

The CRPD as a Legal Instrument

Markus Schefer, March 29, 2021

Dear Friends and Colleagues

I am a Swiss national and have been on the Committee since 2019. Ever since I started research on my PhD in 1990, I have worked as a legal academic. For decades, I've had the opportunity and immense pleasure to work very closely with persons with disabilities in Switzerland and their organizations. I have provided them with legal advice as well as legal and political advocacy to progress reform in disability policy and legislation at all levels of our federal state. As a member of the Committee, I am doing my best to bring my legal expertise to bear on our work. I hope that in doing so, I can contribute to strengthening the protection of the rights of persons with disabilities through international law. As the story of my life is – except for my two delightful daughters – not nearly as interesting as these of my colleagues, I will focus my subsequent comments on the question of what it means that the CRPD is international law, as requested by the Chair.

Our Convention is among the youngest of the nine main human rights treaties of the United Nations. Today, 182 countries and the EU have formally declared that they are legally bound by the CRPD. Our Convention is international law, binding for all member States. The text ratified by the State parties is the linguistic expression of the obligations they assumed.

The nine major U.N. human rights treaties create Committees with the task of monitoring their implementation. Our Committee monitors the implementation of the CRPD by the State parties. In this process, our task is to assess whether the State party complies with the legal obligations it assumed with the ratification of the Convention.

In order to fulfil this task, we first need to expound the meaning of the provisions in the Convention. In many areas, the text of the Convention is quite specific and lends itself to a relatively straightforward determination of its meaning. In some areas, however, the text may be opaque and hard to understand. Let me refer to article 4(2) CRPD as an example. This provision states: “With regard to economic, social and cultural rights, each State party undertakes to take measures to the maximum of its available resources ... with a view to achieving progressively the full realization of these rights, ...”. What are “economic, social and cultural rights”? How much is “to the maximum of its available resources”? How fast is “achieving progressively”?

To answer such questions, we need to go beyond the text. What does this mean? Where do we go? Let me start with a negative: I is not our individual preconceived notions of what is fair and needed that are decisive. Rather, international law, i.e. the Vienna Convention on the Law of Treaties, lays down authoritatively what we need to do in such situations: We need to assess the context of the provision we are interpreting and the object and purpose of the CRPD.

Let me start with the context: The CRPD does, in general, not guarantee any new rights but is designed to make existing rights real for persons with disabilities. A key aspect of its context,

therefore, are the rights guaranteed by the other human rights treaties. In our example, this means that we need to look at the U.N. Covenant on Social, Economic and Cultural Rights (ICESCR), which in its article 2 contains a similar provision, after which article 4(2) of the CRPD was framed. Since the adoption of the ICESCR in 1966, there has been an abundance of practice by the State parties, by the Committee on Social, Economic and Cultural Rights, by other U.N. bodies and by the courts of many States parties. In addition, scholarly literature has systematized, structured and further developed this practice. The Vienna Convention mandates us to take these practices and their insights into consideration in the interpretation of the CRPD.

There is not enough space here to discuss all the sources the Vienna Convention mandates us to take into account. The core insight for our purposes here is that we are closely bound by international law in how we go about interpreting the CRPD and giving it concrete meaning. The methods we need to employ are written down authoritatively, and they are binding us. It is not up to us to accept or reject them. The oath we took encompasses the faithful adherence to these rules.

It would, however, be wrong to assume that following the rules of interpretation relieves us of the need to exercise our judgment. Many questions we need to decide in our Committee require us to choose from a wide variety of possible answers. One example pertains to the right to life in article 10, which reads: “(E)very human being has the inherent right to life...”. There has hardly been a more controversial issue in human rights law than the question of when life begins. I presume that most of us have an idea of how to answer this question, and it would probably be safe to say that we could hardly agree on one single answer, even after the most careful and thorough analysis of all the material the Vienna Convention requires us to consult, and after extensive discussions with each other.

Not all questions that require our judgment, however, are equally intractable. In several domestic proceedings, for example, the question has arisen whether obesity may qualify as a disability. One day we may have to decide this question for the purposes of the CRPD. It would require us to exercise our judgment. I would assume that the chances of us coming to a consensus on this question are entirely intact.

Exercising our judgment brings us back to who we are as individuals. We all have been shaped by our very personal life stories, engendering a personality that harkens back to the experiences unique to each of us. We all will bring our personality to bear in the exercise of judgment in the application of the CRPD. It is thus of paramount importance for our endeavor to apply the CRPD who each of us has become as an individual.

Our provenance from all corners of the world creates a body of 18 members of stunning diversity. This is the strength of our Committee. It allows us to infuse the interpretation of the Convention on the Rights of Persons with Disabilities with a superb variety of personal and cultural experiences no national or regional institution could hope to achieve. I have no doubt that we will continue to develop the rights of persons with disabilities as beautifully as the Committee has since its inception. I myself are humbled and uplifted to have the opportunity to work with the fascinating personalities and outstanding experts the Committee is comprised of.