The Disabilities Convention:

Towards a Holistic Concept of Rights

Whilst obviously of prime importance for persons with disabilities, the new United Nations Conventions on the Rights of Persons with Disabilities should also be of utmost interest for the construction and conceptualization of human rights generally. This article explores the Convention from the point of view of general human rights. Specifically, it argues that because of the irreducibility of persons with disabilities' rights experience, the Convention is led to comprehensively ignore a number of founding and traditional dichotomies of international human rights law. In the process, it ends up producing a fuller concept of the subject of human rights, and a more holistic view of the idea of rights.

Keywords: disabilities; subject; United Nations; treaty; dichotomies; holistic

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Introduction

On the 13th December 2006, the United Nations Convention on the Rights of Persons with Disabilities was adopted.[1] The Convention is bound to give rise to many legal analyses. The Committee on the Convention, which has been charged with monitoring its application, will produce its own reports and general comments.

It is likely that most comments on the Convention will focus on the issue of disability itself, and the contribution that the treaty can do to the rights of people with disabilities – no doubt the Convention's foremost contribution. What I want to attempt in this article, however, is something quite different, indeed almost the reverse. Instead of focusing strictly on the subject/object (people with disabilities/disability), I want to concentrate on the medium (the idea of human rights, human rights law) to see how it is being affected by the issue of disabilities. Rather than address the question of how human rights can help persons with disabilities, therefore, I want to look at how the Disabilities Convention may impact and challenge some of the ways in which international human rights law is framed. In other words, I want to approach the Convention as a human rights lawyer, interested in how a particular object of regulation, far from being merely passive material waiting to be molded within existing rights categories, can influence and shape the development of the field that is trying to shape it.[2]

My main contention is that human rights encounter with disability is having a significant impact on the formulation of human rights, because of the way the idea of disability challenges many of the ordinary conceptions of rights. More specifically, I want to claim that the Disabilities Convention has an approach to the issue of rights which rather cavalierly (but very beneficially) ignores or reinvents some perennial dichotomies of the "mainstream" of human rights.[3] This is, I contend, because disability forces human rights to reexamine some core assumptions about what the needs of human beings are, and how these relate to society and the state. There is a lesson in this for human rights itself, of course, which can gain tremendously from the resulting, more holistic, concept of rights that emerges.

In order to make that point, a bit of background must be given about both how the project of human rights has traditionally understood itself and the idea of disability. At its emergence and throughout, the human rights "movement" has always relied on a certain concept of the human. What it is to be human, *how one is human*, has always been the barely hidden core, as it were, of human rights. It is not the case, however, that human rights simply take an existing "human essence" and then try to determine what rights inhere in it. Rather, human rights in large part construct a human essence; or rather they construct a human in the image of his/her rights. Human rights, therefore, are the "constitution of the human", a living and evolving portrayal of their subject as bearer of rights.

Because there is nothing obvious about what being human is, human rights has often been a contested terrain and vulnerable to capture by certain dominant social groups or categories, which project their own essence onto it. What human rights "implicit human" has been, historically, is a very disaggregated, bare and relatively solipsistic creature, an abstraction of a human being. He is above all an autonomous, self-determining individual. There is no fundamental lag between his conceiving of a project and his ability to realize it. His feet and his mind take him in whichever direction he pleases. Freedom is a given, limits to it the exception. Indeed, his only limits are those the state forces upon him. There is no doubt that this human being is above all the able bodied human being.

This vision of the human being, however, is not that of an isolated, solipsistic human being, as much as it is a vision of the human being *in society*, whose very individuality is dependent on a number of social and political arrangements (e.g.: keeping the state outside the private sphere). Human rights do not simply consecrate a certain human being, they also build for his benefit a particular niche within a constellation of social and power arrangements, which are designed to maximize his essence. Finally, human rights law adds a layer of its own specific institutional and technocratic arrangements, concerned with the best possible implementation of rights.

This entire construction – a vision of the human being, his place in society, and the best way to maximize it - is then consolidated into the body of human rights, through what I would describe as a series of elaborate dichotomies which reinforce human rights core assumptions. Indeed, much of the history of the promulgation of human rights law, particularly international human rights standards, has been a history of the creation of such dichotomies, distinctions and hierarchies. Specifically, I can see four main types of distinctions which have been essential to the construction of the contemporary human rights project and its normative lexicon: between types of rights (e.g.: positive and

negative rights); about the actors of rights (i.e.: the extent to which the state is the principal actor as opposed to a number of alternate rights actors); concerning the intensity of rights (e.g.: immediate implementation v. progressive realization); and about modes of implementation of rights (e.g.: adopting laws vs. adopting policies). These dichotomies, at various stages of their evolution create a constantly evolving yet quite rigid geography of what is important, and what is less so. Indeed, all these divisions invite hierarchies, even as they seek to minimize their importance. They build upon *and* reify a number of assumptions about the nature of the individual, his place in society and the best way to protect it, which are all, in a way, peculiar to the able bodied.

These divisions then create problems of their own even for the able-bodied, of course, and, in a sense, human rights law is always seeking to recapture a sense of unity from its partitioned self. Considerable energy has been devoted for example to emphasizing the extent to which human rights are "indivisible, interdependent and inter-related",[4] and to conceptualizing a fuller, less fragmented version of the human being. However, by and large the existing divisions are self-sustaining and even have a tendency to reinforce themselves over time, not least because they have a role in socially-constructing and reinforcing the status of the sort of individual they presuppose. Only a very different vision of the human being and the type of social settings in which he is set to thrive can, in my opinion, disrupt the permanently divided nature of human rights.

Persons with disabilities, in this context, display a number of unusual features which can significantly challenge human rights. On the one hand, they are unmistakably human and entitled to the same rights as all human beings. As a result, they can undoubtedly profit from solemn proclamations that this is so, just as they have, undoubtedly, suffered excruciatingly at times as a result of being blatantly denied these rights. Indeed, in many ways, the Disabilities Convention is simply but forcefully restating the obvious: namely that people with disabilities are entitled to the same rights as all. In that respect, it is not fundamentally different from major anti-discrimination treaties before it (CERD, CEDAW), the principal goal of which is to ensure that the rights of certain individuals are as respected as those of others.

On the other hand, the reality of persons with disabilities' rights experience in most contexts is more complex than simply outright denial. Even when their entitlement to rights has been formally recognized and uncontentious, their disability has often effectively excluded them from rights enjoyment. One of the key "moments" in the Convention, therefore, is when it affirms its "concern" that "despite (the main international human rights instruments and undertakings) persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world".[5]

This creates a perplexing puzzle for human rights, which is that it may well be the very formulation and structure of rights which is the root cause of the exclusion of persons with disabilities. Indeed, I would contend that it is precisely human rights law's quasi-permanent dichotomies which have marginalized disabled people and prevented them from fully enjoying their rights. The disabled individual's life experience – and his rights experience – is much more complex and interactional than that of persons without disabilities. As a result, it is much less easy to disaggregate, and much more vulnerable to logics of rigid partitioning of rights. Where the "able-bodied" may be in a position to maximize their rights in a context of rights "laissez-faire", the disabled typically require a

much more complex social, political, economic and institutional set-up to enjoy rights on an equal basis. Furthermore, persons with disabilities have been particularly prone to "fall between the cracks" of various divisions internal to human rights, as their position is uniquely vulnerable to omissions, lack of coordination, and narrow focuses.
My thesis, thus, is that the fractured, disaggregated nature of much of human rights law is itself what requires reinvention if the rights of persons with disabilities are to be fully respected. This is arguably precisely what the Disabilities Convention has done, and indeed probably its most significant contribution. Specifically, I can think of a dozen of divides which the Convention either ignores, transcends, or substantially reinvents. Drawing on the above mentioned classification of human rights' major dichotomies, I will argue that the Disabilities Convention reshapes traditional dichotomies concerning the types of rights (I), human rights' main actors (II), the normative intensity of rights (III), and the best way to implement them (IV).

I. Types of rights

"Types" of rights constitute arguably the main distinction within human rights. These distinctions have been more or less explicitly entrenched in actual human rights instruments, but they are at least doctrinally and ideologically part of the way in which many human rights lawyers conceptualize rights. The Disabilities Convention contribution here is quite significant.

1. Transcending the negative/positive rights divide

One of the fundamental distinctions upon which contemporary international human rights are built is that between so-called negative and positive rights. The idea behind negative rights is that they require of the state that it mostly "refrain" from certain conduct ("freedom from"). Positive rights, on the other hand, entitle individuals to have the state take determined steps to secure the rights ("entitlement to"). The distinction is a doctrinal one at best, but it has a strong hold on human rights discourse.
In practice, however, the distinction is not very helpful, something that has been increasingly widely recognized in the literature.[6] Many so called negative rights in fact involve positive obligations from the state. To take a classic example, it is not enough for the state to "abstain" from torture (in the sense of not ordering its agents to commit it) for the right to be free from torture to be guaranteed; states should also set up appropriate mechanisms, training and a regulatory environment so that that torture will not be committed. Similarly, positive rights (say, the right to health) also require negative obligations (the obligation to refrain from compromising the right actively).
Treaty bodies and human rights courts have long been awake to the fact that a rigid distinction between the two is problematic but international human rights instruments do

not make their task of interpretation easy. The ICCPR, for example, seems to implicitly highlight certain rights as being in essence negative ("no one shall be") and others as being essentially positive ("everyone or anyone or X shall be"), while the ICESCR seems almost entirely focused on positive rights ("right to"). Rights tend to be presented as being either one or the other, which has had a durable effect on their implementation. Moreover, there is undeniably an ideological element in the distinction between negative and positive rights which ensures that it remains ingrained long after it has outlived its conceptual usefulness.

Although this may have been only a stylistic deficiency in the case of general human rights, it can turn out to be particularly problematic in the case of persons with disabilities. Because persons with disabilities are often the victims of structural discriminations, having the state simply "abstain from positively violating their rights" is the surest way of condemning them to only marginal respect for their rights. At the very least, granting access requires the active removal of barriers.

Accordingly, the Convention is noteworthy for thoroughly mixing both negative and positive rights, although probably with an unusual emphasis on the latter. Indeed, even within some rights, it constantly oscillates between the affirmation of their "negative" and "positive" components. The two types, for example, closely follow each other in article 18 on liberty of movement. On the one hand, persons with disability should "not be deprived (…) of their ability to obtain, possess, and utilize documentation of their nationality" (negative right), but the same time they should "have the right to acquire and change a nationality" (positive right). Under Article 22 (respect for privacy), individuals both have the right to "not be subjected to arbitrary or unlawful interference" with their privacy (negative), and to "the protection of the law against such interference" (positive). Individuals with disabilities shall both "enjoy the right to liberty and security of person" and "not be deprived of their liberty unlawfully or arbitrarily" (article 14). There is, in other words,

2. Transcending the civil and political/ economic, social and cultural rights divide

A closely related (but subtly different) traditional division of international human rights is that which separates civil and political rights on the one hand from economic and social rights on the other. The international human rights movement has, for better or for worse, forged that distinction, one that is not merely academic but reified in separate international human rights treaties (the two Covenants). For all the efforts at proclaiming these rights as indivisible and inter-dependent, much of the harm of that initial parting of roads seems to have plagued the trajectory of contemporary global human rights.

This division, however, is one that is perhaps even more prejudicial in the case of persons with disabilities than in any other case. Indeed, as one author put it, "(…) there can be few more obvious areas than the field of disability in which to emphasize the inter-connectedness of the civil and political rights tradition with the more avowedly egalitarian social & economic rights tradition".[7] Indeed, one factor that has an absolutely

disproportionate incidence on the lived experience of disability is poverty, understood here both as an individual and societal factor. As one author put it, "(i)t is quite possible to accord full civil and political rights to persons with disabilities, while effectively disenfranchising and silencing them through the maintenance of policies (…) which ignore the particular situations and needs of persons with disabilities".[8] It is clear, conversely, that the minimization of barriers to participation by persons with disabilities is something that entails significant transfers of resources, even more so for all those years of neglect and the need for substantial catching-up (arguably the cost of barrier reduction would be much less significant if the barriers had not been created in the first place).

Indeed, one of the peculiarities of early disability instruments is that, unlike mainstream human rights instruments, they tended, possibly as a result of the domination of welfare approaches, to emphasize economic and social factors (if not quite economic and social rights) at the expense of civil and political ones. For example the Standard Rules clearly had a bias in favor of economic and social concerns. There is a risk, though, that such claims, focused as they are on securing certain economic "goods" will be discredited by others as simply the claims of a special-interest group for a "larger share of the cake", unless they are buttressed with and seen as virtually indistinguishable from demands for civil and political equality.[9]

The Convention, in this respect, is noteworthy for containing as many civil and political rights, as economic and social ones. Indeed, it is particularly prone to, at times within given articles, move seamlessly between both categories of rights. Many civil and political rights in the Convention, for example, are matched with corresponding economic and social ones, and vice-versa. For instance, the Convention requires states to guarantee such a classic civil and political right as "freedom of expression and opinion".[10] It is not hard to see, however, how that promulgation would be in vain in the case of persons with disabilities if the State were not simultaneously forced to provide certain economic and social rights – or at least engage in certain economic and social efforts. The Convention accordingly requires of State parties that they take "all appropriate measures to ensure that persons with disabilities can exercise their right to freedom of expression and opinion", for example by "facilitating the use of sign languages, Braille, etc" or by "recognizing and promoting the use of sign language".[11] Certain civil rights moreover are presented as ways of protecting economic or social rights. For example, the right to privacy (a civil right) covers the "health and rehabilitation information of persons with disabilities"[12] (linked to an economic right). Another example is the repetition of the prohibition of discrimination (a civil right, again) in the context of economic and social rights.[13]

3. Transcending the public/private sphere divide

International human rights law has always had difficulties with the division between rights owed in the public and rights owed in the private sphere, typically overemphasizing the former at the expense of the latter. The contribution of feminist scholars has only begun to correct this historical bias.[14]

Again, the case of persons with disabilities seems to be one that is ideally suited to point out the limits of that dichotomy, their situation having been described as "(…) one of relative and absolute exclusion from entry into and participation in *all* spheres".[15] Because much of the assistance that persons with disabilities need will be provided by family members and/or within the home, they will also be particularly at risk of their rights being obstructed in this context. A treaty that focused exclusively on the obligations owed directly by the state to persons with disabilities without forcing the state to also become involved in preventing negative encroachments occurring in the private sphere would miss an important dimension of the experience of persons with disabilities.
As Louise Arbour put it, "it is not only the public sphere that should concern us. Persons with disabilities are entitled to full equality in the enjoyment of their rights not only with regard to public institutions and services but also (…) in the privacy of their own homes and personal relations".[16]
The Convention does indeed delve deeper into the private sphere than many other international human rights instruments. Particularly noteworthy, in this respect, is article 16 on "freedom from exploitation, violence and abuse". This may refer to exploitation carried out by the state, but the provisions reaffirming the security of persons with disabilities, their integrity, or their right to be free from torture and other practices seem to cater more specifically for that need. The idea of protecting persons with disabilities from exploitation, in fact, is more directly connected to a concern about protecting their integrity in the private sphere generally. Characteristically, the scope of the duty of the state is to protect them "both within and outside the home".[17] When it comes to "raising the awareness (…) regarding persons with disabilities" the Convention specifically stipulates that this includes the "family level",[18] thus identified as a zone that is not at all off-limits for state involvement and international regulation.

II. Actors

Human rights are also about designating a number of relevant actors. The State has featured prominently, traditionally, as the main actor endowed with human rights obligations, to the point of at times eclipsing any sense of other actors having a role to play. But the individual (1), society as such (2) communities (3) or the international system (4), all independently and in relation to each other have been mentioned as having a role potentially in affecting or improving human rights. The Disabilities Convention strongly calls into question the rather reductionist view that concentrates exclusively on the state, probably because the rights of persons with disabilities are in practice mediated by a host of other actors, either directly or indirectly.

1. Transcending the state/individual divide

Apart from the highly peculiar case of international criminal law (where human rights violations, for example as part of the commission of crimes against humanity, become so

outrageous that individual responsibility is entailed), international human rights traditionally shuns the idea that individuals (particularly when not acting as state agents) owe human rights obligations directly. Only one regional instrument makes much of the duties of individuals.[19]

Persons with disabilities, however, are uniquely vulnerable to the treatment they are given by each and every member of society. It is not simply in their encounters with civil servants that they need protection and assistance, but in everyday life and from a variety of quarters.

The Convention, thus, makes a highly unusual recognition of this dimension when it presents itself as being based (among others) on a "realization" that "the individual, (has) duties to other individuals and to the community to which he or she belongs, (and) is under a responsibility to strive for the promotion and observance of the rights recognized in the International Bill of Human Rights".[20] Although that recognition in the Preamble is not followed up directly by any specific provision in the body of the Convention, there are arguably a number of provisions that could be interpreted in light of it.

2. Transcending the state/society divide

Human rights have traditionally been focused on the state, at the expense of how human rights violations may result from factors that are better described as being societal in nature. Indeed, when it comes to issues of discrimination of persons with disability, the discrimination is hardly ever the State's alone, and often contains a clear dimension rooted in culture, mores and habits.

At least the more traditional international human rights instruments are not terribly adept at recognizing this element. For example, even though income inequality may be shaped by cultural or social attitudes towards the poor (as, for example, deserving of their poverty), the ICESCR at no time mandates states to change these attitudes. Even when it comes to the ICCPR's anti-discrimination clause (and one can see how discrimination is typically also a *social* problem), these focus mostly on prohibiting discrimination *by the State*.[21] Persons with disabilities are not the only group to be discriminated against as a result of societal prejudices (sexism and racism fill that role in the case of discrimination against women and racial groups), but they may well be particularly at the mercy of prevailing social attitudes.

Accordingly, the Disabilities Convention may not be the only one to require states to change prevailing social attitudes (the two main anti-discrimination Conventions – CERD[22] and CEDAW[23] - also do), but it does impose a much broader and more detailed obligation to do so than any of its predecessors. For example, the State is "to raise awareness throughout society (…) regarding persons with disabilities".[24] The Convention makes it compulsory for states to adopt measures to "raise awareness (…) regarding persons with disabilities"[25] and to "combat stereotypes, prejudices and harmful practices relating to persons with disabilities".[26] Unlike other forms of discrimination (e.g.: racial discrimination) where only the anti-prejudice element is stressed, awareness raising in the case of persons with disabilities includes an obligation to highlight their positive impact on society (I develop this theme further in the conclusion).[27] There is talk of "social

awareness",[28] of "nurturing receptiveness to the rights of persons with disabilities",[29] and "fostering at all levels of the education system, including in all children from an early age, an attitude of respect for the rights of persons with disabilities (…)"[30] – words which suggest that what is needed is not only a combative or repressive approach to discrimination (as in CERD), but truly a tidal attempt at engineering changes in attitude.

3. Transcending the individual/community divide

One tension that runs through the whole human rights enterprise, both as a philosophical project and as an assortment of positive instruments, is the tension between individual and community. Human rights have traditionally focused on protecting a certain sanctity of the individual. They thus entertain a complex dialectical relationship to community: on the one hand the community can be a source of oppression of the individual; on the other hand, much human rights thought welcomes the idea that the community is an integral part of the individual's self-realization (sovereignty, self-determination, cultural rights).
Most international human rights instruments tread uneasily around that divide. Discrimination is prohibited precisely to the extent that it is based on group belonging (race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status); at the same time, however, certain groups have to be protected as such (minorities), the right of association is guaranteed, the family is protected.
This tension is present in the Disabilities Convention, but it is perhaps more profoundly resolved in that the simultaneous need for autonomy and inclusion in the community are highlighted as such. As will be seen in section III, the Convention requires both that persons with disabilities be granted "autonomy" and live independently, and that they be allowed to "live in the community". This makes them at once removed and integrated into the body social (like persons without disabilities). Persons with disabilities, in other words, should not have to pay for their autonomy by being removed from the community, nor have to pay for living in the community by giving up their autonomy.

4. Transcending the domestic/international divide

While proclaimed internationally on the basis of their universality, international human rights instruments mostly contemplate the state as the prime locus for the implementation of rights. In that framework, each state is both part of the problem and part of the solution to its own particular human rights dilemmas. States are so many "boxes" tightly separated from each other. This vision is quite apt in the context of the rights of non-disabled people, where the crucial relationship seems to be restricted to one between the state and its citizens.
But in the case of persons with disabilities, a focus on each state taken separately at the expense of the specifically international dimension of the problem of disabilities would

be particularly short-sighted. What counts as a disability in a given place, to begin with, is uniquely dependent on economic factors, so that what may not be much of a disability in some corners of the world will be a considerable one in others. To give a simple example, a mild vision impairment will not be a disability in a country where glasses are widely available, nor is there any risk of the short-sighted, for example, being the object of stigma. In a country where glasses are not available, conversely, even a mild, easily corrected impairment may turn out to constitute a disability for many jobs and lead to exclusion and marginalization.

This makes the issue of persons with disabilities a particularly interesting test-case for efforts by the international community to transcend the domestic/international divide. The Convention makes a significant effort to bridge that gap, maybe more of one than any other international human rights treaty. It recognizes, for example, "(…) the importance of international cooperation for improving the living conditions of persons with disabilities in every country".[31] States Parties to the Convention, we are told, "will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations".[32] A number of more detailed obligations complement this general injunction.

III. Intensity of obligation

Although ideally all rights should be guaranteed "here, now, and absolutely", the reality of human rights is more complex, and encompasses both arbitrages in time (1), of human rights vs. other competing priorities (in order to define the exact scope of rights) (2), and in terms of the reach of the state's obligations (3). The fragile compromises elaborated by the mainstream of human rights law, in this respect, are disrupted by the Disabilities Convention's efforts to strike a more optimal balance for persons with disabilities.

1. Transcending the immediate obligation/progressive realization divide

Closely paralleling the civil and political/economic and social rights divide in traditional thinking about international human rights is the distinction between rights which must implemented "here and now",[33] and rights which, generally, because they require significant expenses of resources, are couched in the language of "progressive realization".[34] The main international human rights instruments have often found it very difficult to go beyond that distinction.[35]

Persons with disabilities provide an interesting example of a particular condition that requires both immediate implementation and progressive realization, and the Convention thoroughly mixes those normative discourses. When it comes to civil and political rights, states are to "ensure" them, and the most common injunction is that states "shall" take

certain action (used 92 times in relation to obligations of state parties). The "shall" suggests a rather direct obligation, and one that is to be implemented immediately. States parties otherwise "undertake" 10 times to adopt certain measures (typically "effective and appropriate" ones). When it comes to economic, social and cultural rights, each state party, consonant with the international law of economic and social rights, merely "(…) undertake (…) to take measures to the maximum of its available resources (….) with a view to achieving progressively the full realization of these rights (…)".[36]
However, the Convention does not simply contain both types of obligations. Its specificity lies in the fact that it also contains them often for the *same rights*. For example, the right to education includes both an immediate dimension (persons with disabilities must not be excluded from education) and various more gradual ones (enabling persons with disabilities to learn life and social development skills).[37]

2. Transcending the absolute/relative divide

The immediate/progressive realization divide described above refers to the temporal framework for the implementation of rights. A different question is the extent to which rights have to be implemented, or the degree to which their precise content is amenable to countervailing forces. Typically certain rights – such as torture – are wholly inelastic to external demands, however legitimate (e.g.: the need for security related information). Other rights – such as privacy, or freedom of expression – are elastic to certain demands, through so-called "escape" or "accommodation" clauses which uphold the demands of a "democratic society".[38] Rights in the main international human rights instruments almost always fall into either one of these two categories.
In the case of persons with disabilities, special problems arise. Because of the potentially high cost of perfectly leveling the playing field (e.g.: if every facility had to be totally accessible to all persons with disabilities), at least in the short term some sort of mediation is required to minimize disabilities in a manner that accounts for the finite character of resources. Progressive realization, the favored standard for economic and social rights, however, does not really answer the question, as much as it defers it to the future. Indeed, while "progressive realization" may be appropriate for the general population, it would probably fail to take into account the specific disadvantages of persons with disabilities. Instead, the Convention comes up with a *sui generis* concept, which encompasses elements of absoluteness and relativity, and locates the - the idea of "reasonable accommodation".[39]
The idea, which emerged in the context of litigation under the Americans with Disabilities Act (ADA),[40] is that in some cases according to the Convention definition, all that will be owed by the State is "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".[41] Note that the modifications have to be both "necessary and appropriate" (a standard leaning towards absolutism) and they must "not impose a disproportionate or undue burden" (a relative standard). It is not specified for whom the burden might be disproportionate or undue, but presumably the idea

encompasses both the state and private entities as well as society in general. The standard is thus a very novel one which instills an unusual sense of both absoluteness and relativity.

3. Transcending the vertical/horizontal divide

Human rights are traditionally extremely focused on violations occurring directly as a result of state action, to the exclusion of failures by the state to prevent human rights encroachments resulting from the actions of private third parties. Gradually, however, international human rights bodies have promoted the idea of the "indirect horizontal effect" of human rights treaties[42] so that, in addition to *respecting* rights, states have to *protect* individuals from negative encroachments upon their rights by other citizens (or private entities). Again, this is not an idea that is given much direct support by international human rights instruments themselves, and it has been very much a jurisprudential creation.

Persons with disabilities, however, are at as much if not more of a risk of being discriminated against by private entities than public ones. Indeed, they are probably even more so than many other groups, so that a treaty that focused exclusively on the state would have missed a crucial dimension of their difficulties in securing equal rights enjoyment.

The Convention shows a remarkable awareness of this dimension. The Preamble hints at the need to not only "promote" but to "protect"[43] the rights of persons with disabilities. Protection is a term that is typically interpreted as implying an obligation for the state to ensure that private actors are not allowed to violate rights. The Convention is the first universal human rights treaty to impose explicitly an obligation on the state to "take all appropriate measures to eliminate discrimination on the basis of disability *by any person, organization or private enterprise*".[44] In addition, State parties are to "Ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities"[45] and "urg(e) private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities".[46] State parties are also to "encourag(e) entities that produce mobility aids, devices and assistive technologies to take into account all aspects of mobility for persons with disabilities",[47] a provision that seems to instruct the state to encourage the private sector in a certain direction. The mention of the need to ensure that persons with disabilities "have equal access to bank loans, mortgages and other forms of financial credit"[48] should probably be seen as extending the scope of the state's obligations to overseeing the private sector in appropriate ways. The need to "Protect the rights of persons with disabilities, on an equal basis with others, to just and favorable conditions of work",[49] also clearly refers to work beyond the public sector itself. Finally, the idea that "all organs of the media" should be encouraged to "portray persons with disabilities in a manner consistent with the purpose of the (…) Convention"[50] constitutes a further erosion of the divide between what the state is supposed to do (or not do) directly, and what it is supposed to ensure indirectly.

IV. Modes of implementation

With human rights come a series of assumptions about how they are best implemented, which generally flow from a host of assumptions about the key nature of rights substantively. For example whether rights should be specified in isolation or should comprehend an insistence on state's obligations (1), whether the emphasis should be on adopting laws or policies (2), or on prevention or remedies (3). Again, the Disabilities Convention subtly but significantly includes elements of all of the above in a way that is quite unusual for an international human rights instrument.

1. Transcending the individual rights/state obligation divide

Typically, international human rights instruments concentrate on rights per se (obligations of result), not the way they are to be implemented (obligations of means). This means that although for every existing right there may be a corresponding state obligation, the exact content of that obligation is never or rarely spelled out. Rights, in other words, are about ends rather than means. At best, their precise implementation is an issue left to monitoring mechanisms' normative output, but instruments such as the ICCPR for example clearly shy away from moving into the realm of policy, possibly out of fear they will be drawn into the mêlée of politics.

This division has proved prejudicial to persons with disabilities. Left to their own devices, states will typically be content with adopting the same measures for all persons, without distinguishing between different categories within their population. The failure to recognize the specificity of the needs of persons with disabilities is one of the surest ways in which they are discriminated against.

To correct that failure, the Convention arguably goes further than any international human rights instrument before it in spelling out in substantial detail exactly how states should go about ensuring the rights of persons with disabilities. For almost every right, the Convention includes a state obligation; indeed, some articles do not even refer so much to rights as such as to a series of obligations. Furthermore, many obligations are spelled in quite comprehensive detail, in contrast to the relative parsimony of even human rights treaties like CEDAW or CERD.

2. Transcending the law adoption/policy implementation divide

Again, not unrelated to the negative/positive rights divide, is the idea that the implementation of certain rights requires both normative changes (laws, regulations) and actual policies to follow up on these normative changes and ensure their realization. This is something to which the Treaty bodies have been sensitive for a long time, as they urge states to go beyond merely reporting changes to their laws, by also reporting on the effective measures they have taken to implement certain rights.

International human rights bodies, however, have not been particularly aided by the classical international human rights instruments. Although these also mention the need to adopt "other measures"[51] or achieve the rights "by appropriate means,"[52] they tend to be most explicit about the need to adopt "laws"[53] ("particularly the adoption of legislative measures"[54]) and often merely require states to "recognize" certain rights[55]. The understanding that human rights have of their implementation is thus often tributary to a legalistic/incorporation oriented model. The idea that implementation requires the adoption of a host of policy initiatives tends to remain largely implicit.

This schism is particularly unwelcome when it comes to persons with disabilities. In the Convention, one of the prime obligations imposed on state parties is indeed to repel/adopt laws, administrative and other measures, including minimum standards in order to improve the rights of persons with disabilities.[56] But perhaps as a result of the relative invisibility of disability in society, people with disabilities are not only (and possibly not principally) discriminated against by the law itself – or by the absence of it. Rather, they are discriminated against as a result of the lack of vigorous policies to ensure that their rights are guaranteed, be it through effective application of the law or policies that fill the gaps left by the law. Merely *outlawing* discrimination, therefore, will hardly be sufficient to eliminate it. This makes it even more necessary for states to go beyond formal laws guaranteeing the rights of all. One of the specificities of the Convention, therefore, lies in the extent to which anticipates almost every sort of policy initiative that might improve the condition of persons with disabilities.[57] These include: mainstreaming concern for peoples with disabilities;[58] launching public awareness campaigns;[59] building or adapting certain infrastructures;[60] training specialized personnel;[61] employing certain individuals;[62] providing certain forms of services, assistance;[63] and consulting with the representative organizations of peoples with disabilities.[64]

3. Transcending the remedy/prevention divide

The linchpin of many international human rights instruments is the existence of individual remedies, which states are supposed to recognize.[65] Even though states are otherwise required to adopt general measures to limit the risk of rights violations, individual remedies remain as a sort of ultimate guarantor of the seriousness of States' commitment. As a result, the focus is very much on rights violations as an individual phenomenon, it being the responsibility of each person to bring claims on his or her own behalf.

The focus on legal, particularly court ordained, remedies has occasionally been criticized as providing an excessively individualistic type of redress, which will grant satisfaction to the few who have the ability and willingness to pursue litigation, but will fail to

address situations of structural discrimination. Whatever the case may be of this critique as a general theme, there is no doubt that it is particularly acute in the case of persons with disabilities. This is so partly because of the particular difficulties which people with disabilities may occasionally experience in accessing the judicial system, or to legal resources (which is of course no excuse not to seek to minimize these obstacles).

But it is more importantly because of the often collective and even generalized problems encountered by the disabled. The focus on individual remedies may be suited for civil and political rights generally, for example, because of a context where their violation is contemplated as being the exception rather than the norm. But it seems particularly unsuited to phenomena of disability which are often the result of generalized, systematic and structural discrimination. In such a situation, isolated legal victories will provide little correction to what are otherwise entrenched manifestations of societal exclusion.

One way of analyzing the Convention, in this context, is as an instrument which, following in that respect the Convention on the Rights of the Child, manifests a distinct wariness of judicial remedies and is instead unusually attentive to the need to prevent violations by situating rights action in a broad policy framework. At the very least, the Disabilities Convention deprives judicial remedies of their otherwise rather central position in the enforcement theory of international human rights instruments. Article 15 on freedom from torture is the only one that mentions judicial measures as directly relevant. The idea of judicial remedies otherwise appears only indirectly, as in article 5 on equality and non-discrimination which requires of states that they "guarantee to persons with disabilities (…) *effective legal protection* against discrimination on all grounds".[66] For the most part, however, legal and judicial remedies are seen as very much one in a very broad panoply of policy decisions that have to be made to maximize rights.

Conclusion

I hope to have shown that the Disabilities Convention is about more than simply the status of persons with disabilities. It also speaks, more generally, to the larger project of which it is a part, human rights. Louise Arbour, in a speech welcoming the adoption of the Convention, insisted that "A paradigm shift is needed if we are really going to eliminate discrimination against persons with disability".[67] Is such a paradigm shift under way?

I have argued that the reason for persons with disabilities inferior enjoyment of rights has lied, traditionally, in the complex relationship that human rights entertain with disability, the presumptively able-bodied subject, and the very dichotomies that make much of contemporary international human rights what it has become. The Convention truly has an approach which, as I have sought to show, rides roughshod over the many neat divisions, both theoretical and practical, upon which human rights is often implicitly premised. In the process, I would argue that it produces a unique vision of human rights, one which is grounded in a plural, relational concept of the human in society; one which is, in a word, considerably more holistic than had been seen in international human rights treaties to this day.

The question then is whether this is a development that is mostly interesting to the field of disabilities, or whether it has a larger lesson to teach for human rights generally. I would argue strongly in favor of the latter. It is not simply the case that disabilities are a "special issue", requiring special and *sui generis* arrangements. Nor is it the case that human rights concepts are having to "adapt" their structure to take care of the needs of persons with disabilities, and that this is a further symptom of the fragmentation of human rights.

Rather, the Disabilities Convention provides a unique opportunity to rethink how we conceive of the human rights of all, and could be a very interesting way of charting the future of human rights.

The Disabilities Convention's most significant contribution, in this respect, is to show a way out of some of the persistent dichotomies that have beset human rights. Perhaps because it focuses on a smaller group than the entire human species, the Convention may be in a better position to recapture, at least for that particular group, the sense of unity and interdependence of rights which otherwise seems to elude the human rights project. Human rights lawyers should pay attention.

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[1] International Convention of the Rights of Persons with Disabilities and its Optional Protocol, U.N. GAOR, 61st Sess., Item 67(b), U.N. Doc. A/61/611 (6 Dec. 2006).

[2] This Article is part of a wider research project which seeks to examine the various ways in which the issue of disabilities is prompting a reconfiguration of human rights.

[3] I realize the 'mainstream of human rights' is an expression that is problematic. In most part here I use it to describe not only human rights as they have traditionally applied mainly to the 'able bodied', but more generally the traditional model of human rights as it emerged in the eighteenth century, a model rich with biases in favor of the male subject, civil and political rights

[4] Vienna Declaration and Programme of Action 1993, U.N. Doc.A/Conf.157/23, para. 5.

[5] Ibid. paragraph i.

[6] S. Fredman, 'Human Rights Transformed: Positive Duties and Positive Rights', *Oxford Law Studies*, Research Paper No. 38/2006 (2006).

[7] G. Quinn, "The International Covenant on Civil and Political Rights and disability: a conceptual framework", in T. Degener & Y. Koster-Dreese (eds.), *Human Rights and Diabled Persons-essays and relevant human rights instruments* (Leiden: Brill 1995) p. 70.

[8] P. Alston, 'Disability and the International Covenant on Economic, Social and Cultural Rights,' in T. Degener and Y. Koster-Dreese (eds), *Human Rights and Disabled Persons: Essays and Relevant Human Rights Instruments* (Netherlands: Martinus Nijhoff Publishers 1995) p.94.

[9] Quinn (note 7) p.76.

[10] Disabilities Convention (note 1) Article 21.

[11] Ibid. Article 21 (b) and (e).

[12] Ibid. Article 22 2.

[13] Ibid. Articles 24.1, 25, 27, and 28 1.

[14] See for example Julie Peters & Andrea Wolper, *Women's Rights, Human Rights – International Feminist Perspectives* (New York: Routledge 1995).

[15] My emphasis. Quinn (note 7) p.75.

[16] Statement by Louise Arbour, U.N. High Commissioner for Human Rights**,** General Assembly Ad Hoc Committee, 7th Sess., (27 Jan. 2006),http://www.un.org/esa/socdev/enable/rights/ahc7stathchr.htm.

[17] Disabilities Convention (note 1) Article 16 1.

[18] Ibid. Article 8 1. (a).

[19] African [Banjul] Charter on Human and Peoples' Rights 1981, (1986), OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

[20] Disabilities Convention (note 1) preambular paragraph (u).

[21] With the notable, but limited, exception of article 20 2. which prohibits "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".
[22] International Covenant on Economic, Social and Cultural Rights 1966, (1976) 993 UNTS 3, Article 7.
[23] International Covenant on Economic, Social and Cultural Rights 1994, General Comment 5, U.N Doc. E/1995/22, Article 5 (a).
[24] Disabilities Convention (note 1) Article 8 1. (a).
[25] Ibid.
[26] Ibid. Article 8 -1. (b).
[27] This is possible in the context of persons with disabilities where a real difference exists, which international human rights seek to protect against discrimination, but also uphold as something positive and enriching. This is not a possibility in the case of racial groups, where to do so would inevitably fall in the trap of racism by reifying the difference (be it under the pretext of promoting positive images of certain racial groups).
[28] Disabilities Convention (note 1) article 8 1. (c).
[29] Ibid. Article 8 2. (i).
[30] Ibid. Article 8 2. (b).
[31] Ibid. preambular paragraph (j) and Article 32. 1.
[32] Ibid. Article 32. 1.
[33] International Covenant on Civil and Political Rights 1966 (1976) 993 UNTS 171, Article 2.
[34] International Covenant on Economic, Social and Cultural Rights (note 22) Article 2 (1).
[35] As shown, for example, by the difficulty in adopting a « violations » approach to economic and social rights. A. R. Chapman, 'A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly*, Vol. 18.1 (1996), pp. 23-66.
[36] Disabilities Convention (note 1) Article 4.2.
[37] Ibid. Article 24.
[38] International Covenant on Civil and Political Rights (note 33) Article 22. Also, Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights', *The Modern Law Review*, Vol. 62 (1999), p.671.
[39] The idea is borrowed from the *American with Disabilities Act*. See E.H. Shaller, 'Reasonable Accommodation under the American with Disabilities Act – What Does it Mean?', *Employee Related Law Journal*, Vol.16 (1991), pp. 431-451.
[40] J. Cooper, 'Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act', *University of Pennsylvania Law Review*, Vol.139(4) (1991), pp.1423-1436.
[41] Disabilities Convention (note 1) Article 2.
[42] K. Preedy, 'Fundamental Rights and Private Acts – Horizontal Direct or Indirect Effect? - A Comment', *European Review of Private Law*, Vol 1. (2000), pp.125-133.
[43] Disabilities Convention (note 1) preambular paragraphs (h), (v); Articles 1 ; 4 (c) ; 5 ; 11 ; 16 ; 22 ; 27 ; 29 (a) (ii).
[44] Disabilities Convention (note 1) Article 4(1)(e).
[45] Ibid. Article 9 (b).
[46] Ibid. Article 21 (c).
[47] Ibid. Article 20 (d).
[48] Ibid. Article 12 5.
[49] Ibid. Article 27 1. (b).
[50] Ibid. Article 8 2. (c).
[51] International Covenant on Civil and Political Rights (note 33) Article 2.2.
[52] International Covenant on Economic, Social and Cultural Rights (note 22) Article 2 (1).
[53] International Covenant on Civil and Political Rights (note 33) Article 2.2.
[54] International Covenant on Economic, Social and Cultural Rights (note 22) Article 2 (1).
[55] Ibid. Articles 6, 7, 9, 10, 11, 12, 13, 15; International Covenant on Civil and Political Rights (note 33) Articles 21 and 23. 2.
[56] Disabilities Convention (note 1) Article 9(2)(a).
[57] See also, Ibid. Article 4 on 'General Obligations.'

[58] Ibid. Article 4(1)(c).
[59] Ibid. Article 8, specifically articles 8 1. (a) and (c).
[60] Ibid. Article 9 1. (a) ; 9 2. (d)
[61] Ibid. Articles 4.1. (h) ; 8. 2. (d) ; 9 1. (c) ; 13 2. ; 20 (c) ; 24 4. ; 25 (d) ; 26 (2) ; 32.1. (b).
[62] Ibid. Article 24.4.
[63] Ibid. Article 4(h).
[64] Ibid. Article 4(3).
[65] See, in particular, International Covenant on Civil and Political Rights (note 33) Article 2.3. Even instruments that do not specifically use the expression "effective remedy" anticipate a strong role for the court system. See Convention on the Elimination of All Forms of Discrimination Against Women 1991, U.N Doc. C/L.8/Add. 18, Articles 2 (a) to 2 (c).
[66] My emphasis.
[67] Arbour Statement (note 16).