available at:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>. Arlene S Kanter, *The Development of Disability Rights under International Law from Charity to Human Rights* (Routledge 2015).

² Art 1 CRC.

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disabilities as ‘subjects’ with rights and focuses on the barriers persons with disabilities face that may hinder their societal participation.³ The provision’s content, particularly the resulting description of persons with disabilities, was ‘among the most controversial’,⁴ with the final version of article 1 only finalized during the last Ad Hoc Committee session.

Article 1 provides a framework for the teleological interpretation of the CRPD’s provisions.⁵ The inclusion of a provision stating the ‘purpose’ of the CRPD is significant under international law.⁶ This is because in accordance with the Vienna Convention on the Law of Treaties (VCLT), no state party can formulate a reservation that ‘is incompatible with the object and purpose of the treaty’.⁷ It is noted that no state party to the CRPD has lodged any declaration or reservation to article 1, unlike in respect of other controversial articles, such as article 12—equal recognition before the law.⁸ Stein and Lord suggest that the protection afforded to the purpose of the treaty also extends to the conceptualization of ‘disability’ set out in article 1, paragraph 2, by

³ Statement by Louise Arbour to the Resumed 8th Session of the Ad Hoc Committee on the CRPD (5 December 2006), available at:

<http://www.un.org/esa/socdev/enable/rights/ahc8hrcmsg.htm>. Rosemary Kayess and Paul French, ‘Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8 HRLR 1; Gerard Quinn and Oddny Mjoll Arnadottir, ‘Introduction’ in Gerard Quinn and Oddny Mjoll Arnadottir (eds), *The UN Convention on the Rights of Persons with Disabilities European and Scandinavian Perspectives* (Martinus Nijhoff 2009); Kanter (n 1).

⁴ Kayess and French (n 3).

⁵ Art 2 CRPD is also interpretive; *ibid*.

⁶ Michael Ashley Stein and Janet E Lord, ‘Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities’ in Quinn and Arnadottir (n 3).

⁷ Art 19(c) VCLT.

⁸ List of Declarations and Reservations to the CRPD, 2515 UNTS 3 (Status as at 20 October 2017).

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virtue of its inclusion in the provision dedicated to the CRPD's purpose.⁹

The CRPD is a thematic convention that focuses on persons with disabilities' human rights, whereas previous core UN human rights conventions failed to adequately protect such rights.¹⁰ The objective of article 1, paragraph 1, is to ensure that persons with disabilities enjoy all the human rights set out in existing UN international core human rights conventions equally with non-disabled persons.¹¹ This provision complements the core UN human rights conventions, as it tailors the relevant norms of existing core human rights conventions to the circumstances of persons with disabilities.¹²

Article 1, paragraph 2, and preambular paragraph e, provide a description, rather than a definition, of the persons whose human rights the CRPD aims to protect. This description of 'persons with disabilities' is underpinned by a 'social model of disability'.¹³ This model draws a distinction between 'impairment' (the biological) on the one hand, and

⁹ Stein and Lord (n 6).

¹⁰ There is one exception to the thematic core conventions, this concerns the Convention on the Rights of the Child (1989), which makes reference to 'disability' in art 2 and 'disabled child/ren' in art 23; Valentina Della Fina, 'Article 1 [Purpose]' in Valentina Della Fina, Rachele Cera, and Guisepppe Palmisano (eds), *The United Nations Convention on the Rights of Persons with Disabilities—A Commentary* (Springer 2017); Bernadette McSherry, 'The United Nations Convention on the Rights of Persons with Disabilities' (2009) 16(1) *Journal of Law and Medicine*; Kayess and French (n 3).

¹¹ Fina (n 10); Anna Lawson, 'The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?' (2007) 34 *Syracuse J Intl L & Com* 563.

¹² Fina (n 10); Lawson (n 11).

¹³ Lisa Waddington, 'A New Era in Human Rights Protection in the European Community: The Implications the United Nations' Convention on the Rights of Persons With Disabilities for the European Community' (2007) April *Maastricht University Faculty of Law Working Papers* 1, 1–22; Stein and Lord (n 6); Kanter (n 1).

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‘disability’ (the societal) on the other hand.¹⁴ Its central thrust is that it is society (the social barriers) that *disables* persons who have impairments.¹⁵ This model ‘defines disability as the societal response to impairment’ and conceptualizes disability as ‘social oppression’.¹⁶ The ‘social model of disability’ rejects the ‘medical model of disability’, which focuses on, and reduces disability to, the impairment a person may have. Through the medical model of disability the ‘problem’ (of disablement) is located *in* the individual who needs to be ‘fixed’,¹⁷ their lives dominated by medical approaches, treatments, and experts,¹⁸ and where persons with disabilities are subject to discrimination, marginalization, exclusion, isolation, and oppression.¹⁹ Also, for many persons with intellectual disabilities, it allows denial of their agency and right to self-determination.²⁰ Significantly, this conceptualization of

¹⁴ Jan Walmsley, ‘Research and Emancipation: Prospects and Problems’, in Peter Goward, Gordon Grant, Paul Ramcharan and Malcolm Richardson (eds), *Learning Disability—A Life Cycle Approach to Valuing People* (Open University Press 2005); Rannveig Traustadottir, ‘Disability Studies, the Social Model and Legal Developments’, in Quinn and Arnadottir (n 3).

¹⁵ Walmsley (n 14); Traustadottir (n 14).

¹⁶ Walmsley (n 14) 724; Traustadottir (n 14); Dan Goodley, *Disability Studies: An Interdisciplinary Introduction* (Sage Publications 2011).

¹⁷ Kayess and French (n 3); Walmsley (n 14); Traustadottir (n 14); Marcia H Rioux, Lee A Basser, and Melinda Jones, *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff 2011); Jan Grue, *Disability and Discourse Analysis* (Ashgate 2015).

¹⁸ Tom Shakespeare, *Disability Rights and Wrongs* (Routledge 2006); Grue (n 17).

¹⁹ Kayess and French (n 3); Rioux et al (n 17).

²⁰ Gerard Quinn, Theresia Degener et al, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights* (UN 2002); Michael Bach, ‘Supported Decision Making under Article 12 of the UN Convention on the Rights of Persons with Disabilities—Questions and Challenges’ (2007) Presentation to Conference on Legal Capacity and Supported Decision Making Parents’ Committee of Inclusion Ireland Athlone, Ireland 1, available at:

https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjOivvliO_XAhXoCMAKHRC5BRAQFggnMAA&url=https%3A%2F%2Fwww.inclusionireland.ie%2Fsites%2Fdefault%2Ffiles%2Fdocuments%2F

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‘disability’ reserves the exercise of power over decisions concerning persons with disabilities’ lives for medical professionals, and not for persons with disabilities, themselves.²¹ Article 1 rejects viewing persons with disabilities as ‘objects’ to be treated and as recipients of charity and welfare; it views persons with disabilities as subjects with human rights and authors of their own lives.²²

The social model of disability has been critical for persons with disabilities and the Disabled Peoples Movement.²³ However, it is also important to note that there are other ‘social approaches’ that share some commonalities with the social model of disability; further, although the social model of disability is extremely influential, it is not without critique.²⁴ Another of the ‘social approaches’, which also had some influence during the drafting and the negotiations for the CRPD, was the ‘minority rights approach’ to disability.²⁵ This approach views persons with disabilities as a disadvantaged and oppressed minority group that have been denied their rights, face discrimination and social exclusion, and it focuses on the relationship between the group of persons considered ‘persons with disabilities’ (the minority group) and

[Fprof-m-bach-shared%2Fbach-supporteddecisionmaking-inclusionirelandnov07.doc&usg=AOvVaw0dsi5rI7HjfwVz7WYji57y](#); Rioux et al (n 17); Grue (n 17).

²¹ Grue (n 17).

²² Kanter (n 1).

²³ Traustadottir (n 14).

²⁴ Traustadottir (n 14); Shakespeare (n 18); Tom Shakespeare, *Disability Rights and Wrongs Revisited* (2nd edn, Routledge 2014).

²⁵ Kayess and French (n 3); Kanter (n 1). This is also found in the literature as the ‘minority group model’ or the ‘minority group approach’. Harlan Hahn, ‘Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective’ (1996) 14 *Behavioral Sciences and the Law* 41.

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other groups.²⁶ Although it does not make the distinction between ‘disability’ and ‘impairment’, it does place emphasis on the social environment.²⁷ This approach considers that the discrimination, oppression, and prejudice persons with disabilities may face should be fought using civil rights legislation.²⁸ This approach was developed in North America,²⁹ and places emphasis on the significance of language, attitudes, and ideas,³⁰ and for this reason employs ‘People First Language’ (PFL) which positions ‘the person before the disability’.³¹

The (‘strong’) ‘social model of disability’ developed in Britain, has been criticized in that by separating ‘disability’ and ‘impairment’ it places too much emphasis on social and structural barriers and ignores the experiential and cultural elements.³² For example, it ignores the importance of impairment in people’s everyday lives and the pain people may experience; and it fails to articulate or reflect the experiences, interests, and needs of persons with particular impairments, such as deafness and intellectual disabilities.³³ Nevertheless, the ‘social model of disability’ was extremely influential in the Disabled Peoples

²⁶ Hahn (n 25); Dan Goodley, *Disability Studies: An Interdisciplinary Introduction* (2nd edn, Sage Publications 2017).

²⁷ Traustadottir (n 14); Shakespeare (n 18), (n 24); Hahn (n 25).

²⁸ Traustadottir (n 14); Shakespeare (n 18).

²⁹ <IBT>Simo Vehmas, ‘Dimensions of Disability’ (2004) 13 *Cambridge Quarterly of Healthcare Ethics* 34.</IBT>

³⁰ *ibid.*

³¹ eg ‘person/s with a/ disability/ies’; Lawson (n 11); Kathie Snow, ‘To Ensure Inclusion, Freedom, and Respect for All, It’s Time to Embrace People First Language’, 1, 2, available at:

<https://nebula.wsimg.com/1c1af57f9319dbf909ec52462367fa88?AccessKeyId=9D6F6082FE5EE52C3DC6&disposition=0&alloworigin=1>; Paul T Jaeger and Cynthia Anna Bowman, *Understanding Disability Inclusion, Access, Diversity, and Civil Rights* (Praeger 2005).

³² Shakespeare (n 24) 11.

³³ Traustadottir (n 14).

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Movement and the Disabled Peoples Organizations (DPOs) that were involved in the drafting and negotiation process of the CRPD.³⁴ This chapter will show how these models and approaches were important and influenced the drafting of article 1(2). Lastly, it also needs to be noted that although the drafting and negotiation for article 1 were heavily influenced by the social model of disability, it is more recently considered that the CRPD goes beyond the social model and is underpinned by the ‘human rights model of disability’.³⁵

At the international level, reports by states parties submitted to the CRPD Committee in view of article 35, reveal that most states are having difficulty in understanding the social model of disability enshrined in article 1, as their reports reflect a medical model of disability understanding.³⁶ At the European Union (EU) level, however, case law from the Court of Justice of the European Union (CJEU), when interpreting the concept of ‘disability’ under Directive 2000/78/EC since the EU ratified the CRPD in 2010,³⁷ has held that the concept of ‘disability’ must be interpreted in view of the CRPD’s article 1(2).³⁸ This in turn is in contrast with earlier case law of the CJEU,³⁹ which predated the EU’s ratification of the CRPD, and reflected a medical

³⁴ Kayess and French (n 3); Theresia Degener, ‘Disability in a Human Rights Context’ (2016) 5 *Laws* 35.

³⁵ Michael Ashley Stein, ‘Disability Human Rights’ (2007) 95 *Cal L Rev* 75; Theresia Degener, ‘A Human Rights Model of Disability’, in Peter Blanck and Eilionoir Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Routledge 2017).

³⁶ Degener (n 35).

³⁷ European Community Council Decision 2010/48/EC of 26 November 2009 (OJ 2010 L23) 35.

³⁸ *HK Danmark v Dansk almennyttigt Boligselskab* [2013] C-335/11 (11 April 2013).

³⁹ At the time, the European Court of Justice (ECJ).

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model of disability.⁴⁰ Thus, the ‘paradigm shift’ in conceptualizing ‘disability’ embodied in the CRPD is reflected in EU anti-discrimination law.

2. Background and *Travaux Préparatoires*

The text of what would become ‘Article 1— Purpose’ CRPD began as text in two separate draft articles when Mexico submitted a working paper of a draft convention at the Ad Hoc Committee’s first session.⁴¹ Its content was discussed during sessions two to four, sessions seven to eight, and the Working Group.⁴² Traditionally, drafting and negotiating

⁴⁰ *Sonia Chacon Navas v Eurest Colectividades SA* [2006] C-13/05 (11 July 2006).

⁴¹ Ad Hoc Committee, ‘Comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities—Working Paper by Mexico’ [First Session] UN Doc A/AC.265/WP.1 (2002), art 1.

⁴² Ad Hoc Committee, ‘Views submitted by Governments, intergovernmental organizations and United Nations bodies concerning a comprehensive and integral international convention on the protection and promotion of the rights and dignity of persons with disabilities Note by the Secretary-General Executive Summary’ [Second Session] UN Doc A/AC.265/2003/4+A/AC.265/2003/4/Corr.1 (16–27 June 2003); UN Enable, ‘Daily summary of discussions by article’ [Third Session] (24 May–4 June 2004) (Landmine Survivors Network, 2004), available at:

<http://www.un.org/esa/socdev/enable/rights/ahc3summary.htm>; UN Enable, ‘Daily summary of discussions by article’ [Fourth Session] (23 August–4 September 2004) (Landmine Survivors Network, 2004), available at:

<http://www.un.org/esa/socdev/enable/rights/ahc4summary.htm>; UN Enable, ‘Daily summary of discussion at the seventh session 30 January 2006’ (30 January 2006) 8(11) (Rehabilitation International), available at:

<http://www.un.org/esa/socdev/enable/rights/ahc7sum30jan.htm>; UN Enable, ‘Daily summary of discussion at the seventh session 31 January 2006’ (31 January 2006) 8(12) (Rehabilitation International), available at:

<http://www.un.org/esa/socdev/enable/rights/ahc7sum31jan.htm>; UN Enable, ‘Eighth Session 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’ (14–25 August and 5 December 2006), available at:

<http://www.un.org/esa/socdev/enable/rights/ahc8.htm>; Ad Hoc Committee, ‘Report of the Working Group to the Ad Hoc Committee— Annex I—Draft comprehensive and integral international convention on the protection and promotion of the rights and

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UN human rights conventions take place between UN member states' delegations only, with the negotiation process based on achieving consensus amongst states.⁴³ However, after intense lobbying at the first session, it was decided that representatives from DPOs and human rights non-governmental organizations (NGOs), were allowed to attend future Ad Hoc Committee sessions,⁴⁴ and that accredited organizations could participate in the Ad Hoc Committee's work.⁴⁵ This is significant, as it meant that the convention's target group were able to directly contribute to the negotiation and drafting process; the process was 'unusually transparent and cooperative';⁴⁶ and it was conciliatory in nature, that is, articles were agreed by consensus and, where disagreements arose, they were amicably resolved.⁴⁷ This in turn had implications for the drafting of what would become the content of

dignity of persons with disabilities' UN Doc A/AC.265/2004/WG/1 CRP.4 plus CRP.4/Add.1, Add.2, Add.4, and Add.5 (2004).

⁴³ Amita Dhanda, 'Constructing a New Human Rights lexicon: Convention on the Rights of Persons with Disabilities' (2008) 5 Sur—International J on Human Rights 43; Richmond Lang, 'The United Nations on the Right and Dignities for Persons with Disability: A Panacea for Ending Disability Discrimination?' (2009) 3 ALTER European Journal of Disability Research 266; Janet E Lord, 'The U.N. Disability Convention: Creating Opportunities for Participation Disability and the Law', (2010) 19 Business Law Today 23–27. Other parties, such as non-UN member states, entities, NGOs, and NHRIs, are excluded from the negotiation process, and may only attend UN General Assembly (GA) sessions where they have been granted 'observer status'. 'Observer status' is granted to organizations where their activities concern issues of interest to the UN GA.

⁴⁴ Lawson (n 11); <IBT>Ad Hoc Committee, 'Report of the First Session 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' (2002) UN Doc A/57/357 (2002).</IBT>

⁴⁵ Ad Hoc Committee Report (n 44).

⁴⁶ Lord (n 43) 23; Lana Moriarity and Kevin Dew, 'The United Nations Convention on the Rights of Persons with Disabilities and Participation in Aotearoa New Zealand (2011) 26 Disabil Soc 683.

⁴⁷ Arlene S Kanter, 'The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities (2007) 34 Syracuse J Int'l L & Com 287.

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article 1. Some delegations were sceptical about the necessity to include an article dedicated to the convention's 'purpose', whereas others supported it as a succinct version supplementing its title.⁴⁸ In particular, what became its second paragraph was one of the 'most difficult' points debated,⁴⁹ as the decision whether to include a definition of 'disability' or 'persons with disabilities' and, if so, its content, was 'among the most controversial',⁵⁰ and one that was nearly not resolved, being negotiated up until the eighth session. Because article 1 began as text in two separate articles that were not joined until the eighth session, the negotiation and drafting process for it is divided in this chapter into two sections: first discussing the purpose (article 1, paragraph 1), and then the description of persons with disabilities (article 1(2)).

2.1. Purpose (article 1, paragraph 1)

Article 1 in Mexico's working paper set out 'the object' of the draft convention. This read:

The object of this Convention is to:

- a) Recognize, guarantee, promote, and protect the rights of persons with disabilities;
- b) Eliminate all forms of discrimination against persons with disabilities in public and private spheres;

⁴⁸ The tentative title for the convention had been 'Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities'. There was a suggestion to revise the title to the 'International Convention on the Rights of Persons with Disabilities' during the seventh session. Daily summary of discussions [Seventh Session] (n 42).

⁴⁹ UN Press Release, 'Disability Convention Drafting Committee Discusses International Monitoring, International Cooperation, Definition of Disability' UN Doc SOC/4709 (15 August 2006).

⁵⁰ Kayess and French (n 3) 23.

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c) Promote the autonomy and independent lives of persons with disabilities and achieve their full participation in economic, social, cultural, civil, and political life, under conditions of equality;

d) Promote new forms of international cooperation to support national efforts in the benefit of persons with disabilities, and achieve the objectives of this Convention.⁵¹

The draft provision made reference to both the convention's object, that is, to recognize, guarantee, promote, and protect the convention's target group's human rights; and to the principles of non-discrimination, autonomy, social participation, and international cooperation.⁵² In contrast, the Working Group's draft separated the convention's 'purpose' from its 'principles', and left the discussion on 'general principles' for article 2.⁵³ Further, the Working Group's article 1 was now entitled 'Purpose'.⁵⁴ It read:

The purpose of this Convention shall be to ensure the full, effective and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities.⁵⁵

The working group also produced an alternative formulation, which read:

The purpose of this Convention shall be to protect and promote the rights of persons with disabilities.⁵⁶

⁵¹ <IBT>Working Paper by Mexico (n 41) art 1.</IBT>

⁵² *ibid.*

⁵³ <IBT>Working Group (n 42).</IBT>

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ *ibid.*

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There was support for both formulations,⁵⁷ and the text was subsequently discussed at the third, fourth, seventh, and eighth sessions. One of the terms discussed was ‘to ensure’. Some states preferred that it be replaced with ‘to promote and to protect’,⁵⁸ whereas there was also a lot of support for the term to be retained.⁵⁹ Liechtenstein argued that the term ‘to ensure’ ‘is the highest level of abstraction that can be used, because “protecting” human rights is more negative and has less to do with positive obligations’,⁶⁰ and Sierra Leone argued that it is a ‘key term’ ‘because it is action-oriented and requires states to do something’.⁶¹ The term was kept in the Chair’s draft at the end of the fourth session,⁶² disappeared from the Chair’s draft before the seventh session (as it had been replaced with ‘fulfil’),⁶³ but reappeared in the text agreed at by the end of the seventh session,⁶⁴ at the insistence of the International Disability Caucus (IDC).⁶⁵ The IDC had proposed

⁵⁷ At the third session, the working group’s article 1 text received support from Ireland, Jordan, the Russian Federation, and the Asia Pacific Forum of NHRIs; whereas the working group’s alternative formulation for article 1 received more support from Argentina, China, El Salvador, Eritrea, Japan, Mali, Mexico, and South Africa—<IBT>Daily summary of discussions [Third Session] (n 42).</IBT>

⁵⁸ *ibid.*

⁵⁹ There was also a lot of support for the draft text’s term ‘to ensure’ to be kept, by Bahrain, Liechtenstein, Norway, Serbia Montenegro, Sierra Leone, and the EDF—<IBT>Daily summary of discussions [Fourth Session] (n 42).</IBT>

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² *ibid.*

⁶³ UNGA, ‘Letter dated 7 October 2005 from the Chairman to all members of the Committee’ A/AC.265/2006/1 (2006).

⁶⁴ ‘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 seventh session’ UN Doc A/AC.265/2006/2 (13 February 2006).

⁶⁵ Marianne Schulze, ‘A Handbook on the Human Rights of Persons with Disabilities Understanding the UN Convention on the Rights of Persons with Disabilities’ (Handicap International 2010).

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replacing ‘fulfil’ with ‘ensure’, noting, first, that governments must refrain from interfering with the human rights of persons with disabilities, second, that they must prevent third parties from interfering, but must also take proactive measures to protect persons’ rights, and third, that the language in the provision needed to reflect this.⁶⁶ The IDC thus argued that ‘ensure’ would be useful to reflect this intention,⁶⁷ and would make sure that the aimed outcome would be achieved.⁶⁸

The terms ‘to protect and promote’ found in the Working Group’s alternative formulation received a lot of support.⁶⁹ In contrast, the EU preferred the Working Group’s original formulation that used the term ‘enjoyment’, as it noted precedents in other human rights conventions, such as the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (CESCR).⁷⁰ Further, Ireland noted a distinction between using the formulation ‘rights’ or ‘the enjoyment of rights’, suggesting that the use of the phrase ‘rights of persons with disabilities’ could be understood as a different set of rights; whereas the latter formulation would make clear that persons with disabilities do not have more or different human rights under the convention, and importantly, that the convention’s purpose is to ensure ‘the enjoyment’ of human rights by

⁶⁶ <IBT>UN Enable ‘Article 1—Purpose—Seventh Session—Comments, proposals and amendments submitted electronically’, available at:

<http://www.un.org/esa/socdev/enable/rights/ahcstata1sevscomments.htm.</IBT>>.

⁶⁷ *ibid.*

⁶⁸ Schulze (n 65).

⁶⁹ <IBT>Canada, Eritrea, Guatemala, Kenya, Mali, Morocco, Thailand, Trinidad and Tobago, supported the alternative formulation, which included the terms ‘to promote and protect’—Daily summary of discussions [Fourth Session] (n 42).</IBT>

⁷⁰ *ibid.*

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persons with disabilities.⁷¹ The Chair's draft at the end of the fourth session,⁷² and before the seventh session,⁷³ as well as the text agreed at by the end of the seventh session,⁷⁴ included both sets of the terms 'to promote, protect' but also 'enjoyment'.

Although the Working Group's draft had separated the convention's 'purpose' (article 1) from its 'general principles' (article 2),⁷⁵ there was a lot of discussion as to the inclusion of certain principles in article 1, in particular the principle of 'dignity'. There was very little support for the inclusion of the concept of 'international cooperation' during the third session,⁷⁶ as it was not considered necessary to be included in article 1,⁷⁷ and thus did not appear in any subsequent drafts of article 1.⁷⁸ There was discussion as to whether the principle of 'non-discrimination' should be included.⁷⁹ Although there was support,⁸⁰ its inclusion was mostly deemed unnecessary,⁸¹ given that it already featured in the articles dealing with 'general principles' and 'non-

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ Letter from the Chairman (n 63).

⁷⁴ Report of the Ad Hoc Committee on its seventh session (n 64).

⁷⁵ Working Group (n 42).

⁷⁶ eg, it was supported by Bahrain and Yemen in the third session—<IBT>Daily summary of discussions [Third Session] (n 42).</IBT>

⁷⁷ Jordan and Mexico did not consider it to be necessary to be included in article 1 in the third session. *ibid.*

⁷⁸ <IBT>Daily summary of discussions [Fourth Session] (n 42).</IBT>

⁷⁹ *ibid.*

⁸⁰ Support was expressed by Eritrea, India, Morocco, and Sierra Leone. <IBT>'Report of the third session 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' UN Doc A/AC.265/2004/5 (9 June 2004).</IBT>

⁸¹ It was considered unnecessary by Canada, Mexico, New Zealand, Serbia Montenegro, and the EDF. *ibid.*

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discrimination’.⁸² The result was that the principle of ‘non-discrimination’ did not appear in any subsequent drafts of article 1.⁸³

There was some support for the inclusion of the principle of active or social ‘participation’ during the third and fourth sessions,⁸⁴ and this was inserted in the Chair’s draft at the end of the fourth session;⁸⁵ however, it disappeared from the Chair’s draft before the seventh session,⁸⁶ and did not reappear in the text agreed at by the end of the seventh session.⁸⁷

The only principle that made it into the final text of article 1 was that of ‘dignity’. There was support for the inclusion of the principle of ‘dignity’ during the third,⁸⁸ fourth,⁸⁹ and seventh sessions.⁹⁰ People with Disability Australia (PWDA) encouraged the inclusion of the principle of ‘dignity’ explaining that the recognition of persons with disabilities’ human rights alone may not necessarily entail that they are also treated with dignity.⁹¹ The principle of dignity was inserted in the Chair’s draft at the end of the fourth session,⁹² disappeared from the text before the

⁸² eg, it was considered unnecessary by Canada, Jamaica, Mexico, Norway, New Zealand, and Thailand in the fourth session. <IBT>Daily summary of discussions [Fourth Session] (n 42).</IBT>

⁸³ *ibid.*

⁸⁴ eg, in the third session the Philippines stated that it should include ‘responsibility to take part in society’—Daily summary of discussions [Third Session] (n 57); eg, in the fourth session Venezuela suggested ‘active participation’—Daily summary of discussions [Fourth Session] (n 42).

⁸⁵ Daily summary of discussions [Fourth Session] (n 42).

⁸⁶ Letter from the Chairman (n 63).

⁸⁷ Report of the Ad Hoc Committee on its seventh session (n 64).

⁸⁸ Its insertion was suggested by Mexico—Daily summary of discussions [Third Session] (n 42).

⁸⁹ Its insertion was suggested by Mexico, Morocco, and the PWDA—Daily summary of discussions [Fourth Session] (n 42).

⁹⁰ Daily summary [Seventh Session] (30 January 2006) 8(11) (n 42).

⁹¹ <IBT>Daily summary of discussions [Fourth Session] (n 42).</IBT>

⁹² *ibid.*

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seventh session,⁹³ but reappeared in the agreed text by the end of the seventh session in the articulation of ‘promote respect for their inherent dignity’, as its inclusion was supported by many delegations and the IDC.⁹⁴ Discussion on the inclusion of the principle of ‘dignity’ in article 1 was intertwined with discussion on the content of the convention’s title, during the seventh session.⁹⁵ Prior to the seventh session, the Chair had raised the question of whether article 1 was necessary to the convention in view of its lengthy title and the drafting practice of other conventions;⁹⁶ however, states and observers expressed support in their written submissions for its retention.⁹⁷ The rationale provided included that the convention’s text should be clear and accessible and that a purpose provision would assist with this.⁹⁸ It was also recognized that although human rights conventions traditionally do not have a ‘purpose’ article, there are UN treaties, such as the Charter of the UN,⁹⁹ which do.¹⁰⁰ Further arguments were made that although domestic and international law differ, it is common practice to include a ‘purpose’ when drafting domestic legislation.¹⁰¹

⁹³ Letter from the Chairman (n 63).

⁹⁴ <IBT>Report of the Ad Hoc Committee on its seventh session (n 64); Daily summary [Seventh Session] (30 January 2006) 8(11) (n 42).</IBT>

⁹⁵ *ibid.*

⁹⁶ Letter from the Chairman (n 63).

⁹⁷ The states and observers that favoured retention of a ‘purpose’ article were: Algeria, China, the EU, India, Kenya, the IDC, the Japan Disability Forum (JDF), and People with Disability Australia (PDA); <IBT>Art 1, Seventh Session Comments (n 66).</IBT>

⁹⁸ As expressed by the IDC, *ibid.*

⁹⁹ Art 1 UN Charter.

¹⁰⁰ <IBT>As expressed by the Japan Disability Forum (JDF). Art 1, Seventh Session Comments (n 66).</IBT>

¹⁰¹ *ibid.*

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Although there was support for the insertion of the principle of dignity into article 1,¹⁰² a point arose as to whether it was better placed in the title or article 1.¹⁰³ The IDC's written submission and comments by Liechtenstein during the seventh session were instrumental in resolving this. The draft title for the convention at this point was the:

Comprehensive and Integral International Convention on
the Protection and Promotion of the Rights and Dignity
of Persons with Disabilities.¹⁰⁴

The IDC had instead suggested the following title: International Convention on the Rights of Persons with Disabilities.¹⁰⁵ Liechtenstein supported this, explaining that the title should primarily act as a point of reference and not as a complete description.¹⁰⁶ It went on to suggest that the principle of dignity could be included in article 1, since delegations were concerned that the more concise title eliminated important substantive elements, such as the principle of dignity.¹⁰⁷ Furthermore, Liechtenstein emphasized the need for caution regarding how the principle was to be applied, noting that rights and dignity differ, in that states can confer the former but not the latter, which is inherent to everyone.¹⁰⁸ Thus, it did not support the inclusion of 'dignity' in the title, especially in conjunction with the word 'rights', but supported its inclusion in article 1.¹⁰⁹ Furthermore, it feared that the formulation 'to

¹⁰² The states that supported the incorporation of the term 'dignity' (or 'inherent dignity') in their written submissions were: Algeria, China, and India. *ibid.*

¹⁰³ Daily summary [Seventh Session] (30 January 2006) 8(11) (n 42).

¹⁰⁴ Letter from the Chairman (n 63).

¹⁰⁵ <IBT>Daily summary [Seventh Session] (30 January 2006) (n 42).</IBT>

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*

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promote dignity’ could imply that dignity was not already there. It is for these reasons that the phraseology agreed at the end of the seventh session, at the insistence of the IDC and Liechtenstein, was a reference to ‘respect’ for ‘dignity’.¹¹⁰ The text of article 1 that was agreed by the end of the seventh session read:

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 persons with disabilities, and to promote respect for their inherent dignity.¹¹¹

Finally, there was one last amendment to this text during the eighth session, in which the word ‘all’ was inserted, between ‘by’ and before ‘persons with disabilities’, at the insistence of the IDC.¹¹²

2.2 Definition of ‘Disability’ (article 1, paragraph 2)

What began as article 2 in Mexico’s working paper, ultimately set out ‘definitions’ and included a definition of ‘disability’. Article 2(a) read:

‘Disability’ means a physical, mental (psychic), or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment.¹¹³

This definition was a verbatim reproduction of the same definition as contained in the Inter-American Convention on the Elimination of All

¹¹⁰ *ibid*; Schulze (n 65).

¹¹¹ Report of the Ad Hoc Committee on its seventh session (n 64).

¹¹² Marianne Schulze (n 65).

¹¹³ Working Paper by Mexico (n 41) art 2(a).

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Forms of Discrimination Against Persons with Disabilities (IACED) of 1999, the only difference in the formulation being the addition of ‘(psychic)’ in Mexico’s proposal.¹¹⁴ This definition was situated largely in a medical model of disability, as it focused on the types of impairment a person may have and that this may limit a person’s capacity to perform activities; also, it located the ‘problem’ (of ‘disability’) in the individual. However, the definition was not situated solely within a medical model, as it also recognized that limitations may be caused by the social and economic environment.

The discussion concerning whether to include a definition of ‘disability’ was situated within a larger discussion about incorporating an article on ‘definitions’ in the convention.¹¹⁵ Some delegations were of the view that a separate article on ‘definitions’ may not be necessary, as pertinent terms may be defined in other articles.¹¹⁶ Other states were opposed to the convention including a definition of ‘disability’, as they were concerned about having a definition at the international level that would differ from states’ domestic legislation,¹¹⁷ and considered that this should be left to states to decide.¹¹⁸ The EU was opposed to the inclusion of a definition of both ‘disability’ or ‘persons with disabilities’, as it considered that such a definition ran the risk of

¹¹⁴ Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities.

¹¹⁵ eg, Colombia and South Africa supported setting aside some time to discuss a ‘definitions’ section—Daily summary of discussions [Third Session] (n 42).

¹¹⁶ This view was held by Australia, Canada, the EU, New Zealand, and Norway in the Third Session (n 57); and by Bahrain, New Zealand in the Fourth Session (n 42).

¹¹⁷ Japan and Russia—Daily summary of discussions [Third Session] (n 42).

¹¹⁸ Costa Rica, India in the fourth session—Daily summary of discussions [Fourth Session] (n 42).

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becoming exclusive as opposed to inclusive.¹¹⁹ In contrast, other delegations, DPOs, and NGOs supported the inclusion of a definition of disability.¹²⁰ For example, National Human Rights Institutions (NHRIS) explained that if a definition of ‘disability’ were not included in the convention there was a danger that states may refuse to ratify it if the convention’s meaning and obligations were uncertain; moreover, without a definition the convention would not provide guidance for domestic law and policy regarding disability awareness.¹²¹

Many definitions of ‘disability’ were suggested and discussed. The majority of written submissions noted that there was no single definition of ‘disability’, and that it was frequently context-dependent.¹²² Japan submitted that a definition should be universally accepted but also be flexible enough to allow interpretation by individual states and accommodate different legal systems.¹²³ There was support for the inclusion of a definition of ‘disability’ based on the UN World Health Organisation’s (WHO) 2001 International Classification of Functioning, Disability and Health (ICF),¹²⁴ with Canada suggesting

¹¹⁹ Daily summary of discussions [Fourth Session] (n 42).

¹²⁰ Mexico in the first session (n 41); Yemen in the third session (n 42); Argentina, Chile, China, Holy See, Kenya, Korea, Mali, Mexico, National Human Rights Institutions (NHRIS), PWDA, Save the Children Alliance, WBU, WNSU in the fourth session (n 42); and Yemen in the seventh session (n 42).

¹²¹ Daily summary of discussions [Fourth Session] (n 42).

¹²² Views submitted [Second Session] (n 42).

¹²³ *ibid.*

¹²⁴ This was supported by Australia, Cuba, and Korea in the fourth session. Daily summary of discussions [Fourth Session] (n 42). It was also supported by UN treaty bodies, organizations, and agencies. Views submitted [Second Session] (n 42). It was supported by the Bangkok Recommendations. Ad Hoc Committee, ‘Bangkok recommendations on the elaboration of a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities—Outcome of an expert group meeting and seminar held in Bangkok at the headquarters

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that the definition in the convention should reflect the WHO's work in order to promote the standardization of international disability terminology and data collection on disability issues.¹²⁵ There was also support for a medical model of disability. For example, the Russian Federation submitted a definition of 'persons with disabilities' that read:

persons whose health is impaired by a lasting deterioration of the functions of the organism resulting from disease, injury or deficiencies, creating limitations affecting their daily living and necessitating social protection.¹²⁶

The PWDA, supported a definition that encompassed all impairment groups, including health conditions such as HIV/AIDS, and recognized that impairment may be episodic, temporary, transitory, or permanent.¹²⁷ There was a lot of support for the definition of 'disability' as set out in the IACED.¹²⁸ This definition, however, was rejected by the World Network of Users and Survivors of Psychiatry (WNSUP).¹²⁹ The International Labour Organization (ILO) considered that a definition of disability would be limiting, but that if the decision to include a definition were taken then 'it should be broad, inclusive, and reflect the social dimension of disability'; it also made reference to the ILO

of the Economic and Social Commission for Asia and the Pacific from 2 to 4 June 2003' UN Doc A/AC.265/2003/CRP/10 (2003).

¹²⁵ <IBT>Views submitted [Second Session] (n 42).</IBT>

¹²⁶ *ibid* para. 25.

¹²⁷ <IBT>PWDA—Daily summary of discussions [Fourth Session] (n 42)</IBT>, set out the full definition that was suggested.

¹²⁸ <IBT>Argentina in the fourth session. *ibid*; Colombia and Costa Rica in the seventh session (n 42).</IBT>

¹²⁹ *ibid*.

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Convention 159 and Code of Practice on Managing Disability in the Workplace.¹³⁰

During the second session panel discussions were also held, with one devoted to exploring ‘new and emerging approaches to definitions of disability’ and the implications of these approaches, which had the purpose of determining the convention’s scope.¹³¹ The panellists expressed the view that discussion on contextual variables was essential and that the situation of disability should be taken into consideration. They also focused on accessibility, which they considered more important as compared to a definition of disability and drew a distinction between experiences of impairment on the one hand and experiences of disability on the other hand.¹³²

There was also a lot of support for a definition of ‘disability’ based on the social model of disability.¹³³ DPOs explained that many states’ definitions of ‘disability’ were grounded in a medical model and that its effect was that persons with psychosocial disabilities may be, and usually were, excluded.¹³⁴ This view was reiterated by Yemen, which was concerned with the link with the medical field and that some psychiatric conditions may not be classified as ‘disability’ in some states, leading to a fear that some states would define disability

¹³⁰ *ibid.*

¹³¹ <IBT>Ad Hoc Committee, ‘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’ [Second Session] UN Doc A/58/118 & Corr.1 (3 July 2003) para 13.</IBT>

¹³² *ibid.*

¹³³ Yemen in the Third Session (n 42); the DPI, the EDF, National Human Rights Institutions (NHRIS), Guatemala, and Thailand in the Fourth Session (n 42); and Serbia and Montenegro and Yemen in the Seventh Session (n 42).

¹³⁴ Daily summary of discussions [Fourth Session] (n 42).

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‘according to their own preferences’.¹³⁵ In contrast, Australia suggested that a medical model of disability should be used because although it considered the social model important, its delegation felt that ‘disability seen purely as a function of the environment would render a definition unworkable’, because it considered persons with disabilities in need of being ‘clearly identified’.¹³⁶

Views also were expressed that a definition should avoid the conceptualization of disability as solely medical, and emphasized that it should reflect social dimensions of disability.¹³⁷ For example, Norway submitted that a definition should include all types of impairments, such as physical, mental, and sensory, but also the ‘handicaps’ that were imposed on persons with disabilities by societies’ and the environment’s demands.¹³⁸ Similarly, the Economic Commission for Latin America and the Caribbean (ECSCAP) submitted that a definition of disability should recognize multiple forms, including physical, sensory, intellectual, psychiatric, perceived, or temporary.¹³⁹ In addition, it also submitted that the convention should consider social and environmental factors, and not only medical factors.¹⁴⁰ There was also support that a definition should be harmonized with human rights principles¹⁴¹ and that the convention should adopt a human rights-based approach and move away from a ‘charity model of disability’.¹⁴²

¹³⁵ Daily summary [Seventh Session] (31 January 2006) 8(12) (n 42).

¹³⁶ Australia—Daily summary of discussions [Fourth Session] (n 42).

¹³⁷ <IBT>Views submitted [Second Session] (n 42).</IBT>

¹³⁸ *ibid.*

¹³⁹ *ibid.*

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.*

¹⁴² *ibid.*

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The discussion over the inclusion of a definition on ‘disability’ carried on into the seventh session but remained unresolved.¹⁴³ Whereas some delegations and the Chair did not support the inclusion of a definition of ‘disability’ or of ‘persons with disabilities’; other delegations supported the inclusion of a definition of ‘disability’,¹⁴⁴ ‘persons with disabilities’, or both definitions.¹⁴⁵ The IDC was also in favour of including a definition at this point because it feared that without a definition states might narrowly interpret the range of persons protected, which would make the convention ‘virtually meaningless’.¹⁴⁶ There was also discussion over the position of the definition in the text, with suggestions including that it could be positioned in the preamble,¹⁴⁷ rather than in the body of the convention.

Concerning content, views included a combination of both a medical model and a social model. For example, Canada reached the view that a definition was problematic, but if it were to be included it should:

be based on physical or mental impairment, functional limitations, whether real or perceived, and socially constructed barriers to the full participation in society of persons with disabilities.¹⁴⁸

¹⁴³ <IBT>Daily summary of discussions [Seventh Session] (n 42).</IBT>

¹⁴⁴ eg, Costa Rica considered that a definition of ‘persons with disabilities’ was not necessary but that a definition on ‘disability’ ‘might have merit’ but that it would depend on the Ad Hoc Committee, as a whole, to decide, and supported the IACED definition of ‘disability’. *ibid.*

¹⁴⁵ *ibid.*

¹⁴⁶ Lawson (n 11) 593.

¹⁴⁷ <IBT>Serbia and Montenegro in the seventh session. Daily summary of discussions [Seventh Session] (n 42).</IBT>

¹⁴⁸ *ibid.*

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Australia was concerned that a ‘strict’ social model approach may lead to the interpretation that once the barriers created by society are removed the state will have ‘no further obligation toward the person with a disability’.¹⁴⁹ It proposed a definition that would be ‘part of the social model . . . but that works on the concept of impairment and disability, so as to recognize the triggers for the protection of the convention’.¹⁵⁰

By the end of the seventh session, the overall consensus pointed towards the inclusion of a definition of ‘disability’ or ‘persons with disabilities’ to be included in the article on definitions.¹⁵¹ However, the formulation of the text had not been decided upon. Following the seventh session, the Chair circulated a draft text for discussion that read:

‘Disability’ results from the interaction between persons with impairments, conditions or illnesses and the environmental and attitudinal barriers they face. Such impairments, conditions or illnesses may be permanent, temporary, intermittent or imputed, and include those that are physical, sensory, psychosocial, neurological, medical or intellectual.¹⁵²

This was considered one of the ‘most difficult issues’;¹⁵³ with the provision’s formulation and positioning being one of the most time

¹⁴⁹ *ibid.*

¹⁵⁰ Daily?.

¹⁵¹ *ibid.*

¹⁵² UN Enable, ‘Possible Definition of “Disability”’: Discussion Text Suggested by the Chair’ [Seventh Session], available at:

<http://www.un.org/esa/socdev/enable/rights/ahc7pddisability.htm>.

¹⁵³ See (n 49).

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consuming during the eighth and final session,¹⁵⁴ which was finally resolved with the assistance of the facilitator's text.¹⁵⁵ This text did two things: firstly, it moved the text that was previously found in the 'definitions' provision, into the 'purpose' provision (article 1); and secondly, it provided a description as opposed to a definition of 'persons with disabilities'. It thus read:

Persons with disabilities include those who have long-term physical, mental, or sensory impairments which in interaction with environmental barriers may hinder their full and effective participation in society on an equal basis with others.¹⁵⁶

Nevertheless, the negotiations did not stop there, but rather continued with another two changes being made to the final text. The term 'intellectual' was introduced to the list of impairments; and the term 'various' was introduced before 'barriers', replacing 'environmental'. The final text for article 1(2), which was adopted read:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers

¹⁵⁴ Lawson (n 11).

¹⁵⁵ <IBT>UN Enable, 'Facilitator's text on Definition of Disability as of 23 August 2006' [Eighth Session],</IBT> available at:

https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwid79bPvNDWAhWMJIAKHRcQCgMQFggnMAA&url=http%3A%2F%2Fwww.un.org%2Fesa%2Fsocdev%2Fenable%2Frights%2Fahc8docs%2Fahc8dfdfdis3.doc&usg=AOvVaw06e_3YnoI4atmm-qJ7NaGc.</IBT>

¹⁵⁶ *ibid.*

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may hinder their full and effective participation in
society on an equal basis with others.¹⁵⁷

The new placement of, and the formulation of the description (and not a definition), in the convention constituted the compromise that was arrived at, as agreement could not be reached on a definition, or whether the convention should even include one.¹⁵⁸ This marked the end of the substantive drafting as it concerned the text of article 1.¹⁵⁹

3. Paragraph 1

3.1. ‘The purpose of the present Convention’

The CRPD is the only core UN human rights convention to have a separate article entitled ‘purpose’. Traditionally, the purpose of UN international human rights conventions has been conveyed through their title and preambular paragraphs, as is the case with the ICCPR, the CESCRC, the CRC, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) and the International Convention for the Protection of All Persons from Enforced Disappearance (CED). In contrast, some international environmental law treaties contain a ‘purpose’ or ‘objectives’

¹⁵⁷ Art 1(2) CRPD.

¹⁵⁸ Lawson (n 11).

¹⁵⁹ The remaining issues that were discussed by the drafting committee concerned: (a) whether the two paragraphs in article 1 should be merged into one; (b) whether the two paragraphs should be numbered; and (c) whether a comma should be placed after the word ‘impairments’. UN Enable, ‘Drafting Group’ [Eighth Session], available at: <http://www.un.org/esa/socdev/enable/drafting.htm>.

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provision.¹⁶⁰ The inclusion of such a provision in the CRPD is in line with environmental law treaty drafting practice.¹⁶¹

During the negotiations, there was much discussion on whether there was need for a separate article on the convention's purpose.¹⁶² The inclusion of the provision was not finalized until the seventh session, where it was decided that the convention's title would be shortened and the 'purpose' article be retained.¹⁶³ The need for a 'thematic' human rights convention, which focused on persons with disabilities had arisen from a recognition that persons with disabilities were 'invisible' within the core UN human rights conventions; that their particular needs were not being met as none adopted a human rights approach to 'disability',¹⁶⁴ and existing human rights obligations were not tailored to address the particular barriers persons with disabilities faced in the realization of their human rights.¹⁶⁵ The purpose provision in the CRPD

¹⁶⁰ eg Art 1 of the 1992 Convention on Biological Diversity.

¹⁶¹ Fina (n 10).

¹⁶² Daily summary [Seventh Session] (n 42); Schulze (n 65).

¹⁶³ This was eventually supported by the states: Algeria, Australia, Bosnia and Herzegovina, Chile, China, Colombia, Costa Rica, Ethiopia, the EU, India, Iran, Israel, the Republic of Korea, Lichtenstein, Libya, Mauritius, Mexico, Nigeria, Norway, Serbia and Montenegro, Sudan, Syria, United States of America, and Yemen—Daily summary of discussions [Seventh Session] (n 42).

¹⁶⁴ Janet E Lord, 'NGO Participation in Human Rights Law and Process: Latest Developments in the Effort to Develop an International Treaty on the Rights of People with Disabilities' (2004) 10 ILSA Journal of International & Comparative Law 311; Caroline Harnacke and Sigrid Graumann, 'Core Principles of the UN Convention on the Rights of Persons with Disabilities: An Overview', in Joel Anderson and Jos Philips (eds), *Disability and Universal Human Rights: Legal, Ethical, and Conceptual Implications of the Convention on the Rights of Persons with Disabilities* (Netherlands Institute of Human Rights 2012). Emily Julia Kakoullis, *A Shift from Welfare to Rights: A Case Study of the Ratification Process for the Convention on the Rights of Persons with Disabilities in Cyprus*, PhD Thesis (University of Bristol 2015); Fina (n 10).

¹⁶⁵ Stein and Lord (n 6).

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ensures that all persons with disabilities fully enjoy all human rights and fundamental freedoms on an equal basis with all other persons.¹⁶⁶

3.2 ‘to promote, protect, and ensure’

The formulation ‘to promote, protect, and ensure’,¹⁶⁷ is a combination of the Working Group’s two draft proposals for article 1: the term ‘to ensure’, was initially found in the Working Group’s draft, and the terms ‘to protect and promote’, in its alternative formulation.¹⁶⁸ This particular formulation is unique in international human rights law.¹⁶⁹ The three over-arching obligations on states parties to international human rights conventions effectively encompass the obligations: ‘to respect, to protect and to fulfil’.¹⁷⁰

These are explicitly articulated in the CESCR’s General Comment No. 15. The obligation ‘to respect’ requires states parties to international human rights conventions to refrain from directly or indirectly interfering with the enjoyment of a person’s human right.¹⁷¹ The obligation ‘to protect’ requires states parties to take measures to prevent third parties from interfering in any way with the enjoyment of a person’s human rights,¹⁷² that is, to ensure that no person is denied their human rights.¹⁷³ This obligation also includes the adoption of

¹⁶⁶ Kanter (n 1).

¹⁶⁷ Art 1, CRPD.

¹⁶⁸ Working Group (n 42).

¹⁶⁹ Schulze (n 65).

¹⁷⁰ CESCR, ‘General Comment No 15: The Right to Water (Arts 11 and 12 of the Covenant)’ UN Doc E/C.12/2002/11 (20 January 2003) para 20.

¹⁷¹ <IBT>General Comment 15 (n 170)</IBT> para 21.

¹⁷² *ibid* para 23.

¹⁷³ Schulze (n 65).

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necessary and effective legislative and policy measures.¹⁷⁴ The obligation ‘to fulfil’ comprises three further obligations, namely: ‘to facilitate, promote and provide’.¹⁷⁵ The obligation ‘to facilitate’ requires states parties to take positive measures to assist persons and communities to enjoy the right.¹⁷⁶ The obligation ‘to promote’ requires states parties to take steps to support the upholding of the right,¹⁷⁷ including to ensure that there is appropriate education around the right.¹⁷⁸ Lastly, the obligation ‘to provide’ requires states parties to provide access to the right when persons or a group are unable to realize the right themselves by the means at their disposal, for reasons that are beyond their control.¹⁷⁹

The wording was discussed at the Working Group and the Ad Hoc Committee’s third, fourth, and seventh sessions.¹⁸⁰ In advance of the seventh session, the Chairman had disseminated a draft text in which article 1 included the formulation ‘to promote, protect and fulfil’.¹⁸¹ At the seventh session the IDC proposed that ‘fulfil’ be replaced with ‘ensure’, as it was concerned that the language of the article needed to reflect that states parties must refrain from interfering with the human rights of persons with disabilities and prevent third parties from interfering, in addition to taking proactive measures to protect the

¹⁷⁴ <IBT>General Comment 15, </IBT> para 23.

¹⁷⁵ *ibid* para 25.

¹⁷⁶ *ibid* para 25.

¹⁷⁷ Schulze (n 65).

¹⁷⁸ <IBT>General Comment 15 (n 170) para 25.</IBT>

¹⁷⁹ *ibid*.

¹⁸⁰ Working Group (n 42); Daily summary of discussions [Third Session] (n 42); Daily summary of discussions [Fourth Session] (n 42).

¹⁸¹ Letter from the Chairman (n 63).

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rights.¹⁸² It also argued that the terms ‘ensure’ and ‘respect’ may be useful to reflect that.¹⁸³ It is noted that if the formulation ‘to respect and to ensure’ had been adopted, it would have matched the formulation used in the articles 2(1) of the ICCPR¹⁸⁴ and CRC.¹⁸⁵ The term ‘ensure’ was eventually included to replace ‘fulfil’ but the term ‘respect’ was not included. The result was that the text that was finally adopted read: ‘to promote, protect, and ensure’.¹⁸⁶ Nevertheless, the text of article 1 encompasses all three over-arching obligations on states parties to international human rights conventions (‘to respect, to protect and to fulfil’), as the discussions did not aim to exempt state parties from any obligations, but rather aimed to ensure ‘the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities’. It is also evident that because the CRPD iterates and tailors existing human rights to the needs of persons with disabilities, these three over-arching obligations *ab initio* underlie the entire foundation of the CRPD. Furthermore, the human rights nature of the CRPD reaffirms and underpins the universality, indivisibility, interdependence, and interrelatedness of all human rights and fundamental freedoms stipulated therein.¹⁸⁷

¹⁸² <IBT>Daily summary of discussions [Seventh Session] (n 42).</IBT>

¹⁸³ *ibid.*

¹⁸⁴ Art 2(1) ICCPR.

¹⁸⁵ Art 2(1) CRC.

¹⁸⁶ Art 1 CRPD.

¹⁸⁷ CRPD, preambular para c.

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3.3 ‘full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities’

The phrase ‘human rights and fundamental freedoms’ is central to international human rights law and is found in the UDHR, ICERD, ICCPR, CESCRC, CEDAW, CRC, and CED;¹⁸⁸ further, the phrase ‘full and equal enjoyment of human rights and fundamental freedoms’ is also found in the ICERD.¹⁸⁹ The text of article 1(1) uses this phrase but adds to it the word ‘*all*’ in front of it; this achieves to ensure that persons with disabilities enjoy the human rights and fundamental freedoms set out in the existing international human rights treaties equally with all other persons.¹⁹⁰ The core UN international human rights treaties prior to the CRPD aimed to protect and ensure the rights for all persons, including persons with disabilities; however, in practice they did not afford protection or ensure the implementation of the rights of persons with disabilities on an equal basis with non-disabled persons.¹⁹¹ Persons with disabilities were ‘invisible’ and their particular needs were not being met by the core UN human rights conventions.¹⁹² The intention of the CRPD’s drafters was to ensure that all human rights and fundamental freedoms provided by other international human rights treaties are enjoyed by persons with disabilities, tailored to their needs, and that the

¹⁸⁸ In the preamble and Art 26(2) UDHR; Arts 1(1), 1(4), 2(2) and 6 ICERD; Art 41(e) ICCPR; Arts 13(1) and 18 ICESCR; Arts 1 and 3 CEDAW; Arts 29(1)(b) and 40(1) CRC; and in the preamble of the International Convention for the Protection of All Persons from Enforced Disappearance (CPED).

¹⁸⁹ Art 2(2) ICERD.

¹⁹⁰ Fina (n 10).

¹⁹¹ Kanter (n 1).

¹⁹² Kayess and French (n 3); Harnacke and Graumann (n 164).

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states parties' obligations are set out in detail.¹⁹³ Therefore, this phrase was intended to reaffirm that all human rights and fundamental freedoms are equally applicable under the three layers of obligations to persons with disabilities. The CRPD therefore complements the other core UN human rights treaties.¹⁹⁴ Further, article 1(1), makes explicit that the rights and freedoms are to be enjoyed 'by *all* persons with disabilities'. The addition of the word 'all', before 'persons with disabilities' was added at the insistence of the IDC; this aimed to both highlight the diversity of persons with disabilities, as well as emphasize that some persons may require additional intensive support.¹⁹⁵

3.4 'to promote respect for their inherent dignity'

The principle of 'dignity' is the 'anchor norm of human rights' law;¹⁹⁶ persons are valued because of their inherent self-worth.¹⁹⁷ Atrocities in Nazi Germany and Japan during the Second World War (WWII), were primary factors that sensitized post-war governments to adopt the first generation of international human rights, and in turn appreciate the significance of the inviolable and fundamental value of a person as the basis of international human rights law.¹⁹⁸ Following the end of WWII,

¹⁹³ <IBT>Fina (n 10).</IBT>

¹⁹⁴ *ibid.*

¹⁹⁵ Schulze (n 65).

¹⁹⁶ Lee Ann Bassar 'Human Dignity' in Rioux et al (n 17).

¹⁹⁷ Quinn and Degener (n 20) 14.

¹⁹⁸ A eugenic policy was not unique in Nazi Germany and Japan; Shohei Yonemoto et al, *Eugenics and Human Society* (Kohdandshya 2007), state that eugenic policies can also be found in the United States and in the United Kingdom before the Second World War. They argue that the social desire for superiority and efficiency, found in every society, could be an incubator of eugenics. The decision of the U.S. Supreme Court, *Bucks v Bell* [247 U.S. 200 (1927)], expressed a eugenic tendency. It stated, 'It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are

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the establishment of the UN, and the adoption of the UDHR, the principle of ‘dignity’ was recognized as a foundational human rights principle. The preamble to the Charter of the United Nations reaffirmed the international community’s commitment to human rights and human dignity (‘the peoples of the United Nations determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person’), and the preamble to the UDHR recognizes ‘the inherent dignity and . . . equal and inalienable rights of all members of the human family . . .’,¹⁹⁹ and emphasizes, in article 1, that ‘[a]ll human beings are born free and equal in dignity and rights.’²⁰⁰ The principle of dignity is found in all the core international human rights treaties.²⁰¹ Regional human rights treaties have also adopted the principle of dignity as a founding value.²⁰² This is equally encountered in domestic law, via the judicial application of international human rights law or as a constitutional or legislative right.²⁰³ For example, Germany confers the principle of dignity as an objective legal norm and basic right in its

manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts*, 197 U.S. 11. Three generations of imbeciles are enough.’ Because of this tendency, it is extremely important to specify human dignity in human rights documents.

¹⁹⁹ UDHR preamble.

²⁰⁰ UDHR Art 1.

²⁰¹ In the preambles of all the core UN human rights treaties, and in Arts 10(1) ICCRP, 13(1) CESC, and 37(c) CRC. In the preambles to the ICERD, CEDAW, CAT, and CRC, as well as in Arts 23(1), 28(2) CRC. Lastly, in Art 19(2) CED.

²⁰² For information on regional treaties, see Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Rights* (CUP 2015) 107, where it is stated that: ‘human dignity is seen as a founding value that expresses the basic concept and rationale underlying the basic rights. It is understood as a value that indicates that human rights are not granted by the state, and thus the state cannot take them away. Indeed, human dignity stands at the foundations of democracy itself.’

²⁰³ Bassar (n 196).

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constitution,²⁰⁴ as does South Africa as a foundational value and constitutional right.²⁰⁵

The principle of dignity has been crucial to achieving the ‘paradigm shift’ in conceptualizing ‘disability’, from a medical model of disability, to a social model and a human rights perspective.²⁰⁶ Historically, persons with disabilities were seen and treated as ‘objects’ to be pitied and protected; in contrast, focusing on the inherent dignity of persons with disabilities achieves a powerful shift in reminding society that they ‘have a stake in and claim on society that must be honoured quite apart from any considerations of social or economic utility’.²⁰⁷ The principle of dignity underpins the CRPD and peppers its text.²⁰⁸ Further, the principle is explicitly intertwined with particular rights, such as freedom from exploitation, violence, and abuse (article 16(4)), the right to education (article 24(1)(a)), and the right to health (article 25(d)).

The inclusion of the principle of dignity was first suggested by Mexico in its working paper for a convention.²⁰⁹ Similar to the final text of the CRPD, the principle underpinned and peppered the working paper for the convention.²¹⁰ However, the principle of dignity was not present

²⁰⁴ Art 1 of the Basic law of the Federal Republic of Germany of 1949 states that: ‘Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.’ English translated version of the article available at:

https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

²⁰⁵ Basser (n 196).

²⁰⁶ <IBT>Quinn and Degener (n 20).</IBT>

²⁰⁷ *ibid* 14.

²⁰⁸ The term ‘inherent dignity’ is found in art 1, the preamble (paragraphs a and h), and in the provision on ‘general principles’ (art 3(a)). Further, the term ‘dignity’ is also found in the preamble (paragraph y) and the provision on awareness-raising (art 8(1)).

²⁰⁹ <IBT>Working Paper by Mexico (n 41).</IBT>

²¹⁰ *ibid*.

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in the working group's text for article 1 or the alternative formulation, and Mexico was keen to ensure that the principle would be included in article 1. It thus provided suggestions for amendment to the alternative formulation during the third session, adding 'and dignity of [persons with disabilities] . . .'.²¹¹ This had the support of Colombia, as it was considered to create a single vision.²¹² Mexico persisted in the fourth session with its suggestion that the principle of 'dignity' be included in article 1; this was also supported by Morocco and the PWDA, which argued that the recognition of persons with disabilities' human rights alone would not necessarily ensure that they are treated with dignity.²¹³ The principle was included in the Chair's draft at the end of the fourth session which read: 'The purpose . . . all human rights and fundamental freedoms of [persons with disabilities], their dignity . . .';²¹⁴ nevertheless, it was not present in the Chair's draft before the seventh session.²¹⁵

During the seventh session, the discussion regarding article 1, the Convention's title, and the position of the principle of dignity, were eventually resolved by the decision that article 1 would be retained but that the title would be shortened and the principle of dignity be included in article 1, and not in the title.²¹⁶ As discussed in section 2, key to this resolution were Liechtenstein's and the IDC's actions. There was further support for shortening the convention's title and including the

²¹¹ <IBT>Daily summary of discussions [Third Session] (n 57).</IBT>

²¹² *ibid.*

²¹³ <IBT>Daily summary of discussions [Fourth Session] (n 42).</IBT>

²¹⁴ *ibid.*

²¹⁵ Letter from the Chairman (n 63).

²¹⁶ <IBT>Daily summary [Seventh Session] (n 42). </IBT>

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principle of dignity in article 1 from Bosnia and Herzegovina, India, Iran, Jordan, Libya, and Mauritius.²¹⁷ Although Mexico agreed to a shorter title, it still supported the inclusion of the principle of dignity in the title; this was also supported by Korea and Senegal.²¹⁸ Moreover, Bosnia and Herzegovina and the IDC suggested that the phrase ‘respect for dignity’ be used in order to avoid implying that dignity may somehow not be inherent; or that it requires promotion, respectively.²¹⁹ Furthermore, the Chair suggested that the term ‘inherent’ be added and the phrase ‘respect for inherent dignity’ be used so as to resolve concerns around the nature of the principle of dignity and to be consistent with the phrasing used in other human rights treaties.²²⁰

Aharon Barak discusses four common connotations of the concept of dignity.²²¹ Firstly, protection and ensuring bodily integrity; including the prohibition of torture, severe punishment, systematic rape, and degradation. Secondly, ensuring basic equality between persons. Thirdly, the protection of the personal identity of the individual, psychological integrity, and intellectual fulfilment. Lastly, ensuring the minimal subsistence of the individual in society. It is argued that the CRPD includes these four connotations in various clauses. For example, article 17 protects the integrity of the person.²²² Article 15, in turn,

²¹⁷ *ibid.*

²¹⁸ *ibid.*

²¹⁹ *ibid.*

²²⁰ Fina (n 10).

²²¹ Barak (n 209) 237.

²²² The IDC stated that: ‘Forced interventions have long been recognized by people with disabilities ourselves as a serious violation of our mental and bodily integrity, comparable to rape and other forms of torture. The definition in the Convention Against Torture includes discrimination as a purpose of torture, which is clearly relevant in the disability context. Measures intended to obliterate the personality or to

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provides for freedom from torture, cruel, inhuman, or degrading treatment and punishment. Secondly, preambular paragraph (h) stipulates that ‘discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person’.²²³ Thirdly, in addition to article 17, article 3 CRPD envisages ‘[r]espect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons’ and ‘[r]espect for [the] difference and acceptance of persons with disabilities as [a] part of human diversity and humanity’. Fourthly, article 28 protects the right to an adequate standard of living, including adequate food, clothing, and housing; the continuous improvement of living conditions; and social protection.²²⁴ These clauses are particularly associated with the principle of dignity.

diminish the physical or mental capacities of the victim are also regarded as torture, in the Inter-American Convention to Prevent and Punish Torture and by leading commentators. Many forced interventions used against people with disabilities would fall into this category, since they are intended to diminish capacities of the individual which are seen as undesirable, or compel people with disabilities to give up their identity as disabled people and mimic non-disabled reality.’ UN Enable, ‘Article 11: Freedom from Torture or Cruel, Inhuman or degrading Treatment or Punishment—Draft Proposal’, available at:

<http://www.un.org/esa/socdev/enable/rights/art11draft.htm#note>.

²²³ CRPD preambular para h.

²²⁴ The interrelation between dignity and an adequate standard of living might be less emphasized than that between dignity and civil and political rights. However, the Constitutional Court of the Republic of South Africa articulated: ‘Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter’ (para 23). ‘A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality.’ (para 44)—*Government of the Republic of South Africa and Others v Grootboom* 2001 (1) SA 46 (CC).

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Further, Christopher McCrudden suggests that a basic minimum content of ‘human dignity’ consists of, firstly, that every person ‘possesses an intrinsic worth’ by virtue of being human; secondly, that the intrinsic worth should be both recognized and respected, and that some types of behaviour are ‘inconsistent with respect for this intrinsic worth’; and lastly, that the state exists for the sake of the person, not the other way round.²²⁵ Although the principle of dignity is extremely important in human rights law, it has also been criticized for being vague regarding the variations in its judicial interpretation,²²⁶ and there is concern over how the principle has been interpreted regarding persons with disabilities by the ECtHR and UK domestic courts because ‘[t]here are precious few case reports concerning disabled people that provide a benchmark of judges actually facing a concrete situation and identifying it as [“]indignity[”].’²²⁷

4. Paragraph 2

This paragraph is slightly unusual in terms of UN human rights treaties, as other such treaties, with the exception of the CRC,²²⁸ do not contain a provision that includes a description of the convention’s target group as an identifiable group in one of its provisions. As mentioned, the CRPD does not contain a definition of ‘disability’ and/or ‘persons with

²²⁵ <IBT>Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 EJIL 655, 723.</IBT>

²²⁶ *ibid.*

²²⁷ Luke Clements, ‘Disability, Dignity and the Cri de Coeur’ (2011) 6 EHRLR 675, 675.

²²⁸ Art 1 CRC reads: ‘For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.’

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disabilities’. Instead, preambular paragraph (e) asserts that ‘disability is an evolving concept’, and article 2, which provides definitions of the CRPD’s key terms, also does not provide a definition of ‘persons with disabilities’. Instead, a description of the CRPD’s target group, ‘persons with disabilities’ is included in article 1(2), as part of the CRPD’s purpose. This paragraph is instrumental to the CRPD. Key to understanding the CRPD, it is important to understand the conceptualization of ‘disability’ that it employs.²²⁹

The CRPD’s drafting and negotiation process was a unique, participatory and collaborative process, within which persons with disabilities’ voices were heard and listened to, forming a central part of the process. During the negotiations and drafting for the CRPD, the social model of disability was a motto of the International Disability Movement and was used as a powerful tool that enabled DPOs to demand legal reform at the international level.²³⁰ Through the participatory process, a particular conceptualization of disability was enabled to shape the text. Article 1(2) (and preambular paragraph e) rejects a conceptualization of ‘disability’ grounded exclusively in a medical model of disability; rather, it shifts focus away from impairment and the individual, towards attitudinal, environmental, and societal barriers such as infrastructure, social, legal, and economic, processes and structures. The conceptualization is underpinned by the social model of disability because it explicitly makes reference to the interaction between persons with impairments on the one hand, and

²²⁹ Harnacke and Graumann (n 164).

²³⁰ Degener ‘A New Human Rights Model of Disability’ in Fina et al (n 10).

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societal barriers on the other;²³¹ with the CRPD being ‘the highest legal manifestation and confirmation of the social model of disability on the international stage’.²³² The CRPD thus reflects a ‘paradigm shift’ in conceptualizing ‘disability’.²³³ It is important to understand, however, that the significant influence the social model of disability had over the drafting and negotiation process came from a ‘populist conceptualization 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’.²³⁴ In view of the fact that treaty negotiation is a highly politically charged process, ‘reductionism in the use of the social model is comprehensible’.²³⁵ Lastly, to consider the conceptualization of ‘disability’ in article 1(2), as underpinned exclusively and solely by the social model of disability, would be to ignore the language it employs.

²³¹ Waddington (n 13); Janet E Lord and Michael A Stein, ‘The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities (2008) 83 *Washington Law Review* 449; Raymond Lang, Maria Kett, Nora Groce, and Jean-Francois Trani, ‘Implementing the United Nations Convention on the Rights of Persons with Disabilities: Principles, Implications, Practice and Limitations’ (2011) 5 *ALTER European Journal of Disability Research* 206; Kelley Johnson, ‘The UN Convention on the Rights of Persons with Disabilities’ (2013) 7 *Ethics and Social Welfare* 218–231; UN OHCHR, ‘The Convention on the Rights of Persons with Disabilities Training Guide Professional Training Series No. 19’ (2014).

²³² Waddington (n 13).

²³³ Moriarity and Dew (n 46); Gauthier de Beco, ‘Case Note: Is Obesity a Disability? The Definition of Disability by the Court of Justice of the European Union and its Consequences for the Application of EU Anti-Discrimination Law’ 22 (2016) *Colum J Eur L* 381.

²³⁴ Kayess and French (n 3) 7.

²³⁵ Degener (n 230) 56.

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4.1. ‘Persons with disabilities’

Article 1(2), the CRPD’s title and text, use the phrase ‘persons with disabilities’.²³⁶ Viewed through a social model of disability ‘lens’, the use of the phrase ‘persons with disabilities’ appears at odds, because situated through such a ‘lens’ the term ‘disabled people’ better reflects the social model as it is societal and environmental factors that disable persons with impairments. Although article 1 is underpinned by the social model of disability its formulation reveals that it also employs PFL, which is the dominant language/terminology in the international disability rights field.²³⁷ Further, the term ‘disability’ and not ‘impairments’ (or ‘conditions’) was used, which would better reflect the social model of disability, as it is societal and environmental barriers that disable persons with impairments. An examination of the language of article 1 (and the CRPD text) reveals that it is also underpinned by the minority group approach to disability, that is, it involves the identification of persons that (self)identify as ‘persons with disabilities’ in order to be entitled to human rights protection under the CRPD. Lastly, another issue concerns linguistic/translation, translating the distinction between the term ‘disability’ and ‘impairments’ into different languages. Translation to other states parties’ languages is required as the CRPD is available in the UN’s six official languages.²³⁸ Article 1(2) distinguishes between the term ‘impairment’ and the term ‘disability’.²³⁹ This may pose a challenge for states parties that do not

²³⁶ eg, the title reads: ‘Convention on the Rights of Persons with Disabilities’.

²³⁷ Shakespeare (n 24).

²³⁸ These are: Arabic, Chinese, English, French, Russian, and Spanish.

²³⁹ This situates the conceptualization of disability within the social model of disability.

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have a corresponding term in their language to the English language term ‘impairment’.²⁴⁰

4.2 ‘include those who have long-term physical, mental, intellectual or sensory impairments’

An exclusive conceptualization of a social model of disability based on the text of article 1, may have read ‘include those who have impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’, and not included a list of impairments or temporal limitation. Article 1(2), however, also includes a list of impairment types, these are: ‘physical, mental, intellectual, or sensory’.²⁴¹ There was a lot of discussion concerning the list of impairment types; this had two aspects, one aspect concerned the language/terminology employed, and the second the potential distributive impact of including a definition. Following the seventh session the Chair had circulated a draft text for discussion and the negotiations on this provision were only eventually resolved at the eighth and final session with the aid of a facilitator’s

²⁴⁰ eg, in Cyprus, in contrast to the UN English language version, the official Cypriot Greek language CRPD translation employs the term ‘disabilities’ (in Greek: ‘αναπηρίες’); with no distinction being made between the terms ‘disability’ and ‘impairment’. The outcome is the confusing Greek translated formulation of article 1: ‘*disability* arises from the interaction between persons with *disabilities* and . . . barriers . . .’. The implication is that the linguistic difference, in which the English term ‘impairment’ does not have a corresponding term in Greek, renders interpreting the Greek translated CRPD text of article 1 difficult within the context of the social model of disability. Kakoullis (n 164) 224. Further, in the Nordic states, the distinction between the term ‘impairment’ and ‘disability’ is difficult to translate, because ‘there are not separate words which can capture the sense of individual bodily experience and social-contextual experience’. Shakespeare (n 18) 25.

²⁴¹ Art. 1(2) CRPD.

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text. Both the Chair and facilitator's texts included the term 'impairment', which the IDC was extremely concerned about because it 'reject[ed] the use of the term "impairment" to refer to intellectual or psychosocial disability',²⁴² and preferred that the term 'condition' be used instead, which would have been 'more inclusive and less stigmatizing'.²⁴³ The IDC had thus proposed: 'physical, sensory, psychosocial, intellectual, neurological and medical impairments and conditions'.²⁴⁴ Eventually, however, the term 'impairment' was maintained in the final draft but not 'conditions'.

Regarding the contents of the list, the Chair's draft, circulated after the seventh session, mirrored almost verbatim the IDC's proposal, as it stated: 'physical, sensory, psychosocial, neurological, medical or intellectual'.²⁴⁵ It was an open and non-exhaustive list.²⁴⁶ The facilitator's draft, however, removed the terms 'psychosocial', 'neurological' and 'intellectual', and replaced these with the term 'mental'.²⁴⁷ The IDC would have preferred that a formulation included terms such as 'psychosocial' and 'neurological',²⁴⁸ because that is the

²⁴² International Disability Caucus (IDC), 'International Disability Caucus News page for 23 August [2006]', available at:

<https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0ahUKEwi-69iQpOnXAhVICcAKHbzKBz0QFggrMAI&url=http%3A%2F%2Fwww.un.org%2Fesa%2Fsocdev%2Fenable%2Frights%2Fahc8docs%2Fahc8idcreact23aug.doc&usg=AOvVaw3sFyZ-WPSVI5NiA5aSME5j>.

²⁴³ Lawson (n 11) 594.

²⁴⁴ Schulze (n 65) 38.

²⁴⁵ UN Enable (n 152).

²⁴⁶ Schulze (n 65) 38.

²⁴⁷ UN Enable (n 155).

²⁴⁸ UN Enable, 'Article 2—Definitions—Seventh Session—Comments, proposals and amendments submitted electronically', available at:

<http://www.un.org/esa/socdev/enable/rights/ahcstata2sevscomments.htm#idcsk>.

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language/terminology preferred by the leading organizations of the persons concerned, which the IDC was representing.²⁴⁹ Furthermore, the IDC explained that the term ‘mental’ was no longer used because it ‘confuses very distinct forms of disabilities and does not explicitly cover psycho-social disabilities’.²⁵⁰ During the eighth and final session the term ‘intellectual’ was re-inserted back into the provision; however, the term ‘mental’ impairment remained, referring to the ‘psychosocial dimension’.²⁵¹

Although article 1(2) includes a list of impairment types, it is not exclusive as it is premised on the words ‘include those’ persons.²⁵² One of the concerns that some delegations with large populations, such as China, India, and Russia, expressed during the negotiations, regarded the potential distributive impact of including a definition of ‘disability’ or ‘persons with disabilities’.²⁵³ Some delegations wanted a narrow scope of ‘disabilities’ as they were worried that otherwise it would ‘open the floodgates’, with the implication of obligating states parties to recognize and afford protection to a large number of persons from impairment groups, such as persons with HIV/AIDS or psychosocial conditions, which traditionally were not viewed as ‘persons with disabilities’ within the objecting states’ societies and cultures.²⁵⁴ In contrast, DPOs, NGOs, and other delegations, wanted to make sure that

²⁴⁹ Anna Lawson (n 11) 594.

²⁵⁰ Schulze (n 65) 38.

²⁵¹ Tina Minkowitz, ‘The United Nations Convention on the Rights of Persons with Disabilities and the Right to be Free from Nonconsensual Psychiatric Interventions’ 34 (2007) *Syracuse J Intl L & Com* 405, 407.

²⁵² Art 1(2) CRPD.

²⁵³ <IBT>Kayess and French (n 3) 23.</IBT>

²⁵⁴ *ibid.*

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the convention would apply to all persons with disabilities, that is, persons from all impairment or condition groups.²⁵⁵ The final text eventually adopted did not contain an exclusive list of impairment types.

Paragraph 2 does, however, include a temporal limitation, as it reads: ‘. . . those who have long-term . . . impairments’.²⁵⁶ Formulations that were suggested during the negotiations included: Australia’s draft: ‘. . . (h) may presently exist; or (i) may have previously existed but no longer exists; or (j) may exist in the future; or (k) may be imputed to a person’;²⁵⁷ the Chair’s draft: ‘may be permanent, temporary, intermittent or imputed’;²⁵⁸ and the IDC’s draft: ‘imputed, perceived, temporary and intermittent’.²⁵⁹ None of these formulations included the term ‘long-term’. The term ‘long-term’ was present in the UK’s Disability Discrimination Act (DDA 1995) and at the time the CRPD was being negotiated, the DDA was being challenged ‘as arbitrary and unnecessarily restrictive’ and was under review.²⁶⁰ However, the term was included in the facilitator’s text at the eighth session.²⁶¹ Although the IDC opposed the term’s insertion, it was unsuccessful.²⁶²

²⁵⁵ Schulze (n 65) 36.

²⁵⁶ Art 1(2) CRPD.

²⁵⁷ UN Enable, ‘Seventh Session—Proposed modifications by Governments - Proposed changes to draft articles made by Australia’ [Seventh Session], available at: <http://www.un.org/esa/socdev/enable/rights/ahc7contgovs.htm>.

²⁵⁸ UN Enable (n 152).

²⁵⁹ Schulze (n 65) 38.

²⁶⁰ Lawson (n 11) 594.

²⁶¹ UN Enable (n 155).

²⁶² Schulze (n 65) 38.

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4.3 ‘which in interaction with various barriers’

As already discussed, the central thrust of the social model is that attitudinal, environmental and structural barriers disable persons who have impairments. Therefore, the formulation ‘. . . impairments which in interaction with various barriers . . . ’ in article 1, paragraph 2,²⁶³ crystallizes and ensures the ‘legal anchoring’ of the ‘paradigm shift’ to the social model of disability in the CRPD.²⁶⁴ It is noted, however, that in paragraph 2, the formulation merely makes reference to ‘various barriers’ and does not describe any of these. This is because, although during the negotiations suggestions were made to describe the ‘barriers’ as ‘environmental and attitudinal’ or ‘social’ consensus could not be achieved and so only the term ‘various’ was used.²⁶⁵ Nevertheless, concerning the interpretation of ‘barriers’ in article 1, guidance is provided in preambular paragraph e, which states: ‘. . . the interaction between persons with impairments and attitudinal and environmental barriers . . .’. This wording also reflects the Chair’s draft text that was circulated after the seventh session which read: ‘environmental and attitudinal barriers’.²⁶⁶ It is clear that ‘barriers’ in article 1, concern both attitudinal and environmental societal barriers.

²⁶³ Art 1(2) CRPD.

²⁶⁴ <IBT>Schulze (n 65) 39.</IBT>

²⁶⁵ *ibid.*

²⁶⁶ UN Enable (n 152).

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4.4 ‘may hinder their full and effective participation in society’

There was initially some support for the inclusion of the principle of active or social ‘participation’ during the third and fourth sessions;²⁶⁷ however, despite the fact that the IDC’s suggestion submitted in advance of the seventh session included reference to, ‘ability to lead an inclusive life in the community of his/her own choice is limited by . . .’,²⁶⁸ the Chair’s draft text did not include a reference to participation in society.²⁶⁹ A background document that was used during the eighth session was that of ‘Definition[s] of disability in selected national legislation’, which drew on various states’ domestic definitions of ‘disability’, ‘disabled persons’, and ‘persons with disabilities’.²⁷⁰ Some of the definitions (found in French, Mauritian, Peruvian, and Zimbabwean law), made reference to participation in society.²⁷¹ Further, the EU suggested that the term ‘may’ be inserted, in order ‘to avoid a too close linkage between the impairment and the barrier(s)’.²⁷² The facilitator’s text made reference to participation in society, and read:

²⁶⁷ eg in the third session the Philippines stated that it should include ‘responsibility to take part in society’—Daily summary of discussions [Third Session] (n 57). eg in the fourth session Venezuela suggested ‘active participation’—Daily summary of discussions [Fourth Session] (n 42).

²⁶⁸ UN Enable, Seventh Session—NGO Comments on the draft text—Chairman’s text amended by the IDC, available at:

<http://www.un.org/esa/socdev/enable/rights/ahc7contngos.htm>.

²⁶⁹ UN Enable (n 152).

²⁷⁰ <IBT>UN Enable, Documents of the Eighth Session—Definition[s] of disability in selected national legislation, available at:

<http://www.un.org/esa/socdev/enable/rights/ahc8documents.htm> </IBT>.

²⁷¹ *ibid.*

²⁷² Schulze (n 65) 39.

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‘may hinder their full and effective participation in society’.²⁷³ This is also the formulation found in the final version, which was adopted.

4.5 ‘on an equal basis with others’

The formulation ‘on an equal basis with others’ is not found in other UN human rights treaties. During the drafting and negotiations for the CRPD, a plethora of at least fifty domestic law definitions of disability were examined, including Serbian legislation which included the phrase ‘. . . on an equal basis with others . . .’.²⁷⁴ In addition to the phrase’s position in article 1, paragraph 2, it is also found in many other CRPD provisions.²⁷⁵ This phrase seeks to ensure that persons with disabilities have their human rights respected, protected, fulfilled, monitored, and evaluated on an equal basis with others, but it also serves as a caveat to make sure that persons with disabilities are not provided with ‘more’ human rights protection than other persons in some states parties, for example where some states continue to impose the death penalty.²⁷⁶

Although the CRPD was heavily shaped and influenced by the social model of disability, it is more recently considered that the CRPD goes beyond the social model, and that through the CRPD a ‘human rights model of disability’ has been developed.²⁷⁷ It has been argued that the human rights model of disability and the social model of disability differ in six ways:²⁷⁸ Firstly, where the social model of disability

²⁷³ UN Enable (n 155).

²⁷⁴ Schulze (n 65) 35.

²⁷⁵ These are the preambular para e, and arts 2, 9, 10, 12, 13, 14, 15, 17, 18, 19, 21, 22, 23, 24, 27, 29, and 30.

²⁷⁶ Schulze (n 65).

²⁷⁷ <IBT>Degener (n 230) 56.</IBT>

²⁷⁸ *ibid.*

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explains ‘disability’ (or ‘disablement’), the human rights model of disability includes principles and values that acknowledge the human dignity of persons with disabilities. Secondly, the human rights model of disability goes beyond anti-discrimination rights and encompasses civil and political, and economic, social, and cultural rights. Thirdly, the human rights model of disability acknowledges experiential elements, such as the importance of impairment in people’s everyday lives and the pain some people may experience, and demands that these are considered. Fourthly, the human rights model of disability allows space for identity politics, such as minority and cultural (self)identification. Fifthly, it recognizes the need for health prevention services in the context of the human right to health. Lastly, the human rights model of disability seeks to achieve social justice.²⁷⁹ Importantly, the human rights model of disability (or ‘disability human rights paradigm’) recognizes the intrinsic value of every person for their own end, ‘rather than focusing on a lack of overall capabilities as measured against a functional baseline’.²⁸⁰

Eleven years following the CRPD’s adoption in 2006, most states parties continue to face challenges in interpreting and implementing the human rights model of disability conceptualization enshrined in article 1(2). This is revealed by the examination of states parties’ reports submitted to the CRPD Committee on the Rights of Persons with Disabilities (Committee) in view of article 35²⁸¹ and the CRPD Committee’s concluding observations. In the examination of the

²⁷⁹ *ibid.*

²⁸⁰ Stein (n 35) 107.

²⁸¹ Degener (n 35).

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CRPD Committee's concluding observations from 2011 to 2017, four recurring challenges were identified that states parties to the CRPD are facing globally: 'Definitions' (or the 'concept') of 'disability' or 'persons with disabilities', situated in laws, regulations, or policies that are based on the medical model of disability and not on the human rights model of disability. For example, in the case of Cyprus, the Persons with Disabilities Law of 2000,²⁸² defines 'disability' as:

any form of inadequacy or disadvantage which causes permanent or of an unspecified duration physical, intellectual or mental restriction to persons who taking into consideration their [medical] history and other personal data of the person in question substantively limits or excludes the possibility of carrying out one or more activities or functions that are considered normal and substantive for the quality of life of every person of the same age who does not have such an inadequacy or disadvantage.²⁸³

This definition reflects a medical model of disability, as it focuses on, and reduces 'disability' to, the impairment a person may have. The CRPD Committee noted with concern that Cyprus's domestic legislation has not incorporated a human rights-based approach to disability in line with article 1; it also urged Cyprus to adopt and

²⁸² CRPD Committee, 'Concluding Observations on the Initial Report of Cyprus' UN Doc CRPD/C/CYP/1 (27 February 2015) para 20. <IBT>The Persons with Disabilities Law of 2000 (L 127(I)/2000) with amendments 57(I)/2004; 72(I)/2007; 102(I)/2007; 63(I)/2014; 22(I)/2015,</IBT> available at: http://www.cylaw.org/nomoi/enop/non-ind/2000_1_127/full.html.

²⁸³ The Persons with Disabilities Law of 2000 (n 282) art 2 (author's translation).

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implement a human rights model of disability and to review all legislation and policies in collaboration with Cypriot DPOs.²⁸⁴

Similarly, in the case of Italy, the Committee found that ‘disability’ ‘continues to be defined through a medical perspective’, and recommended that Italy adopts a concept of disability that is in line with article 1.²⁸⁵ Legislation (legislative framework), regulations, policies, measures or programmes, are in need of amendment, in order to embody and reflect the human rights model of disability. For example, the Committee expressed concern that Belgium’s regulations primarily reflect a medical model of disability.²⁸⁶ It also noted with concern that domestic legislation on persons with disabilities adopted before the CRPD was ratified by Morocco, Qatar, and UAE, has not been harmonized with the CRPD and does not reflect the human rights model of disability.²⁸⁷ ‘Disability determination’ or ‘disability assessment criteria’ are used by states parties, which are based on the medical model of disability and not on the human rights model. For example, in the case of Bolivia, the Committee noted with concern that the criteria used to certify ‘disability’ continue to reflect the medical model of disability, and that they do not take into account the barriers persons

²⁸⁴ Cyprus Concluding Observations (n 282) paras 5, 6.

²⁸⁵ CRPD Committee, Concluding Observations on the Initial Report of Italy’ UN Doc CRPD/C/ITA/CO/1 (6 October 2016), paras 5, 6.

²⁸⁶ CRPD Committee, ‘Concluding Observations on the Initial Report of Belgium’ UN Doc CRPD/C/BEL/CO/1 (28 October 2014) para 7.

²⁸⁷ CRPD Committee, ‘Concluding Observations on the Initial Report of Morocco’ UN Doc CRPD/C/MAR/CO/1 (25 September 2017) paras 6, 7; CRPD Committee, ‘Concluding Observations on the Initial Report of Qatar’ UN Doc CRPD/C/QAT/CO/1 (2 October 2015) paras 7, 8; CRPD Committee, ‘Concluding Observations on the Initial Report of the UAE’ UN Doc CRPD/C/ARE/CO/1 (3 October 2016) paras 7, 8.

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with disabilities face or the human rights model of disability.²⁸⁸ Further, in the case of Colombia, the Committee noted with concern that the single register for locating and classifying persons with disabilities, employs criteria that are based on the medical model of disability for the purposes of calculating pension and social assistance benefits.²⁸⁹ The Committee recommended that they review and amend their criteria for certifying (Bolivia) and classifying (Colombia) ‘disability’, so that the criteria reflect the human rights model of disability. Lastly, ‘derogatory terminology’ against persons with disabilities is present in legislation and/or policies, which needs to be removed. For example, in the case of Iran, the Committee noted with concern that domestic Iranian legislation contains derogatory terms such as ‘mentally ill’, ‘insane’, and ‘retarded’.²⁹⁰ Also, in the case of Lithuania, it noted again with concern, that in domestic legislation and data collection, where reference is made to persons with disabilities, derogatory language, such as ‘deaf-mute’ and ‘disorder’, is used.²⁹¹ In both these situations, the Committee recommended that the states in question eliminate the use of all derogatory language when referring to persons with disabilities. It is also notable in view of that it is in the UK where the (‘strong’) social model of disability was originally developed,²⁹² that in 2017 the

²⁸⁸ CRPD Committee, ‘Concluding Observations on the Initial Report of the Plurinational State of Bolivia’ UN Doc CRPD/C/BOL/CO/1 (4 November 2016) para. 7.

²⁸⁹ CRPD Committee, ‘Concluding Observations on the Initial Report of Colombia’ UN Doc CRPD/C/COL/CO/1 (30 September 2016) para. 12.

²⁹⁰ CRPD Committee, ‘Concluding Observations on the Initial Report of Iran’ UN Doc CRPD/C/IRN/CO/1 (10 May 2017) para 8(c).

²⁹¹ CRPD Committee, ‘Concluding Observations on the Initial Report of Lithuania’ UN Doc CRPD/C/LTU/CO/1 (11 May 2016) para 7.

²⁹² Shakespeare (n 24) 11.

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Committee found a lack of consistency across the UK in the understanding and application of the human rights model of disability.²⁹³ Overall, the challenges experienced by states parties, demonstrate that the ‘paradigm shift’ in conceptualizing ‘disability’ embodied in the CRPD is not reflected in the majority of states parties to the CRPD.²⁹⁴

Further, the CRPD places an obligation on states parties to collect appropriate statistical and research data so to enable them to formulate and implement policies to give effect to the CRPD’s provisions and to assess the implementation of their obligations.²⁹⁵ Prior to ratifying the CRPD some states parties may not have had adequate data collection and analysis methods in place regarding ‘disability’ to enable them to assess the extent to which all persons with disabilities are exercising all of their rights under the CRPD²⁹⁶ and subsequently sought to introduce such data collection systems.²⁹⁷ During the negotiations for the CRPD, the WHO’s ICF (2001) had been suggested. Following the adoption of the CRPD, suggestions have been made that the conceptualization of ‘disability’ in the CRPD ‘is in line with the

²⁹³ CRPD Committee, ‘Concluding Observations on the Initial Report of the United Kingdom’ UN Doc CRPD/C/GBR/CO/1 (3 October 2017) para 6.

²⁹⁴ Degener (n 35).

²⁹⁵ Art 31 CRPD.

²⁹⁶ CRPD Committee, ‘Concluding Observations on the Initial Report of Armenia’ UN Doc para 55; Cyprus (n 295) para 61; CRPD Committee, ‘Concluding Observations on the Initial Report of Thailand’ UN Doc CRPD/C/THA/CO/1 (12 May 2016) para 63; CRPD Committee, ‘Concluding Observations on the Initial Report of Serbia’ UN Doc CRPD/C/SRB/CO/1 (21 April 2016) para 63; European Union Agency for Fundamental Rights (FRA), ‘From Institutions to Community Living Part III: Outcomes for Persons with Disabilities’ (FRA 2017).

²⁹⁷ eg Cyprus; Michalis Demosthenous, *A Critique on the Classification System of Disability and Functionality* [author’s translation] (Parga Publishers 2013).

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ICF’,²⁹⁸ and calls have been made for the ICF to be used for data collection and to monitor the implementation of the CRPD.²⁹⁹ These suggestions and calls need to be treated with utmost caution, as the ICF ‘explicitly relies on a medicalised understanding of disability’,³⁰⁰ which does not accord with article 1(2), of the CRPD. Further, it is significant to note that although the ICF is used as an analytical, statistical, and planning tool’,³⁰¹ the drafting process and the text of the CRPD sought to explicitly ‘break away’ from the ICF being potentially used to implement the CRPD. This is illustrated in preambular paragraph f, of the CRPD.³⁰²

The ‘paradigm shift’ embodied in article 1(2) of the CRPD is also about the instruments and programmes at the UN human rights law level. Preambular paragraph f, explicitly demarcates the continuity and discontinuity of the CRPD with previous UN documents and activity,³⁰³

²⁹⁸ Fina (n 10) 97. Jerome E. Bickenbach, ‘Disability, Culture and the UN Convention’ (2009) 31 *Disabil Rehabil* 1111; Katerina Kazou ‘Analysing the Definition of Disability in the UN Convention on the Rights of Persons with Disabilities: It Is Really Based on a ‘Social Model’ Approach?’ (2017) 23 *IJMHL* 25.

²⁹⁹ Jerome E Bickenbach, ‘Monitoring the United Nation’s Convention on the Rights of Persons with Disabilities: Data and the International Classification of Functioning, Disability and Health’ (2011) 11 *BMC Public Health* 1. The UN Development Group (UNDG) Guidance Note for UN Country Teams (UNCTs) and implementing partners on including the rights of persons with disabilities in view of the CRPD in UN programming at country level ‘proposes th[e] [WHO ICF] definition as a possible reference’. United Nations Development Group (UNDG), ‘Including the Rights of Persons with Disabilities in [UN] Programming at Country Level—A Guidance Note for Country Teams and Implementing Partners’ (UNDG 2011) 70; Jerome E Bickenbach, ‘The ICF and Disability Studies’ in Nick Watson, Alan Roulstone, and Carol Thomas (eds), *Routledge Handbook of Disability Studies* (Routledge 2012) 59.

³⁰⁰ Steven R Smith, ‘Social Justice and Disability’, in Kristjana Kristiansen, Simo Vehmas, and Tom Shakespeare (eds), *Arguing about Disability* (Routledge 2009) 17.

³⁰¹ Rachele Cera, ‘Preamble’ in Fina et al (n 10).

³⁰² CRPD preambular para f.

³⁰³ Cera (n 301).

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as it explicitly links the CRPD to the World Action Programme concerning Disabled Persons (1982) and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993).³⁰⁴ Concurrently, it seeks to explicitly ‘break away’ from the Declaration on the Rights of Mentally Retarded Persons (1971), the Declaration on the Rights of Disabled Persons (1975), the Principles for the Protection of Persons with Mental Illness, and the ICF (2001); by excluding reference to these in the CRPD’s preamble.³⁰⁵ This ‘break’ was deliberate. The ICF (2001) is ‘seen as inadequate’ by many within the International Disability Rights Movement,³⁰⁶ and during the drafting and negotiations for the CRPD the IDC ‘vehemently opposed’ reference to it on the basis that it reflected a medical model of disability and that it was part of the ‘old paradigm’ human rights problem persons with disabilities experienced that the CRPD sought to overcome with article 1.³⁰⁷ The exclusion of the ICF from any reference in the CRPD suggests that it is not compatible with the CRPD.

Furthermore, the Committee has expressed concern regarding how the ICF is implemented and its compatibility with the CRPD in its concluding observations on Mongolia.³⁰⁸ Another state party that has recently implemented the ICF (2001), and established an ‘assessment centre’, including the special training of doctors and other health

³⁰⁴ <IBT>CRPD preambular para f.</IBT>

³⁰⁵ *ibid.*

³⁰⁶ Smith (n 300) 17.

³⁰⁷ Kayess and French (n 3) 25.

³⁰⁸ CRPD Committee, ‘Concluding Observations on the Report of Mongolia’ para 5.

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professionals, is Cyprus.³⁰⁹ The decision to introduce the ICF in Cyprus was taken without asking DPOs and was implemented despite DPOs' written objections.³¹⁰ Other tools that could be used by states parties for data collection and monitoring are those developed by the Disability Rights Promotion International (DRPI) and the Academic Network of European Disability Experts' (ANED).³¹¹

Historically, case law by the CJEU reflected a medical model of disability; however, since ratifying the CRPD it has held that the concept of 'disability' must be interpreted in view of article 1 CRPD. *Chacon Navas* in 2006 presented the CJEU with the opportunity to interpret the concept of 'disability' in the Employment Equality Framework Directive of 2000 (Directive). The concept of 'disability' was not defined in the Directive, nor did the Directive refer to EU member states' domestic law for a definition.³¹² This conceptualization was heavily grounded in the medical model of disability. In 2013, after the EU had ratified the CRPD, the CJEU was provided with another opportunity to interpret the concept of 'disability' in the context of the same Directive, in *HK Danmark*. In this case it acknowledged its earlier judgment in *Chacon Navas* and then went on to explain that subsequently the EU had ratified the CRPD and hence the

³⁰⁹ Department for Social Inclusion of Persons with Disabilities, 'The Project', available at:

http://www.mlsi.gov.cy/mlsi/dsid/dsid.nsf/dsipd06_en/dsipd06_en?OpenDocument.

³¹⁰ Demosthenous (n 297) 25.

³¹¹ Marcia H Rioux, Paula C Pinto, and Gillian Parekh, *Disability, Rights Monitoring, and Social Change—Building Power out of Evidence* (Canadian Scholars' Press 2015).

³¹² *Chacon Navas* (n 40) para 43.

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conceptualisation must be interpreted in view of article 1 CRPD. This time it built on the conceptualisation in *Chacon Navas*.³¹³

It also stated that the impairment must be ‘long-term’ in light of article 1 CRPD.³¹⁴ Its interpretation of the concept of ‘disability’ thus reflected article 1 CRPD. A year later, the CJEU affirmed its interpretation in *Z v A Government department*.³¹⁵ The ‘paradigm shift’ in conceptualizing ‘disability’ embodied in the CRPD can thus also be seen in EU disability anti-discrimination law. Further, EU member states must follow the CJEU’s interpretation of the Directive. In view of this, this may have the implication that the CJEU becomes an important actor in the implementation of the CRPD within EU member states.

Case law before the ECtHR has been slower than the CJEU to reflect the ‘paradigm shift’ in conceptualizing ‘disability’ that is embodied in the CRPD. However, the case of *Glor v Switzerland*,³¹⁶ decided in 2009, suggests that the CRPD’s provisions may be likely to influence the ECtHR’s interpretation of the ECHR when considering cases regarding persons with disabilities.³¹⁷ In *Glor*, the ECtHR found a violation of article 14 in conjunction with article 8. It was the first time the ECtHR used the CRPD upon which to base the ‘European

³¹³ <IBT>*HK Danmark v Dansk* (n 38) para 38.</IBT>

³¹⁴ *ibid.*

³¹⁵ *Z. v A Government department, The Board of management of a community school* [2014] C-363/12 (18 March 2014) para 76.

³¹⁶ *Glor v Switzerland* (application no 13444/04) para. 53.

³¹⁷ Jill Stavert, ‘Case Comment—*Glor v Switzerland*: Article 14 ECHR, Disability and Non-Discrimination’ (2010) 14 *Edinburgh Law Review* 141; Sandra Fredman, ‘Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights’ (2016) 16 *HRLR* 273.

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consensus' on the need to protect persons with disabilities from discrimination.³¹⁸

³¹⁸ *Glor* (n 316).