

# Comment: The CRPD and Children with Disabilities

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## Abstract

This comment considers how international law responds to children with disabilities, particularly children with disabilities in situations of forced migration. We argue that the *Convention on the Rights of Persons with Disabilities* ("CRPD") revolutionises the way international law responds to people with disabilities, particularly children. This comment recognises the established status of children as rights bearers deserving of special protection under international law and examines how the CRPD interacts with and builds upon two existing human rights treaties. We argue that the CRPD and its expert monitoring committee are uniquely placed to offer a constructive, rights-based framework for the protection of children with disabilities.

## I Introduction

It is well settled under international law that children are rights bearers who are entitled to special protections which accrue to them simply because they *are* children, and they apply equally to *all* those who are children. But not all children do experience those rights equally. Having a disability puts a child in a situation of particular vulnerability. Since 2008, it has been recognised that international law should go further for these children: not by giving them greater rights, but by providing extra protection so that they can enjoy ordinary rights on an equal basis with other, non-disabled, children.

International law (and the international community) was relatively slow to recognise the human rights of persons with disabilities, including children. Only in the last decade has disability been 'mainstreamed' as a human rights issue and the situation of children with disabilities taken seriously as a discrete human rights issue. The turning point was 2008, when the United Nations *Convention on the Rights of Persons with Disabilities* ("CRPD")<sup>1</sup> came into force. The CRPD is an instrument that revolutionises the way international law responds to people with disabilities, particularly children.

The primary purpose of this comment is to analyse how the CRPD operates to respect and protect children who experience disability. We examine how the CRPD interacts with

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<sup>1</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 Mar 2007, (2008) 2515 UNTS 3 (entered into force 3 May 2008); *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 Mar 2007, (2007) 46 ILM 443 (entered into force 3 May 2008). The texts of both instruments are available online: <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx>>.

the *Convention on the Rights of the Child* ('CRC')<sup>2</sup> and critique the reach and scope of the CRPD and its specific accommodations for children. We argue that the CRPD is uniquely placed to offer a constructive, rights-based framework for the protection of children with disabilities. The CRPD's unique monitoring committee has begun this task. As we will explore, this relatively new committee has carved out an important interpretive and educational function.

This article will then consider how international law might develop to respond to and protect children at risk. Considerable momentum is building for the inclusion of disability in development law and policy for the post-Millennium Development Goals (post 2015) era, and we will consider how children with disabilities should be included in these developments. But the world today presents another challenge in respect of which we argue that children with disabilities are not being adequately considered. The challenge is that of forced migration, which is today at an 18-year high.<sup>3</sup> We therefore conclude this article with brief observations on the application of the CRPD to children who are in situations of forced migration. Those children should also be protected by another international human rights instrument: the *Convention on the Status of Refugees*,<sup>4</sup> but that Convention sits awkwardly outside the United Nations human rights treaty system, even though it is indeed a treaty that protects human rights. We will briefly discuss the interaction of the CRPD and the *Refugee Convention* and evaluate the strengths and gaps in the protection which they offer.

## II The Human Rights of Persons with Disabilities and the Establishment of the CRPD

This part briefly sketches the recent incorporation of disability rights into the UN human rights treaty body system, describes the context in which the CRPD was developed and indicates the similarities and differences the CRPD has with other human rights instruments.

Until quite recently, international human rights law was largely silent on persons, including children, with disabilities. Prior to the CRPD, the CRC was the only treaty to include a stand-alone article on the rights of children with disabilities (art 23) and indeed the first treaty to contain a specific reference to disabilities.<sup>5</sup> The CRC makes very clear that children's vulnerability is not to be equated with worthlessness, and that children have equal value, irrespective of their circumstances. It is clear that the drafters of the CRC and the Committee on the Rights of the Child (CRC Committee) were ahead of their time in 'mainstreaming' disability as a human rights issue. Reflecting the importance and innovation of art 23, the the CRC Committee gave particular attention to the situation of

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<sup>2</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>3</sup> United Nations High Commissioner for Refugees ('UNHCR'), *Displacement: The New 21<sup>st</sup> Century Challenge — UNHCR Global Trends 2012* (UNHCR, 2013) <<http://www.unhcr.org/statistics>>.

<sup>4</sup> Opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 Apr 1954) ('*Refugee Convention*').

<sup>5</sup> Committee on the Rights of the Child, *General Comment No 9 (2006): The rights of children with disabilities*, CRC, 43<sup>rd</sup> sess, UN Doc CRC/C/GC/9 (27 February 2007) [2], 2.

children with disabilities in some of its early General Comments.<sup>6</sup> It also adopted a General Comment on the rights of children with disabilities in 2006.<sup>7</sup>

As the CRC Committee paid more attention to disabilities as a human rights issue, so too did the other UN human rights treaty bodies and indeed the entire UN human rights system. As the CRC Committee observed, the new focus on disability ‘is explained partly by the fact that the voice of persons with disabilities and of their advocates from national and international non-governmental organizations (NGOs) is being increasingly heard’.<sup>8</sup> It is no coincidence that as their voices became louder, the agency, capacity and rights of persons with disabilities came to be recognised.<sup>9</sup>

The CRPD was the first human rights treaty concluded after the Vienna Declaration and Plan of Action.<sup>10</sup> It was adopted by resolution of the General Assembly of the United Nations on 13 December 2006,<sup>11</sup> and it was opened for signature on 30 March 2007. It came into force on 3 May 2008, 30 days after the 20<sup>th</sup> ratification.<sup>12</sup> Over the last five years, ratifications of the CRPD have taken place at record pace. By September 2013, 134 states parties and the European Union had ratified the CRPD. These figures make it the fastest ratified Convention amongst all of the United Nations human rights treaties. In our view, this is because there is general recognition that persons with disabilities,<sup>13</sup> and more especially children with disabilities, must have their human rights protected by an international treaty. It has been clear to those 134 states that so many persons with disabilities are unable to enjoy fully all of the human rights which most able-bodied people take for granted.

The CRPD is distinctive in that it fulfils its basic protective function while proposing a significant paradigm shift. Rather than approaching people with disabilities from a benevolent welfare mindset, it places their human rights, their agency and their dignity

<sup>6</sup> See, eg, Committee on the Rights of the Child, *General Comment No. 1 (2001): Article 29(1): The Aims of Education*, UN Doc CRC/GC/2000/1 (17 April 2001) [10] 4; Committee on the Rights of the Child, *General Comment No 4 (2003): Adolescent health and development in the context of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/4 (1 July 2003); Committee on the Rights of the Child, *General Comment No 7 (2005): Implementing rights in early childhood*, UN Doc CRC/C/GC/7/Rev 1 (20 September 2006) [36(d)] 17.

<sup>7</sup> Committee on the Rights of the Child, *General Comment No 9 (2006): The rights of children with disabilities*, CRC, 43<sup>rd</sup> sess, UN Doc CRC/C/GC/9 (27 February 2007).

<sup>8</sup> Ibid 1 [2]; See also Marcia H Rioux, Lee Ann Basser and Melinda Jones, *Critical Perspectives on Human Rights and Disabilities Law* (Martinus Nijhoff, 2011), 482–3.

<sup>9</sup> On the role of disabled persons’ organisations in drafting the CRPD, see further Maya Sabatello and Marianne Schulze (eds), *Human Rights and Disability Advocacy* (University of Pennsylvania Press, 2013).

<sup>10</sup> Marianne Schulze, *Understanding the UN Convention on the Rights of Persons with Disabilities: A Handbook on the Human Rights of Persons with Disabilities* (Handicap International, 3<sup>rd</sup> ed, 2010) 5.

<sup>11</sup> UN General Assembly, *Committee On the Rights of Persons With Disabilities*, GA Res 61/106, UN GAOR, 61<sup>st</sup> sess, 76<sup>th</sup> plen mtg, Agenda item 67(b), UN Doc A/RES/61/106 (13 December 2006).

<sup>12</sup> In accordance with CRPD art 45(1).

<sup>13</sup> It is beyond the scope of this article to consider the extensive literature on what constitutes a disability and who are people with disabilities, however it is important to note that the CRPD’s definition, in art 1, of ‘persons with disabilities’ adopts the social model of disabilities and in doing so, recognises that persons with disabilities are prevented from exercising all of their human rights and fundamental freedoms as much by attitudinal and environmental barriers as by their physical, sensory, mental or intellectual impairment. See further CRPD Preamble (e), art 8; Gerard Quinn and Theresia Degener with Anna Bruce et al, *Human Rights and Disabilities: The current use and future potential of United Nations human rights instruments in the context of disabilities* (Office of the United Nations High Commissioner for Human Rights, 2002) 14 [1.1] <[www.ohchr.org/Documents/Publications/HRDisabilitiessen.pdf](http://www.ohchr.org/Documents/Publications/HRDisabilitiessen.pdf)>; Schulze, above n 10, 16; Tom Shakespeare, ‘The Social Model of Disability’ in Lennard J Davis (ed), *The Disability Studies Reader* (Routledge, 3<sup>rd</sup> ed, 2010), 266–73.

front and centre. Its purpose, set out in the first sentence of art 1, 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’. The CRPD does not set out to create new rights for people with disabilities.<sup>14</sup> Instead, it articulates and asserts the application of earlier human rights instruments to people with disabilities and provides a conceptual and practical framework for ensuring those rights.

In this respect the CRPD follows the lead of the CRC, which recognises the inherent dignity and worth of all children and their rights to participate in all matters affecting their future. The CRPD similarly proposes equality for persons with disabilities, but adopts a more radical approach to understanding the rights of such people. It frames the disadvantage faced by its subjects differently. Rather than equating disability with impairment, the CRPD frames vulnerability, and indeed disability itself, as the failure or inability to accommodate a person’s impairment (whether physical, sensory or mental). Put in concrete terms, the CRPD recognises that it is not the loss of a leg that makes a person disabled; it is the absence of a prosthesis.

Article 3 sets out eight principles that underpin the CRPD. These principles require governments, persons and bodies to treat all persons with disabilities with respect because of their inherent dignity, and to ensure that their disabilities do not restrict their full participation in society. The form of these ‘General Principles’ is unique to the CRPD. No other human rights treaty sets out its founding and unifying principles so clearly.<sup>15</sup> As we will show in section four, these general principles are very relevant to the way the CRPD Committee interprets specific obligations under the Convention and determines a state party’s compliance or otherwise. The general principles make very clear that the spirit of the CRPD requires states parties not to treat people with disabilities as the objects of charity, but instead to recognise them as citizens, as subjects and rights-holders who are as equally deserving of their place in the community, civil society and the law as other citizens. This applies equally to children with disabilities as it does to adults with disabilities.

Two concepts are central to the working of the entire CRPD. The first is non-discrimination. Article 5 of the CRPD is its lynchpin provision. It prohibits discrimination against persons with disabilities. Discrimination is defined as:

any distinction, exclusion or restriction on the basis of disabilities which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>16</sup>

The very concept of discrimination is tied to, and measured against a benchmark of, full enjoyment of human rights on equal terms with other persons. Crucially, discrimination expressly includes denial of ‘reasonable accommodation’.

‘Reasonable accommodation’ is the second foundation concept of the CRPD. It is defined as:

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<sup>14</sup> Rioux, Basser and Jones, above n 8, 482.

<sup>15</sup> Schulze, above n 10, 44.

<sup>16</sup> CRPD, above n 1, art 2.

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.<sup>17</sup>

In short, reasonable accommodation is that which is necessary to ensure that persons with disabilities are on a level playing field when compared with other persons. Thus the CRPD provides new ways of approaching and redressing disadvantage. If a person's — a child's — disability is conceptualised as the result of their vulnerabilities not being accommodated, it is much clearer that the onus is on the person or body excluding them to address that exclusion, so long as it is reasonable to do so. On this approach, a harm, such as confinement to institutions and exclusion of children with disabilities from mainstream education, can be addressed, not only as a direct violation of a substantive right (art 24, discussed further below), but also as an example of prohibited discrimination and a lack of reasonable accommodation.

Before analysing the articles of the CRPD that specifically concern children with disabilities, it is appropriate to note several other articles of the CRPD that deal with matters of specific concern to all persons with disabilities. It is pertinent to reiterate that the general provisions in the CRPD apply equally to children as they do to adults. For example, art 11 of the CRPD requires states parties in situations of risk or of emergency to protect persons with disabilities, including children with disabilities. An emergency plan without regard to the needs of children with disabilities would not live up to art 11 of the CRPD. The one article that is not specific to children covers the topic that might be thought to be most relevant to children with disabilities. That is the article relating to education. That article clearly envisages the importance of education to children with disabilities, but it is expressed to apply to *all* people with disabilities. It promotes the right of people with disabilities to an inclusive education on an equal basis with others. Obviously, art 24 makes it clear that children with disabilities are entitled to education and especially to inclusive education where they are mainstreamed with other children.

Other provisions of the CRPD, which are not of direct relevance to children, are nevertheless crucially important because of the way they demand that people with disabilities be treated. We offer here a brief summary of six other key articles that shape the CRPD's approach to people — including children — with disabilities.

First, although much has changed in the lives of persons with disabilities, it is fair to conclude that many still face prejudices and harmful practices. This is why art 8 of the CRPD is of importance. It obliges states parties to establish awareness-raising programs to combat archaic stereotypes and atavistic prejudices about people with disabilities.

Second, art 9, entitled 'Accessibility', places obligations upon states parties to ensure that persons with disabilities are able to gain access to the physical environment, to transportation, and to information and communications, and so to live and work independently in the community. This is of vital importance as it facilitates the enjoyment of other rights; without accessible schools, it is impossible for children with disabilities to receive inclusive and mainstream education.

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<sup>17</sup> CRPD, above n 1, art 2.

Third, restrictive laws and practices often prevent persons with disabilities (especially those with mental, intellectual and psychosocial disabilities) from exercising their full legal capacities.<sup>18</sup> In some countries, harsh and out-of-date guardianship laws prevent many people with disabilities from making decisions about how they wish to lead their lives. This is why equal recognition before the law for all persons with disabilities is enshrined in art 12 of the CRPD. It mandates that all persons with disabilities have full legal capacity.<sup>19</sup> Article 12 obliges states parties to support persons with disabilities to exercise their legal capacity and also to put in place ‘appropriate and effective safeguards to prevent abuse in accordance with human rights law’ (art 12(4)).

Fourth, far too many persons with disabilities in the world are confined in institutions where they lose independence. Article 19 of the CRPD exhorts states parties to establish programs of deinstitutionalisation. It makes it clear that persons with disabilities have the right to live independently in the community and to choose their place of residence.

Fifth, throughout history, persons with disabilities have been denied the right to participate fully in public and in political life. Article 29 of the CRPD guarantees full participation in political life by expressly prescribing the right to vote and to stand for public office for all persons with disabilities. This is of course not relevant to children, but it is significant that there can be no derogation from their right to participate — in an age appropriate fashion — on the grounds that they are children with disabilities. Finally, art 30 of the CRPD requires states parties to take measures to assist persons with disabilities to take part in cultural life, to engage in recreational pursuits and to participate in sporting activities. These articles neatly illustrate the unique role of the CRPD as the guarantor of the human rights and inherent dignity of all persons with disabilities, including all children with disabilities.

### III Children in the CRPD

According to the World Health Organisation/World Bank 2011 report on persons with disabilities, approximately 15 per cent of the world’s population have or will experience a disability in their lifetime.<sup>20</sup> This means that there are approximately one billion people with disabilities. Among those one billion are children with disabilities. Due to very poor statistical data, estimates of the number of children with disabilities vary, but children with disabilities can certainly be said to number in the hundreds of millions.<sup>21</sup>

As explained in the previous section, the CRPD covers all people with disabilities, but it is especially protective of children with disabilities. They have their own specific article, art 7, but it is important to stress that their rights are embedded across the breadth of the CRPD. The word ‘children’ is mentioned 24 times in the English version of the CRPD and

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<sup>18</sup> In June 2013, the Australian Law Reform Commission was given a reference to inquire into how to reduce legal barriers to people with disabilities. See further ‘Legal barriers for people with disabilities’, *Australian Law Reform Commission*, 7 June 2013 < <http://www.alrc.gov.au/inquiries/legal-barriers-people-disabilities>>.

<sup>19</sup> See further Gerard Quinn, ‘Personhood and Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD’ (Paper presented at Harvard Project on Disability Conference, Harvard Law School, 20 February 2010).

<sup>20</sup> World Health Organisation and The World Bank, *World Report on Disabilities* (World Health Organisation, 2011) 27, 29, 44.

<sup>21</sup> Committee on the Rights of the Child, *General Comment No 9 (2006): The rights of children with disabilities*, CRC, 43<sup>rd</sup> sess, UN Doc CRC/C/GC/9 (27 February 2007) 1 [1].

the word ‘child’ is mentioned 12 times. Girls and boys with disabilities are mentioned another six times.

Their prominence begins with para (r) of the Preamble to the CRPD, which recognises the importance of the CRC and the importance of the obligations that states parties to that treaty have undertaken. It recognises ‘that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children’ and recalls obligations to that end undertaken by states parties to the CRC. This paragraph demonstrates the close alignment of the two treaties, each of which is premised on the recognition that children with disabilities are entitled to enjoy human rights and fundamental freedoms on an equal basis with all other children.

The General Principles in art 3(h) also give prominence to children and to the CRC. Paragraph (h), like the other principles in art 3, is ‘a corner stone of the mosaic that ensures that persons with disabilities are equal and meaningful participants in the mainstream’.<sup>22</sup> It requires states parties to have ‘respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities’. It, too, has close synergy with the CRC: the language of ‘evolving capacities’ comes directly from the CRC arts 5 and 14(2).

The concept of the best interests of the child is perhaps the most important concept in the CRC, and the CRPD has adopted it in art 7, its specific ‘children’s provision’. Article 7(2) promises children with disabilities the enjoyment of rights on an equal basis with other children by demanding that their ‘best interests’ are a primary consideration in all decisions concerning them. This article does not create in signatory states any greater obligation than under the CRC, which is more widely ratified.<sup>23</sup> But the absence of a communications procedure under the CRC has hampered the development of jurisprudence on the meaning of ‘best interests’. In an attempt to clarify the meaning of this important obligation, the CRC Committee has adopted a General Comment on the right of the child to have his or her best interests taken as a primary consideration.<sup>24</sup> Until the CRC’s optional protocol on individual communications is in force (it has been opened for signature but is not yet signed by a sufficient number of states),<sup>25</sup> a child’s only international remedy for an alleged breach of the obligation to consider their best interests is in a complaint to the CRPD Committee. The ‘best interests’ standard is also found in art 23 of the CRPD. Article 23 is concerned with respect for family life, requiring that:

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

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<sup>22</sup> Schulze, above n 10, 44.

<sup>23</sup> See the current list of the status of ratification, Reservations and declarations for the CRC and CRPD, available at United Nations Treaty Collection <<http://treaties.un.org>>. As at September 2013 the CRC had 193 States parties and the CRPD had 134 States parties.

<sup>24</sup> Committee on the Rights of the Child, *General Comment No 14: The right of the child to have his or her best interests taken as a primary consideration (art 3 [1])*, CRC, 62<sup>nd</sup> sess, UN Doc CRC/C/GC/14 (29 May 2013).

<sup>25</sup> *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, opened for signature 19 December 2011, GA Dec 66/138, UN GAOR, 66<sup>th</sup> sess, Agenda item 64, UN Doc A/RES/66/138 (19 December 2011) (not yet in force).

The CRPD also follows the pattern set by the CRC in demanding that children have the right to participate in decisions affecting them. The CRPD asks states to facilitate participation by children with disabilities. It allows for that participation to be weighted according to age and maturity but, importantly, not according to degree of disabilities. Instead, it demands that disabilities-appropriate *assistance* is provided. This is consistent with arts 4(3) and 12(2)–(3), and reflects the CRPD’s approach to disabilities as a combination of impairment *plus* social barriers or lack of accommodation and assistance. It puts into practice the principle that disability is not a qualifier on the *content* of rights but a barrier to their exercise. Paragraph 3 of art 4 of the CRPD gives form to the principle of participation, requiring children with disabilities to be consulted on ‘the development and implementation of legislation and policies to implement the present Convention’ and also with respect to ‘other decision-making processes concerning issues relating to persons with disabilities’. Article 4 para (3) mirrors, in part, art 12 of the CRC.

In its 2006 General Comment on the rights of children with disabilities, the CRC Committee noted that children with disabilities are disproportionately vulnerable to non-registration at birth and that non-registration in turn increases the risk of neglect, institutionalisation and even death.<sup>26</sup> Article 18 of the CRPD covers liberty of movement and nationality. Paragraph (2) of this article expressly concerns itself with children with disabilities. It states: ‘Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by their parents’. The CRC Committee’s concern about birth registration has been shared by members of the CRPD Committee. Although this matter has not yet been focused upon in any of its first seven concluding observations, it does appear that instances still occur of infanticide of babies with disabilities, the baby never being registered. It is through registration and the granting of a nationality that children with disabilities can be protected.

#### **IV The CRPD Monitoring Committee and its Concluding Observations so Far**

The Committee on the Rights of Persons with Disabilities (‘CRPD Committee’) mirrors the other human rights treaty monitoring bodies in structure and function. Article 34 of the CRPD establishes a committee of independent experts charged with monitoring the implementation of the CRPD in member states. It comprises 18 members who are elected by the states parties. Members can only be re-elected once, which means that members may only serve two four-year terms. The result is that the CRPD Committee’s membership will renew itself and the CRPD Committee will not be in danger of stagnation.

Article 36 para 1 of the CRPD gives power to the CRPD Committee to examine reports (which art 35 requires states parties to submit, a first two years after ratification and subsequently every four years)<sup>27</sup> and to ‘make such suggestions and general recommendations on the report as it may consider appropriate and shall forward these to the State Party concerned’. The manner in which the CRPD Committee examines these reports, which culminate with a constructive dialogue with the reporting country, is much

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<sup>26</sup> Committee on the Rights of the Child, *General Comment No 9 (2006): The rights of children with disabilities*, CRC, 43<sup>rd</sup> sess, UN Doc CRC/C/GC/9 (27 February 2007) 10 [35].

<sup>27</sup> CRPD, above n 1, art 35(1)–(2).

the same as the examination of state party reports by the other United Nations treaty bodies. Its members read the report from the country, and alternative reports which are usually supplied by disabled persons' organisations from that country, then the CRPD Committee engages in a constructive dialogue with the country.

The CRPD Committee's composition is unique. It is made up almost entirely of persons who have disabilities: 17 of the current 18 members have disabilities such as blindness, difficulties with mobility, loss of limbs and psychosocial disabilities. There is no parallel among the other treaty bodies of a monitoring body whose members are both independent experts and uniquely rights holders owing to their disabilities. Certainly, the delegates of bodies like the Human Rights Council and the Committee Against Torture are themselves rights holders, but there is no parallel to the way that the CRPD Committee models, as well as promotes, inclusion and reasonable accommodation. The CRPD Committee, by its very presence as well as its work, challenges the stereotypes and social barriers described in art 8(1)(b) of the CRPD. This began during the drafting process, which involved people with disabilities (as members of disabled persons' and civil society organisations and as members of government delegations to the ad hoc committee and working group).<sup>28</sup> No doubt, for some government officials (particularly those from countries without strong disabled persons' organisations), their constructive dialogue with the CRPD Committee is the first occasion where they have found themselves questioned directly by knowledgeable and articulate persons with disabilities.

The CRPD Committee has now completed 10 constructive dialogues and published 10 concluding observations. The countries that have engaged in dialogue with the Committee so far are Tunisia, Spain, Peru, China, Argentina, Hungary Paraguay, Austria, Australia and El Salvador. It is, of course, early days in the work of the CRPD Committee, and not until a larger number of states parties have dialogued with the CRPD Committee will it be appropriate to make a more detailed study of its Concluding Observations. What strikes us about these early concluding observations, however, is that it is clear that the CRPD Committee takes its educative role seriously. Often, its recommendations seek to educate governments about how persons with disabilities should be treated, and perhaps this flows from the life experiences of its members with disabilities.

Many of the CRPD Committee's Concluding Observations so far have highlighted the provisions of the CRPD that protect characteristics and vulnerabilities unique to children and childhood. For example, in its Concluding Observations on Spain the committee highlighted the issue of early intervention for children with disabilities. A motif for the Committee's concern about children with disabilities has been its repeated insistence on states parties moving away from institutional care for children with disabilities. The Committee has expressed its particular concern about the numbers of children in institutional care in Hungary<sup>29</sup> and in China.<sup>30</sup> Another of the Committee's primary

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<sup>28</sup> Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the *Convention on the Rights of Persons with Disabilities*' (2008) 8 *Human Rights Law Review* 1.

<sup>29</sup> Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial periodic report of Hungary, adopted by the Committee at its eighth session* (17–28 September 2012), CRPD 8<sup>th</sup> sess (22 October 2012) UN Doc CRPD/C/HUN/CO/1, [21].

<sup>30</sup> Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of China, adopted by the Committee at its eighth session* (17–28 September 2012), CRPD 8<sup>th</sup> sess (15 October 2012) UN Doc CRPD/C/CHN/CO/1, [13].

concerns has been the related issue of violence and abuse against persons with disabilities. Article 16 deals with violence and abuse against persons with disabilities. Paragraph (1) of art 16 says, 'States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.' This is a related issue because, as much evidence to the CRPD Committee has shown, women, girls and sometimes boys with disabilities who are institutionalised are often subject to high levels of violence and sexual violence.<sup>31</sup> Article 23 also addresses concealment, abandonment, neglect and segregation of children with disabilities. It does so by requiring states parties to ensure that children with disabilities have equal rights with respect to family life. There is a clear synergy in the concerns and recommendations of the CRPD Committee and the CRC Committee, reflecting once again the obvious parallels between the two treaties. In recommending that Hungary undertake greater efforts to enable children to live with their families rather than in institutions, the Committee drew comments made by the CRC Committee in its most recent consideration of Hungary.<sup>32</sup>

The CRPD Committee has made clear that it assesses each country on its own terms and expects of each a response appropriate to the country's stage of development and resources. That is not to say, however, that it treats obligations under the Convention as derogable: indeed the Concluding Observations on Spain make very clear that the duty to provide reasonable accommodation is 'immediately applicable and not subject to progressive realisation'.<sup>33</sup> But it has become clear from the Committee's concluding observations so far that while issues like accessibility are well understood, many countries have further to go on issues in relation to which the CRPD shifts the paradigm. For example, the Committee has observed of many countries that they have yet to adopt an approach to discrimination (art 5), legal capacity (art 12) and the right to live independently in the community (art 19) that truly recognises people with disabilities as independent bearers of human rights. These are not approaches which are contingent on a country having great wealth or resources. Instead, they are dependent on attitudes and assumptions.

The CRPD Committee has stressed the importance of enabling children with disabilities to obtain education, and preferably inclusive education where children with disabilities are alongside other children in the classroom. Again, owing to their experiences of their own disabilities, the members of the CRPD Committee see the availability of

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<sup>31</sup> Committee on the Rights of Persons with Disabilities, *Consideration of reports submitted by States parties under article 35 of the Convention, Concluding observations of the Committee on the Rights of Persons with Disabilities: Tunisia*, CRPD 5<sup>th</sup> sess, (13 May 2011), UN Doc CRPD/C/TUN/CO/1, [16]-[17], Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Argentina as approved by the Committee at its eighth session* (17–28 September 2012), CRPD 8<sup>th</sup> sess, (8 October 2012), UN Doc CRPD/C/ARG/CO/1, [29]–[30]; As part of its 9<sup>th</sup> session in April 2012, the CRPD Committee held a half day of General Discussion on Women and Girls with Disabilities, focusing on violence against women and girls with disabilities: see 'Committee on Rights of Persons with Disabilities holds General Discussion on Women and Girls with Disabilities', Office of the High Commissioner for Human Rights, 19 April 2013 <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13241&LangID=E>>.

<sup>32</sup> Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial periodic report of Hungary, adopted by the Committee at its eighth session* (17–28 September 2012), CRPD 8<sup>th</sup> sess (22 October 2012) UN Doc CRPD/C/HUN/CO/1, [21].

<sup>33</sup> *Ibid.*

education from kindergarten to university as being crucial for the development of children with disabilities.

Finally, the CRPD Committee has consistently noted in its concluding observations that it is hampered by a lack of accurate data and statistics.<sup>34</sup> The CRPD Committee is not alone in this observation. In its most recent *State of the World's Children* publication, UNICEF notes that: 'Research on child disabilities is woefully inadequate, especially in low- and middle-income countries.'<sup>35</sup> There are further problems in gathering data on children with disabilities. As the 2011 World Report on Disabilities notes, the first is that questions in surveys designed for adults, if used for children, may give skewed results<sup>36</sup> because of children's very different developmental stage. Second, 'parents or caregivers — the natural proxy responders in surveys — may not accurately represent the experiences of the child'.<sup>37</sup> Article 31 of the CRPD relates to statistics and data collection. It is unique among human rights treaties in providing so specifically and prescriptively for the collection of statistics.

## V Future Directions

Momentum is building for the further inclusion and mainstreaming of children with disabilities in human rights law. Much has changed from a time when the Millennium Development Goals ('MDG') were drafted without any mention of persons with disabilities. Those goals are shortly to expire, and the global community is now looking towards a 'post MDG era' which will fully commence in 2015. Much effort is being put into ensuring that people with disabilities will not be excluded this time around.<sup>38</sup> We argue that the alignment of disability rights with development policy is a positive one, but that there is an equally important area which is so far being forgotten: the rights of persons with disabilities who are migrants, particularly forced and/or irregular migrants.

<sup>34</sup> Committee on the Rights of Persons with Disabilities, *Consideration of reports submitted by States parties under article 35 of the Convention, Concluding observations of the Committee on the Rights of Persons with Disabilities: Tunisia*, CRPD 5<sup>th</sup> sess, (13 May 2011), UN Doc CRPD/C/TUN/CO/1, [16]–[17], [36]–[39]; Committee on the Rights of Persons with Disabilities, *Consideration of reports submitted by States parties under article 35 of the Convention, Concluding observations of the Committee on the Rights of Persons with Disabilities: Spain*, CRPD 6<sup>th</sup> sess, (19 October 2011) UN Doc CRPD/C/ESP/CO/1, [51]–[52]; Committee on the Rights of Persons with Disabilities, *Consideration of reports submitted by States parties under article 35 of the Convention, Concluding observations of the Committee on the Rights of Persons with Disabilities: Peru*, CRPD 7<sup>th</sup> sess, (9 May 2002), UN Doc CRPD/C/PER/CO/1, [46]–[47]; Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Argentina as approved by the Committee at its eighth session* (17–28 September 2012), CRPD 8<sup>th</sup> sess, (8 October 2012), UN Doc CRPD/C/ARG/CO/1, [49]–[50]

<sup>35</sup> United Nations Children's Fund (UNICEF), *The State of the World's Children 2013: Children with Disabilities* (New York, 2013) < [http://www.unicef.org/publications/index\\_69379.html](http://www.unicef.org/publications/index_69379.html)>.

<sup>36</sup> World Health Organisation and The World Bank, *World Report on Disabilities* (World Health Organisation, 2011) 24.

<sup>37</sup> Ibid.

<sup>38</sup> *Realising the Millennium Development Goals and other internationally agreed development goals for persons with disabilities towards 2015 and beyond*, GA Res 67/140, UN GAOR, 67<sup>th</sup> sess, 60<sup>th</sup> plen mtg, Agenda item 27(b), UN Doc A/Res/67/140 (13 February 2013). See also a number of other relevant General Assembly Resolutions, including 64/131 on realising the MDG for persons with disabilities, 65/186 on realising the MDG for persons with disabilities towards 2015 and beyond, 66/229 on the Convention on the Rights of Persons with Disabilities and the Optional Protocol thereto; 66/288 endorsing the outcome document of the United Nations Conference on Sustainable Development; and resolution 66/124 deciding to convene a High-level Meeting of the General Assembly on the realisation of the Millennium Development Goals and other internationally agreed development goals for persons with disabilities.

2013 has been an important year for disability and development, mostly because the General Assembly of the United Nations has convened<sup>39</sup> a High-Level Meeting of the General Assembly on disabilities and development ('HLMDD') for 23 September 2013. In May 2013, the CRPD Committee released a statement<sup>40</sup> for presentation at the 23 September HLMDD. The CRPD Committee argued for a human rights-based approach in the outcome of that meeting, so as to align the post-2015 development agenda with the CRPD. In the Committee's view, if development goals are to be sustainable, they must be 'rooted in a human rights-based approach', they must 'take into account the enjoyment by all persons with disabilities of their civil, political, economic, social and cultural rights', and they must use as a yardstick the human rights-based approach embodied by the CRPD.<sup>41</sup> The Committee's statement also supports linking development goals to legal obligations of states under human rights treaties, including the legal obligations arising from the ratification of the CRPD.

In preparation for the HLMDD, in July 2012, the Secretary General of the United Nations established the High Level Panel of eminent persons to deliberate upon the post-2015 development agenda. In May 2013, they released their report entitled 'A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development'.<sup>42</sup> Put briefly, the argument of this report is that development policy should 'leave no-one behind' in a new development framework. The report makes it clear that persons with disabilities must not be left behind and that development must take account of the needs of persons with disabilities.

There have also been more localised preparations for the post-2015 era. From 29 October to 2 November 2012, the United Nations Economic and Social Commission for Asia and the Pacific ('ESCAP') meeting at Incheon, in the Republic of Korea, adopted a strategy to assist persons with disabilities in the Asia-Pacific region. ESCAP is the primary United Nations economic and social development agency for the Asia-Pacific region, with 53 nations, including Australia, as members. Member governments attended the Incheon meeting along with disabled persons' organisations.

The member states of ESCAP adopted the Ministerial Declaration on the Asian and Pacific Decade of Persons with Disabilities, 2013–22, and adopted the Incheon Strategy to 'Make the Right Real' for Persons with Disabilities in Asia and the Pacific.<sup>43</sup> The Incheon Strategy is the first regionally agreed set of 10 disability-inclusive goals. Accompanying these goals are 27 targets and some 62 indicators which will enable ESCAP nations to measure progress on improving the lives of persons, and especially of children with disabilities. As most children with disabilities, especially in the developing world, live in

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<sup>39</sup> *High level Meeting of the General Assembly on the realization of the Millennium Development Goals and other internationally agreed development goals for persons with disabilities*, GA Res 66/124, UN GAOR, 66<sup>th</sup> sess, Agenda item 27(b), UN Doc A/RES/66/124 (27 February 2012).

<sup>40</sup> Committee on the Rights of Persons with Disabilities, 'Statement of the Committee on the Rights of Persons with Disabilities on including the rights of persons with disabilities in the post 2015 agenda on disabilities and development', May 2013, United Nations Office of the High Commissioner for Human Rights <<http://www.ohchr.org/Documents/HRBodies/CRPD/StatementInclusionPost2015.doc>>.

<sup>41</sup> *Ibid.*

<sup>42</sup> High-Level Panel of Eminent Persons on the Post-2015 Development Agenda, *A New Global Partnership: Eradicate Poverty and Transform Economies Through Sustainable Development: The Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda* (United Nations, 2013).

<sup>43</sup> United Nations Economic and Social Commission for Asia and the Pacific, *Incheon Strategy to 'Make the Right Real' for Persons with Disabilities in Asia and the Pacific* (United Nations, 2012), UN Doc ST/ESCAP/2648.

poverty, the first of the 10 Incheon goals is important. It obliges Incheon countries to 'reduce poverty and enhance work and employment prospects'.

Goal 5 focuses directly on children with disabilities. It requires ESCAP nations to 'Expand early intervention and education of children with disabilities'. Goal 8 exhorts nations to improve the reliability of statistics on persons with disabilities. More accurate statistics will undoubtedly assist the effective allocation of resources and will also assist the CRPD Committee when undertaking its constructive dialogues. Finally, the 10<sup>th</sup> goal seeks to advance regional and sub-regional cooperation. This will enable nations to further develop mechanisms for cooperation and for the delivery of aid which is required by art 32 of the CRPD. States parties to the CRPD have an obligation, pursuant to art 32, to engage in international cooperation, including international development programs which must be inclusive of, and accessible to, persons with disabilities.

The HLMDD adopted an outcome document which resolved to:

[e]nsure that all development policies, including those regarding poverty eradication, social inclusion, full and productive employment and decent work, and access to basic social services, and their decision making processes take into account the needs of and benefit all persons with disabilities, including women, children, youth, indigenous peoples and older persons who can be subject to violence and multiple or aggravated forms of discrimination.<sup>44</sup>

The HLMDD was an important and positive development for the rights of persons with disabilities and particularly for the rights of children with disabilities. But there remain gaps, particularly with respect to children with disabilities. The High Level Panel Report failed to make any reference to education in the context of MDG Number 1 on eradicating poverty, and it appears that this omission was carried over to the outcome document.

Ensuring that persons with disabilities are included in the development process and have their rights respected is critically important to ensuring that there is global parity in the enjoyment of human rights. But there is another very important area in which work must be done to ensure that all persons with disabilities can enjoy their basic human rights. At a time when the number of people on the move is at a record high level,<sup>45</sup> it is troubling that there appears to be little recognition of the rights of people, especially children, with disabilities who are outside their country of nationality or habitual residence. Of the estimated 15.4 million people worldwide who are refugees, approximately 45 per cent are children and this figure appears to be increasing.<sup>46</sup>

The CRPD clearly applies to all persons with disabilities, including children with disabilities, who are lawfully resident in any of those states parties which have ratified this Convention. Yet often the children at greatest risk are children who are not lawfully resident: children who have left their countries of origin and are either refugees within the meaning of the *Refugee Convention*, or are asylum seekers, or are simply persons at risk. Children, especially children with disabilities, are often more vulnerable than adults in

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<sup>44</sup> *Outcome document of the high-level meeting of the General Assembly on the realization of the Millennium Development Goals and other internationally agreed development goals for persons with disabilities: the way forward, a disability-inclusive development agenda towards 2015 and beyond*, 68<sup>th</sup> sess, Agenda Item 27(b), UN Doc A/68/L.1 (17 September 2013), 2 [II 4(b)].

<sup>45</sup> UNHCR, above n 3.

<sup>46</sup> *Ibid* 3, 34.

situations of forced displacement.<sup>47</sup> The *Refugee Convention*, drafted in the post-World War II political context, protects certain rights of children. Although refugee rights under this instrument form a hierarchy of status as they attach cumulatively to simple presence, lawful presence and lawful residence,<sup>48</sup> certain children's rights such as the right to education<sup>49</sup> are immutable. Yet this convention makes no mention of persons with disabilities.

We have argued that it is a simple matter of construing the language of the CRPD to reach the conclusion that it applies equally to children as it does to adults in situations of displacement. Article 5(1) of the CRPD says that 'States Parties recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.' The words 'all persons' should be interpreted in accordance with the *Vienna Convention on the Law of Treaties*<sup>50</sup> art 29, which makes clear that words in treaties are to be given their ordinary meaning. The amplitude of 'all persons' is thus 'all persons with disabilities on the territory of a state party'. The expert bodies which monitor the *International Covenant on Civil and Political Rights*<sup>51</sup> and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*<sup>52</sup> have drawn the same conclusion with regard to those treaties.<sup>53</sup> So, too, has the Executive Committee of UNHCR stated at least implicitly that the CRPD applies to all children with disabilities when they enter a party's territory, irrespective of whether or not they are citizens of that country.<sup>54</sup> The CRPD Committee immediately endorsed this interpretation of the breadth and scope of the CRPD.<sup>55</sup>

The argument that the CRPD does not apply to refugees and asylum seekers has been given undue prominence because there were some suggestions during the drafting of the Convention (and recorded in the *travaux préparatoires*)<sup>56</sup> that the Convention should only apply to citizens.<sup>57</sup> It is abundantly clear that those suggestions were never accepted. The CRPD must apply to all persons with disabilities, including children with disabilities, who enter the territory of a state party, whether as refugees or asylum seekers. Thus, children with disabilities on the territory of a CRPD signatory state should necessarily receive its protections. If they are refugees, or asylum seekers, not only should they not be denied the

<sup>47</sup> UNHCR Executive Committee, *Conclusion on Children at Risk*, EXCOM Conclusion No. 107 (LVIII), 5 October 2007, Preamble, contained in United Nations High Commissioner for Refugees, *Report of the fifty-eighth session of the Executive Committee of the High Commissioner's Programme*, UN GOAR, 58<sup>th</sup> sess, Agenda item 14, UN Doc A/AC96/1048 (5 October 2007) 14.

<sup>48</sup> See further James Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 2009) 154.

<sup>49</sup> *Refugee Convention* art 22.

<sup>50</sup> Opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

<sup>51</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>52</sup> Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

<sup>53</sup> Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004 [10]; Committee against Torture, *General Comment No 2: Implementation of article 2 by States parties*, UN Doc CAT/C/GC/2, 24 Jan 2008 [7].

<sup>54</sup> UNHCR Executive Committee, *Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR*, EXCOM Conclusion No 110 (LXI), 12 Oct 2010, contained in United Nations High Commissioner for Refugees, *Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees*, UN GAOR, 61<sup>st</sup> sess, Agenda item 42, UN Doc A/61/12.

<sup>55</sup> See Paragraph 16 of the decisions adopted by the CRPD Committee at its Fourth Session 4 October 2010.

<sup>56</sup> Mary Crock, Christine Ernst and Ron McCallum, 'Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities' (2012) 24 *International Journal of Refugee Law* 735, 738–9.

<sup>57</sup> *Ibid.*

protection of the CRPD, but they should also receive some degree of protection under the *Refugee Convention*. And finally, as long as they are in any country other than the United States,<sup>58</sup> they will be protected by the CRC.

The CRPD Committee's Concluding Observations have not yet examined the issues confronting children with disabilities who are refugees because these have not arisen in the constructive dialogues that have been undertaken. However, in future constructive dialogues with refugee-receiving countries, the CRPD Committee will have to grapple with whether refugee children are being treated in accordance with the rights and obligations of the CRPD. As we have shown, once children at risk are lawfully within the territory of the state party, they are covered by the CRPD.

Approximately 650 million persons with disabilities live in the Asia-Pacific region. There are also huge numbers of migrants in the region, both migrants by choice and those who are forcibly displaced. But the Incheon Strategy makes no mention of refugees, or even of migrants. Regional cooperation is an important theme in the relations of Asia-Pacific countries and it has gained new prominence in the area of refugees and migration. Both developed and developing countries in the Asia-Pacific Region have been keen to frame forced migration, especially migration via illicit channels such as people smugglers, as a regional issue. This has had a number of consequences for refugee rights, particularly as both *Refugee Convention* and non-*Refugee Convention* countries become tougher on refugees, recognising only the basic *non-refoulement* obligation but not granting other rights.<sup>59</sup> There is much to be said for genuine regional cooperation in the management of irregular migration flows. If these regional cooperation approaches are to truly protect the most vulnerable of forced migrants, then they must take into account the vulnerabilities, and the rights, of children and persons with disabilities.

## VI Conclusion

This article has analysed how the CRPD, as interpreted and applied by its monitoring committee, offers a new framework for the protection of children at risk. This framework has great potential for application in Australia's own region, where there are enormous populations of children, refugees and people with disabilities. Australia has the opportunity to take the lead in formulating law and policy that recognises rights as vested in individuals — including non-citizens. The participatory and inclusive approach of the CRPD Committee, as well as the content of its Concluding Observations, should be a model.

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<sup>58</sup> The United States has not signed either the CRC or the CRPD.

<sup>59</sup> Mary Crock, 'Shadow Plays, Shifting Sands and International Refugee Law: Convergences in the Asia-Pacific (2013) *International and Comparative Law Quarterly* (forthcoming).