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Shared Understanding or Consensus-Masked Disagreement? The Anti-Torture Framework in the Convention on the Rights of Persons with Disabilities

JANET E. LORD*

I. INTRODUCTION

The adoption of the Convention on the Rights of Persons with Disabilities (CRPD or Convention)¹ offers an opportunity to assess both the state of international human rights law generally and the progressive development of the international anti-torture framework in particular. As a core international human rights convention, and the first to be adopted in the twenty-first century, its constellation of civil, political, economic, social, and cultural rights offers a window through which to view human rights law in the context of disability, including the prohibition against torture and other cruel, inhuman, and degrading treatment or punishment.² The Convention was opened for signature on

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1. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Jan. 24, 2007) [hereinafter CRPD]. The Convention was adopted by consensus by the General Assembly on December 13, 2006, together with its Optional Protocol. Optional Protocol to the Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Jan. 24, 2007).

2. CRPD, *supra* note 1, art. 15. For an overview of the Convention on the Rights of Persons with Disabilities, see Michael Ashley Stein & Janet E. Lord, *The United Nations Convention on the Rights of Persons with Disabilities: Process, Substance and Prospects*, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS: ACHIEVEMENTS AND CHALLENGES 495, 495–514 (Felipe Gomez Isa & Koen De Feyter eds., 2009) [hereinafter *Process, Substance and Prospects*].

March 30, 2007, and entered into force on May 3, 2008.³ The CRPD provisions that are closely linked to physical and mental integrity, in particular Article 12 on legal capacity, have attracted reservations and interpretive declarations by ratifying States.⁴ This calls into question the depth of consensus on the anti-torture framework in its disability-specific application. Notwithstanding some unsettled questions as to the specific circumstances falling within the torture prohibition in the CRPD,⁵ it represents a significant development that should not be lost on scholars and practitioners.

Following this introduction, Part II of this article describes the particular disability context wherein the CRPD anti-torture framework is placed, namely, the prevalence of violence against persons with disabilities and its particularized manifestations. Next, Part III reviews the general human rights law prohibition of torture and cruel, inhuman or degrading treatment or punishment, and charts the development of disability-specific standards relating to the anti-torture framework prior to the adoption of the CRPD. Part IV analyzes the normative landscape against which the CRPD text was negotiated as well as the anti-torture provisions more specifically. Part V addresses State duties to protect, respect, and fulfill the right of persons with disabilities to be free from torture and other cruel, inhuman, and degrading treatment or punishment, noting areas of agreement as well as disagreement. It also considers issues of specific relevance to persons with disabilities, including conditions of detention or imprisonment, the use of restraints and seclusion, compulsory treatment, private acts constituting torture or other abuse, punishment, and duties to protect. Part VI addresses the gender implications of the torture prohibition, focusing in particular on women and girls with disabilities. Finally, Part VII analyzes a largely disregarded issue, namely, the implications of Article 15 of the CRPD with regard to expulsion and extradition within the context of disability. The article concludes by charting suggested implications for both scholarship and human rights advocacy around the torture prohibition. It also puts forward suggestions as to how the CRPD, through its treaty

3. *Convention on the Rights of Persons with Disabilities*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en (last visited Oct. 15, 2011) [hereinafter U.N.T.S. Website]. Notably, the CRPD received the greatest number of signatures of any human rights treaty on its opening signature day and is the second most rapidly ratified of the core human rights conventions. See *Latest Updates*, DISABLED PEOPLES' INT'L (Apr. 5, 2007), <http://www.icrpd.net/ratification/en/updateFiles/2007-04-09.pdf>.

4. See U.N.T.S. Website, *supra* note 3.

5. CRPD, *supra* note 1, art. 15.

monitoring body, the Committee on the Rights of Persons with Disabilities, the periodic Conference of States Parties and other institutional arrangements (regional and international), can continue to foment the progressive development and direction of the anti-torture framework and foster deeper normative consensus and shared understanding around the meaning of Article 15.

II. CONTEXTUALIZING THE TORTURE PROHIBITION TO ADDRESS DISABILITY RIGHTS

A. *Violations of Physical and Mental Integrity Against Persons with Disabilities*

Disability discrimination, including the failure to reasonably accommodate persons with disabilities, frequently manifests in violations of physical and mental integrity, making disability a risk factor when considering vulnerability to torture and other forms of inhuman or degrading treatment.⁶ Violations against people with disabilities may go unnoticed, particularly where they take place in institutionalized settings or other places that are similarly isolated and shielded from scrutiny.⁷ In many parts of the world, persons with disabilities are still subjected to long-term and even permanent institutionalization in psychiatric facilities and social care homes, frequently in isolated environs within rural areas or locations set apart from established communities.⁸ In other cases, persons with disabilities are isolated not in institutional settings, but in their own homes and

6. See Special Rapporteur on Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Report*, ¶¶ 37–76, U.N. Doc. A/63/175 (July 28, 2008) (by Manfred Nowak) [hereinafter *Nowak Interim Report*]; see also Report of the Office of the High Comm’r for Human Rights, Expert Seminar on Freedom from Torture and Ill-Treatment and Persons with Disabilities (Dec. 11, 2007), http://www2.ohchr.org/english/issues/disability/docs/torture/seminar_torturereportfinal.doc [hereinafter OCHR Report].

7. Disability Rights International (DRI) (formerly Mental Disability Rights International (MDRI)) has documented egregious human rights violations against person with disabilities in institutional settings, such as orphanages, social care homes, and psychiatric hospitals. See MENTAL DISABILITY RIGHTS INT’L, HUMAN RIGHTS & MENTAL HEALTH: MEXICO 13–41 (2000); MENTAL DISABILITY RIGHTS INT’L, CHILDREN IN RUSSIA’S INSTITUTIONS: HUMAN RIGHTS AND OPPORTUNITIES FOR REFORM 10–23 (1999) [hereinafter MDRI RUSSIA REPORT]; MENTAL DISABILITY RIGHTS INT’L, HUMAN RIGHTS & MENTAL HEALTH: HUNGARY (1997) [hereinafter MDRI HUNGARY REPORT], available at <http://www.mdri.org/PDFs/reports/Hungary.pdf>; MENTAL DISABILITY RIGHTS INT’L, HUMAN RIGHTS & MENTAL HEALTH: URUGUAY 16–48 (1995).

8. See Debra Benko & Brittany Benowitz, *The Application of Universal Human Rights Law to People with Mental Disabilities*, 9 HUM. RTS. BRIEF 9, 11 (2001).

communities with little or no opportunity to interact with their peers, receive an education, pursue economic opportunities, or otherwise engage in community life.⁹

In many countries, the living conditions associated with the institutionalization of persons with disabilities not only represent serious barriers to the enjoyment of economic, social, and political inclusion, but constitute life-threatening situations, with inadequate food and shelter and unacceptable hygiene that presents high risks of infectious diseases.¹⁰ The work of one international disability rights organization in Armenia, for example, disclosed a thirty percent annual mortality rate in one particular social care institution, an exceedingly high death rate that cannot be explained away by reference to disability-related causes.¹¹ In other cases, practices that purport to “treat” or “protect” persons with disabilities in institutions are dangerous, not to mention degrading and undignified. Human rights documentation by the Mental Disability Advocacy Center (MDAC) based in Hungary disclosed the use of cage beds in Hungary, Slovenia, the Czech Republic, and Slovakia as a form of restraint in facilities warehousing children with disabilities.¹²

Persons with disabilities are likely to live in poverty, a condition that exposes women and girls with disabilities in particular to sexual exploitation, with research suggesting that a large percentage will experience sexual assault or abuse during their lifetime.¹³ Sexual violence is also a major tool of warfare, often perpetrated against women and girls, resulting in psycho-social and physical disability.¹⁴ Women and girls with disabilities, as well as persons with intellectual disabilities, are at particularly high risk for violence and sexual abuse

9. *Id.*

10. *Id.* at 10.

11. *Id.*

12. See MENTAL DISABILITY ADVOCACY CTR., CAGE BEDS: INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT IN FOUR EU ACCESSION COUNTRIES 36–41 (2003), http://mdac.info/sites/mdac.info/files/English_Cage%20Beds.pdf [hereinafter MDAC CAGE BEDS REPORT]. The use of cage beds has since been discontinued in Hungary and Slovenia.

13. See U.N. OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, WORLD HEALTH ORG. & UNITED NATIONS AIDS, DISABILITY AND HIV POLICY BRIEF 2–3 (2009), available at http://data.unaids.org/pub/Manual/2009/jc1632_pol_brief_disability_long_en.pdf [hereinafter DISABILITY AND HIV POLICY BRIEF]; see also Nora Ellen Groce & Reshma Trasi, *Rape of Individuals with Disability: AIDS and the Folk Belief of Virgin Cleansing*, 363 LANCET 1663, 1663–64 (2004).

14. See Jennifer Park, *Sexual Violence as a Weapon of War in International Humanitarian Law*, 3/1 INT’L PUB. POL’Y REV. 13, 15 (2007), available at <http://www.ucl.ac.uk/ippr/journal/downloads/vol3-1/Park.pdf>.

when confined to institutions¹⁵ and often experience multi-dimensional discrimination in many countries due to discrimination on the basis of both gender and disability.¹⁶ Disability Rights International (DRI) reported that women who survived violence and trauma in Kosovo were improperly detained in institutions because women with psychiatric diagnoses are excluded from community services.¹⁷

Children with disabilities are likewise at risk for mistreatment and abuse in institutionalized settings such as orphanages,¹⁸ social care homes and schools,¹⁹ and in their homes and communities. Some particularly egregious cases of abuse have been well documented, while others go unnoticed and unaddressed. In Russia, for example, DRI reported that there were some 400,000 to 600,000 children who were institutionalized, many of whom were children with disabilities, and others who were at high risk of acquiring a disability due to their conditions of institutionalization.²⁰ The practices of psychiatry to advance Soviet governmental interests is well documented and involved sweeping psychiatric commitment procedures that subjected persons with psycho-social disabilities as well as others, including political

15. DISABILITY AND HIV POLICY BRIEF, *supra* note 13, at 2–3.

16. See Nora Ellen Groce, *HIV/AIDS and Individuals with Disability*, 8 HEALTH & HUM. RTS. 215, 217 (2005), available at <http://www.hhrjournal.org/archives-pdf/4065341.pdf>. bannered.pdf; NORA ELLEN GROCE ET AL., GUIDELINES FOR INCLUSION OF INDIVIDUALS WITH DISABILITY IN HIV/AIDS OUTREACH EFFORTS 3–4 (2006), available at http://globalsurvey.med.yale.edu/inclusion_guidelines_hiv aids.pdf; NORA ELLEN GROCE ET AL., HIV/AIDS AND INDIVIDUALS WITH DISABILITY 10, 12–13, 28 (2004), available at <http://www.dpi.org/files/uploads/hiv/Health%20and%20Human%20Rights%20-%20Published%20version.pdf> [hereinafter HIV/AIDS AND INDIVIDUALS WITH DISABILITY].

17. See MENTAL DISABILITY RIGHTS INT’L, NOT ON THE AGENDA: HUMAN RIGHTS OF PEOPLE WITH MENTAL DISABILITIES IN KOSOVO 13–15 (2002), available at <http://www.mdri.org/PDFs/reports/KosovoReport.pdf> [hereinafter MDRI KOSOVO REPORT].

18. See, e.g., MENTAL DISABILITY RIGHTS INT’L, HIDDEN SUFFERING: ROMANIA’S SEGREGATION AND ABUSE OF INFANTS AND CHILDREN WITH DISABILITIES 6 (2006), available at http://www.mdri.org/PDFs/reports/romania-May%209%20final_with%20photos.pdf; MENTAL DISABILITY RIGHTS INT’L, BEHIND CLOSED DOORS: HUMAN RIGHTS ABUSES IN THE PSYCHIATRIC FACILITIES, ORPHANAGES AND REHABILITATION CENTERS OF TURKEY 24–25 (2005), available at <http://www.mdri.org/PDFs/reports/turkey%20final%209-26-05.pdf>; MDRI RUSSIA REPORT, *supra* note 7.

19. See generally MARK C. WEBER, DISABILITY HARASSMENT (2007).

20. MDRI RUSSIA REPORT, *supra* note 7. “Under the Russian discipline of defectology, children are seen as having defects that need to be corrected rather than disabilities that should be accommodated within their communities. Officials report that at least 20 percent of institutionalized children with mental disabilities are permanently confined with physical restraints to their beds in ‘lying down’ rooms and given no treatment. Furthermore, children are severely undernourished and either overmedicated or not provided with needed medication.” Benko & Benowitz, *supra* note 8, at 10.

prisoners and dissidents, to years of confinement and isolation, in addition to other abuses.²¹ More recently, DRI has found egregious abuses in U.S. facilities, with electric shocks administered via backpacks strapped onto children with disabilities perpetrated in the guise of legitimate behavior modification “therapy.”²²

Protecting the physical and mental integrity of persons with disabilities is an essential component of any disability-specific human rights strategy and formed the basis of one of the central—as well as most controversial—dialogues during the drafting of the CRPD. Ultimately, the CRPD anti-torture framework offers human rights organizations the opportunity to improve and redress their historical neglect of egregious abuses against persons with disabilities, and to underscore disability rights obligations under human rights law for governments.

B. The Torture Prohibition as a Rule of Special Character in Human Rights Law

The prohibition of torture or cruel, inhuman, or degrading treatment or punishment is a rule of special character in international human rights law: it is reflected in a host of international instruments,²³

21. See Dennis Ougrin et al., *Psychiatry in Post-Communist Ukraine: Dismantling the Past, Paving the Way for the Future*, 30 PSYCHIATRIC BULL. 456, 456–58 (2006), available at <http://pb.rcpsych.org/cgi/reprint/30/12/456.pdf>; Amy Young-Anawaty, *International Human Rights Norms and Soviet Abuse of Psychiatry*, 10 CASE W. RES. J. INT'L L. 785, 785–89 (1978); Victoria Rood, *Soviet Abuse of Psychiatric Commitment: An International Human Rights Issue*, 9 CAL. W. INT'L L.J. 629, 629–30 (1979).

22. See MENTAL DISABILITY RIGHTS INT'L, TORTURE NOT TREATMENT: ELECTRIC SHOCK AND LONG-TERM RESTRAINT IN THE UNITED STATES ON CHILDREN AND ADULTS WITH DISABILITIES AT THE JUDGE ROTENBERG CENTER 1–3, 12–13 (2010), available at <http://www.mdri.org/PDFs/USReportandUrgentAppeal.pdf> [hereinafter MDRI ROTENBERG CENTER REPORT] (documenting human rights abuses in a U.S. institution in Massachusetts where children and adults were routinely subjected to electric shock, receiving multiple skin shocks on their legs, arms, hands, feet, fingers, and torsos for non-compliance such as getting out of their seats, making noises, swearing, or failing to follow staff directions, where they were also subjected to other punishments such as food deprivation and mock stabbings).

23. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 5, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 7, U.N. Doc. A/RES/21/2200 (Dec. 16, 1966) [hereinafter ICCPR]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3(I)(a), (c), Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217; Geneva Convention Relative to the Protection of Civilian Persons in the Time of War art. 3(I)(a), (c), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. For additional sources of international humanitarian and criminal law relevant to protection against violations of physical and mental

including a specialized convention on the subject;²⁴ it is a human rights rule from which no derogation is permitted; and it is subject to no restriction or limitation.²⁵ As such, it must be regarded as having attained the status of customary international law and, moreover, there is ample authority for the proposition that the prohibition of torture has acquired the status of a peremptory norm of international law according to which it may be assigned *jus cogens* status.²⁶

integrity, see Andrew Byrnes, *Torture and Other Offenses Involving the Violation of Physical and Mental Integrity of the Human Person*, in SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW 214, 226–27 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000).

24. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984) [hereinafter CAT].

25. This applies equally to the prohibition of scientific experimentation absent informed consent, which is regarded as a component of the torture prohibition. Manfred Nowak's proposition that reservations to Article 7 of the ICCPR are contrary to the object and purpose of the Covenant owing to the special character of the torture proscription in international law is a sound one, and would also apply to reservations in respect of Article 15 of the CRPD. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 126 (1993); see Vienna Convention on the Law of Treaties art. 19, May 23, 1969, 1155 U.N.T.S. 331 (prohibiting a State from entering a reservation to a treaty, *inter alia*, where the "reservation is incompatible with the object and purpose of the treaty.").

26. The *jus cogens* status of the torture prohibition has been recognized by the Committee against Torture, the treaty body that monitors the Convention against Torture, and provides authoritative interpretations of CAT obligations. See U.N. Comm. Against Torture, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: General Comment No. 2: Implementation of Article 2 by States Parties, ¶ 1, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter General Comment No. 2]; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) (identifying torture as an illustrative example of a *jus cogens* norm, along with piracy, genocide, and the slave trade); NIGEL S. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 67–74 (2d ed., 1999); Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 122, 122 (Louis Henkin ed., 1981). Judge Higgins, in discussing the legal character of the UDHR, states: "[T]he suggestion has been made that human rights treaties have the character of *jus cogens*. There certainly exists a consensus that certain rights—the right to life, to freedom from slavery or torture—are so fundamental that no derogation to them is permissible. And international human rights treaties undoubtedly contain elements that are binding as principles which are recognized by civilized States, and not only as mutual treaty commitments." Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 BRIT. Y.B. INT'L L. 281, 282 (1978). The ruling in *Filartiga v. Pena-Irala* is at least suggestive in this regard: "Among the rights universally proclaimed by all nations . . . is the right to be free of physical torture. Indeed for the purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind." *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980); see also M. Cherif Bassiouni & Daniel Derby, *An Appraisal of Torture in International Law and Practice: The Need for an International Convention for the Prevention and Suppression of Torture*, 48 REV. INT'L DROIT PENAL 17, 67–88 (1977) (arguing that all four sources of international law—treaties, customs, general principles recognized by all civilized nations, and the writings of noted publicists—proscribe torture).

Notwithstanding its stature in international human rights law, its persistence as a frequently violated right²⁷ has given rise to a number of successive efforts to eradicate widespread torture practices through standard-setting, institution-building, and programmatic interventions engaging a wide range of State and non-State actors.²⁸ An extensive jurisprudence has developed, providing guidance to the contours of the international prohibition against torture and cruel, inhuman, or degrading treatment or punishment. Cases specifically relevant for persons with disabilities are reflected in the case law of the European Court of Human Rights (ECHR)²⁹ and the Inter-American Commission of Human Rights,³⁰ as well as in credible and well-documented reports of human rights abuses by leading international human rights organizations³¹ and in studies issued by the United Nations.³² Notably,

27. For example, in a 2009 report, Amnesty International surveyed various States that violate international law prohibitions against torture. See AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2009: THE STATE OF THE WORLD'S HUMAN RIGHTS (2009), available at <http://report2009.amnesty.org/sites/report2009.amnesty.org/files/documents/air09-en.pdf>.

28. See generally General Comment No. 2, *supra* note 26, at 2–4; AMNESTY INT'L, *supra* note 27, at 369–89 (obligating States to take actions to reinforce the prohibition against torture through legislative, administrative, judicial, and other actions to prevent it); see also Convention for the Protection of Human Rights and Fundamental Freedoms art. 17, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter CPHRFF] (forbidding any State, group, or person from engaging in any activity that would destroy any rights and freedoms both in an beyond the convention).

29. See, e.g., *Keenan v. United Kingdom*, App. No. 27229/95, 10 Eur. Ct. H.R. 319, ¶¶ 27–40 (2001). For a review of the jurisprudence of the European Court of Human Rights and mental disability, see Oliver Lewis, *Protecting the Rights of People with Mental Disabilities: The European Convention on Human Rights*, 9 EUR. J. HEALTH L. 293, 294–316 (2002); European Comm. for the Prevention of Torture & Inhuman or Degrading Treatment or Punishment, *Report on Visit to Romania*, Ref. CPT/Inf(98)5, COUNCIL OF EUROPE ¶ 177 (Feb. 19, 1998), <http://www.cpt.coe.int/documents/rom/1998-05-inf-fra-1.htm> (reporting on sixty-two deaths at the Poiana Mare Psychiatric Institution, of which twenty-five were attributed to severe protein and calorific malnutrition); *Report to the Bulgarian Government on the Visit to Bulgaria Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Doc. CPT/Inf ¶ 174 & n.16 (Jan. 28, 2002) (reporting deaths at the Terter Social Care Home, including causes attributable to asphyxia and hypothermia).

30. See, e.g., INTER-AM. COMM'N H.R., ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 2003, OEA/Ser.L/V/II.118, doc. 70 rev. 2 ¶ 60 (2004); *Congo v. Ecuador*, Case 11.427, Inter-Am. Comm'n H.R., Report No. 63/99, OEA/Ser.L/V/II.102, doc. 6 rev. ¶ 59 (1999).

31. See generally MDRI JUDGE ROTENBERG CENTER REPORT, *supra* note 22, at 1; Press Release, Amnesty Int'l, Bulgaria: Disabled Women Condemned to 'Slow Death' (Oct. 10, 2001) (on file with author), available at <http://www.amnesty.org/en/library/asset/EUR15/002/2001/en/02db7d67-d8d7-11dd-ad8c-f3d4445c118e/eur150022001en.pdf>; MENTAL DISABILITY ADVOCACY CTR., LIBERTY DENIED: MENTAL DISABILITY DETENTION IN HUNGARY 8 (2004), available at http://mdac.info/sites/mdac.info/files/English_Liberty%20Denied.pdf.

32. See, e.g., LEANDRO DESPOUY, HUMAN RIGHTS AND DISABLED PERSONS ¶¶ 179–82 (United Nations 1993), available at <http://www.un.org/esa/socdev/enable/dispaperdes0.htm>.

the failure of mainstream human rights practice to account for the violations of the torture prohibition against persons with disabilities, particularly against persons with disabilities in institutional settings, led to the development of a niche human rights practice genre³³ and served as an impetus for drafters of the CRPD to ensure its coverage in the treaty.³⁴

III. THE GENERAL PROHIBITION OF TORTURE AND CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT IN INTERNATIONAL HUMAN RIGHTS LAW

The point of departure for addressing the prohibition of torture and cruel, inhuman, or degrading treatment or punishment in contemporary human rights law is Article 5 of the Universal Declaration of Human Rights (UDHR),³⁵ which states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”³⁶ Article 7 of the International Covenant on Civil and Political Rights (ICCPR)³⁷ reaffirms this prohibition, adopting the same language. It also adds an explicit reference to scientific experimentation in a second sentence that reads: “In particular, no one shall be subjected without his free consent to medical or scientific experimentation”—a standard first set forth in the Nuremberg Code and notably *without* exception or permissible derogation.³⁸

Regional human rights conventions similarly reflect the prohibition against torture and cruel, inhuman, or degrading treatment or

33. The founding of the Mental Disability Rights International organization was the direct result of the failure of Human Rights Watch (HRW) to include disability rights in its agenda, a fact that was readily acknowledged by the Executive Director of HRW at the beginning of the CRPD process. See MDRI KOSOVO REPORT, *supra* note 17, at 22. The work of Mental Disability Advocacy Centre (MDAC) in Budapest is also of particular note and has resulted in successful strategic litigation before the European Court of Human Rights and credible documenting and reporting. See Press Release, Mental Disability Advocacy Ctr., Why Must People with Disabilities Turn to the European Court of Human Rights for Protection? (Aug. 23, 2007), available at <http://mdac.info/MEDIA+RELEASE+23.08.2007>. Also, note that mainstream human rights organizations, including both HRW and Amnesty International, focused on the horrific conditions of detention among political prisoners while ignoring the very same conditions imposed on persons with disabilities. See Janet E. Lord, *Disability Rights and the Human Rights Mainstream*, in THE INTERNATIONAL STRUGGLE FOR NEW HUMAN RIGHTS 83 (Clifford Bob ed., 2009).

34. See CRPD, *supra* note 1, annex I(k).

35. See UDHR, *supra* note 23, art. 5.

36. *Id.*

37. See ICCPR, *supra* note 23, art. 7.

38. *Id.*

punishment as generally articulated in the ICCPR formulation without the explicit reference to medical or scientific experimentation.³⁹ Notably, the American Convention on Human Rights (ACHR) recognizes within a single article (Article 5) the right of the individual “to have his physical, mental and moral integrity respected” along with the right to be free from torture and cruel, inhuman, or degrading treatment or punishment. This article formed the basis of arguments in favor of a similar formulation in the CRPD.⁴⁰

Of additional relevance are those non-binding but authoritative standards and guidelines that have been adopted at the international level in an effort to guide State conduct in the eradication of torture. These include, for example, the Standard Minimum Rules for the Treatment of Prisoners,⁴¹ the Code of Conduct for Law-Enforcement Officials,⁴² the Principles of Medical Ethics,⁴³ and the Body of

39. See CPHRFF, *supra* note 28, art. 3. Trenchantly, during the negotiation of the European Convention, the British representative proposed amending the text to make the torture provision considerably more detailed such that (1) torture would be recognized as a crime against humanity; (2) torture would never be justified under any circumstances; (3) the prohibition would encompass any kind of torture, even that carried out by “private organizations”; (4) the prohibition would extend to beating, “imprisonment with such an excess of light, darkness, noise or silence as to cause mental suffering,” as well as to mutilation and sterilization; and (5) no person shall “be forced to take drugs nor shall they be administered to him without his knowledge and consent.” 2 COUNCIL OF EUROPE, COLLECTED EDITION OF THE “TRAVAUX PRÉPARATOIRES” OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 2–4 (1975). The detailed proposal was eventually withdrawn, not on the basis that such conduct was permissible, but rather that singling out specific instances of torture whilst excluding others would undermine the scope of the prohibition. A leading commentator has concluded that the resulting Article was intended by the drafters of the ECHR to constitute “a very sweeping ban, so broad as to embrace all the forms of torture or inhuman treatment” included in the proposal of the British representative. A. Cassese, *Prohibition of Torture and Inhuman or Degrading Treatment or Punishment*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 225, 228 (R. St. J. Macdonald et al. eds., 1993); Organization of American States, American Convention on Human Rights art. 5, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Organization of American States, Inter-American Convention to Prevent and Punish Torture art. 2, Sept. 12, 1985, O.A.S.T.S. No. 67, 25 I.L.M. 519; African Charter on Human and Peoples’ Rights art. 5, June 27, 1981, 1520 U.N.T.S. 217.

40. See American Convention on Human Rights, *supra* note 39, art. 5; see also Inter-American Convention to Prevent and Punish Torture, *supra* note 39, art. 2.

41. See Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Held at Geneva in 1955, and Approved by the Economic and Social Council by its Resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 (Aug. 30, 1955), <http://www2.ohchr.org/english/law/pdf/treatmentprisoners.pdf> (providing in Rule 3: “Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.”).

42. See Code of Conduct for Law Enforcement Officials, G.A. Res. 34/169, art. 5, U.N. Doc. A/RES/34/169 (Dec. 17, 1979) (“No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may

Principles for the Protection of all Persons under any Form of Detention or Imprisonment.⁴⁴

In 1984, the United Nations adopted a specialized convention on the subject, the Convention against Torture,⁴⁵ that provided a definition of torture—inclusive of torture based on discrimination “of any kind”⁴⁶—and establishes an implementation mechanism, including a Committee against Torture, serving as a treaty monitoring body endowed with the functions of considering State reports, reviewing individual and inter-State communications, and undertaking confidential inquiries.⁴⁷ In 1985, the Human Rights Commission established a Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁴⁸ mandated to investigate allegations of torture in all countries and authorized to issue reports which provide supplemental means of interpreting the nature and scope of the

any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.”).

43. See Principles of Medical Ethics, G.A. Res. 37/194, principle 2, U.N. Doc. A/RES/37/194 (Dec. 18, 1982) (“It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment.”).

44. See Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988), available at <http://www2.ohchr.org/english/law/pdf/bodyprinciples.pdf>.

45. See CAT, *supra* note 24.

46. The Convention Against Torture defines torture as:

“[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incident to lawful sanctions.” *Id.* art. 1, ¶ 1.

47. For the work of the Committee against Torture, see U.N. Office of the High Comm’r for Human Rights, Fact Sheet No. 17, The Committee Against Torture, 2–5 (Jan. 1992), <http://www.unhcr.org/refworld/docid/4794773d2.html>.

48. The Special Rapporteur was appointed by the United Nations Commission on Human Rights in Resolution 1985/33, and is mandated to examine questions pertaining to torture in consideration of all countries, irrespective of whether a State has ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See *Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/issues/torture/rapporteur/> (last visited Oct. 15, 2011).

prohibition, a mandate that continues under the Commission's successor body, the Human Rights Council.⁴⁹ In 2008, the Special Rapporteur released a report that, among other things, detailed the application of the prohibition against torture and other forms of ill-treatment in relation to persons with disabilities.⁵⁰

The foregoing review highlights the CRPD as one of many international human rights instruments and mechanisms designed to address and eradicate torture and other forms of ill-treatment. Disability-specific instruments provide additional guidance on matters pertaining to the physical and mental integrity of persons with disabilities. In particular, the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (MI Principles) affirm the right of persons with psycho-social disabilities to "be treated with humanity and respect for the inherent dignity of the human person."⁵¹ The MI Principles further provide that "[a]ll persons with a mental illness, or who are being treated as such persons, have the right to protection from economic, sexual and other forms of exploitation, physical or other abuse and degrading treatment"⁵² and that "medication . . . shall never be administered as a punishment or for the convenience of others."⁵³

Other MI provisions are decidedly less enlightened; for example, certain MI provisions pitch against facilitating individual choice and autonomy in decisions regarding an individual's right to refuse to take medication.⁵⁴ As Gendreau emphasizes, "far from recognizing the lay character of the decision to accept or to refuse a treatment, these Principles consecrate a particular medical approach to human rights."⁵⁵ Notably, the MI Principles recognize a limited right to refuse treatment or to stop treatment, and in so doing require that "[t]he consequences of

49. Human Rights Council, G.A. Res. 60/251, ¶¶ 3, 5(g), (i)–(j), U.N. Doc. A/Res/60/251 (Apr. 3, 2006).

50. See Nowak *Interim Report*, *supra* note 6, at 2.

51. The Protection of Persons with Mental Illness and the Improvement of Mental Health Care, G.A. Res. 46/119, principle 1.2, U.N. Doc. A/RES/46/119 (Dec. 17, 1991) [hereinafter MI Principles]. For more on the MI Principles, see Eric Rosenthal & Leonard S. Rubenstein, *Human Rights Advocacy Under the "Principles for the Protection of Persons with Mental Illness,"* 16 INT'L J.L. & PSYCHIATRY 257 (1993).

52. MI Principles, *supra* note 51, principle 1.3.

53. *Id.* principle 10.1.

54. *Id.* arts. 6–8, 13, 15.

55. Caroline Gendreau, *The Rights of Psychiatric Patients in the Light of the Principles Announced by the United Nations: A Recognition of the Right to Consent to Treatment?*, 20 INT'L J.L. & PSYCHIATRY 259, 276 (1997).

refusing or stopping treatment must be explained to the patient.”⁵⁶ This perspective and its terminology—rights-holder qua “patient”—implicitly reinforces power differentials and undermines the notion that persons with psycho-social disabilities are rights-holders like all other human beings.⁵⁷ This view is so anathema to certain segments of the disability community, notably anti-psychiatry/survivor advocates, that the MI Principles have been wholly discarded, even as a guide to more progressive disability rights framings in the CRPD.⁵⁸

In keeping with the insights of Celia Albin and others that norms act as “external referents,”⁵⁹ the MI Principles were a lightning rod for the survivor community, whose advocates emphasized their shortcomings and discredited their relevance in order to add normative value to their own claims.⁶⁰ This served to constrain dialogue in significant ways, for example, limiting discussion of those aspects of the MI Principles that some non-governmental organizations (NGOs) regarded as essential safeguards that could be usefully reflected in the CRPD text.⁶¹

56. MI Principles, *supra* note 51, principle 11.4.

57. *See id.*

58. *See* World Network of Users and Survivors of Psychiatry, Submission to the United Nations Ad Hoc Committee on a Comprehensive & Integral International Convention to Promote & Protect the Rights & Dignity of Persons with Disabilities, pmb. (2003), <http://un.org/esa/socdev/enable/rights/contrib-wnusp.htm> [hereinafter WNUSP Position] (asserting that the MI Principles do not reflect international human rights standards and should not be regarded as a legitimate instrument). For an explanation of the divergence of opinion on the MI Principles, see Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUMAN RIGHTS L. REV. 1, 15 (2008). As Kayess and French accurately note, the International Disability Caucus (IDC), in its advocacy position on the CRPD preambular language, sought to omit any mention of the MI Principles as historical antecedents of the CRPD among two other earlier instruments. These omissions “were intensely pursued by the IDC, which sought to negate any relationship between these instruments and the CRPD, and thereby to limit any future reliance upon them for the purposes of interpreting and applying CRPD rights. The IDC’s objections were focused on these instruments’ perceived derivation from the medical model and their approval or acceptance of institutionalization, substitute decision-making, and the compulsory treatment of persons with disability.” *Id.* at 24–25.

59. *See* CECILIA ALBIN, JUSTICE AND FAIRNESS IN INTERNATIONAL NEGOTIATION 228 (2001).

60. For more on this fraught and embittered advocacy between anti-psychiatry survivors and those adopting an alternative perspective, see Janet E. Lord, *Mirror, Mirror on the Wall: Voice Accountability and NGOs in Human Rights Standard Setting*, 5 SETON HALL J. DIPL. & INT’L REL. 93, 100–01 (2004).

61. NGOs such as DRI routinely invoke the MI Principles in human rights reporting, in particular the procedural safeguards reflected therein that serve as checks on the arbitrary decision-making of mental health professionals. *See also* OCHR Report, *supra* note 6, at 6–8 (discussing the importance of the CRPD as a means to prevent forced psychiatric intervention).

Other disability-specific instruments set the foundation for the development of the CRPD and serve to highlight threats to the physical and mental integrity of persons with disabilities. For example, the World Programme of Action concerning Disabled Persons, adopted in 1982,⁶² recognizes the issue of violence and torture as a cause of disability and emphasizes the importance of taking action to prevent such violence.⁶³ The Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted in 1993,⁶⁴ were formulated along with the World Programme in lieu of a disability-specific treaty; however, these rules failed to fully address civil rights, such as the right to be free from torture, which served as the primary disability-specific touchstone during negotiations on the CRPD anti-torture provisions.⁶⁵

Finally, international humanitarian law also provides a repository of rules pertaining specifically to the prohibition of torture and ill-treatment and offers disability-specific guidance in certain instances, although within a decidedly paternalistic model of protection.⁶⁶

62. World Programme of Action Concerning Disabled Persons, G.A. Res. 37/52, U.N. Doc. A/RES/37/52 (Dec. 3, 1982).

63. See UNITED NATIONS, WORLD PROGRAMME OF ACTION CONCERNING DISABLED PERSONS ¶ 49, available at <http://www.leeds.ac.uk/disability-studies/archiveuk/united%20nations/world%20programme.pdf> (“Victims of torture who have been disabled physically or mentally, not by accident of birth or normal activity, but by the deliberate infliction of injury, form another group of disabled persons.”); see also *id.* ¶ 168 (“Incidents of gross violation of basic human rights, including torture, can be a cause of mental and physical disability. The Commission on Human Rights should give consideration, inter alia, to such violations for the purpose of taking appropriate ameliorative action.”). Note, however, that the World Programme of Action, adopted in 1982, is very much a product of its time because it conflates disability rights with disability prevention and often echoes a decidedly medical model approach.

64. Standard Rules on the Equalization of Opportunities for Persons with Disabilities, G.A. Res. 48/96, U.N. Doc. A/RES/48/96 (Mar. 4, 1994).

65. See *id.* As mentioned in note 58, *supra*, earlier soft law instruments adopted during the 1970s fell into desuetude during negotiations due to their outmoded and controversial disability characterizations. These included both the Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856 (XXVI), U.N. Doc. A/RES/26/2856 (XXVI) (Dec. 20, 1971) and the Declaration on the Rights of Disabled Persons, G.A. Res. 3447 (XXX), U.N. Doc. A/RES/30/3447 (Dec. 9, 1975).

66. For a discussion of violations of human rights and humanitarian law as factors causing disability, see DESPOUY, *supra* note 32, ¶¶ 119–26. International humanitarian law largely reflects medical/charity approaches to disability that rights-based and social/contextual models of disability have disparaged. See Janet E. Lord & Michael A. Stein, *Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation, and Play*, 27 B.U. INT’L L.J. 249, 255 (2009) (noting that “[t]he shifting perspective of the social model, in contrast to the traditional medical model approach, reveals that the many factors exogenous to a disabled person’s own limitations are really what determine the extent to which that individual will be able to function in a given society”). Still, it should be noted that international humanitarian law is a

IV. THE ANTI-TORTURE FRAMEWORK WITHIN THE DISABILITY TREATY
NEGOTIATIONS

A. The CRPD Drafting Context

The Ad Hoc Committee responsible for negotiating the CRPD during the course of eight sessions and one working group meeting finalized its elaboration of the consensus CRPD text in August 2006, and in December 2006, it was adopted by the General Assembly.⁶⁷ The text that emerged from that process as Article 15 of the CRPD is a relatively sparse provision.⁶⁸ It adds little to existing human rights law on the prohibition against torture,⁶⁹ at least if read apart from other CRPD provisions that most certainly expand its meaning and intended application.⁷⁰ The consensus text also masks the considerable disagreement that surrounded the provision during the drafting process and that is extant at the level of State practice.⁷¹

The drafting of the CRPD torture and abuse provisions took place against a well-developed normative landscape, which helped to shape actor identities and interests during the negotiation of Article 15 and related provisions.⁷² Various claims were put forward to support varying perspectives on how best to reflect the prohibition against torture and

minimalist regime, seeking not to restructure or work systemic change in society; rather, it seeks to secure a protective veil around particularly vulnerable groups in armed conflict situations.

67. See United Nations General Assembly, 61st Sess., U.N. Doc No. A/61/611 (Dec. 6, 2006), <http://www.un.org/esa/socdev/enable/rights/convtexte.htm> [hereinafter United Nations General Assembly, 61st Sess.].

68. See CRPD, *supra* note 1, art. 15.

69. See, e.g., UDHR, *supra* note 23, art. 5; ICCPR, *supra* note 23, art. 7.

70. See CRPD, *supra* note 1. Article 15 must be read with reference to the articles of general application in the CRPD (Articles 1 through 9) and holistically, with reference to all other articles of the CRPD. For an overview of the structure and substantive obligations of the CRPD, see *Process, Substance and Prospects*, *supra* note 2, at 495–96, 500–04.

71. For a more detailed discussion of disagreements regarding past and future conventions, see Aaron A. Dhir, *Human Rights Treaty Drafting Through the Lens of Mental Disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, 41 STAN. J. INT'L L. 181, 191–96 (2005). I have argued elsewhere that accounts of international law-making tend to overgeneralize and exaggerate processes of norm development, either because of the international lawyer's drive to prove the existence and relevance of legal norms or the interest of the international relations scholar to prove the power of non-State actors in norm development, maintenance, and change. See Janet E. Lord, *Normative Landscaping: Power and Norms within Human Rights Law-Making Processes*, Paper presented at Annual International Studies Association Conference, Honolulu, HI, March 2005 (on file with author).

72. See *Process, Substance and Prospects*, *supra* note 2; see also MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 3 (1996) (suggesting that the effects of norms are shared understandings according to which actor identities and interests are shaped).

other cruel, inhuman, or treatment or punishment within the disability context.⁷³ In that regard, the CRPD process offered an interesting perspective on norm development, maintenance, and change in a specialized drafting context where the mandate was not to create “new” law, but rather to apply existing rights to persons with disabilities.⁷⁴ While ostensibly a theoretical exercise, such a perspective offers a deeper and richer understanding of human rights law in practice and can yield important insights for drafters and treaty implementers.

In keeping with Brunnée’s (re)conceptualization of consensus in international law, human rights law-making (and law-making in other realms) is not fixed in time and fused at the point of formal adoption, but is a “continuous interactional [process].”⁷⁵ Under this view, the CRPD negotiations formed a process whereby certain shared understandings converged regarding disability in relation to human rights law. In some instances, the negotiations triggered the progressive development of norms, while in other cases, negotiating conditions fostered constraint and even retraction. Here, Clifford Bob’s observation—that contentious and extensive political interactions occurring at every stage of the human rights law-making and implementation continuum are relevant to understanding norm diffusion—is particularly apt.⁷⁶ Furthermore, this perspective on human rights law-making complements the continual development of law, rather than the static perspective yielded by traditional notions of consent that fail to explain human rights law-making.

Understanding the normative “stickiness” of a particular provision is germane to treaty drafting actors, whether government delegates, NGO advocates, national human rights institutions, or others with

73. See *infra* notes 78–145 and accompanying text.

74. See Kayess & French, *supra* note 58, at 20 (noting that “[t]he GA mandate under which the CRPD was developed stipulated that the negotiating Committee was not to develop any new human rights, but was to apply existing human rights to the particular circumstances of persons with disability”). For Michael Byers’ fascinating (but underappreciated) work on norm maintenance, development, and change within the context of customary international law, see MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW* (1999) (applying an interdisciplinary perspective to study power and rules within the customary international law process; more specifically, the work examines an interactive and evolving customary law process that is shaped by State relations and poignantly structured by existing rules despite power differentials).

75. Jutta Brunnée, *COPing with Consent: Law-Making Under Multilateral Environmental Agreements*, 15 LEIDEN J. INT’L L. 1, 6 (2002).

76. See Clifford Bob, *Fighting for New Rights*, in *THE INTERNATIONAL STRUGGLE FOR NEW HUMAN RIGHTS* 1, 30 (Clifford Bob ed., 2009).

interests in the process.⁷⁷ Where a particular provision is a carefully negotiated text, its chances of progressive development in instances such as elaboration through interpretation are likely more limited. This also holds true with regard to the evolution of a well-settled norm that has developed over time. The discussion that follows tracks the drafting of Article 15 and related provisions and seeks to explain the shared understanding and outstanding disagreement masked by the consensus text. This discussion will also yield some insight into Article 15 application and implementation. As drafted, many core human rights issues with the potential to trigger State responsibility under Article 15 will require elaborate argumentation that draws on a holistic reading of the CRPD and engages provisions on non-discrimination and reasonable accommodation (Articles 2, 3, & 5), legal capacity (Article 12), physical and mental integrity (Article 17), informed consent (Articles 15 & 25), and liberty of the person (Article 14).

B. Freedom from Torture and What Other Forms of Abuse?

Some, though not all, of the early draft CRPD proposals and position papers reflected the inclusion of a provision prohibiting torture and cruel, inhuman, and degrading treatment or punishment of persons with disabilities.⁷⁸ The first proposal tabled at the Ad Hoc Committee, that of Mexico, included a provision on torture, cruel, inhumane, or

77. Malcolm Gladwell refers to the “stickiness factor” in his book, *The Tipping Point*, to discern the ingredient of a message that makes it memorable and gives it staying power. Normative stickiness, as used here, is similar because it understands the power of context and normative evolution’s sensitivity to the conditions and circumstances in which normative claims are made and deployed. See MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 19, 92 (2002).

78. See, e.g., Ad Hoc Comm. on a Comprehensive & Integral Int’l Convention on Prot. & Promotion of the Rights & Dignity of Persons with Disabilities, Convention on the Rights of Persons with Disabilities: Working Paper by Mexico, art. 9, July 29–Aug. 9, 2002, U.N. Doc. A/AC.265/WP.1 [hereinafter Mexico Working Paper on Convention] (prescribing measures to prohibit sexual abuse and degrading treatment of persons with mental disabilities, and proposing strict regulation of psychiatric institutions); Ad Hoc Comm. on a Comprehensive & Integral Int’l Convention on the Prot. & Promotion of the Rights & Dignity of Persons with Disabilities, Convention on the Rights of Persons with Disabilities: A Proposed Draft Text by China, arts. 5, 12 (Dec. 11, 2003), <http://www.un.org/esa/socdev/enable/rights/wgcontrib-china.htm> [hereinafter Proposed Draft by China] (ensuring the freedom and independence of persons with disabilities and designating hate crimes against persons with disabilities as “aggravated criminal behavior”); cf. Ad Hoc Comm. on a Comprehensive & Integral Int’l Convention on Prot. & Promotion of the Rights & Dignity of Persons with Disabilities, Draft Submitted by the Government of the Bolivarian Republic of Venezuela, arts. 11–12, 17, June 16–27, 2003, U.N. Doc. A/AC.265/2003/WP.1 [hereinafter Venezuela Draft] (proscribing various forms of violence and abuse and medical experimentation, though failing to reference the torture prohibition).

degrading treatment or punishment, as well as other violence.⁷⁹ A legal analysis of the text, however, noted that while the proposal recognized that persons with disabilities are vulnerable to various forms of violence, the drafters did not couch the provision in terms of an explicit prohibition in line with existing international human rights law.⁸⁰ Rather, the provision required States to guarantee respect for dignity and integrity and, in that sense, represented weaker protection.⁸¹ The formulation received little attention, but it likely served as a placeholder for coverage of the torture prohibition in subsequent proposals, much as other provisions in the Mexican proposal helped shape the final text.⁸²

Following the second meeting of the Ad Hoc Committee in 2003, a regional consultation in Bangkok resulted in the adoption of a comprehensive draft convention, which was then submitted to the 2004 Working Group.⁸³ The draft ultimately served as the basis for several Working Group draft provisions.⁸⁴ Draft Article 12(1)⁸⁵ of the Bangkok

79. Article 9 of the Mexican proposal provided: "States Parties recognize that persons with disabilities are particularly vulnerable to different forms of violence, as well as torture and other cruel, inhumane or degrading treatment or punishment, in public and private spheres. Therefore, States shall guarantee respect for the dignity and integrity of persons with disabilities." Mexico Working Paper on Convention, *supra* note 78, art. 9. A legal analysis of the text noted that while the proposal recognizes that people with disabilities are vulnerable to various forms of violence, the provision was not couched in terms of an explicit prohibition in line with existing international human rights law. Rather, it required States to guarantee respect for dignity and integrity and, in that sense, represented weaker protection. See Janet E. Lord & Katherine N. Guernsey, Legal Commentary on the Mexico Proposal, submitted to the Permanent Mission of Mexico to the United Nations (Winter 2002) (on file with author).

80. *Id.* at 9–10.

81. *Id.*

82. Perhaps the best example of the influence of the Mexican proposal was the inclusion of a provision with an amplified Conference of States Parties, an innovation for human rights treaties. See CRPD, *supra* note 1, art. 40; cf. Mexico Working Paper on Convention, *supra* note 78, art. 19 (originally proposing the provision).

83. Regional Workshop Towards a Comprehensive & Integral Int'l Convention on Prot. & Promotion of the Rights & Dignity of Persons with Disabilities, Oct. 14–17, 2003, *Bangkok Draft: Proposed Elements of a Comprehensive and Integral International Convention to Promote and Protect the Rights of Persons with Disabilities*, available at <http://www.un.org/esa/socdev/enable/rights/bangkokdraft.htm> [hereinafter *Bangkok Draft*].

84. See Report of the Working Group to the Ad Hoc Committee, Ad Hoc Comm. on a Comprehensive & Integral Int'l Convention on the Prot. & Promotion of the Rights & Dignity of Persons with Disabilities, Jan. 5–16, 2004, annex I, art. 11, U.N. Doc. A/AC.265/2004/WG.1 (Jan. 27, 2004), available at <http://www.un.org/esa/socdev/enable/documents/ahcwgreport.pdf> [hereinafter Working Group Report].

85. *Bangkok Draft*, *supra* note 83, art. 12, ¶ 1 ("No person with disability shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation [or intervention].").

text articulated the legal prohibition against torture and other cruel, inhuman, or degrading treatment of people with disabilities in terms consistent with the ICCPR formulation and inclusive of the ICCPR reference to prohibited “medical and scientific experimentation.”⁸⁶ It also included a bracketed addition (“[or intervention]”) that would prohibit not only medical and scientific experimentation, but also undefined types of interventions.⁸⁷ The brackets signaled significant disagreement among the Bangkok meeting participants about the expansion of prohibited conduct beyond experimentation.⁸⁸ The language broadened the prohibited sphere of conduct and was intended to include involuntary medical interventions commonly provided to people with psycho-social disabilities, such as forced drugging.⁸⁹

The Bangkok draft included two paragraphs that represented a further effort to tailor the prohibition of torture and other ill-treatment to the particular situation faced by people with disabilities.⁹⁰ The first of these bracketed paragraphs suggest that medical or scientific “intervention” is lawful, provided that it is accompanied by a form of consent given by someone else, without specifying who, under what conditions, or otherwise providing the level of detail necessary to render the consent proviso meaningful.⁹¹ In other words, it addressed, to some extent, the situation of safeguards around substituted decision-making. Drafters were concerned with the issue of substituted decision-making throughout the negotiations⁹² and ultimately addressed it, not in the provision concerning torture, but in Article 12 of the final CRPD text.⁹³ The second bracketed paragraph added a prohibition against forced interventions aimed at altering a perceived or actual disability.⁹⁴ Finally, the Bangkok draft included a third paragraph that addressed violence

86. ICCPR, *supra* note 23, art. 7.

87. *Bangkok Draft*, *supra* note 83, art. 12, ¶ 1.

88. *See id.* art. 2, ¶ 4.

89. *See id.* art. 12, ¶ 1.

90. *See id.* art. 12, ¶ 2.

91. *See id.* (“Where any person with disability is unable to give free and informed consent, no intervention shall occur unless a form of consent is given on their behalf by a duly authorized authority.”).

92. *See* Ad Hoc Comm. on a Comprehensive & Integral Int’l Convention on Prot. & Promotion of the Rights & Dignity of Persons with Disabilities, Views submitted by Governments, Note by the Secretary-General, ¶ 66, UN Doc. A/AC.265/2003/4+A/AC.265/2003/4/Corr.1 (June 16–27, 2003).

93. *See* CRPD, *supra* note 1, art. 12, ¶ 4.

94. *Bangkok Draft*, *supra* note 83, art. 12, ¶ 2 (“Everyone has the right not to be subjected to forced or coerced interventions of a medical nature or otherwise, aimed at correcting, improving, or alleviating any actual or perceived impairment.”).

and abuse against persons with disabilities more generally, making specific mention of women and children and requiring States to “take all appropriate legislative, administrative, social and educational measures” to provide protection against such acts.⁹⁵

The resulting Working Group text, adopted in 2004, and drawing in particular on the Bangkok formulation, was substantially broader than the final provision reflected in Article 15 of the CRPD.⁹⁶ The final text engaged State responsibility for forced institutionalization and forced treatment, in addition to addressing torture and other cruel, inhuman, or degrading treatment or punishment and medical and scientific experimentation.⁹⁷

1. States Parties shall take all effective legislative, administrative, judicial, educational or other measures to prevent persons with disabilities from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

2. In particular, States Parties shall prohibit, and protect persons with disabilities from, medical or scientific experimentation without the free and informed consent of the person concerned, and shall protect persons with disabilities from forced interventions or forced institutionalization aimed at correcting, improving, or alleviating any actual or perceived impairment.⁹⁸

The Coordinator noted during Working Group discussions that the traditional presumption, evident in State practice, in favor of involuntary interventions stands in contrast to the contemporary approach. Unlike the contemporary approach, the traditional approach expresses a presumption *against* intervention unless necessary.⁹⁹ This contrast, the Coordinator concluded, signals that the contemporary approach could be a useful development.¹⁰⁰

95. *Id.* art. 12, ¶ 3 (“States Parties shall take all appropriate legislative, administrative, social and educational measures to protect persons with disabilities, in particular, women and children with disabilities, from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.”).

96. *See* CRPD, *supra* note 1, art. 15.

97. *See* Contributions Submitted by Governments in Electronic Format at the Fourth Session, Proposed Modifications to Draft Article 11: Freedom from Torture or Cruel, Inhuman or Degrading Treatment or Punishment, art. 11, ¶¶ 1–2, <http://www.un.org/esa/socdev/enable/rights/ahc4da11.htm> [hereinafter Fourth Session Modifications].

98. *Id.*

99. Working Group on the Convention on the Rights of People with Disabilities, Working Group Daily Summary, Vol. 3, No. 3, 4 (January 7, 2004), <http://web.archive.org/web/20080511214655/http://www.worldenable.net/rights/wg1meetsummary03.htm> (accessed through the Internet Archive) [hereinafter Working Group Daily Summary].

100. *Id.* art. 11(1)–(2).

A number of delegations expressed support for the general approach taken in the draft text, albeit with caveats that revealed a considerable discomfiture.¹⁰¹ Japan noted, for example, that in principle, no forced intervention or institutionalization should occur.¹⁰² In exceptional cases, however, where forced intervention may be necessary—in cases of harm to self or others—there must be strict guidelines to prevent abuse and the convention should include judicial remedies for abuse.¹⁰³ A footnote to the Working Group text presaged some of the most controversial aspects of future negotiating sessions and referenced a divergence in views on both (i) the appropriate placement of provisions concerning forced intervention and forced institutionalization, and (ii) whether such practices “should be permitted in accordance with appropriate legal procedures and safeguards.”¹⁰⁴

During the Third Session of the Ad Hoc Committee in 2004, much of the discussion on the draft torture provision in the Working Group draft centered on the appropriate placement of the language, at paragraph two, concerning forced intervention and forced institutionalization.¹⁰⁵ While the International Disability Caucus (IDC), the coalition of disability organizations formed during the drafting process, asserted that forced interventions and institutionalization constitute cruel and inhuman treatment and therefore should be covered in the article on torture, support for this position represented only a small minority of the overall views.¹⁰⁶ The most vocal NGO on this

101. See generally Working Group Daily Summary, *supra* note 99.

102. *Id.*

103. *Id.*

104. Ad Hoc Comm. on a Comprehensive & Integral Int’l Convention on the Prot. & Promotion of the Rights & Dignity of Persons with Disabilities, Rep. on its 3rd Sess., May 24–June 4, 2004, 26 n.38, U.N. Doc. A/AC.265/2004/5 (June 9, 2004), <http://www.un.org/esa/socdev/enable/documents/ahc3reporte.pdf> [hereinafter Report on Third Session] (“Members of the Working Group had differing opinions on whether forced intervention and forced institutionalization should be dealt with under ‘Freedom from torture’, or under ‘Freedom from violence and abuse’, or under both. Some members also considered that forced medical intervention and forced institutionalization should be permitted in accordance with appropriate legal procedures and safeguards.”).

105. See Working Group Report, *supra* note 84, at 17 n.38.

106. The position of the World Network of Users and Survivors of Psychiatry, articulated at the Third Session, held constant throughout the negotiations, namely, that forced interventions constitute torture and that they must be proscribed in the torture provision as opposed to addressed in another article. See WNUSP Position, *supra* note 58. This position was endorsed at the Third Session by Kenya. See Ad Hoc Comm. on a Comprehensive & Integral Int’l Convention to Promote & Protect the Rights of Persons with Disabilities, Daily Summary of Third Meeting, Vol. 4, No. 3 (May 26, 2004), available at <http://www.un.org/esa/socdev/enable/rights/ahc3sum26may.htm> [hereinafter Summary of Third Meeting].

issue was the World Network of Users and Survivors of Psychiatry (WNUSP) whose position was that the new treaty “should prohibit unwanted medical and related interventions as a form of torture or cruel, inhuman or degrading treatment or punishment . . . [and] prohibit any kind of confinement or internment based in whole or in part on disability.”¹⁰⁷ WNUSP therefore held that the specific language was important to include in the draft torture provision and should not be shifted elsewhere, or worse, be excluded altogether creating the need to assert a prohibition by implication.¹⁰⁸

Other attempts during the Third Session to broaden language formulations, as in Algeria’s proposal to proscribe torture “in all its forms,”¹⁰⁹ Thailand’s proposal in relation to the prohibition of medical or scientific “and other forms of” experimentation,¹¹⁰ and Uganda’s proposal to reference “abduction,”¹¹¹ alongside the language requiring protection from forced interventions, received only limited support. As detailed below, delegations preferred to maintain formulations that mirrored language found in the ICCPR.¹¹² Also, at the Third Session, India proposed to merge Article 11 and 12 (violence and abuse), which received some support, but was not ultimately accepted.¹¹³ In addition, Mexico introduced a proposal to add a third paragraph to the draft article which would address monitoring the living situations of persons with disabilities.¹¹⁴ This proposal appeared in the draft text of the Report of the Third Session, but it did not make its way into the final text

107. WNUSP Position, *supra* note 58. For more discussion on the drafting of the CRPD provisions concerning persons with mental disabilities, see Dhir, *supra* note 71.

108. See WNUSP Position, *supra* note 58.

109. Report on Third Session, *supra* note 104, art. 11, ¶ 1; see Summary of Third Meeting, *supra* note 106.

110. Report on Third Session, *supra* note 104, art. 11, ¶ 2; see Summary of Third Meeting, *supra* note 106.

111. Report on Third Session, *supra* note 104, art. 11, ¶ 2.

112. See ICCPR, *supra* note 23, art. 7.

113. Report on Third Session, *supra* note 104, art. 11, ¶ 1. At the Fifth Session, the Coordinator referred Article 11 to a Facilitator, Ms. Carina Mårtensson. Ad Hoc Comm. on a Comprehensive & Integral Int’l Convention on the Prot. & Promotion of the Rights & Dignity of Persons with Disabilities, Rep. on its 5th Sess., Jan. 24, 2007–Feb. 4, 2007, ¶ 39, U.N. Doc. A/AC.265/2005/2 (Feb. 23, 2005), available at <http://www.un.org/esa/socdev/enable/rights/ahc5docs/ahc5reporte.pdf> [hereinafter Report on Fifth Session].

114. See Report on Third Session, *supra* note 104, art. 11, ¶ 3; Summary of Third Meeting, *supra* note 106. The amendment on monitoring proposed by Mexico provided: “In order to monitor living conditions and facilities of places where persons with disabilities are placed, international instruments shall be applied, as appropriate, including the Optional Protocol of the Convention against Torture, for the realization of visits by national or international bodies to detention centres.” Report on Third Session, *supra* note 104, art. 11, ¶ 3.

(although the final text of Article 16 does contain a monitoring provision).¹¹⁵ This reflected the drafters' sense that close monitoring of the living conditions of persons with disabilities in prisons and other institutional settings is essential.¹¹⁶

The draft provision (Article 11) was taken up briefly again at the Fourth Session of the Ad Hoc Committee.¹¹⁷ Discussions quickly turned to structural and, by implication, substantive concerns over the inclusion of the second sentence of Article 11(2), with the EU proposing deletion of the language "and shall protect persons with disabilities from forced interventions or forced institutionalisation aimed at correcting, improving, or alleviating any actual or perceived impairment."¹¹⁸ This proposal was supported by a number of delegations primarily on the basis that such practices do not give rise to an absolute prohibition against which no derogation is permitted, unlike the proscription of torture and other cruel, inhuman, and degrading treatment or punishment.¹¹⁹ Accordingly, there was a strong move at the Fourth Session to extract the reference to forced institutionalization and forced treatment for placement elsewhere in the draft convention, separate and apart from the torture provision.¹²⁰

At the Fifth Session in 2005, New Zealand proffered new language that sought to address the substantive issues of medical and scientific experimentation, forced institutionalization, and involuntary treatment by amending draft Articles 11 and 12 and creating a new Article 12 (bis).¹²¹ Its core rationale for doing so was based on its view that forced interventions and forced institutionalization are best addressed in the

115. See CRPD, *supra* note 1, art. 16, ¶ 3 ("In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.").

116. See, e.g., Proposed Draft by China, *supra* note 78, art. 7; Venezuela Draft, *supra* note 78, arts. 11–12, 17.

117. See Ad Hoc Comm. on a Comprehensive & Integral Int'l Convention on the Prot. & Promotion of the Rights & Dignity of Persons with Disabilities, Rep. on its 4th Sess., ¶ 9, U.N. Doc. A/59/360, (Sept. 14, 2004), available at <http://www.un.org/esa/socdev/enable/rights/ahc4reporte.htm>.

118. See Fourth Session Modifications, *supra* note 97, art. 11, ¶ 2.

119. See Summary of Third Meeting, *supra* note 106.

120. See Ad Hoc Comm. on the Convention on the Rights of People with Disabilities, Daily Summary of Discussions Related to Article 11, Vol. 5, No. 4 (Aug. 26, 2004), available at <http://www.un.org/esa/socdev/enable/rights/ahc4sumart11.htm>.

121. See New Zealand: Proposed Modifications to Draft Articles 11 and 12, Contributions to the Fifth Session of the Ad Hoc Committee on a Comprehensive & Integral Int'l Convention on Prot. & Promotion of the Rights & Dignity of Persons with Disabilities, <http://www.un.org/esa/socdev/enable/rights/ahc5newzealand.htm> [hereinafter New Zealand Proposed Modifications].

context of a new article on “Free and Informed Consent to Interventions,” separate from Article 11, because “there are absolutely no circumstances where violence, abuse and torture or cruel, inhumane or degrading treatment is acceptable.”¹²²

While the New Zealand proposal was not taken up, the Fifth Session considerably advanced the form and structure of the draft article on torture.¹²³ The draft provision was reordered with a new first paragraph added to closely mirror the language in the ICCPR. It reflected the view of States that the language must contain an absolute prohibition against torture and other forms of abuse, in line with other instruments.¹²⁴ The original first paragraph as drafted by the Working Group was renumbered and structured as paragraph 2.¹²⁵

Outstanding difficulties related to the draft provision on torture were referred to the facilitator at the Fifth Session for informal consultations among States in an effort to reach consensus on those

122. *Id.* The new language proposed for a draft Article 12 (bis) provided:

1. States Parties shall take the necessary measures to ensure that medical or scientific, experimentation or interventions, including corrective surgery, aimed at correcting, improving or alleviating any actual or perceived impairment, are undertaken with the free and informed consent of the person concerned[.]
2. Such measures shall include the provision of appropriate and accessible information to persons with disabilities and their families[.]
3. States Parties shall accept the principle that forced institutionalisation of persons with disabilities on the basis of disability is illegal.
4. In countries where involuntary treatment has not been abolished it shall only be used only in exceptional circumstances prescribed by law and its use shall be minimised through the active promotion of alternatives[.]
5. States Parties shall ensure in any case of involuntary treatment of persons with disabilities that:
 - a. it is undertaken in accordance with the procedures established by law and with the application of appropriate legal safeguards[;]
 - b. the law shall provide that the interventions are in the least restrictive settings possible and the best interests of the person concerned will be fully taken into account[; and]
 - c. forced interventions are appropriate for the person and provided without financial cost to the individual receiving the treatment or to his or her family.

Australia reflected the view of many States during the course of the negotiations on Article 11 in stating that “a simple blanket ban on involuntary interventions or care of any kind, without the consideration that this may be necessary in some occasions with appropriate legal procedures and safeguards, is not acceptable.” Ad Hoc Comm. on a Comprehensive & Integral Int’l Convention on Prot. & Promotion of the Rights & Dignity of Persons with Disabilities, Daily Summary of Discussion at the Fifth Session, Vol. 6, No. 5 (Jan. 28, 2005), <http://www.un.org/esa/socdev/enable/rights/ahc5sum28jan.htm>.

123. See Report on Fifth Session, *supra* note 113, ¶¶ 36–42.

124. See *id.* ¶ 36.

125. See *id.* ¶ 37.

matters.¹²⁶ One proposal suggested an amendment to the language “free and informed consent” to more explicitly emphasize the nature of consent (“free, informed and clearly expressed prior consent”).¹²⁷ Notably, some delegations opposed any change on the basis that the phrase was well-understood in international human rights law,¹²⁸ which was reflected in a General Comment of the Human Rights Committee,¹²⁹ and also on the basis that the notion of prior, clear expression of consent was implicit.¹³⁰ Second, the Fifth Session proposed that the words “or other form of” be added to the phrase “medical or scientific experimentation,” which would then read “medical, scientific or other forms of experimentation,” and thus broaden the parameters of the prohibition.¹³¹ Finally, delegations were in agreement on the wording “[s]tates parties shall prohibit, and protect persons with disabilities from, medical or scientific experimentation without the free and informed consent of the person concerned,” but were unable to reach consensus on the wording or placement of the second part of the provision referencing the principle of protecting persons with disabilities from “forced interventions or forced institutionalization aimed at correcting, improving or alleviating any actual or perceived impairment.”¹³² Similarly, the Fifth Session designated the wording and meaning of the terms “institutionalization” and “perceived” in the draft text for further consideration, along with the overall placement of the provision.¹³³ There seemed to be consensus in line with the recommendation of the Chair that paragraph 2 follow the formula used in the United Nations Convention Against Torture (CAT), Article 2(1), which refers to “legislative, administrative, judicial or other measures”

126. *See id.* ¶¶ 38–42.

127. *Id.* ¶ 39. Thus, in the position paper of New Zealand submitted at the Fifth Session, it was emphasized that care should be taken “to separate the right to free and informed consent from issues related to torture and abuse.” Furthermore, “[u]nlike torture or violence there are exceptions to the right to free and informed consent.” Also, “[i]f this convention is to outline these exceptions, which essentially allow for some forms of involuntary treatment, then they must be given strong qualifiers and detailed attention.” New Zealand Proposed Modifications, *supra* note 121.

128. *See* Report on Fifth Session, *supra* note 113, ¶ 39.

129. *See* Int’l Covenant on Civil & Political Rights, General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (Mar. 10, 1992), <http://www.unhcr.org/refworld/docid/453883fb0.html> [hereinafter CCPR General Comment No. 20].

130. *See* Report on Fifth Session, *supra* note 113, ¶ 39.

131. *See id.* ¶ 40.

132. *See id.* ¶ 41.

133. *See id.*

and which had been supported by a number of delegations on the basis that further amplification was unnecessary and might create interpretive difficulties in relation to the CAT.¹³⁴

At the Seventh Session, the Ad Hoc Committee resumed its consideration of the draft provision on torture and other forms of ill-treatment, which had been renumbered Article 15 during the course of amendments and overall restructuring of the draft convention text.¹³⁵ The IDC maintained its position that language concerning the protection of the right to mental and physical integrity be moved to the torture prohibition article and be further amended to reflect language in the American Convention.¹³⁶ The Chair's summary of discussions indicated that (i) the draft text had a good level of support; (ii) the proposal to restructure Article 15(1) by moving the second sentence to Article 17¹³⁷ was supported by some, opposed by others, and would be revisited; and (iii) the Mexican proposal to replace the term "experimentation" with "procedures" had some support, but it was withdrawn in view of the debate.¹³⁸

C. Medical Experimentation Prohibition and the Travaux Préparatoires

The original Working Group text contained the prohibition against medical and scientific experimentation in a second discrete paragraph, following the first paragraph concerning torture.¹³⁹ The provision made specific reference to the prohibition in the absence of free and informed

134. See Ad Hoc Comm. on a Comprehensive & Integral Int'l Convention on Prot. & Promotion of the Rights & Dignity of Persons with Disabilities, Letter dated 7 October 2005 from the Chairman to all members of the Committee, ¶ 62, U.N. Doc. A/AC.265/2006/1 (Oct. 14, 2005), <http://www.un.org/esa/socdev/enable/rights/ahcchairletter7oct.htm>.

135. See Ad Hoc Comm. on a Comprehensive & Integral Int'l Convention on the Prot. & Promotion of the Rights & Dignity of Persons with Disabilities, Report of the Coordinator to the Fifth Session, Draft Article 11, <http://www.un.org/esa/socdev/enable/rights/ahcstata15fisreport.htm>.

136. See Int'l Disability Caucus, *Chairman's Text as Amended by the International Disability Caucus* art. 17 (Working Paper), available at <http://www.un.org/esa/socdev/enable/rights/ahc7docs/ahc7idcchairamend1.doc> (last visited Oct. 15, 2011) [hereinafter IDC Chairman's Text].

137. See Ad Hoc Comm. on a Comprehensive & Integral Int'l Convention on Prot. & Promotion of the Rights & Dignity of Persons with Disabilities, Daily Summary of Discussion at the Seventh Session, Vol. 8, No. 4, art. 15 (Jan. 19, 2006), <http://www.un.org/esa/socdev/enable/rights/ahc7sum19jan.htm>.

138. See IDC Chairman's Text, *supra* note 136, art. 17.

139. See Working Group Report, *supra* note 84, art. 11, ¶ 2.

consent language included in Article 7 of the ICCPR,¹⁴⁰ but not appearing in the UDHR, ECHR, or ACHR. As noted by Nowak, the drafting history of the ICCPR reveals the tension faced by drafters in finding a formulation that expressly prohibits criminal experimentation, whilst preserving legitimate scientific and medical experiments or practices, such as emergency medical procedures to preserve the life of an unconscious person, required vaccination programs, or water fluoridation programs.¹⁴¹

Early discussions in the drafting of the CRPD concerning the prohibition of scientific and medical experimentation centered on its controversial pairing with language concerning protection from forced interventions and forced institutionalization in the Working Group text.¹⁴² The draft paragraph, therefore, carried both an obligation reflected in the ICCPR (prohibition against medical experimentation absent informed consent) as well as the additional obligation to “protect persons with disabilities from forced interventions or forced institutionalization aimed at correcting, improving, or alleviating any actual or perceived impairment.”¹⁴³ This formulation was controversial, however, because there was no precedent found in existing human rights conventions to support the additional obligation.¹⁴⁴ A footnote to the Working Group text referenced the controversy surrounding this additional reference, both in terms of its structural placement as well as its substantive impact.¹⁴⁵ During the Working Group, some States expressed concern over the inclusion of the issue of forced

140. See ICCPR, *supra* note 23, art. 7.

141. See NOWAK, *supra* note 25, at 138; see also Zaim M. Nedjati, *Human Rights Under the European Convention*, in 8 EUROPEAN STUDIES IN LAW 61, 63 (A.G. Chloros ed., 1978) (“Having regard to the travaux préparatoires of the UN Covenant text . . . it would appear that there was no intention in Article 7 of the Covenant to exclude genuine medical experiments or to prohibit practices which might be permitted in European Member States, such as experiments with the fluoridation of water.”).

142. See Fourth Session Modifications, *supra* note 97, draft art. 11, ¶ 2.

143. Working Group Report, *supra* note 84, draft art. 11, ¶ 2.

144. See generally Fourth Session Modifications, *supra* note 97, draft art. 11 (European Union proposing to delete the phrase “and shall protect persons with disabilities from forced interventions or forced institutionalisation aimed at correcting, improving, or alleviating any actual or perceived impairment”).

145. Footnote 38 to the Working Group draft Article 11 reads:

Members of the Working Group had differing opinions on whether forced intervention and forced institutionalization should be dealt with under ‘Freedom from torture’, or under ‘Freedom from violence and abuse’, or under both. Some members also considered that forced medical intervention and forced institutionalization should be permitted in accordance with appropriate legal procedures and safeguards.

Working Group Report, *supra* note 84, draft art. 11, n.38.

institutionalization and forced treatment in the provision on torture and cruel, inhuman, or degrading treatment or punishment, on the basis that its placement alongside the torture provision would be inappropriate.¹⁴⁶ Other States expressed the view that forced institutionalization and forced treatment should be permissible in certain cases subject to procedural safeguards.¹⁴⁷ This argument was based on the commonplace practice in domestic laws to allow for such interventions in narrow circumstances, and provided the rationale for placing the issue in another part of the text given that the prohibition against torture is a non-derogable right, admitting of no exception.

D. The Final Article 15 Text

The final formulation of the prohibition of torture and cruel, inhuman or degrading treatment or punishment in the Convention¹⁴⁸ parallels the provision found in Article 7 of ICCPR,¹⁴⁹ and therefore, does not contextualize the torture prohibition with respect to persons with disabilities:

Article 15

Freedom from torture or cruel, inhuman or degrading treatment or punishment

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.

2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.¹⁵⁰

Note that the phrasing of the first paragraph of Article 15, in line with the ICCPR and not CAT, is significant because the ICCPR applies to private institutions¹⁵¹ whereas CAT is restricted to public settings.¹⁵²

146. *See id.*

147. *See, e.g.*, Ad Hoc Comm. on a Comprehensive & Integral Int'l Convention on Prot. & Promotion of the Rights & Dignity of Persons with Disabilities, Seventh Session, Comments, Proposals and Amendments Submitted Electronically, <http://www.un.org/esa/socdev/enable/rights/ahcstata15sevscomments.htm#argentina> [hereinafter Seventh Session Electronic Submissions]

148. CRPD, *supra* note 1, art. 15.

149. *See* ICCPR, *supra* note 23, art. 7.

150. CRPD, *supra* note 1, art. 15.

151. *See* ICCPR, *supra* note 23, pmb1 & art. 1 (applying the ICCPR to all individuals without restriction).

Additionally, the text does not refer to any of the specific practices proposed by some during the course of the negotiations for explicit reference in Article 15.¹⁵³ The CRPD Committee must therefore give meaning to the prohibition in the myriad of contexts referenced by the drafters during the treaty drafting process.

The prohibition set out in Article 15 of the CRPD is reinforced by an exceedingly spare Article 17 that simply and decidedly without illumination guarantees the physical and mental integrity of persons with disabilities.¹⁵⁴ Article 17, then, is the ultimate product of the controversy that arose during the initial negotiations around Article 15.¹⁵⁵ The provision came about when fraught negotiations around forced institutionalization and forced treatment moved to a debate over the proposed new provision. As noted by Kayess and French:

The IDC and WNUSP sought the ultimate goal of the CRPD ‘outlawing’ all forms of compulsory assistance, but, when this proved impossible to achieve, they adopted the alternative lobbying stance that there ought to be no reference to compulsory treatment in the CRPD as this would provide it with legitimacy.¹⁵⁶

Accordingly, Article 17 provides no guidance whatsoever on the regulation of forced treatment that is practiced often with sweeping abandon and with little or no due process protection in many parts of the world.¹⁵⁷

Still, Articles 15 and 17 of the CRPD must be understood by reference to the CRPD general principles in Article 3,¹⁵⁸ along with other substantive articles relating to legal capacity, informed consent, and similar topics. This understanding entails a more nuanced process of interpretation that not all actors will be up to undertaking. Even the mainstream human rights organizations have a history of ignoring the

152. See *Committee Against Torture*, OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/cat> (last visited Oct. 15, 2011). Alignment with the ICCPR occurred during the Seventh Session of negotiations, upon a proposal by the Latin American and Caribbean Group. See Seventh Session Electronic Submissions, *supra* note 147; see also MARIANNE SCHULZE, UNDERSTANDING THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 99 (Handicap International ed., 2009), available at <http://www.handicap-international.fr/fileadmin/documents/publications/HICRPDManual.pdf> (asserting that the language of Article 15 can be found in ICCPR Article 7).

153. See CRPD, *supra* note 1, art. 15.

154. See *id.* art. 17.

155. See Kayess & French, *supra* note 58, at 29–30.

156. *Id.* at 30.

157. See especially MDRI HUNGARY REPORT, *supra* note 7.

158. CRPD, *supra* note 1, art. 3.

human rights of persons with disabilities and have neglected to apply international standards to persons with disabilities.¹⁵⁹ In some instances, mainstream human rights organizations chose to highlight abuses against political prisoners held in the very same institutions as persons with disabilities, without recognizing how such treatment infringes upon political prisoner and disabled detainee alike.¹⁶⁰ At the same time, the CRPD offers opportunities for creative and mutually beneficial partnerships between mainstream human rights organizations and disability rights organizations around Article 15 and related advocacy.¹⁶¹

Articles with a particularly close relationship to Article 15 include Article 16, which prohibits violence, abuse, and exploitation of persons with disabilities¹⁶² and, Article 17,¹⁶³ which provides additional avenues through which meaning may be given to the CRPD's anti-torture framework. These articles also give rise to varying interpretations. The IDC claimed that Articles 15 and 17, in combination with the requirement of informed consent in Article 25 and Article 12 on legal capacity, provide protection against any form of forced or compulsory intervention.¹⁶⁴ More recently, others have pointed to Article 14 in asserting that it serves the function of prohibiting forced or compulsory treatment or living situations such as institutionalization.¹⁶⁵ States have already entered reservations to clarify their position on these matters; however, they suggest that the interpretation put forward by the IDC is far from crystallized at the level of State practice.¹⁶⁶

159. See, e.g., Press Release, Human Rights Watch, Uzbekistan: Dissident Forced Into Psychiatric Detention (Sep. 2, 2005), available at <http://hrw.org/english/docs/2005/09/03/uzbeki11684.htm>. For an illustration of where mainstream human rights organizations highlight abuses against political dissidents held in unacceptable conditions in psychiatric institutions, but pay no attention to the human rights situation of others held under the same conditions, see Press Release, Human Rights Watch, Uzbekistan: Psychiatric Punishment Used to Quash Dissent: Government Deploys Stalinist-Era Tactic Against Leading Human Rights Defender (Oct. 19, 2005), available at <http://hrw.org/english/docs/2005/10/20/uzbeki11905.htm>.

160. See *id.*

161. See CRPD, *supra* note 1, art. 15.

162. See *id.* art. 16.

163. *Id.* art. 17.

164. IDC Chairman's Text, *supra* note 136, arts. 15, 25.

165. For example, the International Disability Alliance notes that Article 14 prohibits deprivation of liberty based on the existence of a disability. See Int'l Disability Alliance et al., OPCAT Monitoring of Psychiatric Institutions and Related Issues in Other Forms of Detention: CRPD Framework (Oct. 2009), <http://www.internationaldisabilityalliance.org/wp-content/uploads/2009/10/IDAOPCATRecommendationsFinal.doc> [hereinafter OPCAT Monitoring].

166. Australia, for example, entered a declaration to Article 17 stating: "Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others. Australia further declares its understanding that the Convention

The relationship between Article 15 and Article 5 (equality and non-discrimination) should also be underscored. As an article of general application to be applied across the CRPD text, Article 5 requires States to ensure the equality of persons with disabilities in their societies while also prohibiting all types of discrimination “on the basis of disability.”¹⁶⁷ To that end, the CRPD requires States to recognize “that all persons are equal before and under the law” and therefore are entitled “to the equal protection and equal benefit of the law” free of any discrimination.¹⁶⁸ States must “prohibit all discrimination on the basis of disability”¹⁶⁹ and “take all appropriate steps to ensure that reasonable accommodation is provided.”¹⁷⁰ The section that follows analyzes State obligations in respect of the torture prohibition under Article 15, focusing on the disability-specific context of the provision and issues requiring guidance in particular from the CRPD Committee.

V. STATE DUTIES TO RESPECT, PROTECT, AND FULFILL THE RIGHT TO BE FREE FROM TORTURE OR CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT

In interpreting Article 15 of the CRPD, it is critical to give substantive content to the concepts of torture and other cruel, inhuman, or degrading treatment or punishment within the specific context of disability.¹⁷¹ The nature and existence of these legal concepts, insofar as they pertain particularly to the lived experience of people with disabilities, have been addressed to some extent in human rights

allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards.” *Declarations and Reservations*, U.N. ENABLE, <http://www.un.org/disabilities/default.asp?id=475> (last visited Oct. 15, 2011).

167. CRPD, *supra* note 1, art. 5. For a discussion of the three main normative theories of equality (and by implication, non-discrimination) that are applied to the disability context, see Gerard Quinn, *The International Covenant on Civil and Political Rights and Disability: A Conceptual Framework*, in HUMAN RIGHTS AND DISABLED PERSONS: ESSAYS AND RELEVANT HUMAN RIGHTS INSTRUMENTS 69, 72–75 (Theresa Degener & Yolán Koster-Dreese eds., 1995) [hereinafter *A Conceptual Framework*].

168. CRPD, *supra* note 1, art. 5, ¶ 1.

169. *Id.* art. 5, ¶ 2.

170. *Id.* art. 5, ¶ 3.

171. Indeed, the stated purpose of the CRPD is: “While the Convention does not recognize any new human right of persons with disabilities, it clarifies the application of existing rights to the specific situation of persons with disabilities.” Annual Report of the United Nations High Comm’r for Human Rights and Reports of the Office of the High Comm’r and the Sec’y-Gen., U.N. High Comm’r for Human Rights, 10th Sess., Mar. 2–27, 2009, ¶ 11, U.N. Doc. A/HRC/10/48 (Jan. 26, 2009) [hereinafter OHCHR Report].

practice and have given rise to the same difficulties of interpretation that confront interpreters of such provisions generally.¹⁷² These issues include, *inter alia*: (i) differentiating between acts that constitute torture on the one hand and acts that, for the lack of one or more fundamental elements of the torture definition, would fall into the categories of cruel, inhuman, or degrading treatment or punishment; (ii) identification of when the failure of a State to ensure protection against conduct by private actors triggers responsibility under Article 15; and (iii) when responsibility is triggered for failing to respect the prohibition against *punishment* (as opposed to treatment) that amounts to torture or may be considered cruel, inhuman, or degrading.

The delineation of individual offenses within Article 15 of the CRPD is ultimately a subjective exercise that will depend upon the circumstances of the case and conduct in question. The Human Rights Committee has asserted that it does not “consider it necessary to develop a list of prohibited acts or to establish sharp distinctions between different kinds of punishment or treatment; the distinction depends on the nature, purpose and severity of the treatment applied.”¹⁷³ The jurisprudence of the ECHR has examined, in a number of cases, the ambit of Article 3 of the European Convention on Human Rights, according to which torture entails deliberateness of action, causing very serious and cruel suffering and inhuman treatment or punishment involving intense mental or physical suffering.¹⁷⁴ Its jurisprudence supports taking into account the individual circumstances of the victim, including his or her disability and attendant accommodation needs.¹⁷⁵ The discussion below considers specific instances where Article 15 is most likely to be triggered.

172. See SCHULZE, *supra* note 152, at 69–70.

173. CCPR General Comment No. 20, *supra* note 129, ¶ 4. Common elements pertaining to all acts within the torture and ill-treatment prohibition include: (i) meeting a minimum threshold level of severity; (ii) subjective and objective assessment; (iii) physical and or mental suffering fall within the scope of protection; (iv) the protection is not confined to the criminal investigation and judicial process. See Byrnes, *supra* note 23, at 217–20.

174. For a useful analysis of this jurisprudence, see Colm O’Cinneide, *Extracting Protection for the Rights of Persons with Disabilities from Human Rights Framework—Established Limits and New Possibilities*, in THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES 224–29 (Oddný Mjöll Arnardóttir & Gerard Quinn eds., 2009).

175. For a useful summary of these cases, see MENTAL DISABILITY ADVOCACY CTR., SUMMARIES OF MENTAL DISABILITY CASES DECIDED BY THE EUROPEAN COURT OF HUMAN RIGHTS 13–72 (2007), available at http://mdac.info/sites/mdac.info/files/English_Summaries%20of%20Mental%20Disability%20Cases%20Decided%20by%20the%20European%20Court%20of%20Human%20Rights.pdf [hereinafter SUMMARIES OF ECHR CASES].

A. Disability Accommodations and Conditions of Detention and Imprisonment

Particularly relevant, not only for detainees and prisoners with disabilities, but also for persons with disabilities in other institutional settings, is the scrutiny of living conditions against human rights standards, including the torture prohibition. In *Price v. United Kingdom*, the Court found that the prison conditions of a woman with a disability who used a wheelchair were inappropriate given her accommodation needs.¹⁷⁶ The Court held that “to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go the toilet or keep clean without the greatest of difficulty, constituted degrading treatment contrary to Article 3.”¹⁷⁷ The approach of the ECHR in this regard—namely, recognizing the particular accommodation needs of an individual—is very much in keeping with the CRPD. The CRPD’s explicit recognition that the failure to provide reasonable accommodation to a person with a disability constitutes discrimination is therefore a core component of an overall analysis of conditions of treatment and punishment under Article 15. Earlier cases decided by the European Commission suggesting a much higher threshold for finding a violation of permissible detention conditions must be regarded with considerable skepticism.¹⁷⁸

While there is a tendency to focus narrowly on protecting persons held in detention and imprisonment from torture and other ill-treatment, some rightly suggest that there are clearly other contexts within which

176. *Price v. United Kingdom*, 34 Eur. Ct. H.R. 53 (2002).

177. *Id.*; see also *Farbtuhs v. Latvia*, App. No. 4672/02, Eur. Ct. H.R. (2004) (holding that the continued imprisonment of a disabled elderly prisoner with intensive support needs and several serious health conditions was inappropriate, because his continued detention would cause him permanent anxiety and a sense of inferiority and humiliation so acute as to constitute degrading treatment contrary to Article 3).

178. See *B. v. United Kingdom*, App. No. 6870/75, 1983 Y.B. Eur. Conv. on H.R. 6, ¶¶ 4–5 (Eur. Comm’n on H.R.) (finding that detaining a prisoner diagnosed with paranoid schizophrenia in Broadmoor Hospital does not violate Article 3, notwithstanding proven conditions of overcrowding, poor sanitation and hygiene, lack of appropriate employment and occupation, and lack of psychiatric treatment. The Commission’s assessment failed to consider the applicant’s mental disability or how the conditions could, in the aggregate, amount to inhuman treatment or punishment.); *Chartier v. Italy*, App. No. 9044/80, 33 Eur. Comm’n H.R. Dec. & Rep. 41, ¶¶ 4, 17 (1983) (rejecting an application because the applicant, a prisoner with hereditary obesity, respiratory problems, hypertension, and pancreatic diabetes held in a detention center for persons with physical disabilities and who required medical treatment unavailable where he was detained, received necessary treatment and because prison was likely a “particularly painful experience” given his serious health problems).

the protection is relevant.¹⁷⁹ Article 15 of the CRPD is most certainly applicable when assessing the treatment of students with disabilities in both State-run and privately-run schools, as well as rehabilitation clinics, social care institutions, and the like. The work of DRI¹⁸⁰ and the Mental Disability Advocacy Center (MDAC)¹⁸¹ in Budapest have considerably advanced human rights analyses in the context of the torture and cruel, inhuman, and degrading treatment or punishment prohibition as applied to persons with disabilities. The obligation under the CRPD to accommodate persons with disabilities—with the failure to do so constituting discrimination—will no doubt animate the work of DRI, MDAC, and others, including national human rights institutions and hopefully, the work of national torture preventive mechanisms established under the Optional Protocol to the Convention against Torture.

B. Practices Involving the Use of Restraints and Seclusion

In addition to the poor conditions for detention in prisons and in other institutional settings that may amount to torture or other ill-treatment, practices that involve the use of restraints or seclusion similarly require serious scrutiny under Article 15. Thus, for example, the use of cage beds¹⁸² and other types of restraints¹⁸³ clearly falls within the ambit of Article 15 and has been so highlighted by the Special Rapporteur.¹⁸⁴ The use of medication, particularly psychotropic medications, either on prisoners or persons with disabilities in institutions where overmedication is used as a form of chemical restraint for treatment (or punishment) will also fall afoul of the proscription.¹⁸⁵ Remote administration of electroshock delivered via backpacks as a form of behavioral modification or aversive therapy, as

179. See Byrnes, *supra* note 23, at 211 n.64.

180. For human rights reporting and documentation by Disability Rights International, see MDRI reports, *supra* note 7.

181. For human rights reporting and documentation by Mental Disability Advocacy Center, see SUMMARIES OF ECHR CASES, *supra* note 175.

182. See MDAC CAGE BEDS REPORT, *supra* note 12, at 23–58.

183. See European Comm. for the Prevention of Torture & Inhuman or Degrading Treatment or Punishment, *The CPT Standards: “Substantive” Sections of the CPT’s General Reports*, ¶¶ 47–50, CPT/Inf/E (2009), available at <http://www.cpt.coe.int/en/documents/eng-standards.pdf>. The Special Rapporteur has stressed that any prolonged use of restraints unquestionably violates the prohibition against torture or ill-treatment. See Nowak *Interim Report*, *supra* note 6, ¶ 55.

184. See Nowak *Interim Report*, *supra* note 6, ¶¶ 55–56.

185. See *id.* ¶ 63.

recently documented in a United States institution,¹⁸⁶ is clearly contrary to Article 15, among other provisions of the CRPD. Domestic legislation clarifying the prohibition of such practices is an area where there is much work to be done among States.

The Human Rights Committee has indicated that “prolonged solitary confinement of the detained or imprisoned person” may constitute torture or other ill-treatment.¹⁸⁷ The use of solitary confinement in the case of a person with a mental disability amounted to inhuman and degrading treatment in one case before the Inter-American Commission.¹⁸⁸ The CRPD requires close scrutiny of any solitary confinement situation and the particular situation of persons with disabilities, and makes clear that confinement based on disability constitutes discrimination. When assessing the legality of solitary confinement or seclusion in a given case, the individual’s circumstances and particular accommodation needs must be taken into account.¹⁸⁹ Seclusion and isolation that take place outside the framework of prison or institutions must likewise be closely examined, as so often persons with disabilities are isolated in their communities, chained to beds, locked away in their homes, and otherwise isolated.¹⁹⁰ Such customary practices tend not to be highlighted or documented by human rights organizations, but State responsibility may indeed be triggered in such cases where States fail to exercise due diligence in bringing an end to such practices, providing sanctions against perpetrators and remedies to victims.¹⁹¹

186. See MDRI ROTENBERG CENTER REPORT, *supra* note 22.

187. CCPR General Comment No. 20, *supra* note 129, ¶ 6.

188. See *Congo v. Ecuador*, *supra* note 30, ¶ 59. The Inter-American Commission approved precautionary measures to protect persons detained in a psychiatric hospital in Paraguay, including two teenage boys held in solitary confinement in miserable conditions for more than four years, in a case facilitated by DRI. See INTER-AM. COMM’N H.R., *supra* note 30, ¶ 60.

189. See *Nowak Interim Report*, *supra* note 6, ¶¶ 77, 82. Note, too, that under the CAT definition of torture, the purpose element is fulfilled if disability discrimination is found. See CAT, *supra* note 24, art. 1.

190. See, e.g., MENTAL DISABILITY RIGHTS INT’L, *TORMENT NOT TREATMENT: SERBIA’S SEGREGATION AND ABUSE OF CHILDREN AND ADULTS WITH DISABILITIES 2* (2007), http://www2.ohchr.org/english/bodies/cat/docs/ngos/MDRI_Serbia41.pdf.

191. See General Comment No. 2, *supra* note 26, ¶ 18; see also Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Rep. on the Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 32, U.N. Doc. A/HRC/7/3 (Jan. 15, 2008) (by Manfred Nowak), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/101/61/PDF/G0810161.pdf> [hereinafter *Nowak Report*].

C. Practices Involving Compulsory or Forced Treatment

Another set of cases relevant for the interpretation of Article 15 concerns instances of compulsory or forced treatment, particularly those involving persons with psycho-social disabilities. Early drafts of the CRPD contained specific language on such practices, along with involuntary institutionalization,¹⁹² but the Ad Hoc Committee ultimately excised it from the torture provision¹⁹³ and the CRPD final text, leaving advocates without specific proscriptive language.¹⁹⁴

The ECHR has established a particularly high—and highly dubious in the light of the CRPD—threshold for the characterization of forced treatment as proscribed conduct under Article 3 of the European Convention,¹⁹⁵ principally through the application of the doctrine of “medical necessity.” Thus, in *Herczegfalvy v. Austria*,¹⁹⁶ the court considered the application of a prisoner diagnosed with a mental disability who claimed that the prison guards had given him sedatives unnecessarily and involuntarily, force-fed him, and restrained him with handcuffs to a hospital bed for weeks in violation of Article 3.¹⁹⁷ The court held that there was no violation on the basis of the doctrine of therapeutic necessity, according to which medical authorities “decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used” in a particular case, “if necessary by force, to preserve the physical and mental health of patients.”¹⁹⁸ The view embraced by the court was that a measure deemed—apparently by doctors in a unilateral process of decision-making—to be a therapeutic necessity cannot be classified as inhuman or degrading.¹⁹⁹ The sweeping thrust of this decision, which acts as a presumption in favor of institutional and substituted decision-making, must be regarded as deeply flawed when set against the aim of the CRPD, which is to preserve the autonomy and participation of persons with disabilities in all contexts, including medical decision-making.²⁰⁰

192. See, e.g., Report on Fifth Session, *supra* note 113, ¶ 41.

193. See CRPD, *supra* note 1, art. 15.

194. See *id.* annex I–II.

195. See CPHRFF, *supra* note 28, art. 3.

196. *Herczegfalvy v. Austria*, 242-B Eur. Ct. H.R. (ser. A) (1992), 15 E.H.R.R. 437, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695658&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

197. *Id.* ¶¶ 25–28.

198. *Id.* ¶ 82.

199. *Id.*

200. See CRPD, *supra* note 1, arts. 3, 4.3, 25.

A holistic reading of the CRPD calls for a more robust interpretation of the prohibition than that espoused by the ECHR in *Herczegfalvy v. Austria*. Such an approach is suggested in treaty body practice, under which the forced and non-consensual administration of psychiatric drugs has been recognized as a form of torture or inhuman treatment.²⁰¹ Moreover, Article 15 of the Convention, read together with Article 17 (respect for mental and physical integrity),²⁰² Article 19 (right to independent living in the community),²⁰³ and Article 12 (legal capacity),²⁰⁴ in particular, require the application of a highly robust informed consent regime.

The Special Rapporteur on Torture has also recognized that involuntary commitment and deprivation of liberty based on the existence of a disability might, under certain circumstances, constitute torture or other ill-treatment.²⁰⁵ Following the argumentation put forward by the Special Rapporteur, the NGO coalition, IDA, proffered that the administration of psychiatric treatments such as neuroleptic drugs and electroshock absent free and informed consent “may constitute torture or ill-treatment”²⁰⁶ and further, that “involuntary commitment to psychiatric institutions for any reason may also constitute torture or ill-treatment.”²⁰⁷ Whether such practices will be eliminated over time through the application of Article 15, the prohibition against disability discrimination, or indeed other CRPD provisions, remains to be seen, but a full reading of the CRPD suggests that Article 8 (awareness-raising) advocacy is crucial in this area. In any event, sole reliance on Article 15 to found a claim regarding forced treatment would be a poor advocacy posture. In this context, IDA’s call for the research and promotion of “[b]etter practices for the elimination of restraint, seclusion and all forms of coercion in mental health

201. See, e.g., U.N. Human Rights Comm., Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Right, Communication No. 110/1981, ¶¶ 2.7, 14–15, U.N. Doc. CCPR/C/21/D/110/1981 (Mar. 29, 1984); see also *Nowak Interim Report*, *supra* note 6, ¶ 63. Here, Nowak asserts that “[t]he more intrusive and irreversible the treatment, the greater the obligation on States to ensure that health professionals provide care to persons with disabilities only on the basis of their free and informed consent” and that, otherwise, medical interventions “may constitute torture or cruel, inhuman or degrading treatment.” *Id.* ¶ 59.

202. CRPD, *supra* note 1, art. 17.

203. *Id.* art. 19.

204. *Id.* art. 12.

205. See *Nowak Interim Report*, *supra* note 6, ¶ 65.

206. *Id.* ¶ 61.

207. *Id.* ¶¶ 64–65.

facilities and programs, the creation of a totally voluntary mental health system, and supportive approaches to meeting the needs of people in altered states of consciousness or mental health crises²⁰⁸ is much needed.

D. Private Acts

Also challenging are those instances in which acts amounting to torture or other ill-treatment are carried out by private individuals without any clear link to a State.²⁰⁹ There is sound authority for the proposition that torture may apply to private acts even absent the kind of close connection to the State suggested by the terms of CAT.²¹⁰ Thus, the United Nations Human Rights Committee has stressed that the duty of the State to ensure protection against torture and other ill-treatment applies in respect to perpetrators “acting in their official capacity, outside their official capacity or in a private capacity.”²¹¹ The CRPD confers legitimacy on this understanding. The task is to identify the nature and scope of the duty on the part of States to ensure effective protection, including the parameters of the preventive duties associated with State responsibility for torture and other ill-treatment. Most relevant in these cases are instances of ill-treatment against people with disabilities within private facilities, such as hospitals, psychiatric institutions, nursing homes, retirement facilities, orphanages, rehabilitation centers, and drug-treatment centers.

208. See OPCAT Monitoring, *supra* note 165, ¶ 7.

209. In this regard, the Human Rights Committee, in its General Comment on Article 7, has helped to articulate the content of the duty on the part of States in fulfilling its protective function. Effective protection in this regard entails the establishment of oversight mechanisms, including prompt investigation of complaints about torture and ill-treatment, responsibility on the part of torturers and the provision of effective domestic remedies, including compensation. Int'l Covenant on Civil & Political Rights, General Comment No. 7: Torture or Cruel, Inhuman or Degrading Treatment or Punishment ¶ 1 (May 30, 1982), <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/7e9dbcf014061fa7c12563ed004804fa?Opendocument>.

210. CAT Article 1 restricts the definition of torture to acts according to which “pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” CAT, *supra* note 24, art. 1. Nonetheless, it is well established that “consent and acquiescence by a public official clearly extends state obligations into the private sphere” and should likewise, in accordance with the clear intention of the drafters of the CPRD, “be interpreted to include state failure to protect persons within its jurisdiction from torture and ill-treatment committed by private individuals,” as so often such violence against persons with disabilities occurs in this sphere. *Nowak Report*, *supra* note 191, ¶ 31.

211. CCPR General Comment No. 20, *supra* note 129, ¶ 2. See ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 184–244 (1993).

The drafters of the CRPD were keenly aware of the need for the obligations imposed by the Convention to extend to the prevention, punishment, and remedy of abuses inflicted against people with disabilities in private institutional settings by doctors, health professionals, social workers, and others working in private spheres.²¹² Thus, the clear thrust of the proscription in Article 15 is that State responsibility extends well beyond the traditional setting of prisons and places of criminal detention to sites commonly associated with violations against the physical and mental integrity of disabled persons, a view that corresponds to that of the Special Rapporteur on Torture and the Committee against Torture.²¹³ The proscriptions would also apply to interventions that occur in community settings outside the framework of modern medical facilities, such as community-based “curative” treatments (e.g., compulsory drinking of spring water to purge evil spirits).²¹⁴ Likewise, Article 15 is applicable in cases of private violence where the State may be deemed to acquiesce, as in the case of maintaining civil laws that effectively strip persons with disabilities of their legal capacity and thus, their ability to protect themselves and to assert their rights in cases of violence (whether public or private).²¹⁵ The maintenance of discriminatory laws may therefore serve to reinforce dependency, isolation, and vulnerability to violence.²¹⁶

212. See, e.g., Mexico Working Paper on Convention, *supra* note 78, arts. 9, 13; *Nowak Interim Report*, *supra* note 6, ¶ 51; General Comment No. 2, *supra* note 26, ¶ 17.

213. See *Nowak Interim Report*, *supra* note 6, ¶ 51; General Comment No. 2, *supra* note 26, ¶ 17. The Special Rapporteur stated that: “the prohibition against torture related not only to public officials, such as law enforcement agents in the strictest sense, but may apply to doctors, health professionals, and social workers, including those working in private hospitals.” *Nowak Interim Report*, *supra* note 6, ¶ 51. Note, too, that the Inter-American Court of Human Rights found a private psychiatric hospital liable under international law in the *Ximenes-Lopes* case. *Ximenes-Lopes v. Brazil*, 2006 Inter-Am. Ct. H.R. (Ser. C) No. 149 (July 4, 1996), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_149_ing.pdf.

214. See, e.g., *Persons Living with Psychosocial Disabilities in Kenya*, UNITED NATIONS, http://www.un.org/disabilities/documents/mental_disabilities_kenya.doc (last visited Oct. 15, 2011).

215. See *Nowak Interim Report*, *supra* note 6, ¶ 69.

216. Cf. *Nowak Report*, *supra* note 191, ¶¶ 45–46 (discussing intimate partner violence and State acquiescence in domestic violence taking many forms); see *A. v. United Kingdom*, App. No. 100/1997/884/1096 Eur. Ct. H.R. (1998), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=696109&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (holding that the U.K. had violated Article 3 in a case where a stepfather was acquitted by the English Court for repeatedly beating his stepson on a defense of “reasonable chastisement” and that “the failure to provide adequate protection constitutes a violation of Article 3 of the Convention,” *id.* ¶ 24.); *Maria da Penha v. Brazil*, Case 12.051, Inter-Am. Comm’n H.R., Report No. 54/01, OEA/Ser./L/V/II.111, doc. 20 rev. (2001) (The State was held responsible for failing to act with due diligence in a case where a

It will be a question of interpretation, however, as to what standard to apply to determine whether a State may be deemed in breach of its obligation to take preventive, punitive, or remedial action in such cases. Particularly egregious instances of State failure in this regard should incur State responsibility under the Convention. More difficult, however, may be forms of violence and abuse that are not perpetrated in institutional settings, but in other settings shielded from governmental scrutiny. States are nonetheless still obliged to vigorously investigate and prosecute where allegations in such contexts are well-founded.²¹⁷

E. Punishment

The violation of the Article 15 prohibition of cruel, inhuman, or degrading *punishment* gives rise to a somewhat different analysis insofar as all forms of punishment in some sense offend human dignity.²¹⁸ As suggested by leading commentators, an element of reprehensible conduct must be present in order to trigger State responsibility in this context.²¹⁹ In the view of the ECHR, the proscription implies that conduct must “go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.”²²⁰ While violations in this sphere traditionally equate to violations against prisoners, it has broader application in the disability rights realm.

As human rights tribunal jurisprudence already makes clear, the incidents of one’s lawful confinement in prison must be carefully scrutinized, necessitating an inquiry into the nature and conditions of

woman suffered years of domestic abuse, leading to her permanent disability, and a lengthy fifteen year judicial investigation which was not concluded. The court reasoned, “discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts,” *id.* ¶ 56.).

217. See CAT, *supra* note 24, arts. 15, 4; see also CRPD, *supra* note 1, art. 16.

218. Thus, the Constitutional Court of South Africa has opined that imprisonment inevitably impairs the dignity of the prisoner. *State v. Makwanyane*, 1995 (3) SA 391 (CC) at 92–93, ¶¶ 142–43 (S. Afr.). As noted in the leading commentary on the South Africa Bill of Rights, “[t]he circumstances in which prisoners are placed necessarily mean that they will have to tolerate greater limitations of their rights, including their right to dignity, than other persons. But any infringement of prisoners’ rights must be justifiable with reference to the objectives of placing them in prison: that is the prevention of crime and the rehabilitation of the offender.” IAIN CURRIE & JOHAN DE WAAL, *THE BILL OF RIGHTS HANDBOOK* 276 (5th ed. 2005).

219. See *Nowak Interim Report*, *supra* note 6, ¶ 49.

220. *Case of Kudla v. Poland*, 2000-XI Eur. Ct. H.R. 199, 223, ¶ 92 (2000).

punishment.²²¹ Thus, the failure to provide reasonable accommodation to a prisoner with a disability will run afoul of the principle of non-discrimination and, depending on the circumstances, may well constitute a violation of Article 15 of the CRPD. Likewise, poor conditions within other institutional settings will also be relevant under certain circumstances where conduct may be deemed punishment.

In *Huseyin Yildirim v. Turkey*,²²² the ECHR held that a violation of Article 3 had occurred in the case of a disabled prisoner who required extensive support. He had been left to the supervision of his cellmates in prison, and while in the prison hospital wing, to the supervision of his brother and two sisters. This continued for a period of three years in which he relied on them to feed, wash, dress, and perform other essential functions of everyday life. This, in the Court's view, amounted to "degrading treatment" within the meaning of Article 3, though it could clearly have constituted degrading "punishment" as well.²²³ In *Keenan v. United Kingdom*,²²⁴ the ECHR found a violation of Article 3 for a prisoner with a psycho-social disability who was confined to seven days isolation without effective monitoring or psychiatric evaluation. The prisoner killed himself during the isolation period.²²⁵ The Court held that punishment under these circumstances, which may have threatened the physical and moral resistance of the prisoner, was "not compatible with the standard of treatment required in respect of a mentally ill person."²²⁶

Beyond the prison setting, practices constituting punishment may occur in a myriad of other contexts, such as schools, homes, social care homes, and psychiatric institutions.²²⁷ Similarly, certain behavioral modification practices can fall within the Article 15 proscription.²²⁸ Significantly for the purposes of interpreting the CRPD, treaty bodies and special procedures have consistently stated that any form of

221. See, e.g., *Yildirim v. Turkey*, App. No. 2778/02 Eur. Ct. H.R. (2007); *Engel v. Hungary*, App. No. 46857/06 Eur. Ct. H.R. (2010).

222. *Yildirim v. Turkey*, *supra* note 221, ¶ 59.

223. *Id.* ¶ 82.

224. *Keenan v. the United Kingdom*, 2001-III Eur. Ct. H.R. (2001).

225. *Id.* ¶ 116.

226. *Id.* ¶ 115.

227. See MDRI ROTENBERG CENTER REPORT, *supra* note 22, at 28.

228. DRI has documented punishments practiced at a Massachusetts facility under the guise of "aversive treatments," a particularly severe form of behavioral modification, and has put forward a compelling legal analysis of such practices which run afoul of international (and domestic) human rights law. See *generally* MDRI ROTENBERG CENTER REPORT, *supra* note 22, at 21–32.

corporal punishment is contrary to the prohibition of torture and other cruel, inhuman, or degrading treatment or punishment.²²⁹ Practices of the kind documented in DRI's report on the Judge Rotenberg Center in Massachusetts most clearly run afoul of Article 15 in this context.

F. State Duties to Protect

The inclusion of paragraph 2 in Article 15 makes clear that the implementation of the provision obliges States Parties to do more than merely prohibit such conduct by means of domestic legislation. It requires States to "take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment."²³⁰ It thus imposes positive duties on the State to protect persons with disabilities against violations of Article 15(1). Reading Article 15(2) together with Article 4 (General Obligations), States Parties are required to take effective measures to respect, protect, and fulfill the right to be free from torture and cruel, inhuman, and degrading treatment or punishment. This must include the obligation to undertake an effective investigation where an individual raises a claim of abuse.²³¹ As Jan Fiala emphasizes, however, procedures are needed to ensure that domestic authorities will effectively and with due diligence investigate torture and other ill-treatment, an issue requiring further development given its lack of explication in the CRPD.²³² State responsibility will attach with respect to Article 15 in cases where State authorities know or should know that abuse is taking place. Further, States have the obligation to exercise due diligence to prevent, investigate, prosecute, and punish non-State officials or private

229. See Nowak *Interim Report*, *supra* note 6, ¶ 40.

230. United Nations General Assembly, 61st Sess., *supra* note 67, art. 15.

231. See *Assenov v. Bulgaria*, App. No. 24760/94, 28 Eur. H.R. Rep. 652, 652, 654–55 (1999) (holding that States must carry out an effective investigation where a person raises an arguable claim of an Article 3 violation by State agents, and that such investigation "should be capable of leading to the identification and punishment of those responsible").

232. See Jan Fiala, *The Obligation to Investigate Torture of Persons with Disabilities: The Way Forward* 56 (2010) (unpublished LL.M. thesis, Harvard Law School) (on file with author) (underscoring that procedures "will therefore have to be developed by the opinions and general comments of the Committee on the Rights of Persons with Disabilities, the body entrusted with interpreting it. The Committee should make the issue of effective investigation a high priority in order to give persons with disabilities an effective and timely remedy for the widespread violations they continue to suffer in many parts of the world").

actors.²³³ Article 15 is likely to form the basis of communications submitted under the Optional Protocol to the CRPD,²³⁴ insofar as conditions within prisons and other institutional settings have long been the subject of scrutiny by disability organizations.²³⁵ The emergence of some ninety-four national human rights commissions around the world,²³⁶ along with many disability-specific NHRIs,²³⁷ should hopefully generate heightened scrutiny, thereby reinforcing State duties to protect against torture and other forms of ill-treatment.

G. What Constitutes Prohibited Medical or Scientific Experimentation?

The right to protection against medical or scientific human experimentation is a component of the protection against inhuman and degrading treatment under Article 7 of the ICCPR.²³⁸ Article 15 of CRPD, in line with the terms of Article 7 of the ICCPR, expressly prohibits medical or scientific experimentation on persons with disabilities without their free consent.²³⁹ The inclusion of this explicit provision in the ICCPR, representing an elaboration not included in the UDHR proscription against torture or other cruel, inhuman, or degrading treatment or punishment, has been traced to the interest of the drafters to account for the horrific forms of experimentation performed by Nazi doctors during the Holocaust. Such experimentation was based on bogus scientific and medical theories.²⁴⁰ Many of these experiments

233. See General Comment No. 2, *supra* note 26, ¶ 15; see also Fiala, *supra* note 232 (describing the emergence of an international obligation to investigate ill-treatment, tracking its development under the European Convention, which requires States to effectively investigate all allegations of ill-treatment, and its particular implications for CRPD Article 16).

234. See CRPD, *supra* note 1, art. 25.

235. The reports of DRI are particularly relevant in this regard. See MDRI reports, *supra* note 7.

236. See *Directory of Institutions*, INT'L COORDINATING COMM. OF NAT'L INSTS. FOR THE PROMOTION AND PROT. OF HUM. RTS. (ICC), <http://nhri.ohchr.org/EN/National/DirectoryOfInstitutions/Pages/default.aspx>.

237. A specific role and responsibility for NHRIs is contemplated in Article 33(2) of the CRPD. CRPD, *supra* note 1, art. 33.

238. ICCPR, *supra* note 23, art. 7. For discussion of the protections for research subjects under both the ICCPR and the MI Principles, see Eric Rosenthal, *The International Covenant on Civil and Political Rights and the Rights of Research Subjects*, in 4 ACCOUNTABILITY IN RES. 253, 253 (1996).

239. See CRPD, *supra* note 1, art. 15. The only variation in the formulation is the more modern framing of "his or her" found in the CRPD. United Nations General Assembly, 61st Sess., *supra* note 67, art. 15 (emphasis added).

240. ICCPR commentators have noted the rationale for the inclusion of the language proscribing medical and scientific experimentation without informed consent. Twenty-three German physicians and administrators were criminally prosecuted by an American military

were performed on disabled persons.²⁴¹ The application of this particular provision to persons with disabilities is featured in human rights commentaries, and it is not surprising that drafters of the CRPD early on during the negotiations referenced the importance of including such a provision.²⁴²

The final expression of the prohibition against medical and scientific experimentation in the adopted Convention text appears as the second sentence of a single paragraph provision.²⁴³ As in the ICCPR formulation, Article 15 of the CRPD refers to impermissible medical or scientific experimentation. The text does not include the language “treatment,” proposed during the drafting process,²⁴⁴ and therefore should not be interpreted as constituting a blanket prohibition against any medical and scientific treatment per se in the absence of informed consent, a position that some disability advocates supported during the treaty negotiations to address, in particular, the coercive practice of administering psychiatric treatments (both of chemical and/or surgical variety).²⁴⁵ Moreover, the relationship of the second sentence of Article 15 to its first

tribunal for their willing participation in war crimes and crimes against humanity, including medical experimentation against disabled persons. Sixteen of the accused were found guilty, and seven were sentenced to death. See 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 795–96, 801 (U.S. Government Printing Office 1949); THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION 63–65, 105 (George J. Annas & Michael A. Grodin eds., 1992); Bernard M. Dickens et al., *Research on Human Populations: National and International Ethical Guidelines*, 19 L. MED. & HEALTH CARE 157, 157–58 (1991).

241. See HUGH GREGORY GALLAGHER, *BY TRUST BETRAYED: PATIENTS, PHYSICIANS, AND THE LICENSE TO KILL IN THE THIRD REICH* 53 (1995); *DISABILITY RIGHTS ADVOCATES, FORGOTTEN CRIMES: THE HOLOCAUST AND PEOPLE WITH DISABILITIES* 27–29 (2001); ROBERT PROCTOR, *RACIAL HYGIENE: MEDICINE UNDER THE NAZIS* 41–43, 188–94 (1988); see also *People With Disabilities*, in 1 *ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY* 253, 257 (Dinah L. Shelton ed., 2004); Oliver Lewis, *Protecting the Rights of People with Mental Disabilities: The European Convention on Human Rights*, 9 *EUR. J. HEALTH L.* 293, 293 (2002).

242. For discussions of violations of human rights and of humanitarian law as factors causing disability, see DESPOUY, *supra* note 32, at 179–80; *A Conceptual Framework*, *supra* note 167, at 85.

243. See CRPD, *supra* note 1, art. 15, ¶ 1. The only difference in the final formulation of the prohibition to the language in the ICCPR is the addition of gender sensitive language—“or her”—regarding the need for free consent.

244. See *id.*

245. See WNUSP Position, *supra* note 58. Such a prohibition would have had the consequence that any sort of treatment provided in the absence of informed consent would run afoul of the article, thereby creating considerable problems for a wide array of medical treatments provided in accordance with therapeutic necessity, including, of course, life-saving treatments in cases of medical emergencies.

sentence, particularly its extraction from its original placement as a second paragraph and insertion as the second sentence of the first paragraph, suggests that the provision targets a specific brand of ill-treatment that itself constitutes torture or cruel, inhuman, or degrading acts, namely coercive medical and scientific experimentation. This view is strongly supported by Nowak's analysis of the *travaux préparatoires* of ICCPR Article 7.²⁴⁶ Thus, the specific prohibition against medical and scientific experimentation could not successfully be invoked to cover compulsory treatment according to standard medical protocol on the basis that such treatment does not constitute "experimentation," but it could cover compulsory treatment that is non-standard and therefore experimental in nature, either of a medical drug or drug regimen, device, or procedure. This argument is missing from the existing discussion but should not be disregarded as a possible tool. To the extent that involuntary treatment is proscribed, it falls within the general prohibition and not within the terms of the medical experimentation prohibition.

The question as to what practices might constitute "experimentation" is a difficult one. Courts will look to medical standards in order to assess whether a procedure is acceptable or not. In instances where novel and untested practices are unacceptable, they may be outlawed as experimentation. However, grounding a claim in the medical experimentation prohibition alone may be difficult with respect to a full range of practices which ostensibly appear to be experimental but have nonetheless received the imprimatur of legitimacy within the medical profession. Thus, in the absence of national medical protocols, it is doubtful whether cage beds, psychosurgery, or unmodified ECT could be considered "experimentation." Such practices are, in any case, captured by the general prohibition as they most certainly do constitute "inhuman treatment," prohibited by the first sentence of Article 15 which does not hinge upon violating a medical standard. Practices prohibited under the "experimentation" prohibition are those falling outside of national psychiatric (and other medical) protocols, or practices for which the World Psychiatric Association (or other medical body)

246. See NOWAK, *supra* note 25, at 139.

issued a protocol and they are outside of it. An example could be the trial of new psychiatric drugs on residents of social care homes in the Czech Republic without their knowledge and consent,²⁴⁷ or certain behavioral aversive techniques of the kind reported on by DRI in its report on the practices of the Judge Rotenberg Center in Massachusetts.

In this regard, the MI Principles, though outdated and highly problematic in many respects, are relevant as a guide to the interpretation of CRPD, insofar as they provide clear authority for the prohibition of psychosurgery and other irreversible and highly dubious treatments on involuntary subjects.²⁴⁸ This protection is essential given that the drafters of the CRPD were unwilling to address these issues with any degree of specificity and in the light of ongoing and persistent egregious abuses across the world perpetuated against persons with psycho-social disabilities under the guise of “therapeutic treatment” or “cure.”

H. Article 15 as a (Re)invigorated Informed Consent Regime?

The prohibition of medical and scientific experimentation in the absence of informed consent is likewise relevant in the context of certain diseases that cause disabling conditions and in respect of which medical science offers no cure, but which are the subject of research and experimentation.²⁴⁹ In this context, the interpretive challenge for the CRPD treaty-monitoring body is considerable, particularly given the difficulty of clearly differentiating between treatment and experimentation in such contexts. The danger of conflating treatment and experimentation on human subjects—particularly in the case of treating those with terminal illnesses such as cancer or AIDS—is real and must be a core concern of those charged with interpreting Article 15. In the specific context of disability, offering (or coercively administering) a regimen of various drugs or therapies that in their combination are unproven in their medical efficacy gives rise to questions about differentiating between that which is experimental in nature and that which legitimately constitutes therapeutic treatment.

247. See Fiala, *supra* note 232, at 56.

248. See MI Principles, *supra* note 51, principle 11, ¶ 14. Insofar as the CRPD does not explicitly address psycho-surgery, the MI Principles are an essential repository of standards that, in the absence of more specific guidelines articulated by the Committee on the Rights of Persons with Disabilities, must be accorded due weight and interpretive value.

249. See *A Conceptual Framework*, *supra* note 167, at 84.

Of particular importance is the interpretation of Article 15, together with Article 3 (General Principles)²⁵⁰ and Article 12 (Equal recognition before the law),²⁵¹ which give primacy, respectively, to the principles of informed consent, non-discrimination, autonomy, and participation in decision-making and the presumption of legal capacity combined with a framework for supported decision-making. In the context of medical and scientific experimentation, the principles of non-discrimination, autonomy, and participation set forth in the CRPD strongly support a view contrary to that held by Nowak in his commentary on the ICCPR proscribing only treatment or experimentation without consent where the *effects* amount to degrading or inhuman treatment. At the core of the Convention and reflected in the Nuremberg Code is the notion that medical and scientific experimentation without consent itself constitutes a degradation of human dignity and an affront to individual autonomy, irrespective of the harmful effects of such experimentation or treatment.²⁵² Such conduct rejects the agency of the rights-holder, treating him/her as an object on which to act, as opposed to a subject and holder of rights.²⁵³ The Nuremberg Code admits of no limitation, restriction, or exception.²⁵⁴ Respect for autonomy as dictated by the Convention, as well as the principle of participation in decision-making, requires an informed consent process that is forthright and free of deceptive exploitation. It will be the role of the CRPD Committee to clarify the essential requirements of the informed consent process, not only with respect to the prohibition against medical and scientific experimentation in Article 15, but also in respect of all other medical interventions or services, such as those falling under the general right to health and rehabilitation provisions.²⁵⁵ Accordingly, it will fall to the interpreters of the CRPD to discern with care whether a particular intervention is experimental in nature and, if so, whether the strict requirements of informed consent

250. CRPD, *supra* note 1, art. 3.

251. *Id.* art. 12.

252. See 2 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 181–82 (U.S. Government Printing Office 1949) [hereinafter 2 TRIALS OF WAR].

253. See CRPD, *supra* note 1, art. 15. The focus in Nowak's interpretation on the physical harm done in such cases, and not on the harm resulting from the disrespect of the decisional authority of the human being concerned is therefore problematic. See generally *Nowak Report*, *supra* note 191, ¶ 80 (discussing the harmful results of solitary confinement, but not addressing the harms resulting from disrespect).

254. See 2 TRIALS OF WAR, *supra* note 252, at 181.

255. See CRPD, *supra* note 1, arts. 15, 24–25.

within the framework of supported decision-making proffered by the CRPD are met.

Finally, consistent with the foregoing discussions regarding informed consent, the CRPD must be regarded as going beyond the European Convention on Human Rights and Biomedicine (ECHR), which recognizes exceptions to the prohibition against research and experimentation absent consent in certain circumstances.²⁵⁶ The drafters of the CRPD adopted the approach taken in the ICCPR, maintaining a strict prohibition against scientific experimentation absent informed consent, as opposed to the approach taken in the ECHR. This is the better view and one that corresponds to the original regime outlined in the Nuremberg Code²⁵⁷ and springs from the egregious cases of medical experimentation perpetrated against persons with disabilities during the Holocaust, which unfortunately have modern manifestations.

VI. ENGENDERING THE CRPD ANTI-TORTURE FRAMEWORK

The drafters of the CRPD were concerned with the need to address the specific experiences of women and girls with disabilities within the framework of the rights articulated in the Convention. In this regard, Article 15 must be understood in the light of its gender implications and interpreted by reference to, among others, Article 6 (Women with Disabilities),²⁵⁸ as well as Article 3 (General Principles), which recognizes “[e]quality between men and women” as a general principle of the CRPD.²⁵⁹

The prohibition against torture and other forms of violence often takes on a particular form when perpetrated against women and girls generally, and this may be even more pronounced for women and girls with disabilities.²⁶⁰ Conditions within institutions may pose specific threats to women and girls. The threat of gender-based violence faced

256. See Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, art. 17, ¶ 2, Apr. 4, 1997, E.T.S. No. 164, available at http://www.vib.be/NR/rdonlyres/6EE92136-7F13-403F-83ED-05CD3506283B/0/conventionhumanrightsandbio_medicine.pdf.

257. See 2 TRIALS OF WAR, *supra* note 252, at 181.

258. CRPD, *supra* note 1, art. 6.

259. *Id.* art. 3(g).

260. See *Nowak Report*, *supra* note 191, ¶¶ 29–43; see also HUMAN RIGHTS WATCH, “AS IF WE WEREN’T HUMAN:” DISCRIMINATION AND VIOLENCE AGAINST WOMEN WITH DISABILITIES IN NORTHERN UGANDA 32–34, available at http://www.hrw.org/sites/default/files/reports/uganda_0810webwcover_0.pdf.

by women and girls in institutional settings has been well-documented²⁶¹ and persons with disabilities—both men and women—are up to three times more likely to be victims of physical and sexual abuse and rape.²⁶² This gender-based violence includes acts committed at the hands of family members and caregivers, dimensions which will be important factors to consider in the context of interpreting Article 15.²⁶³ Moreover, rape and other sexual violence is always cruel, inhuman, and degrading and in certain circumstances will constitute torture as well as breaches of other rules of international law, including war crimes.²⁶⁴ As noted by the Special Rapporteur on Torture, “rape constitutes torture when it is carried out by or at the instigation of or with the consent or acquiescence of public officials.”²⁶⁵

The Human Rights Committee has referenced both forced abortion and involuntary sterilization as violations of Article 7 of the ICCPR,²⁶⁶ and such practices would also trigger violations of Article 15 of the CRPD.²⁶⁷ The Special Rapporteur has noted that “given the particular vulnerability of women with disabilities, forced abortions and sterilizations of these women if they are the result of a lawful process by which decisions are made by their ‘legal guardians’ against their will, *may* constitute torture or ill-treatment.”²⁶⁸ The better view, however, and one consistent with Article 12 of the Convention²⁶⁹ and its framework of supported decision-making, is that such practices must be presumed to fall afoul of Article 15 absent free and informed consent. Finally, the failure to take the particular needs of women and girls with disabilities into account when in prison, detention, or otherwise in a controlled

261. See MDRI KOSOVO REPORT, *supra* note 33, at 12–15.

262. See HIV/AIDS AND INDIVIDUALS WITH DISABILITY, *supra* note 16, at 10.

263. See *id.*

264. See *Nowak Report*, *supra* note 191, at 8–9; see, e.g., Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶¶ 475–96 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf; Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶¶ 172–73 (Sept. 2, 1998), <http://www.unict.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>.

265. *Nowak Report*, *supra* note 191, ¶ 34.

266. See *id.* ¶ 38.

267. See generally Special Rapporteur on Violence Against Women, Its Causes and Consequences, Rep. on Violence Against Women, Its Causes and Consequences 18, Human Rights Council, U.N. Doc. A/HRC/14/22 (Apr. 23, 2010) (by Rashida Manjoo). CRPD Article 23(1)(c) obligates States Parties to ensure that “persons with disabilities, including children, retain their fertility on an equal basis with others” and, under Article 23(1)(b) to ensure their right to decide freely and responsibly on the number and spacing of their children. CRPD, *supra* note 1, art. 23, ¶ 1(b)–(c).

268. *Nowak Report*, *supra* note 191, ¶ 38 (emphasis added).

269. CRPD, *supra* note 1, art. 12.

setting in terms of reproductive health care, family contact, hygiene, and the like is central to ensuring compliance with Article 15, as well as Article 6, of the CRPD.

The implementation of Article 15 puts States under an obligation to include a gender dimension in their reporting to the Committee on the Rights of Persons with Disabilities.²⁷⁰ As a component of their reporting obligations, States must include measures they have undertaken to investigate and prosecute allegations of torture or cruel, inhuman, and degrading treatment or punishment against women and girls as well as measures implemented to provide effective remedies to victims.²⁷¹ The obligation to respect mandates that States undertake measures to ensure that women and girls with disabilities are protected from such abuse, which would entail, among other things, effective training of police, prison officials, caregivers, and medical personnel, all of whom will have responsibility for ensuring the protection of persons with disabilities in various custodial settings.

VII. EXPULSION AND EXTRADITION

The Convention makes no reference to the right of persons with disabilities to seek asylum nor does it make reference to the principle of non-refoulement, the obligation not to return a person to a State where he or she is likely to be subjected to torture.²⁷² Authoritative interpretations of the prohibition against torture do provide guidance as to the interaction of Article 15 of the CRPD and expulsion, deportation, extradition, and related procedures.²⁷³

The Committee against Torture has opined that deporting or extraditing a person to a country where he or she is likely to face torture

270. *See id.* arts. 3, 6, ¶¶ 2, 15.

271. *See id.* art. 16, ¶ 5; *see also* U.N. Secretary-General, Guidelines on Treaty-Specific Document to be Submitted by States Parties Under Article 35, Paragraph 1, of the Convention on the Rights of Persons with Disabilities, art. 16, U.N. Doc. CRPD/C/2/3 (Nov. 18, 2009), *available at* <http://www.ohchr.org/Documents/HRBodies/CRPD/CRPD-C-2-3.pdf>.

272. *See* GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 117 (2d ed. 1996) (defining the principle of non-refoulement to mean that “no refugee should be returned to any country where he or she is likely to face persecution or torture”).

273. The Committee against Torture has on occasion reviewed communications involving expulsion and deportation in the context of the anti-torture framework of the CAT. *See, e.g.*, *Agiza v. Sweden*, Decision of the Comm. Against Torture, Commc’n No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005), *available at* <http://www1.umn.edu/humanrts/cat/decisions/233-2003.html>.

or ill-treatment may constitute a violation of Article 3 of ICCPR.²⁷⁴ The Human Rights Committee, in its General Comment on Article 7, emphasized that “[s]tates parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”²⁷⁵ Gender-based aspects are of key relevance to any analysis, including the risk of gender-based violence which may aggravate existing disabilities or result in secondary disabilities.²⁷⁶

The jurisprudence of the ECHR supports the view that a State may breach its obligation under the torture prohibition of the European Convention if it expels or extradites an individual to another State in circumstances facilitative of torture or inhuman treatment.²⁷⁷ Particularly relevant to understanding the impact of Article 15 on expulsion and extradition cases is the decision in *D. v. United Kingdom*.²⁷⁸ There, the ECHR held that the deportation order of a man in advanced stages of AIDS to his home in St. Kitts constituted inhuman treatment on the basis of substandard medical resources accessible to him there.²⁷⁹ In *Bensaid v. United Kingdom*, however, the ECHR found no violation of the (Article 3) prohibition where an Algerian national due to be deported complained that deportation would violate his rights on the basis that he would receive no psychiatric medication for his mental illness.²⁸⁰ Similarly, the ECHR in *Salkic v. Sweden*²⁸¹ held

274. See, e.g., *Balabou Mutombo v. Switzerland*, Commc’n No. 13/1993, Report of the Comm. Against Torture, ¶ 3.1, U.N. Doc. CAT/C/12/D/013/1993 (Apr. 27, 1994), available at <http://www.unhcr.org/refworld/docid/3ae6b6784.html>.

275. CCPR General Comment No. 20, *supra* note 129, ¶ 9.

276. Gender-based violence impacting the risk of return would include, among others, rape and other forms of sexual violence, such as female genital mutilation, forced abortion, and forced sterilization. See *Nowak Report*, *supra* note 191, ¶¶ 59–60.

277. See, e.g., *Chahal v. United Kingdom*, App. No. 22414/93, 23 Eur. H.R. Rep. 413, 415 (1997) (holding that the return to India of Karamjit Singh Chahal, a Sikh activist suspected of involvement in terrorism, would violate the United Kingdom’s obligations under the European Convention on Human Rights, despite assurances that Chahal would not suffer mistreatment); see also *D. v. United Kingdom*, 1997-III Eur. Ct. H.R. (1997) (removal of an alien drug courier dying of AIDS to his country of origin (St. Kitts) where he has no accommodation, family, moral or financial support, and no access to adequate medical treatment would be deemed a violation of Article 3). For a relevant communication before the Committee against Torture, see *Mutombo v. Switzerland*, *supra* note 274, ¶ 9.4 (“The Committee considers that, in the present circumstances, his return to Zaire would have the foreseeable and necessary consequence of exposing him to a real risk of being detained and tortured.”).

278. *D. v. United Kingdom*, *supra* note 277.

279. *Id.*

280. *Bensaid v. United Kingdom*, App. No. 44599/98, Eur. Ct. H.R., ¶ 41 (2001).

281. *Salkic and Others v. Sweden*, App. No. 7702/04 Eur. Ct. H.R., 11 (2004).

inadmissible a case alleging a breach of Articles 2 and 3 on the basis that Sweden's expulsion order following the denial of refugee status would cause irreparable damage to the applicant's entire family on account of their poor mental health and inadequacy of treatment in Bosnia.²⁸² There, the Court stated that people subject to expulsion cannot claim an entitlement to remain in the territory in order to benefit from medical, social, or other forms of assistance.²⁸³ However, the Court left open the possibility that, in exceptional circumstances, humanitarian circumstances may trigger an Article 3 violation and justify the overruling of an expulsion order.²⁸⁴

Placed within the context of the Convention, one may conclude that it is impermissible under Article 15 for a State to return persons with disabilities to a country where they would likely experience conduct amounting to torture, or cruel, inhuman, or degrading treatment or punishment on the basis of their disability. More specifically, for example, a violation would clearly occur if a person with a psycho-social disability was returned to a country where he or she would face involuntary treatment, such as psycho-surgery, forced ingestion of poison, or an equivalent customary or bogus medical practice.²⁸⁵

VIII. CONCLUSION

The adoption of the CRPD clearly constitutes an important development in the anti-torture framework under international human rights law. Its principal contribution is to apply the torture prohibition within a disability context, consistent with core principles of the CRPD including dignity, non-discrimination, autonomy, and independence.²⁸⁶ It also contributes to the framework by introducing explicitly, for the first time in an international human rights treaty, the requirement that reasonable accommodations be provided and that the failure to do so

282. *Id.*

283. *Id.* at 10.

284. *Id.* at 11.

285. Examples of bogus medical practices predicated on the perception of disability include reparative therapies to "cure" gays and lesbians or violent "therapies" designed to exorcise or purge "demons." See generally SEXUAL CONVERSION THERAPY: ETHICAL, CLINICAL, AND RESEARCH PERSPECTIVES (Ariel Shidlo et al. eds., 2001) (offering current perspectives on the harmful impact of sexual orientation "reparative" interventions). Customary practices in more traditional societies that may rise to the level of an Article 15 violation include forced ingestion of harmful substances to heal persons with psycho-social disabilities, which the author observed during field work in Ethiopia in 2002. Such cases could in theory trigger State responsibility under Article 15 but may, in practice, be difficult to demonstrably link to the State.

286. See CRPD, *supra* note 1, art. 3.

results in a finding of discrimination.²⁸⁷ As implicitly recognized in cases before the ECHR,²⁸⁸ the CRPD makes clear that the duty to accommodate is part of the non-discrimination and equality framework and is thus applicable to persons detained or imprisoned.²⁸⁹ These principles add content to the overall anti-torture framework and should thus find ready application as a guide to regional and international regimes applying the prohibition against torture and other cruel, inhuman, and degrading treatment or punishment.

That said, the CRPD does little in Article 15 (or Article 17) other than codify existing human rights law and create the need for a complex and more nuanced application of CRPD principles and provisions. The ostensible consensus around Article 15 represented in the adopted text masks significant disagreement, particularly in the area of forced treatment.²⁹⁰ It is likewise a decidedly weak framework from which to tackle involuntary institutionalization, and its relationship in that regard to Article 14 is unclear.²⁹¹ Other questions remain about the reading of Article 15 in the context of other key provisions of the CRPD, as the reservations and declarative interpretations entered by States reveal. Following Andrew Byrnes and other commentators, in some instances human rights treaties can do little more than draw suggestive boundaries, leaving the precise contours of the obligation to evolve over time.²⁹²

Returning to constructivist accounts of human rights law-making,²⁹³ the contextualized meaning of Article 15—the application of the torture prohibition to disability is, at least in part, a work in progress. As noted in this article, certain components of the CRPD contextual regime are unsettled and have not yet given rise to the level of mutual confidence and shared understanding that have coalesced in

287. See *id.* arts. 5–7.

288. See SUMMARIES OF ECHR CASES, *supra* note 175, at 25.

289. See CRPD, *supra* note 1, arts. 2, 5.

290. See Report on Third Session, *supra* note 104, art. 11, ¶ 2 n.38.

291. See CRPD, *supra* note 1, art. 14, ¶ 1(a)–(b) (providing, *inter alia*, that “States Parties shall ensure that persons with disabilities, on an equal basis with others . . . [e]njoy the right to liberty and security of person . . . [a]re not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty”).

292. See Andrew Byrnes, *The Convention on the Elimination of All Forms of Discrimination Against Women and the Committee on the Elimination of Discrimination against Women: Reflections on Their Role in the Development of International Human Rights Law and as a Catalyst for National Legislative and Policy Reform* 6 (revision of a paper submitted to the Commission on the Status of Women, 54th Session, Mar. 1–12, 2010).

293. See *Process, Substance and Prospects*, *supra* note 2, at 508–09.

respect of other obligations.²⁹⁴ As Kayess and French emphasize in their superb analysis of the CRPD, “some crucial areas, including bioethics and compulsory treatment, are barely grazed by the CRPD text” and “[s]ome disability rights issues still remain untouched or undeveloped in international human rights law.”²⁹⁵ In a similar vein, Fiala points to the need for procedural development of the duty to investigate torture and other forms of ill-treatment as a priority for the CRPD Committee (or other treaty bodies such as CAT) as the CRPD text is scant on details regarding the duty to investigate.²⁹⁶

In this sense, therefore, the CRPD mechanisms and other United Nations human rights and regional institutional arrangements assume special significance. They should be seen as generators of the continuing CRPD law making process, offering opportunities to foster shared meaning around the disability rights set forth in the Convention. The institutional arrangements created by the CRPD, including its potentially innovative periodic Conference of States Parties and the Committee on the Rights of Persons with Disabilities,²⁹⁷ along with those that will be implicated by it, such as existing treaty bodies (e.g., the CAT Committee), regional human rights systems and national human rights commissions, are important sites of advocacy and can foster shared understanding, bearing in mind the educative and constitutive effects of such processes.²⁹⁸ The CRPD, then, is a “living

294. Another provision whose implications are far from settled is Article 12, in particular the view put forward in some quarters that it requires abolishing the “insanity defense” in domestic criminal law. According to a Report issued by the OHCHR: “In the area of criminal law, recognition of the legal capacity of persons with disabilities requires abolishing a defence based on the negation of criminal responsibility because of the existence of a mental or intellectual disability.” OHCHR Report, *supra* note 171, ¶ 47.

295. Kayess & French, *supra* note 58, at 34. They further acknowledge that “it will be important that disability human rights activists neither undervalue, nor overestimate, the role and scope of the CRPD and its potential contribution to securing the human rights of persons with disability into the future.” *Id.*

296. Fiala, *supra* note 232, at 56.

297. See generally Michael A. Stein & Janet E. Lord, *Monitoring the Committee on the Rights of Persons with Disabilities: Innovations, Lost Opportunities, and Future Potential*, 32 HUM. RTS. Q. 691 (2010); Janet E. Lord & Michael A. Stein, *The Committee on the Rights of Persons with Disabilities: An Opportunity to Provide Guidance on CRPD Interpretation and Engage with the Disability Community*, 58 INT’L REHAB. REV. 2 (2009).

298. See *Process, Substance and Prospects*, *supra* note 2, at 509 (describing the Convention “as a process through which actor identities and interests are shaped and reconstituted”).

treaty regime²⁹⁹ and a site for the further development and enrichment of the anti-torture regime, generally, and disability rights relating to physical and mental integrity, in particular.

299. See Geir Ulfstein, *Reweaving the Fabric of International Law? Patterns of Consent in Environmental Framework Agreements*, Comment, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 145, 145 (Rüdiger Wolfrum & Volker Röben eds., 2005) (applying the concept of “living treaty regime” to the constellation of institutions and procedures developed by multilateral environmental agreements).