

## **The Human Rights' Implications Of Non-Ratification Of And Reservations To The UN Convention On The Rights Of Persons With Disabilities**

**Kenneth Asamoah Acheampong\***

### **ABSTRACT**

*The UN Convention on the Rights of Persons with Disabilities, 2006, (CRPD) opened the door to the enjoyment of human rights by persons living with disabilities in equal measure with the rest of humanity as mandated by the foundational International Bill of Human Rights (IBHR), viz. the Universal Declaration of Human Rights, 1948, and the two human rights Covenants of 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR) and their Optional Protocols. This door had been nudged by the UN Declaration on the Rights of Mentally Retarded Persons, 1971, the UN Declaration on the Rights of Disabled Persons, 1975, and United Nations General Assembly's declaration of the "UN Decade of Disabled Persons" from 1983 to 1992. However, the non-ratification of and reservations made to this Convention by some UN Member States appear to be steadily unsettling this door as they adversely impact on the Conventions' guiding principles, such as the following: respect for inherent dignity and individual autonomy, including the freedom to make one's own choices; non-discrimination; equality of opportunity; and full and effective participation and inclusion in society. This is the context in which this paper, from a theoretical perspective, interrogates the CRPD in a two-pronged approach. Firstly, it challenges UN Member States who are yet to ratify the CRPD to uphold their treaty obligation under the UN Charter, 1945, and the IBHR to encourage respect for human rights for all without discrimination; thus, the paper argues about the effects of lack of such non-ratification. Secondly, the paper critiques reservations made to the CRPD, which have the effect of defeating the object and purposes of the Convention and, thus, undermining international law and, more importantly, the dignity of persons with disabilities. Hence, the paper concludes by urging UN Member*

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\* Associate Professor, University of Botswana, Gaborone, Botswana: Email: [Acheampongk@UB.AC.BW](mailto:Acheampongk@UB.AC.BW)

*States yet to ratify the CRPD to do so and those who have attached reservations to their ratifications and which reservations dilute or obfuscate the Convention to renounce such reservations and, thereby, contribute to the maintenance of the integrity of the Convention and, thereby, the inherent dignity of persons with disabilities.*

## 1. INTRODUCTION

*“Human rights are those rights without which there can be no human dignity.”<sup>1</sup>*

When on 13 December 2006, the United Nations General Assembly (UNGA) adopted the Convention on the Rights of Persons with Disabilities (CRPD) (and its Optional Protocol)<sup>2</sup> and the then UN Secretary General, Kofi Annan, stated that the Convention represented the “dawn of a new era,”<sup>3</sup> a large segment of humanity, around 650 million people living with disabilities, saw the ray of human rights’ dawn envisioned by article 1 of the UN Universal Declaration of Human Rights (UDHR),<sup>4</sup> 1948, which states, inter alia: “All human beings are born free and equal in dignity and rights.”

This freedom and equality in dignity and rights was not conferred on people living with disabilities by the CRPD. These people already had such dignity and rights; the Convention was adopted with the aim of ensuring that people living with disabilities are afforded equal opportunities as all other persons to fully exercise human rights and, thereby, maintain their inherent human dignity. This was the essence of the determination made by the peoples

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1 John Humphrey, *No Distant Millennium: The International Law of Human Rights*, Paris, UNESCO, 1989, p. 20 [John Humphrey was one of the authors of the landmark and pacesetting UN Universal Declaration of Human Rights (UDHR), which the UN General Assembly proclaimed, on 10 December 1948, “... *as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms* and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.” (Italics and bolding added) See Preamble, Last para., UDHR, UN Doc. A/RES/217(III), 10 December 1948].

2 UN General Assembly, Convention on the Rights of Persons with Disabilities; resolution adopted by the General Assembly, 24 January 2007, UN Doc. A/RES/61/106.

3 UN, The Secretary General’s Message on the International Day of Disabled Persons, 3 December 2005, New York/Geneva, UN, 2005.

4 See note 4, supra.

of the United Nations, in the UN Charter, 1945 (Charter),<sup>5</sup> to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.<sup>6</sup> Hence, the numerous references to human rights and fundamental freedoms in the Charter<sup>7</sup> and the UDHR's specification of what these human rights are and their application to all persons without discrimination had the whole of humanity, including people living with disabilities, in their perspective.

This absolute universal application of human rights to all persons could not have been otherwise considering the egregious violation of the human rights of people living with disabilities, which took place in some societies in the not-too-distant past of human history. For example, there was forced sterilisation of people who were deemed to be "undesirables" because of their disability. This was carried out, purportedly, to prevent such people from having progeny who might, it was claimed, adulterate society's perception of an ideal or perfect human being. Though it is hard to believe now, such sterilisations took place in some states of the United States of America in 1907 through compulsory legislation directed at people believed to have genetic illnesses or conditions. In the 1920's and 1930's, the Scandinavian countries of Denmark, Sweden, Finland, and Norway, which today are overwhelmingly perceived as democratic societies with high human rights' credentials, had similar pieces of sterilisation legislation on their statute books. Other European countries such as Lithuania, Estonia, Latvia, Czechoslovakia, Yugoslavia, Hungary, and Turkey, were, also, in the fray of these scurrilous and dehumanising programmes.<sup>8</sup>

Nazi Germany's Third Reich regime reinforced and accelerated the demeaning treatment of people with disabilities. In addition to forced sterilisation, Adolf Hitler and his ideological cohorts carried out exterminations premised upon eugenics. After their assumption of political power in 1933, they established "euthanasia centres" across Germany and Austria. At these centres, and under the nauseous "T4" Programme of euthanasia, they killed people with disabilities through lethal injection or poison gas. An estimated 275,000

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5 United Nations, Charter of the United Nations and Statute of the International Court of Justice, 24 October 1945, New York, UN, 1 United Nations Treaty Series XVI.

6 Ibid., See Preamble, para. 2.

7 Ibid., See Preamble (para. 2), Article 1(3), Article 13(1)(b), Article 55(c), Article 62(2), Article 68, and Article 76(c).

8 BBC, "The Holocaust and disabled people: Frequently asked questions" <[www.bbc-co.uk/ouch/fact/the\\_holocaust\\_and\\_disabled\\_people\\_faq\\_frequently\\_asked\\_questions.shtml](http://www.bbc-co.uk/ouch/fact/the_holocaust_and_disabled_people_faq_frequently_asked_questions.shtml)> accessed 21 August 2020.

people lost their lives because of this atrocity.<sup>9</sup> This and similar treatment of other Nazi-perceived societal “undesirables”, such as the Roma, homosexuals, Jehovah Witnesses, and non-white Germans and the Nazi holocaust<sup>10</sup> provided the fillip, if any were needed, for the main Allied Powers of World War 2, viz., Great Britain, France, the United States of America, and the Soviet Union, to fight strenuously to defeat the Axis Powers of Germany, Japan and Italy in a war fought to vindicate human rights. The international human rights’ regime established to protect the human rights of all persons after the War provided the beacon for the world’s gravitation towards an international instrument to equalise the opportunity of people with disabilities to enjoy, unconditionally, such rights in common with the rest of humanity.

This is the context in which this paper discusses the UN Convention on the Rights of Persons with Disabilities. It begins with an Introduction in which it outlines, albeit briefly, the deprivations suffered by persons with disabilities, including the right to life, the most paramount of all rights, human rights included. Next, the paper sets out the human rights’ underpinnings of the UN General Assembly’s adoption of the Convention. It does this with the aim of showing that based on the human dignity grounding of human rights, the Convention’s adoption by UNGA was bound to materialise. The paper follows this up with an analysis of the core principles of the Convention to lay a firm basis for the Conventions’ human rights’ roots. The paper’s penultimate discussion focuses on the non-ratification of, and reservations made to the Convention. This is done to highlight the fact that without the concerted efforts of the entire international community, acting principally through the United Nations, the *raison d’etre* for the establishment of the world body would be negated and the laudable provisions of the Convention would amount to nothing more than pious averments bereft of moral authority and legitimacy and having only rhetorical flavour. Finally, the paper ends with concluding remarks emanating from the discussions carried out in it.

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9 The Wiener Holocaust Library, “The Holocaust Explained: How and why did the Holocaust happen?” <<https://www.the.holocaustexplained.org/how-and-why/>> accessed 21 August 2020 (The designation ‘T4’ was a reference to the address of the Programme’s Berlin Headquarters, viz., Tiergartenstrasse 4, Ibid).

10 The Wiener Holocaust Library, “The Holocaust Explained: What was the Holocaust?” <<https://www.theholocaustexplained.org/what-was-the-holocaust/>> accessed 21 August 2020 [NOTE: (i) The Nazi Holocaust was the Nazi regime’s murder of six million European Jews through extermination centres or camps and death squads known as ‘Einsatzgruppen’. (ii) The “Holocaust”, also, refers to the mass murder of disabled people, Roma people, Polish civilians, Soviet Prisoners-of-war and civilians, Jehovah’s Witnesses, Freemasons, homosexuals, communists, socialists, and trade unionists. Ibid.]

## 2. THE HUMAN RIGHTS' UNDERPINNINGS OF THE CRPD

World War II (1939 – 1945) was a watershed in the development and concretization of the concept of human rights, which the Allied Powers had advanced during the War. Hence, when these Powers formed the United Nations organization, arguably the most important international organization, they stated in the UN Charter, which set up the UN, that the peoples of the United Nations were determined to reaffirm faith in fundamental human rights and in the dignity and worth of the human person.<sup>11</sup>

This reaffirmation was critical to human rights as it patently implied that the maintenance of the dignity and worth of the human person was the final goal of the concept of human rights. Human dignity is indispensable to human rights; in fact, human dignity is the basis and quintessence of human rights. This stipulation finds anchor in the unanimous affirmation made by all Member States of the United Nations at the World Conference on Human Rights held in Vienna, Austria, in 1993, that “[a]ll human rights derive from the dignity and worth inherent in the human person.”<sup>12</sup> This underpins the United Nations’ general definition of human rights in the following words: “Human rights could be generally defined as those rights which are inherent in our nature and without which we cannot live as human beings.”<sup>13</sup> Similarly, the UN Development Programme (UNDP) states, as follows:

Human rights are the rights possessed by all persons by virtue of their common humanity, to live a life of freedom and dignity. They give all people moral claims on the behaviour of individuals and on the design of social arrangements, and are universal, inalienable, and indivisible.<sup>14</sup>

These rights are as critical to persons living with disabilities as much as they are to those who are living without such liabilities as they all possess human dignity in equal measure by virtue of their common humanity. As Mahlmann, in elucidating the concept of human dignity, contends: “Human dignity means the specific value status of human beings derived from their humanity as such.”<sup>15</sup>

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11 See Note 9, *supra*.

12 United Nations, Vienna Declaration and Programme of Action (adopted at the World Conference on Human Rights), New York, United Nations, 1993, UN Doc A/CONF/24.

13 United Nations, Human Rights: Questions and Answers, New York, United Nations, 1987, p. 4

14 UNDP, Human Rights and Development, retrieved from <[hd.undp.org/sites/default/files/hdrp.2010](http://hd.undp.org/sites/default/files/hdrp.2010)> accessed 22 April 2012.

15 Malcolm Mahlmann, “The Basic Law at 60: Human Dignity and the Culture of Republicanism”, 11 German Law Journal 1, (2010), p. 9 – p. 31, at p. 30.

Schachter jurisprudentially argues that “[w]e do not find an explicit definition of the expression ‘dignity of the human person’ in international instruments... or in national law” and that “[i]ts intrinsic meaning has been left to intuitive understanding, conditioned in large measure by cultural factors.”<sup>16</sup> However, from this perspective, Shaw contends that human dignity is constitutive of values such as respect, power, enlightenment, skill, health, well-being, affection, and rectitude or integrity.<sup>17</sup> The UN Charter highlighted this dignity by profusely asserting that all human rights must be respected and promoted for all without distinction as to race, sex, language, or religion.<sup>18</sup>

In following the human rights’ path chartered by the UN Charter, the peoples of the United Nations stressed the fact that human dignity forms the cornerstone of the concept of human rights enshrined in the International Bill of Human Rights (IBHR), viz., the Universal Declaration of Human Rights, 1948 (UDHR),<sup>19</sup> and the two 1966 international covenants on human rights, the International Covenant on Economic, Social and Cultural Rights (I CESCRR)<sup>20</sup> and the International Covenant on Civil and Political Rights (ICCPR).<sup>21</sup> In doing so, the UDHR, the first of the IBHR instruments, specifically provided for the rights deemed as human rights but which the Charter did not stipulate. It preceded these rights with a stipulation, in Article 1 that “[a]ll human beings are born free and equal in dignity and rights.”

Significantly, the UDHR went beyond the four prohibited grounds of discrimination in human rights enjoyment specified by the UN Charter, viz., race, sex, language and religion, by expanding these grounds with the following words: “Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>22</sup> The ICESCRR and the ICCPR took up this cue and, also, made such expansion in their Article 2 by stipulating that their States Parties undertake to ensure that the rights they have enunciated will be exercised without discrimination or distinction of any kind, such as race, colour, sex,

16 Oscar Schachter, “Human Dignity as a Normative Concept” Vol. 77 AJIL, (1983), p. 848, at p. 849

17 Malcolm Nathan Shaw, *International Law*, 5th ed., Cambridge, Cambridge University Press, 2003, p. 249

18 See the Charter’s Articles 1(3), 13(1)(b), 55(c), 62(2), 68, and 76(c).

19 UN Doc. A/RES/217 A (III), 10 December 1948.

20 UN Doc. A/RES/2200 A (XXI), 16 December 1966.

21 UN Doc. A/RES/2200 A (XXI), 16 December 1966.

22 See Article 2 of the UDHR.

language, religion, political or other opinion, national or social origin, property, birth, or other status.<sup>23</sup>

This equality and non-discrimination provision, which is one of the fundamental principles of the concept of human rights, is standard fare in the myriad of human rights' instruments adopted by the UN General Assembly in the context of the IBHR. It provides a major motivation for the UN's adoption of the CRPD, and its antecedents.

### 3. THE GENERAL PRINCIPLES OF THE CRPD

#### 3.1 The Human Rights' Background of the CRPD's General Principles

To appreciate both the letter and spirit of the CRPD, one must understand the human rights' context of the guiding principles of the Convention. In this context, it must be noted, first and foremost, that the CRPD does not, as stated earlier, provide for new rights for persons with disabilities; it only affirms their human rights explicitly for them. Hence, in highlighting the essence and the potential of the Convention, Louise Arbour, the UN High Commissioner for Human Rights,<sup>24</sup> stated:

This new treaty will play a key role. It will affirm the rights of persons with disabilities explicitly and spell out the action needed to implement them. It will also raise awareness about the human rights of persons with disabilities (...). We need to understand better the specific challenges that persons with disabilities face in accessing their human rights, and this treaty will serve to educate as well as to ensure that obligations are met.<sup>25</sup>

The meeting of these obligations was long overdue as people with disabilities had, for a long time, been treated unequally in matters of human rights. As Kofi Annan, the UN Secretary-General at the time of the Convention's adoption, stated:

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23 See Article 2(2) of the ICESCR and Article 2(1) of the ICCPR.

24 Louise Arbour was the UN High Commissioner for Human Rights at the time of the UN adoption of the CRPD.

25 Statement by Louise Arbour, UN High Commissioner for Human Rights, UN General Assembly Ad Hoc Committee, Seventh Sessions, New York, 27 January 2006.

Persons with disabilities make up the world's largest minority group. They are disproportionately poor, are more likely to be unemployed, and have higher rates of mortality than the general population. All too often, they do not enjoy the full spectrum of civil, political, social, cultural, and economic rights. For many years, the rights of persons with disabilities were overlooked.<sup>26</sup>

This human rights' assessment is a clear testimony to the fact that when it comes to persons living with disabilities, the fundamental human rights' principle of equality and non-discrimination has been honoured more in its breach than in its acknowledgment and effectuation. In recognition of these human rights' lapses or deficiencies, the Convention's Preamble, which is as important as the Convention's substantive provisions in the interpretation of the Convention,<sup>27</sup> begins by recalling the UDHR's principles, which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice, and peace in the world.<sup>28</sup> Furthermore, and in stressing the equality principle underpinning the enjoyment of human rights, the Convention's Preamble recognizes that in the IBHR the United Nations has, further, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind.<sup>29</sup> In the same tune, the Preamble recognizes "that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person."<sup>30</sup>

### 3.2 The Human Rights' Content of the CRPD's General Principles

This dignity and worth inherent in every human being form the cornerstone of the CRPD, which has eight general principles that are deeply embedded in the fundamental human rights' principle of equality and non-discrimination. In sum, these general principles are, as follows:

(a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons.

<sup>26</sup> See Note 6, above.

<sup>27</sup> See Article 31(2), Vienna Convention on the Law of Treaties, 1969, UNTS 1980, Vol. 1155, 1-18232 (Registered on 27 January 1980). Article 31(2) states, in part: "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes, ...".

<sup>28</sup> See CRPD, Preamble, Para. A, and UDHR, Preamble, Para. 1.

<sup>29</sup> See CRPD, Preamble, Para. B.

<sup>30</sup> See CRPD, Preamble, Para. H.

- (b) Non-discrimination.
- (c) Full and effective participation and inclusion in society.
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity.
- (e) Equality of opportunity.
- (f) Accessibility.
- (g) Equality between men and women.
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.<sup>31</sup>

These principles take account of the concern of the Convention's States Parties that persons with disabilities face difficult conditions, which include being "subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status."<sup>32</sup> It is for this reason that these States Parties state, unequivocally, that the Convention's purpose is "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."<sup>33</sup>

This purpose of the CPRD is manifested in each of its eight general principles. The inherent dignity of persons with disabilities, which the first principle highlights, is central to human rights' discourse as human beings have human rights equally by virtue of their common humanity. It is this dignity that empowers each human being to assert her/his autonomy as the Convention acknowledges. Because of this autonomy, each person is enabled to act independently in the making of her/his choices. This is the context in which McCrudden asserts, as follows: "Self-determination, personal autonomy, self-respect, feelings of self-worth, and empowerment, these are the stuff and substance of essential human dignity."<sup>34</sup>

Non-discrimination, the second general principle, is the fulcrum of all the general principles of the CRPD. It underpins the Convention's purpose of

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31 See CRPD, Article 3.

32 See CRPD, Preamble, Para. P.

33 See CRPD, Article 1.

34 Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," *EJIL*, (2008), Vol 19, No 4, p. 655 – p. 724, at p. 701.

promoting, protecting, and ensuring the full enjoyment of all human rights by all persons with disabilities and promoting respect for the dignity that inheres in them. This dignity was totally steamrolled by the forced sterilization of disabled persons in some American states and some European countries, as stated earlier, in the early part of the C20th. Nazi Germany accelerated this odious policy and, also, exterminated these persons, in addition to other minorities, through the Holocaust.<sup>35</sup> The World War 2 Allied Powers definitely had this in mind when they formed the United Nations organization in whose Charter they determined, *inter alia*, to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of man and women.<sup>36</sup> Hence, when the UN General Assembly adopted the UDHR as a common standard of achievement for all peoples and all nations,<sup>37</sup> it had all human beings in mind. This accounts for its stipulation, in the very first article of the UDHR, that “All human beings are born free and equal in dignity and rights.” As discussed earlier, all the prohibited grounds of discrimination in the IBHR, and the myriad of UN human rights’ instruments emanating from it, are grounded on the fundamental human rights’ principle of equality and non-discrimination.<sup>38</sup>

This principle of equality and non-discrimination is at the center of the CRPD principle of full and effective participation and inclusion in society. All persons with disabilities can fully invoke this principle if they are able to enjoy the holistic human right to development by virtue of which all persons and peoples are equally entitled to participate in, contribute to, and enjoy all human rights and fundamental freedoms.<sup>39</sup> Without this principle, persons with disabilities would be consigned to the periphery of development where they would be deemed as objects of pity and/or charity, and, collectively, a medical problem to be solved medically. It is for this reason that the UN, in stressing the human-rights approach to disability, contends, as follows: “Importantly, the Convention (CRPD) and its Optional Protocol challenge previous perceptions of

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35 See Notes 11, 12, and 13, *supra*.

36 See UN Charter, Preamble, Para. 2.

37 See UDHR, Preamble, Final Para.

38 See, for example, the following UN human rights instruments: (i) Convention on the Elimination of All Forms of Discrimination against Women, 1979, UN Doc A/RES/34/180, 18 December 1979; (ii) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, UN Doc A/RES/39/46, 10 December 1984; (iii) UN Declaration on the Right to Development, 1986, UN Doc A/RES/41/128, 4 December 1986; (iv) Convention on the Rights of the Child, 1989, UN Doc A/RES/44/25, 20 November 1989; and (v) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990, UN Doc A/RES/45/158, 18 December 1990.

39 See Article 1(1), UN Declaration on the Right to Development, 1986, UN Doc. A/RES/41/128, 4 December 1986.

disability – as a medical problem or a generator of pity or charitable approaches – and establish an empowering human rights-based approach to disability.”<sup>40</sup>

This human rights-based approach to disability is the pivot of all the CRPD general principles. This applies to those already discussed and the remaining five general principles. In this respect, humanity forms the bedrock for human rights; hence, all human beings are entitled to enjoy human rights in equal measure. Differences emanating from disabilities do not provide any justification for treating human beings differently in matters of human rights. The principle of equality of opportunity should, thus, have general application to all segments of society. This is what the UN General Assembly mandated in the Declaration on the Right to Development in terms of the equal entitlement of all persons and peoples to participate in, contribute to and enjoy all human rights.<sup>41</sup> This entitlement is meaningless if the CRPD general principle of accessibility is not fully activated for persons with disabilities as such accessibility enables persons with disabilities to enjoy all human rights equally with all other persons.

The penultimate general principle of equality between men and women finds resonance in the determination made by the peoples of the United Nations Charter to, *inter alia*, reaffirm faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women.<sup>42</sup> It was on account of this that the Charter made sex one of the four specified prohibited grounds for discrimination in matters of human rights and fundamental freedoms.<sup>43</sup> The fundamental human rights' principle of equality, which directly underpins the just discussed CRPD general principle, also comes into focus in respect of the final CRPD general principle, which calls for “[r]espect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.”<sup>44</sup> The value respect, which is stated twice in this general principle, is one of the major values that are constitutive of human dignity, the quintessence of human rights. Hence, it should, as mandated by this final CRPD general principle, be availed to persons

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40 See Foreword, UN, *The Convention on the Rights of Persons with Disabilities: Training Guide – Professional Training Series No 19*, New York, UN, 18 October 2016, UN Publication HR/P/PT/19.

41 See Note 41(iii), *supra*.

42 See UN Charter, 1945, Preamble, Para. 2.

43 See, for example, UN Charter, Article 1(3). [It should be noted that in the IBHR the United Nations General Assembly expanded the prohibited grounds of non-discrimination in human rights' enjoyment beyond the four grounds of race, sex, language, and religion specified in the UN Charter; all UN instruments dealing with human rights embody the fundamental principle of equality and non-discrimination with prohibited grounds of non-discrimination along the lines of those of the IBHR instruments.].

44 See CRPD, Article 3(h).

with disabilities much as it applies to the rest of humanity.<sup>45</sup>

The substantive provisions of the CPRD give flesh and viscera, human rights-wise, to the dry jurisprudential bones of the CRPD's general principles. To start with, the Convention sets out its aim or purpose as promoting, protecting and ensuring the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and, also, promoting respect for the inherent dignity of these persons.<sup>46</sup> Though the Convention does not specifically define the term disability, it asserts that its States Parties recognize that disability is a concept that is evolving and, further, that "disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others."<sup>47</sup> Furthermore, the Convention defines the expression or term "discrimination on the basis of disability" as follows:

**"Discrimination on the basis of disability"** means any distinction, exclusion, or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment, or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.<sup>48</sup>

On the basis of this definition, which encompasses all human rights as stipulated by the holistic right to development,<sup>49</sup> the CRPD makes provision for, inter alia, the following rights: the right to equality before and under the law<sup>50</sup> as entailed in the fundamental human rights' principle of equality and non-discrimination; the right to life,<sup>51</sup> the pivot of all rights; the right to live independently and participate fully in all aspects of life;<sup>52</sup> the right to recognition everywhere as persons before the law;<sup>53</sup> and the right to freedom from torture or to cruel, inhuman or degrading treatment or punishment and, in particular,

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45 See CRPD, Preamble, Para. h.

46 See CRPD, Article 1.

47 See CRPD, Preamble, Para. e.

48 See CRPD, Article 2, bolding and inverted commas original

49 See Note 41(iii), supra

50 See CRPD, Article 5.

51 See CRPD, Article 10.

52 See CRPD, Article 9.

53 See CRPD, Article 12.

no one shall be subjected without his or her free consent to medical or scientific experimentation.<sup>54</sup>

To make these rights meaningful, States Parties of the CRPD are enjoined to take steps, in accordance with the *pacta sunt servanda* principle of international law,<sup>55</sup> to fulfil their human rights' obligations to respect, protect, and fulfil the rights specified in the CRPD. They must do so fully cognizant of the following UN advice as to the intention with which it adopted the CRPD:

The Convention is intended as a human rights instrument with an explicit social development dimension. It adopts a broad categorization of persons with disabilities and reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms. It clarifies and qualifies how all categories of rights apply to persons with disabilities and identifies areas where adaptations have to be made for persons with disabilities to effectively exercise their rights and areas where their rights have been violated and where protection of rights must be reinforced.<sup>56</sup>

In the context of this unambiguous intention of the UN, the framers of the CRPD, States Parties to this Convention bear a general treaty obligation to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind based on disability. In effecting this omnibus obligation, the Convention's States Parties have assumed, inter alia, the following specific treaty obligations: the adoption of all appropriate legislative, administrative and other measures aimed at the implementation of the Convention's rights; the taking of all appropriate measures, including legislation, aimed at modifying or abolishing existing laws, regulations, customs and practices constituting discrimination against persons with disabilities; and ensuring that all policies and programmes adopted by the state take account of the protection and promotion of the human rights of persons with disabilities.<sup>57</sup>

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54 See CRPD, Article 15.

55 This is a Latin expression, which literally means agreements must be kept. [This principle, which is generally deemed to be the oldest principle of international law, is important as without it no international agreement would be enforceable].

56 As quoted by Disabled World Organization <[www.disabled-world.com](http://www.disabled-world.com)> accessed 31 August 2020.

57 See CRPD, Article 4.

In taking into consideration the fact that women and girls with disabilities are subject to multiple discrimination, the CRPD obligates its States Parties to, firstly, recognize this fact and, secondly, and, in practical terms, take all measures to ensure that this group of persons with disabilities fully and equally enjoy all human rights and fundamental freedoms.<sup>58</sup> With all these considerations, the CRPD imposes a similar obligation on its States Parties in respect of children.<sup>59</sup>

In giving substantive meaning to the obligations assumed by its States Parties, the CRPD mandates that these obligations shall be carried out on the basis of the fundamental human rights' principle of equality and non-discrimination, which is central to the Convention and human rights' discourse, generally.<sup>60</sup> Furthermore, these States Parties must engage in awareness-raising exercises at the family level and in society, generally, with the aim of sensitizing all and sundry to the imperatives of the Convention and, thereby, enabling people with disabilities to fully enjoy human rights.<sup>61</sup>

The discussions above provide a firm human rights' basis for the discussions carried out below in respect of the ramifications of the non-ratification of and reservations made to the CRPD by some UN Member States.

#### **4. THE NON-RATIFICATION OF AND RESERVATIONS TO THE CRPD**

Treaties<sup>62</sup> concluded at the international level give vent to their practical implementation at the domestic or national level only if states for whom they are intended ratify them and, subsequently, domesticate them. It is this paper's submission that the UN adopted the CRPD with the whole of humanity in mind; hence, every country must be a State Party to this Convention. This submission is made on account of the apodictic fact that there is no country without people living with disabilities. However, not all countries have ratified the CRPD as a firm step on the laudable path to the domestication of the provisions of

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58 See CRPD, Article 6.

59 See CRPD, Article 7.

60 See CRPD, Article 5.

61 See CRPD, Article 8.

62 According to Article 2(1)(a) of the Vienna Convention on the Law of Treaties, 1969, a "'Treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." See Vienna Convention on the Law of Treaties, (Concluded at Vienna, Austria, on 23 May 1969), UNTS 1980, Vol No 1155, I – 18232.

the Convention in their jurisdictions. Member States of the United Nations, whose General Assembly adopted the CRPD, have not all gone down the path of ratification of the Convention. As at 1 November 2020, 164 of these UN Member States had become signatories to the Convention while 182 of them had ratified or acceded to the Convention.<sup>63</sup>

In consideration of the fact that there are 193 Member States of the UN, it can be contended that there is no unanimity in the UN regarding the ratification of the CRPD, which was adopted on 13 December 2006, almost 14 years ago. The net effect of this is that there are some UN Member States which have not signalled, through ratification, their intention to have their actions carried out in respect of persons living with disabilities held to international scrutiny. Some legitimate questions that may be posed in respect of the non-ratification of the CRPD<sup>64</sup> are, as follows: What is the attitude of non-ratifying states towards persons with disabilities in their societies? Are disabled people in such countries protected by their countries in terms of the rights availed by the CRPD? What form does such protection, if it exists, take? How do these countries uphold the dignity of disabled people? Can these countries contend, in good faith, that there are no persons with disabilities in their societies? In the absence of ratification of the CRPD by these countries, the international community, acting through UN treaty bodies, is in no position to interrogate these countries in respect of the questions posed, *bona fide*.

The questions just posed apply, to some extent, to UN Member States which have ratified the CRPD but have not ratified its Optional Protocol. By ratifying the CRPD, these states are under an international legal obligation to submit, to the Committee on the Rights of Persons with Disabilities,<sup>65</sup> a comprehensive report on the measures that they have undertaken to give effect to their treaty obligations within two years after the Convention enters into

63 See UN, Department of Economics and Social Affairs, Convention on the Rights of Persons with Disabilities In terms of the Vienna Convention on the Law of Treaties, “‘Ratification’, ‘acceptance’, ‘approval’ and ‘accession’ mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.” See Note 65, *supra*, Article 2(1)(b).

64 As at 1 November 2020, African countries which had not ratified the CRPD were, as follows: Botswana, Equatorial Guinea, Eritrea, Somalia, South Sudan, and Western Sahara; See UN, Convention on the Rights of Persons with Disabilities: Status as at 1/11/2020, UN Treaty Series Vol. 2515 <<https://treaties.un.org/>> accessed 1 November 2020 (Note: Botswana was part of this group until 12 July 2021 when, through accession, she became a State Party to the Convention; see UN Human Rights Treaty Bodies <[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx)> accessed 12 August 2021).

65 See CRPD, Article 34, which establishes the Committee on the Rights of People with Disabilities; see Note 5, *supra*.

force for each particular state. Thereafter, these states must submit such reports at least every four years or whenever the said Committee so requests.<sup>66</sup> The UN Secretary-General is obligated by the CRPD to make these reports available to all States Parties of the Convention.<sup>67</sup>

These reports shed some international light on the state of the human rights of persons with disabilities in these countries. However, the non-ratification of the Convention's Optional Protocol by these states dilutes their ratification of the parent CRPD. This is because through this non-ratification, they exempt themselves from the recognition of the competence of the Committee on the Rights of Persons with Disabilities to consider complaints from individuals within their jurisdictions respecting violations of the CRPD.<sup>68</sup> As individuals with disabilities obviously have a direct interest in the rights stipulated in the CRPD, denying them the right to send their complaints regarding breach of these rights to the Committee on the Rights of Persons with Disabilities means, in effect, that they are not fully enjoying the provisions of the CRPD. This is because the periodic state reports submitted to this Committee under the CRPD may either not cover these violations or cover them improperly and, thereby, make it difficult, if not impossible, for the said Committee to properly interrogate these states as to the extent of their compliance with their treaty obligations under the CRPD.

Furthermore, the fact that only 96 of the 182 Member States which have ratified the CRPD have, also, ratified the Optional Protocol, poses a serious drawback to the aim of the CRPD to ensure that all persons with disabilities are able to enjoy human rights in equal measure with all other persons. This is because it is only the Optional Protocol that allows individual complaints to the Committee on the Rights of Persons with Disabilities in respect of violations of the human rights of persons with disabilities.<sup>69</sup> Hence, if these persons are unable to secure redress in respect of such violations from national entities, including the judiciary, or they have exhausted all domestic remedies, they have nowhere else to vent their grievances, which would remain remediless. Such a situation would undermine, if not totally lacerate, the hallowed legal maxim *ubi*

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66 See CRPD, Article 35.

67 See CRPD, Article 36(3).

68 The Protocol entered into force along with its parent CRPD on 3 May 2008. See Note 5, *supra*.

69 As provided by Article 1(2) of the Optional Protocol to the CRPD, "No communication shall be received by the Committee if it concerns a State Party to the Convention that is not a party to the present Protocol;" see Note 5, *supra*.

*jus ibi remedium.*<sup>70</sup>

The reservations made by some States Parties to the CRPD when ratifying this Convention may, also, compromise these states' ratification of the Convention. According to the Vienna Convention on the Law of Treaties (Vienna Convention),<sup>71</sup> "'Reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."<sup>72</sup> It is worth noting that any such reservation is not, *per se*, illegal in international law. Its legality or otherwise is measured in terms of Article 19 of the Vienna Convention, which is titled "FORMULATION OF RESERVATIONS". The Article provides, as follows:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) The reservation is prohibited by the treaty; (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.<sup>73</sup>

A reservation to a treaty may either be general or specific; however, such a reservation must comply with this provision of the Vienna Convention. An example of a general reservation, as it impacts upon the CRPD, is the one made by El Salvador. In its reservation to the CRPD, El Salvador states: "El Salvador accepts the Convention to the extent that it is compatible with its constitution."<sup>74</sup> It is this paper's submission that this reservation is too general and vague and, also, has a negative effect on human rights. El Salvador cannot claim that its constitution is a substitute for the CPRD and, hence, its provisions duplicate those of the CRPD, or vice-versa. Therefore, the rights guaranteed by the CRPD are not, necessarily, provided for by the Constitution of El Salvador. It follows from this that people with disabilities in El Salvador are not beneficiaries of the rights provided for by the CRPD, *in toto*. One cannot escape the conclusion that

<sup>70</sup> This is a Latin expression, which, literally, means, where there is a right, there is a remedy.

<sup>71</sup> See Note 65, *supra*.

<sup>72</sup> See Vienna Convention on the Law of Treaties, Article 2(1)(d); See Note 65, *supra*.

<sup>73</sup> See Note 65, *supra*; capitalization of title of Article 19 of the Vienna Convention original.

<sup>74</sup> See Note 67, *supra*.

this reservation of El Salvador defeats the purpose and object of the CPRD and should, in terms of international law,<sup>75</sup> generally, and the CRPD,<sup>76</sup> particularly, not be permitted. Austria, a State Party to the CRPD, stated it more forcefully, and, in detail, when it objected to this reservation of El Salvador. As the objection is germane to the discussions being carried out, it is, hereby, quoted, *in extenso*:

According to its reservation, El Salvador envisages becoming Party to the Convention only to the extent that its provisions do not prejudice or violate the provisions of any of the precepts, principles and norms enshrined in the Constitution of the Republic of El Salvador, particularly in its enumeration of principles. In the absence of further clarification, this reservation does not clearly specify the extent of El Salvador's derogation from the provisions of the Convention. This general and vague wording of the reservation raises doubts as to the degree of commitment assumed by El Salvador in becoming a Party to the Convention and is, therefore, incompatible with international law.<sup>77</sup>

In a similar vein, Austria, also, made an objection to a general reservation made by Brunei Darussalam in the following words: "The Government of Brunei Darussalam expresses its reservation regarding those provisions of the said Convention that may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, the official religion of Brunei Darussalam."<sup>78</sup> In an objection similar to the one it made in respect of its objection to El Salvador's reservation, Austria asserted, *inter alia*:

Brunei Darussalam has made a reservation of a general and indeterminate scope. This reservation does not clearly define for the other States Parties to the Convention the extent to which the reserving state has accepted the obligations of the Convention. Austria, therefore, considers the reservation to be incompatible with the object and purpose of the Convention and objects to it.<sup>79</sup>

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75 See Note 65, *supra*.

76 See Note 5, *supra*.

77 See Note 65, *supra*.

78 *Ibid*.

79 *Ibid*.

This conclusion is inescapable; it is, also, backed by both the Vienna Convention and the CRPD. This reservation and that of El Salvador should, thus, be withdrawn, and hastily too, to enable persons with disabilities in both countries to enjoy the human rights' benefits of the CRPD fully and expeditiously, as discussed, above. In the same vein, this recommendation is, also, warranted in respect of The Netherlands' general reservation to her ratification of the CRPD in the following words: "The Netherlands interprets the right to life in Article 10 within the framework of its domestic laws."<sup>80</sup> This omnibus reservation, which is vague and equivocal, is difficult to interpret in the context of the provisions of the CRPD.

As stated above, treaty reservations may be either general or specific. Unlike the general reservations, the specific reservations deal with particular provisions of a treaty and in a manner that detracts from the aims or objectives of the treaty. A paradigmatic reservation of this nature, and in the context of the CRPD, is that of Mauritius. It states: "The Government of Mauritius signs the present Convention subject to the reservation that it does not consider itself bound to take measures specified in article 11 unless permitted by domestic legislation expressly providing for the taking of such measures."<sup>81</sup> This reservation is totally antithetical to the human rights of persons with disabilities as the said article 11 of the CRPD obligates its States Parties to take all necessary measures to protect people with disabilities during natural disasters, armed conflict or humanitarian emergencies. If a state declines to accept an obligation to protect persons with disabilities during such dire situations of emergency during which the right to life, the pivot of all rights, itself may be severely threatened, then it has negated the object and purpose of the CRPD. On this account, the reservation must not be permitted in terms of article 46(1) of the CRPD, which states: "Reservations incompatible with the object and purpose of the present Convention shall not be permitted."<sup>82</sup>

Another example of a reservation that defeats the object and purpose of the CRPD is that of Malaysia. In ratifying the CRPD, it made the following reservation: "The Government of Malaysia ratifies the said Convention subject to the reservation it does not consider itself bound by articles 15 and 18 of the said Convention."<sup>83</sup> It is inconceivable that a State Party to the CRPD, or any

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80 Ibid.

81 Ibid.

82 See Note 5, *supra*.

83 See Note 65, *supra*.

instrument meant to protect human rights, would make a reservation to article 15 of the CRPD, which enshrines the right to freedom from torture or cruel, inhuman or degrading treatment or punishment. To start with, it is difficult to understand why any state would desire, by such reservation, to imply that it is retaining the power to impose torture or cruel, inhuman, or degrading treatment or punishment on persons with disabilities, or any person for that matter. This is because torture, as understood in international law,<sup>84</sup> undermines virtually every human right and could, very easily, extinguish the right to life, the fulcrum of all rights, human rights included. Secondly, the right to freedom from torture is part and parcel of the *jus cogens* of international law and cannot, thus, be limited, even in emergencies,<sup>85</sup> let alone in peacetime.

Furthermore, it is surprising that Malaysia decided to, also, make a reservation in respect of article 18 of the CRPD, which guarantees, for persons with disabilities, the rights to liberty of movement and nationality. Without freedom of movement, one is unduly constrained in her/his enjoyment of the holistic human right to development by which s/he is entitled to participate in, contribute to, and enjoy human rights in their entirety. The right to nationality, just like the right to freedom of movement, also, finds pride of place in the landmark UDHR, 1948, whose article 15 stipulates: “(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.” The importance of this right lies in the fact that nationality is the medium through which one can exercise human rights. These rights have strong international underpinnings, but they find practical realisation in the context of domestic jurisdictions. Hence, if one is arbitrarily denied the right to nationality or the right to change one’s nationality,

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84 Article 1(1) of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, defines torture, as follows: “For the purpose of this Convention, the term ‘torture’ means any 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 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 incidental to lawful sanctions.” See UN Doc. A/RES/39/46, 10 December 1984.

85 Article 4(1) of the International Covenant on Civil and Political Rights, 1966, allows its States Parties to take measures derogating from their obligations under the Covenant “in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.” However, article 4(2) forbids any such derogation from certain articles of the Convention. These rights include the right to freedom from torture, which article 7 provides, as follows: “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 free consent to medical or scientific experimentation.” See UN Doc. A/RES/2200 A (XXI), 16 December 1966.

one is, basically, being denied the means to request a state to respect, protect, and fulfil her/his human rights. Hence, Malaysia should not hold on to her reservation to these rights enshrined in article 18 of the CRPD.

As already noted, these rights have resonance in the bedrock UDHR, which, though a declaration, has, over time, metamorphosed into binding customary international law by virtue of states' practice and *opinio juris*. This strengthens rather than detracts from the fact that the CRPD binds in international law, *per se*. From these discussions, one cannot help but call upon Malaysia to withdraw her reservations to the CRPD as these reservations are incompatible with the object and purpose of the CRPD.<sup>86</sup> The CRPD's main purpose of ensuring that persons with disabilities enjoy human rights equally with all other persons demands nothing less.

## 5. CONCLUSION

The discussions carried out in this paper clearly bear out the fact that at the time of its adoption, the CRPD was more than welcome in terms of its contribution to the strengthening of the human rights' edifice the international community has been faithfully constructing since it adopted the UN Charter, 1945. This is because in the Charter the peoples of the United Nations determined to, inter alia, reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations, large and small.<sup>87</sup> It is this faith that motivated this community to adopt, through UNGA, a Convention on the Rights of Persons with Disabilities by which around 650 million persons with disabilities were given the international legal assurance and guarantee that they would be afforded every opportunity to enjoy human rights in equal measure with all other persons. As noted by Don MacKay, Chairman of the UN Committee that negotiated the treaty, i.e. the CRPD, "[w]hat the Convention endeavours to do is to elaborate in detail the rights of persons with disabilities and set out a code of implementation."<sup>88</sup> History, both ancient and contemporary, shows that persons with disabilities have not always been accorded the opportunity to enjoy human rights on the basis of

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86 Article 46, CRPD, see Note 5, *supra*.

87 See UDHR, Preamble, Para. 2; see Note 4, *supra*.

88 See UN, Convention on the Rights of Persons with Disabilities, Status as at 1/11/2020, UN Treaty Series Vol 2515 <<https://treaties.un.org/>> accessed 1 November 2020.

the fundamental human rights' principle of equality and non-discrimination. In some instances, they have been subjected to dehumanising treatment, including forced sterilisations, which have destroyed their inherent dignity derived from their humanity, *per se*. In the extreme, some have even lost their human right to life, the pivot of all rights, because of exterminations grounded in prejudice, misunderstandings, and warped conceptions of human life. Such was the case with the holocaust in Nazi Germany. This accounts for the call by this paper that all UN Member States who are yet to ratify the CRPD must do so, and promptly too. It is, also, the same reason that motivates the paper's call that all reservations to the CRPD which have the effect of defeating the object and purpose of the Convention must be withdrawn, and hastily too. The laudable cause of human rights and, concomitantly, the inherent dignity of persons with disabilities, make this an absolute imperative.