

Study

Interpreting the 2000 Hague Convention on the International Protection of Adults Consistently with the 2007 UN Convention on the Rights of Persons with Disabilities

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Executive Summary

This Study was commissioned by the Special Rapporteur on the Rights of Persons with Disabilities.

In this Study we present an overview of the 2000 Hague Convention on the International Protection of Adults ('the 2000 Convention'), an analysis of its interaction with the Convention on the Rights of Persons with Disabilities (CRPD) (and, in future, a potential UN Convention on the Rights of Older Persons). In line with other analyses, including, most recently, that of the General Secretariat of the European Council, we suggest that the framework of the 2000 Convention is capable of evolving to reflect the 'operationalisation' by both current and future Contracting States of the CRPD within their domestic legal systems. Throughout the Study, and then gathered in an Appendix, we outline a number of concrete steps which can be taken to support that approach.

Introduction

All States have to consider what to do where decisions have to be made in relation to the person or property of someone who has a connection with a foreign State, whether that is because they are habitually resident somewhere else but present on the territory of the 'receiving' State, or because they have property in the 'receiving' State but live elsewhere. The rules governing these questions are (in international law terms) considered to be private international law rules. They can be complicated, and particularly so where the person in question is not in a position to be able to make their own decisions according to the law of one or both States. The rules vary from State to State, and have evolved over time and reflecting different legal traditions.

The 2000 Hague Convention on the International Protection of Adults ('the 2000 Convention') is a private international law treaty. The term 'private' can be misleading because it suggests that it only relates to relationships between private individuals; it can, though, also relate to the way in which States approach the position of private individuals who have a connection with another State.

In addition, States have their own substantive rules on the treatment of adults who are not in a position to fully make their own decisions. These include domestic law as well as standards and obligations deriving from the State's participation in human rights treaties. In particular, the Convention on the Protection of Persons with Disabilities (CRPD) establishes a baseline of obligations, as well as some standards to ensure the further enhancement of human rights for the protected group. Some of the people benefiting from the CRPD may also be covered by the 2000 Convention. Likewise, a potential future UN Convention on the Rights of Older Persons may provide additional protections to some people also covered by the 2000 Convention.

These rules evolve over time, as social mores and understandings change and as international law continues to build a framework for the protection of rights of various categories of persons.

The intersection of mostly procedural private international law rules and substantive standards from human rights law can present challenges and opportunities. This Study analyses how the private international law rules of the 2000 Convention can be interpreted in light of current human rights protections, thereby making the 2000 Convention a living and up-to-date tool for States.

1. The Hague 2000 Convention in context: the role of private international law to facilitate cross-border recognition of legal acts

The 2000 Convention represents an attempt to create a coherent mechanism to enable the cross-border protection of adults and their property when they are not in a position to protect their interests. It was prepared by the Hague Conference on Private International Law ('the Hague Conference'), the main body concerned with promoting private international law instruments.

The 2000 Convention can be placed in line of international private law instruments going back to 1905 and the Convention Relating to Deprivation of Civil Rights and Similar Measures of Protection.¹ Between that date and the 1990s the primary focus of the Hague Conference was on the protection of children. However, building on those Conventions, in particular the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ('the 1980 Convention') and the Convention of 13 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ('the 1996 Convention'), work was done in the mid-1990s to prepare a text of what became the 2000 Convention, formally concluded and opened for signature on 13 January 2000.

The 2000 Convention came into force on 1 January 2009, following ratification by three States. There are now thirteen contracting States² with a further five states having signed it.³ All of the States are European.

a. What the Hague 2000 Convention does

i. Overview

As is common with private international law instruments, the 2000 Convention does not try to establish uniform substantive laws in relation to its subject matter. Whilst it uses terms such as 'guardianship,'⁴ it does not seek to set down such matters as (1) what guardianship might constitute; or (2) whether and when guardianship might be instituted. It also deliberately uses broad terms, in particular in relation to those to whom it applies, rather than tying itself to concepts that might be used in national law regimes such as 'incapacity,' or 'best interests.'

The 2000 Convention applies to adults, i.e. those who over the age of 18

who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.⁵

¹ *Convention concernant l'interdiction et les mesures de protection analogue* (only available in French) (The Hague, 17 July 1905).

² In alphabetical order: Austria, Belgium, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Latvia, Monaco, Portugal, Switzerland and the United Kingdom (in respect of Scotland, although ratification in respect of England & Wales is anticipated for later in 2021 or 2022).

³ In alphabetical order: Greece, Ireland, Italy, Luxembourg, Netherlands and Poland.

⁴ 2000 Convention, Article 3 – see below.

⁵ Article 1(1). It can also apply in respect of measures taken in anticipation of a person's majority where the person in question was not 18 at the point that they were taken.

The Explanatory Report prepared by Professor Paul Lagarde ('Lagarde Report')⁶ makes clear that the decision not to use a term such as 'incapacity' in this context was quite deliberate.

Moreover, whilst the Explanatory Report identifies as a particular example of those who will fall within the Convention's scope those suffering from Alzheimer's disease, it is important to note that the Convention is intended to cover impairments that are physical as well as mental. This is clear both from the Lagarde Report and from the rejection of the proposal from the United Kingdom which sought to introduce a requirement that the impairment relate to the adult's mental faculties (or ability to communicate).⁷

The result is that the 2000 Convention in principle encompasses a very wide class of individuals, very many of whom fall within the scope of the CPRD (although, as discussed below, the overlap is not total).

The heart of the 'operational' provisions of the Convention address two matters that are, conceptually, very distinct:

- The resolution of questions relating to the taking of protective measures by State authorities in relation to adults (both judicial and administrative), and in particular (1) the identification of which authorities have jurisdiction to take such measures; and (2) the establishment of a framework for the effective recognition and enforcement of such measures in other Contracting States; and
- The resolution of questions (again, as between Contracting States) relating to powers of representation granted in advance by adults and designed to be exercised at a point when they are not in a position to protect their interests (a convenient shorthand for such powers being 'private mandates'). These powers could cover either the adult's person or their property, or both.

ii. Protective measures

Article 3 gives a non-exhaustive definition of 'protective measures,' including: (1) the determination of incapacity and the institution of a protective regime; (2) the placing of the adult under the protection of a judicial or administrative authority; (3) guardianship, curatorship and analogous institutions; (4) the designation and functions of any person or body having charge of the adult's person or property, representing or assisting the adult; (5) the placement of the adult in an establishment or other place where protection can be provided; (6) the administration, conservation or disposal of the adult's property; (7) and the authorisation of a specific intervention for the protection of the person or property of the adult.

⁶ Paul Lagarde, *Protection of Adults Convention – Explanatory Report* (2017), paragraphs 9-10 (hereinafter 'Lagarde Report'), available at <https://assets.hcch.net/docs/1509ab33-c2fe-4532-981c-7aa4dad9ba45.pdf>.

⁷ Lagarde Report, paragraph 9. See also the discussion recorded in Minutes 1 in the Proceedings at pp.223 ff. It should, though, be noted that the Chair of the Commission subsequently expressed the view that Art 1(1) should probably be interpreted such that the Convention only covered 'those who lack decision-making capacity', since 'on human rights grounds, compulsory measures of protection would not be justified in relation to persons who have full decision-making capacity'. Eric Clive, *The New Hague Convention on the Protection of Adults*, 2000 Yearbook Private of International Law Vol. 2, No. 1 at p. 5. See, for an extended discussion on this point, predicated on the basis that the Convention does cover a wider category of individuals, Joëlle Long, *Rethinking Vulnerable Adults' Protection*, International Journal of Law, Policy and the Family, Vol. 27, No. 1, April 2013, at pp. 61–65.

Although it appears open-ended, the definition does not extend to cover decisions made by medical practitioners, medical practitioners not ordinarily counting as ‘authorities’ for purposes of the 2000 Convention.⁸ There are also express exclusions contained in Article 4, some of them because of the rules contained in the 2000 Convention are not apt easily to resolve the conflicts of laws questions which are thrown up; and some because they touch on issues of public law of sufficient national importance (criminal law and immigration, in particular) that they were not apt to be restricted by operation of the Convention.

For purposes of the intersection between the 2000 Convention and the CRPD, perhaps the most important aspect of the 2000 Convention in this context is the framework for recognition and enforcement of measures. It addresses three linked, but distinct, concepts: (1) recognition by operation of law; (2) the obtaining of a declaration of enforceability or registration for purposes of enforcement; and (3) ‘naturalisation’ of a measure by the requested State. These concepts operate in a cumulative fashion so as to provide, in essence, an escalating scale of procedural measures to ensure that the measure(s) in question can be given real effect in the Contracting State in which they are to be implemented.

Article 22(2) sets out an exhaustive list of the bases upon which the competent authorities of a Contracting State—most usually the judicial authorities—can decline to recognise a measure, to declare it enforceable, or to register it.⁹ The most relevant for present purposes are:

- If the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the adult having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State (Article 22(2)(b)); or
- If such recognition is manifestly contrary to public policy of the requested State, or conflicts with a provision of the law of that State which is mandatory whatever law would otherwise be applicable (Article 22(2)(c). This would mean that recognition of a protective measure (for instance a foreign guardianship order) could be refused if the law of the requested State did not have a concept of guardianship. Alternatively, if the guardianship order related to a person who would not be considered ‘incapable’ for purposes of the relevant legislation within the requested State, recognition and enforcement could be refused because of the conflict that it would produce with a mandatory provision of the relevant domestic law.

It should be noted that, in any jurisdiction in which the CRPD forms part of the domestic law, it will constitute a ‘mandatory provision’ for purposes of considering recognition and enforcement. In such a situation, the requested State will be able – by operation of Article 20 the 2000 Convention – to proceed by reference to its understanding of the requirements of the CRPD.

Additionally, Article 21 of the Convention allows a State (typically the requested State) to refuse to apply the law designated by the Convention if such application would be “Manifestly contrary to public policy.” The threshold to prove (1) the existence of a public policy and (2) that the otherwise applicable law is *manifestly* contrary to it is very high and typically not satisfied by the

⁸ The Lagarde Report is silent on this matter, but see in this regard the summaries of the position given by the Chair of the Special Diplomatic Commission during the course of the meetings of the Commission recorded in the Proceedings at pp. 303 and 311.

⁹ They apply to applications for declarations for recognition and enforcement by virtue of Article 25(3).

mere existence of a conflicting law in the state claiming the public policy exception. This is a fairly standard provision in private international law treaties and is interpreted narrowly. Nonetheless, it does provide States with a safeguard to protect the integrity of their most important public policies.

Where a measure is recognised and (if relevant) declared enforceable within a State, it has to be operated according to the law of that State (Article 14). This provides, in practice, a further mechanism by which a State can control the implementation of measures taken in other Contracting States so as to shape them to their own domestic law.

iii. Private mandates

In relation to private mandates, three key points should be noted in respect of the interaction between the 2000 Convention and the CRPD:

- Although the concept was undoubtedly drawn up with national legal frameworks based upon such private mandates being linked to mental incapacity (in some form), the wording is deliberately broader, so there is no necessary tie. Such a concept would be easily assimilable to the models of supported and assisted decision-making enshrined in the CRPD.
- Although the 2000 Convention is not designed to create substantive law, the very fact of the concept being included meant that the concept was brought to the top of the agenda in jurisdictions (in particular civil law jurisdictions) which are much less familiar with the concept of private mandates surviving incapacity. In France, for instance, the coming into force of the 2000 Convention on 1 January 2009 was simultaneous with the coming into force of a new provision (law 2007-308 of 5 March 2007) which for the first time introduced the concept of '*mandat de protection future*'.
- The concept (and indeed the 2000 Convention as a whole) does not appear to extend to the making by a person of a unilateral statement as to what they would wish or not wish (for instance, an advance decision to refuse medical treatment).

b. What the 2000 Convention does not do

It is perhaps important to make express, for the sake of clarity, what the 2000 Convention does not do:

- Not being based upon concepts either of mental incapacity or best interests as found in the laws of Contracting States, it does not seek to make such concepts the foundation either for the taking or recognition of protective measures.
- Whilst it mentions guardianship in Article 3 as an example of a protective measure, it does not say that this is the sole type of protective measure that it covers. Nor, in line with the fact that it does not seek to develop substantive international law norms, does it suggest that guardianship (or equivalent measures) should either be adopted or rejected in individual Contracting States: it is entirely neutral on the matter.
- The Convention expressly excludes a range of measures from its scope, including such personal matters as the formation, annulment of marriage or any similar relationship, issues relating to succession, public measures of a general nature in matters of health (for instance vaccination), criminal measures taken against the person, immigration and measures

directed solely to public safety.

- As noted above, the 2000 Convention excludes – whether by accident or design, it is not entirely clear – the making by a person of a unilateral statement as to what they would wish or not wish (for instance an advance decision to refuse medical treatment). We return to this below, because this appears to us an omission which the Special Rapporteur may wish to take up.

c. The 2000 Convention in practice

To date, as the Convention has only been ratified by a limited number of (European) countries, there is only a limited body of practice. A Practical Handbook is being drafted at present, to be considered at a Special Commission in 2022, as part of a drive on the part both of the Hague Conference and the European Commission to promote wider ratification.

One of the authors of this paper, Alex Ruck Keene, is a practicing barrister in England & Wales¹⁰ which has (in essence) unilaterally adopted the provisions of the 2000 Convention within Schedule 3 to the Mental Capacity Act 2005. From his experience in cross-border cases involving England & Wales, and from his wider work (including as a delegate to the European Commission-Hague Conference Joint Conference on the Cross-Border Protection of Vulnerable Adults in 2018), he makes the following observations:

- Issues relating to the effective operation of private mandates (especially in relation to property owned by individuals abroad who have now lost capacity according to the relevant domestic regimes) arise very much more frequently than do questions of cross-border implementation of protective measures;
- Cross-border implementation of protective measures, however, undoubtedly raise much harder-edged questions of law, and, in particular of the extent to which measures which conform with the domestic law in one jurisdiction chime with or jar against provisions in another;
- The tools contained in Article 22 of 2000 Convention provide a powerful mechanism to resolve the issues in relation to cross-border implementation of protective measures, and, in the resolution of those questions, enable recourse also to international instruments.¹¹

2. Managing overlapping treaties: the CRPD and the Hague 2000 Convention

Although the CRPD and the 2000 Convention are of a different nature, with the former addressing

¹⁰ And co-editor of a textbook on the 2000 Convention: Frimston, Ruck Keene, van Overdijk and Ward (eds), *The International Protection of Adults* (Oxford University Press, 2015).

¹¹ An example being the fact that a court in the United Kingdom is bound (by the Human Rights Act 1998) to act compatibly with the European Convention on Human Rights, so the Court of Protection was required expressly to consider whether the operation of the ECHR prevented recognition and enforcement of measures placing individuals in psychiatric institutions in England & Wales: see: *The Health Service Executive of Ireland v PA & Ors* [2015] EWCOP 38. Whilst this applies strictly by analogy, the United Kingdom not yet having ratified the 2000 Convention, it is a useful illumination of the position.

substantive rights and obligations under international law whereas the latter deals with jurisdictional and procedural issues across domestic legal systems, there are possible points of intersection between the two instruments.

In particular, vulnerable adults (which includes some persons with disabilities) covered by the 2000 Convention may also benefit from the protections of the CRPD. As human rights further develop and other conventions might be negotiated to cover additional groups of people also within the ambit of the 2000 Convention (such as some elderly people), additional issues of treaty overlap may arise.

This section explains how the CRPD and the 2000 Convention deal with such intersections and, beyond that, how other rules of treaty interpretation may come to bear in these cases.

a. What the treaties provide regarding possible conflicts or divergent interpretation

i. Hague Convention Article 49 and timing of ratifications

Article 49 of the 2000 Convention is the main provision addressing relations with other treaty obligations. Most critically for purposes of possible overlaps with the CRPD, it provides:

The Convention does not affect any other international instrument to which Contracting States are parties and which contains provisions on matters governed by this Convention, unless a contrary declaration is made by State Parties to such instrument. (Art. 49.1)

As a result, states that are parties to the CRPD can ensure that their application of the 2000 Convention is consistent with their human rights obligation. At present, all state parties to the 2000 Convention are also parties to the CRPD. Article 49.1 suggests that the 2000 Convention is subordinate to other treaties binding the parties to the 2000 Convention, inasmuch as there may be a conflict between the treaties. No state party has made a declaration against Article 49.1.

This interpretation is bolstered by Article 49.2, which provides that

This Convention does not affect the possibility for one or more Contracting States to conclude agreements which contain, in respect of adults habitually resident in any of the States Parties to such agreements, provisions on matters governed by this Convention.

Article 49.2 is not limited to agreements entered into prior to joining the 2000 Convention, so that any future human rights treaty overlapping with the 2000 Convention would similarly prevail over the Convention inasmuch as there might be a conflict.

In practice, all state parties to the 2000 Convention—except Switzerland—had already signed, ratified, or acceded to the CRPD prior to ratifying or acceding to the 2000 Convention (see Table 1 below).

ii. CRPD Article 4.4

While the CRPD does not have provisions specifically dealing with relationships with other treaties, its Article 4.4. provides that

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of persons with disabilities and which may be contained in the law of a State Party or international law in force for that State.

Therefore, in case of a conflict, or diverging interpretations between provisions of the 2000 Convention and the CRPD, whichever obligation is “more conducive to the realization of the rights of persons with disabilities” should prevail.

With respect to any substantive rights that are affected by the 2000 Convention, this provision strongly leans towards the resolution of any conflict by choosing the more human rights-progressive interpretation.

Article 4.4 also provides that:

[t]here shall be no restriction upon or derogation from any of the human rights and fundamental freedoms recognized or existing in any State Party to the present Convention pursuant to law, conventions, regulation or custom on the pretext that the present Convention does not recognize such rights or freedoms or that it recognizes them to a lesser extent.

Not only does this provision provide a basis for a reading of the 2000 Convention that is congruent with the CRPD, but it also promotes a dynamic reading of the CRPD as the understanding and interpretation of human rights continues to develop. The provision also means that any future human rights treaty that might intersect with the CRPD and the 2000 Convention, such as a possible convention on the rights of older persons, would only operate to ‘ratchet up’ the reading of these treaties in favour of the most developed human rights interpretation.

In conclusion, there are solid legal grounds, both in the CRPD and in the 2000 Convention, for infusing the most progressive human rights interpretation into the 2000 Convention. This results from the combination of the substantive guidance of the CRPD towards the most advanced human rights construction of any domestic or international obligation pertaining to the matters covered by the convention on the one hand, and the recognition in the 2000 Convention that other treaty obligations binding state parties on matters affected by the Convention prevail upon the Convention on the other hand. This would hold true both for the resolution of a direct conflict between the two treaties, however unlikely those would seem, and also for guiding the interpretation of the 2000 Convention even in the absence of an explicit conflict with the CRPD. Overall, there appears to be fairly wide latitude for Contracting States to the 2000 Convention to ensure its compatibility in their domestic practice with the most progressive interpretation of the CRPD.

b. Other rules of international law on treaty interpretation

If the 2000 Convention and the CRPD provisions are found insufficient to resolve any clash of interpretation, the Vienna Convention on the Law of Treaties, or its customary law counterpart, may be used as a gap filler. The two main rules are *lex posterior* (the last in time rule prevails) and *lex specialis* (the more specific rule prevails over the more general rule). However, there are a number of caveats that make the operation of these seemingly straightforward rules difficult, and even often indeterminate, in practice.

With respect to *lex posterior*, Article 30 of the Vienna Convention is limited to the situation where both treaties “relat[e] to the same subject matter.” In that case:

When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

Since all parties to the 2000 Convention are also parties to the CRPD, a clash between the two

treaties on an issue that is governed by both treaties would be resolved in favour of the CRPD, which was adopted in 2007. Likewise, if a subsequent human rights treaty were to address the rights of elderly persons in a way that overlaps with the 2000 Convention, that new treaty would prevail over the older Hague Convention.

It must be noted that the pre-requisite that the successive treaties relate to the same subject matter can limit the application of the *lex posterior* rule, since most treaties only have a partial overlap but are fundamentally on different issues. For instance, in the case of *Irish National Insurance, Ltd v. Aer Lingus Teoranta*, 739 F.2d 90 (2nd Cir., 1984), goods shipped by Aer Lingus were damaged, leading to a claim of \$125,000 against the insurer. The issue was the amount that the insurer was obligated to compensate the insured. The Warsaw Convention on limitation of liability provided that the action could be brought in the courts of the place of the destination of the goods (the United States in the case, where much higher damages would have been awarded). Also applicable between the parties, was a bilateral treaty of Friendship Navigation and Commerce, which provided for national treatment regarding access to courts. That treaty would have meant that the Irish insurance company would have been treated as if it were a US party, the suit would have taken place in Ireland and damages would have been limited to \$260. The treaties are on different subject matters and it would even have been difficult to foresee this type of conflict emerging at the time when the treaties were agreed upon. Such situations lead to uncertain outcomes, with courts typically taking a holistic view and considering a range of other pertinent factors.

The *lex posterior* rule is typically not understood or applied in a rigid fashion. Rather, it is woven into the treaty interpretation exercise to prioritize one treaty obligation, or one interpretation of a treaty obligation over other constructions.¹²

In practice, the entry into force of the 2000 Convention for the state parties that had ratified or acceded to it often took place after those states' accession or ratification of the CRPD. The states that have ratified the CRPD after they ratified the 2000 Convention had signed the CRPD before then (except Switzerland), which triggered the obligation not to undertake any action that goes against the object and purpose of the CRPD (see Table 1). Therefore, a conflict that raises a significant issue under the CRPD would likely be resolved in favour of the CRPD. That is not to say that the CRPD is unequivocal in its meaning; states may have diverging interpretations about the meaning of the CRPD itself.

The *lex specialis* rule often presents similar conceptual indeterminacies. The 2000 Convention is a treaty of private international law while the CRPD is a human rights treaty. Because they each deal with different technical subject matters, it is likely impossible to say which one is the more specialized source. Here again, the rule of conflict is most suited to clashes between treaties that relate to the same subject matter.

¹² Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law*, A/CN.4/L.682, 13 April 2006, paragraph 320, 323.

| State party | Accession or ratification of Hague 2000 Convention/entry into force | Accession/ratification of CRPD |
|----------------|---------------------------------------------------------------------|--------------------------------|
| Austria | 2013/2014 | 2008 |
| Belgium | 2020/2021 | 2009 |
| Cyprus | 2018/2018 | 2011 |
| Czech Republic | 2012/2012 | 2009 |
| Estonia | 2011/2011 | 2012 (signed 2007) |
| Finland | 2010/2011 | 2016 (signed 2007) |
| France | 2008/2009 | 2010 (signed 2007) |
| Germany | 2007/2009 | 2009 |
| Latvia | 2017/2018 | 2010 |
| Monaco | 2016/2016 | 2017 (signed 2009) |
| Portugal | 2018/2018 | 2009 |
| Switzerland | 2009/2009 | 2014 |
| UK | 2003/2009 (with respect to Scotland) | 2009 |

Table 1. Timing of accession, ratification and entry into force of the CRPD and the 2000 Convention.

The development of international law in an ever-increasing number of directions and in both substantive and procedural ways has led to what Bruno Simma and other scholars have dubbed the risk of fragmentation of international law. *Lex specialis* and *lex posterior* rules can be used to provide some coherence and cohesion amongst overlapping or at times inconsistent obligations. Since 2000, the International Law Commission has engaged in an examination of challenges to the coherence and harmonious systemic interpretation of international law. The work culminated in a Report of the Study Group of the International Law Commission, under the leadership of Prof. Martii Koskeniemi.¹³ It emphasizes that no subpart of international law, sometimes called legal regimes, such as human rights, is insulated from the whole.

Once again, it must be recalled that the rules of Article 30.3 of the Vienna Convention on the Law of Treaties are subordinate to any rule in the treaties themselves that addresses potential clashes. This is confirmed by Article 30.2, stating that “[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.”

Article 49 of the 2000 Convention, as discussed above, squarely falls within the meaning of Article 30.2 of the VCLT and would therefore be an interpreter’s first and likely only port of call to resolve a conflict with the CRPD, as far as the 2000 Convention is concerned. Likewise, Article 4.4 of the

¹³ Ibid.

CRPD would also override other provision of Article 30 of the VCLT.

3. Options for consolidating the interpretation of the Hague Convention in line with the CRPD and evolving human rights standards

Beyond the technicalities of rules on conflict of law, the reality of international law practice is that the majority of treaty interpretation befalls upon states and domestic courts which may incorporate a number of additional concerns in their analysis. Government agencies, for instance, might be sensitive to the evolving landscape of treaty membership. Domestic courts might be more attuned to the relationship between domestic standards and the state's international commitments. International organizations that are promoting treaties might have an interest in the longevity of the treaty and its adaptability to the international context.

While all these elements might put further pressure towards fragmentation, there are a number of tools available to maintain or create coherence, such that the 2000 Convention and the CRPD may be interpreted harmoniously in the present and for the future.

Conversely, attempting to cement specific constructions of a treaty, through reservations, declarations, amendments or additional protocols may limit the flexibility needed to adapt to future progress in the development of human rights norms. This section assesses how the long-term goal of coherence between the 2000 Convention and the CRPD might be best achieved.

a. Organic growth versus amending treaties

Private international law treaties are inherently designed to accommodate a range of domestic substantive laws on the topics they address. In particular, such treaties typically leave a lot undefined, which results in significant room for interpretation. This, in turn, allows dynamic constructions of the text in an evolving legal landscape. The 2000 Convention offers such opportunities for organic growth.

Moreover, the Hague Conference on Private International Law (HCCH), a group of 87 states and the European Union from which most general private international law treaties emanate, hopes that its treaties get more widely adopted. Private international law treaties typically have a very low threshold for the number of state parties required for them to come into force; the strategy is for progressive adoption as members get a chance to observe how the treaty operates in practice, even with very few parties to begin. For instance, the now widely adopted 1980 Convention on the Civil Aspects of International Child Abduction required only three state parties to come into force. It now boasts 101 Contracting Parties. Such aggregation over time is more likely if a treaty is sufficiently flexible to accommodate different domestic regulatory perspectives and to remain relevant in the face of evolving substantive norms.

To put it plainly, the HCCH is not in the business of promoting narrow or rigid frameworks that risk rendering conventions obsolete before they even have a chance to gain widespread recognition.

The 2000 Convention flexibilities transpires from its drafting as well as from its silences.

First, the list of subject matters that it covers (Article 3) is explicitly non-exhaustive. It does include guardianship, which was a prevalent legal tool at the time, but by its open-ended nature, the list

can reasonably be interpreted to cover the more progressive supported decision-making regimes that have developed since the drafting of the Convention. The drafters made a purposeful choice to provide an illustrative, non-exhaustive list with respect to covered subject matters; by contrast, the list of subject matters not covered by the convention (Article 4) is exhaustive. The open-ended nature of Article 3 is also specifically mentioned in the August 2017 Outline on the Hague Protection of Adults Convention drafted by the HCCH.¹⁴ Article 23 is similarly open-ended when it reinforces the rights of persons with disabilities “with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation.”

Here, the 2000 Convention not only contemplates institutions beyond those specifically listed, but it also refers to domestic law as the appropriate source. Domestic regimes that have embraced supported decision-making regimes would therefore have the legal space to gain recognition for decisions made under such regimes.

Second, the paucity of definitions in the 2000 Convention creates vast space for accommodating a variety of domestic systems. Private international law conventions are rife with such conscious omissions. Here, the term “adult” is the only one that is defined strictly. Other key terms are left undefined, and are therefore open to interpretation. Foremost amongst those silences is the lack of definition of “protection.” This position acknowledges that the differences, and perhaps divergences between domestic laws are not meant to be resolved, nor domestic rules harmonized through the convention. It is not a standard-setting or harmonization convention but merely a much more technical framework for jurisdiction allocation and mutual recognition of domestic decisions. If some state parties’ domestic interpretation evolves to comport with the CRPD or other emerging human rights norms, then that is the risk of divergence that all parties take when they sign on to the 2000 Convention.

Not only is normative flexibility typically embedded in private international law treaties, but there are strategic reasons to prefer this flexibility over cementing specific substantive interpretations.

Static interpretations enshrined in amendments, protocols or reservations might stymie the dissemination of future human rights norms instead of infusing those norms back into the interpretation of the 2000 Convention.

To reiterate the analysis provided above in Section 2.a., Article 49 of the 2000 Convention explicitly references other treaty obligations pertaining to subject matters covered by the Convention and gives room to interpret those other obligations as prevailing over the convention, should an irreducible conflict occur. Most likely, rather than a “hard conflict”, the issue would be one of choosing the interpretation of the 2000 Convention that best comports with the CRPD and Article 49 appears to encourage that. Similarly, this article would also allow an infusion of future human rights obligations, such as a potential convention on the rights of older people.

Another risk with introducing specific substantive obligations or interpretations in the 2000 Convention is that it might entrench divergent interpretations of the Convention. For instance, if an optional protocol were to explicitly reject guardianships in the case of conflict with a supported decision-making regime outcome, it would suggest by implication that the 2000 Convention alone would command a different result. Therefore, States that are not parties to the protocol may read

¹⁴ HCCH, Outline – Hague Protection of Adults Convention, August 2017, available at <https://assets.hcch.net/docs/a3920f8f-ee66-470e-943b-cf6865af8226.pdf>.

the 2000 Convention to prescribe something else than what the protocol dictates (otherwise, there would have been no need for the protocol in the first place and the Vienna Convention on the Law of Treaties favours interpretations that give meaning to all the provisions of a treaty and collateral texts). Rather than mainstreaming an interpretation of the 2000 Convention that is congruent with the progressive development of human rights, such protocols or amendments risk enshrining divergent, and potentially regressive interpretations of the Convention if not all state parties subscribe to the protocol or amendment.

A further technical problem is that the 2000 Convention does not set out a specific mechanism for amendments or additional protocols. The Vienna Convention on the Law of Treaties, as a codification of customary law, would therefore govern any amendment process. Generally, it provides that states already party to a treaty have the opportunity to accept an amendment, but are not bound by any amendment unless they specifically agree to it. Only states which join the treaty after it has been amended would be automatically bound to the amended version.¹⁵ Such a strategy risks creating a complex ratifications map and hence more uncertainty in the cross-border recognition of legal acts, including the ones coming out of more progressive domestic supported decision-making regimes. Finally, it could also entrench divergent State practices in relation to the CRPD itself, if States contend that they either do not need to propose, or do not need to sign an optional protocol to the 2000 Convention so as to comply with the CRPD, on the basis they do not consider that guardianship (in some form) is incompatible with the CRPD.

Similar risks are, to some extent, created by reservations and declarations. While some treaties allow reservations in order to garner membership from a broader number of States, customary international law as codified by the Vienna Convention on the Law of Treaties provides that reservations cannot go against the object and purpose of the treaty. A complex, and ultimately often fruitless, debate ensues when some state parties contest other states' reservations. Overall, reservations, other than technical ones or reservations specifically allowed by the treaty, are to be discouraged. They tend to dilute the legal effect of the treaty and to generate uncertainty as to which States are bound by what obligations vis-à-vis which other State parties. The 2000 Convention only allows reservations against Article 51, regarding the submission of communications to Central Authorities of Contracting States in French and English. States may object to the use of either language.¹⁶

However, a fairly generic declaration stating that the ratifying State will interpret the 2000 Convention to be consistent with any relevant human rights treaty or customary law obligation to which it is subject might be acceptable and may help promote a cohesive interpretation of the 2000 Convention and the CRPD.

Such a declaration may be drafted as follow:

[Contracting State] confirms that, pursuant to Article 49, it shall interpret and apply the present Convention in accordance with obligations arising out of or relating to [Contracting State]'s participation in the Convention on the Rights of Persons with Disabilities and any other human rights obligations accruing under customary international law or as a result of participation in future human rights treaties bearing on matters governed by the present Convention. [Contracting State] further recognizes that other Contracting State may also adopt interpretations of the present Convention congruent with those Contracting States' obligations

¹⁵ Vienna Convention on the Law of Treaties, Articles 39-40. More complex procedures are envisioned for treaty amendments that are meant to take effect between certain parties to the treaty only.

¹⁶ 2000 Convention, Article 56.1.

under international human rights law.

b. The role of implementation bodies and domestic institutions

A number of authorities and institutions can play a role in developing a particular treaty practice. With respect to the relationship between the 2000 Convention and the CRPD, the monitoring bodies for the treaties, independent authorities such as Special Rapporteurs, and State parties can all help to enshrine a harmonious treaty practice.

The 2000 Convention provides that the Secretary General of the Hague Conference on Private International Law will convene a Special Commission to review implementation on a periodic basis.¹⁷ Indeed, such a process was initiated in 2019, with questionnaires circulated to State parties regarding their experience with the Convention so far. The Special Commission is slated to meet in 2022. While the questionnaires circulated in 2019 and 2020 do not address any issue of overlap or intersection with human rights instruments, such questions could be tabled in future proceedings in order to raise State parties' awareness.

The administrative body of the Hague Conference on Private International Law, while lacking binding authority on State Parties, can also play an important role in helping to shape State practice. There is evidence that, not only is that body aware of the intersection of the 2000 Convention and the CRPD, but it embraces the 2000 Convention as a tool in support of the CRPD. In a *Note to the European Parliament*, the First Secretary and a Senior Legal Officer of the Permanent Bureau of the Hague Conference on Private International Law state that the 2000 Convention can in fact assist States parties to the CRPD to fulfil their obligations under the CRPD:

Through the private international law provisions and Central Authority cooperation system established by the 2000 Convention, the following Articles of the CRPD are supported: Article 18 on Liberty of Movement and Nationality (e.g., individuals' established protective regimes will be internationally "portable"); Article 32 on International Cooperation (e.g., States Parties to the CRPD will participate in an important private international law instrument supporting relevant disabled adults implicated in cross-border circumstances); Article 12 on Equal Recognition Before the Law (e.g., individuals' decision-making assistance / assistance in exercising legal capacity will be recognized in cross-border situations); Article 3 on the Autonomy of Disabled Adults (e.g., arrangements made by individuals for their future care or representation are specifically provided for in the Convention); Article 25 on Health (e.g., the Convention assists in ensuring there is legal certainty and efficiency in making health / medical decisions for relevant disabled adults caught in cross-border circumstances); and, Article 13 on Access to Justice (e.g., individuals and families will benefit from the international cooperation system established by the Convention, greatly facilitating the management of cross-border legal affairs).¹⁸

To similar effect are the conclusions of the Joint Conference convened by the Hague Conference and the European Commission in December 2018, the second of which reads as follows:

The 2000 HCCH Adults Convention and the Convention of 13 December 2006 on the Rights of Persons with Disabilities (2006 UNCRPD) are complementary. As stated in its preamble, the 2000

¹⁷ 2000 Hague Convention, Article 52.

¹⁸ Philippe Lortie, First Secretary, Permanent Bureau of the Hague Conference on Private international Law and Maja Groff, Senior Legal Officer, *The Hague Convention of 13 January 2000 on the International Protection of Adults*, Note, European Parliament, Directorate General for internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, December 2012, available at <https://www.europarl.europa.eu/document/activities/cont/201212/20121219ATT58310/20121219ATT58310EN.pdf>

HCCH Adults Convention affirms that the interests of the adult and respect for his or her dignity and autonomy are to be primary considerations.¹⁹

As at the time of writing, the General Secretariat of the European Council has proposed²⁰ that the Council approve the text of draft Council Conclusions on the Protection of Vulnerable Adults across the European Union, which: (1) recognises the overlapping aims of the two Conventions as “shar[ing] the objective of promoting and protecting the rights of persons with disabilities;”²¹ (2) invites ratification of the 2000 Convention by EU Member States; and (3) importantly, within this framework, invites Member States “ensure that the national measures on the protection of vulnerable adults are in line with the CRPD).”²²

The CRPD has a more developed monitoring system, which includes a regular convening of a Conference of state Parties²³ and Committee on the Rights of Persons with Disabilities.²⁴

Separately, and also concerned with issues in this area, the UN Human Rights Council has appointed a Special Rapporteur on the rights of persons with disabilities,²⁵ and (indirectly) the UN Secretary General has appointed a Special Envoy on Disability and Accessibility.²⁶ Beyond the CRPD, human rights implementation and development is also monitored by the United Nations Human Rights Council, which includes the Universal Periodic Review Working Body and the Advisory Committee. These various bodies and experts provide opportunities to table issues, such as the intersection of the 2000 Convention and the CRPD, and to promote best practices and progressive interpretations. The Committee on the Rights of Persons with Disabilities may, for instance, issue General Comments on the interpretation of the Convention. While not technically binding, General Comments are typically given due consideration by States in their own practice and interpretation. Civil society is included, both formally and informally, in treaty monitoring through, for instance, the convening of expert group meetings by the UN human rights bodies and discussions with Special Rapporteurs and members of the Committee on the Rights of Persons with Disabilities.

Raising issue awareness, developing best practices for interpretation and implementation and building consensus across State parties through these various bodies can be critical in the consistent and progressive interpretation of the CRPD and the 2000 Convention.

State practice is equally crucial to ensure that the 2000 Convention is interpreted consistently with the CRPD and the most recent human rights developments. In that perspective, it may be advisable

¹⁹ EC-HCCH Joint Conference on the Cross-border Protection of Vulnerable Adults, December 5-7 2018, available at [88f10f24-81ad-42ac-842c-315025679d40.pdf](https://www.hcch.net/88f10f24-81ad-42ac-842c-315025679d40.pdf) ([hcch.net](https://www.hcch.net)).

²⁰ *Note from the General Secretariat of the Council to Permanent Representatives Committee/Council with Draft Council Conclusions on the Protection of Vulnerable Adults across the European Union* (27 May 2021), available at <https://data.consilium.europa.eu/doc/document/ST-8636-2021-INIT/en/pdf>.

²¹ See paragraph 7.

²² Paragraph 33.

²³ CRPD, Article 40. The Conference of State Parties has taken place annually since 2008.

²⁴ CRPD, Article 34. The Committee is a body of twelve to eighteen independent experts which monitors state implementation. The optional Protocol to the Convention also allows individual complaints to be lodged with the Committee against state parties to the Protocol.

²⁵ The current mandate holder is Mr. Gerard Quinn, appointed by the Human Rights Council in October 2020. <https://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/SRDisabilitiesIndex.aspx>

²⁶ The current appointee is Ms. María Soledad Cisternas Reyes. <https://www.un.org/development/desa/disabilities/resources/special-envoy-of-the-secretary-general-on-disability-and-accessibility.html>

to ensure that states ratifying the 2000 Convention are already parties to the CRPD or join the CRPD first.

In its *Strategy for the Rights of Persons with Disabilities 2021-2030*, the EU Commission encouraged member States to accede to the 2000 Convention.²⁷ It also plans to “collect good practices on supported decision-making”²⁸ and it emphasizes compliance with the CRPD in every aspect of its initiatives and of the work of member states. Continued efforts by EU member states and the European Commission to explore the intersections of the CRPD with the 2000 Convention, and to promote interpretations of the latter congruent with the obligations of the former are important steps in consolidating a treaty practice of the Hague Convention that is consistent with the CRPD.

c. Leveraging practices from other fields of international law

Using the CRPD to interpret the 2000 Convention in areas of overlap, or more broadly, to infuse the 2000 Convention with a contemporary understanding of the rights of persons with disabilities would not be an unusual move in the practice of international law.

Indeed, there are numerous examples of normative or interpretative imports from one field of international law into another. This allows better coherence and consistency amongst States’ treaty or customary law obligations. It also reflects the malleability of international law as a reflection of evolving practice.

This section offers three illustrations of such normative or interpretative imports that have resulted in more progressive interpretations of a particular set of obligations in light of developments in another field. First, the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction emanating, like the 2000 Convention, from the HCCH has been interpreted in light of the 1989 Convention on the Rights of the Child, one of the most widely ratified multilateral treaty in force. Drafted nearly a decade apart, like the CRPD and the 2000 Convention, they also overlap in part. The intersections are not so much technical as they pertain to the spirit of the respective treaties, with the Convention on the Rights of the Child firmly entrenching the best interests of the child at its core in a way that was not as prevalent at the time of the adoption the 1980 Child Abduction Convention. Second, human rights standards have also been used to inject a more contemporary interpretation into humanitarian law. Lastly, trade law at the World Trade Organization, particularly the General Agreement on Tariffs and Trade has seen its interpretation of environmental protection change of the past 70 years to incorporate understandings from general environmental law.

i. Child abduction convention/Rights of the Child Convention

The 1980 Child Abduction Convention has been very widely ratified, with 101 signatory States. The 1980 Convention, which aims to protect children internationally from the harmful effects of

²⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Union of Equality Strategy for the Rights of Persons with Disabilities 2021-2030, COM(2021) 101 final, March 2021, available at <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8376&furtherPubs=yes>, pp. 16-17.

²⁸ Ibid, p. 17.

their wrongful removal or retention, provides an internationally agreed mechanism for dealing with child abduction, yet its interpretation and implementation is a matter for each individual State Party since there is no supra-national body controlling its application. One of the limited exceptions to return under the Convention is found in Article 13(2) providing that the judicial or administrative authority in the requested State which is hearing the application for return of the abducted child may refuse to order that return if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. The discretionary nature of this provision means that, even its terms are met, the court may still decide to exercise its discretion in favour of returning the child. The Good Practice guide prepared by the Hague Conference in 2010²⁹ expressly addresses the evolution of the position since this provision was agreed:

98. In 1980, when the Convention was adopted, it was not common in many jurisdictions to hear children in court proceedings. Consequently, the Convention does not contain an explicit obligation to hear the child. Return may, however, be refused under Article 13, paragraph 2, if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his / her views. In proceedings under the Convention it will therefore often be the abducting parent, when raising an Article 13, paragraph 2 defence, who brings in the child's perspective.

99. However, since 1980, several new international instruments at the global and regional levels, including the United Nations Convention on the Rights of the Child (UNCRC), the European Convention on the Exercise of Children's Rights, the Brussels IIa Regulation and others, have established an obligation to explore the wishes and feelings of a child and take due account of them in certain court proceedings concerning the child, bearing in mind the child's age and maturity. Most of the provisions of an international nature leave it to national law or to the judge's discretion to determine whether the child is to be heard by the judge in person, or whether the child's views, wishes and feelings are explored by a different professional – normally from the psycho-social professions – and then reported to the court. Domestic legislation on this issue has also evolved – perhaps even more than international law which reflects the lowest common denominator. For many States, the obligation to explore the child's wishes and feelings, as well as his or her views, and to take due account of them, is now mandatory. However, for other States the decision as to whether the child should be heard is left to the discretion of the judge. (footnotes omitted)

In this regard, further helpful discussion can be found in the detailed report prepared on behalf of the European Parliament in October 2020,³⁰ examining the way in which children featured within proceedings under the 1980 Convention, and the way in which different jurisdictions sought to navigate the obligations under the Convention and, in particular, right of children under Article 12 of the United Nations Convention on the Rights of the Child to enable to express their views freely in all matters affecting them, their views being given due weight in accordance with their age and degree of maturity, and to be given the opportunity to be heard in any judicial or administrative proceedings affecting them. In the report, Professor Freeman identifies that:

it is important in this regard to note the shift which has occurred since the Convention was drafted in recognition of the rights of children generally and their right to be heard in particular. This has led to discussion about whether the Convention remains fit for purpose. It is the author's view that, in spite of the critical societal changes which have occurred since its inception, and other challenges which the Convention faces, it is still fit for purpose. The Convention is capable of

²⁹ Hague Conference: Guide to Good Practice Child Abduction Convention: Part IV – Enforcement, available at [HCCH | Guide to Good Practice Child Abduction Convention: Part IV - Enforcement](#) (accessed 10 May 2021).

³⁰ Marilyn Freeman, *The child perspective in the context of the 1980 Hague Convention* (October 2020), available at [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/659819/IPOL_IDA\(2020\)659819_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/659819/IPOL_IDA(2020)659819_EN.pdf).

encompassing the current state of knowledge and understanding of child development and rights, but must do so as the child's participation is not simply instrumental, but also has an independent value also. (footnotes omitted)

Many of the observations set out in the extracts above would apply equally to the interaction between the 2000 Convention and the CRPD, in particular the extent to which it is possible for a Convention to evolve to reflect changing national – and international – standards.

ii. Importing human rights standards into humanitarian law

Human rights law and humanitarian law are separate fields of international law that typically apply in different circumstances and protect somewhat different groups of people. For most of the 20th century, the dominant doctrine was that there was no overlap.³¹ Over the past couple of decades, this understanding has been increasingly called into question.³²

It is now widely recognized that there is some overlap between the two, both in terms of their technical application, but more broadly in their normative objectives and in the evolution of their respective constructions.³³ The ICJ confronted the issue in its advisory opinion on the legality of nuclear weapons, where it found that the right to life enshrined in the International Covenant on Civil and Political Rights is not suspended at time of war, but rather, that whether the deprivation of life was arbitrary in breach of Article 6 of the Covenant “can only be decided by reference to the law applicable in armed conflicts.” In effect, the ICJ considered humanitarian law to be a sort of *lex specialis* vis-à-vis human rights in this instance.³⁴

Subsequent advisory opinions and cases further entrenched an integrated interpretation of human rights and humanitarian law.³⁵ Regional human rights courts have also upheld an integrated reading of human rights and humanitarian law.

iii. Reinterpreting trade obligations in light of international environmental law

The General Agreement on Tariffs and Trade was drafted in 1947 as a temporary gap-filler pending the negotiation of a broader treaty on multilateral trade regulation under the aegis of an International Trade Organization. Some fifty years later, this temporary agreement became ensconced as a cornerstone of the World Trade Organization. During that time, nearly every aspect of international law had undergone significant transformation. While the original GATT had been conceived largely as a *sui generis*, self-contained regime often construed to be largely insulated

³¹ Friedrich von Berber, *Lehrbuch des Völkerrechts*, ii: *Kriegsrecht* (2nd ed, 1969), at p. 64; Alfred Verdross, *Völkerrecht* (1937), at p. 293.

³² See, e.g., Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, *American Journal of International Law*, Vol. 100, No. 3 (July 2006), at pp. 580-622.

³³ See, e.g., Christian Tomuschat, *Human Rights and International Humanitarian Law*, *European Journal of International Law*, Vol. 21, No. 1, February 2010, pp. 15-23.

³⁴ *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, at paragraph 25.

³⁵ Tomuschat, *supra* footnote 30 discussing the Advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [2004 I.C.J. Rep. 136]; the judgment in *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [I.C.J., 2006 I.C.J. 126], and in the order for provisional measures in the case of *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)* [2008 I.C.J. Rep. 353].

from general public international law, this conception was abandoned with the advent of the WTO and its dispute settlement system. In the first few years of this new system, the *Shrimp-Turtles* case³⁶ confirmed this shift, becoming perhaps the most notorious WTO case.

In this case, the Panel and the Appellate Body were tasked with interpreting a provision of the GATT that allowed member states to restrict trade, under certain conditions, if that measure “relate[d] to the conservation of exhaustible natural resources.”³⁷ The United States had banned the import of shrimps that had not been harvested by nets fitted with turtle excluder devices, a metal grid that prevented sea turtles from getting caught in the net and drowned. These devices had been proven effective to reduce the bycatch of endangered sea turtles, in particular. One of the issues was whether a measure taken to protect a living, albeit endangered, species could qualify as a measure for the conservation of an “exhaustible” natural resource, since living creatures could reproduce. The Appellate Body established a landmark practice by referring to the Convention on Trade in Endangered Species (CITES), which entered into force in 1975, several decades after the GATT, and other international environmental instruments. It found that these instruments were designed to protect living but endangered species, and hence, the GATT language of “exhaustible natural resource” should now be read to include living resources.

The Appellate body did not engage in a technical conflict of law analysis, nor did it consider whether all WTO members were also parties to CITES. Rather, it considered CITES and other environmental protection instruments to inform the proper interpretation of the GATT Agreement. This approach is similar to the options presented above with respect to interpreting the 2000 Convention congruent with the CRPD. Such as strategy would ensure that the 2000 Convention reflects the highest and most up-to-date human rights standards even if there is an imperfect overlap between the State parties to the 2000 Convention and the membership to human rights treaties.

4. Beyond the 2000 Convention: further treaty intersections

As a starting point, it is important to note that overlap between those who the 2000 Convention covers and those who are covered by the CRPD is very significant, but not total, for two reasons:

- The 2000 Convention applies, generally, solely to those aged 18 and above, whereas the CRPD has no such age limitation;
- As addressed above, the 2000 Convention addresses the situation where a person who currently has no ‘impairment or insufficiency’ wishes to make provision for the situation where they may do by way of a private mandate. At the point when they are making such provision, they would not necessarily fall within the scope of the CRPD, even if they may well then do at the point when the provision is ‘active’ – i.e. they have an ‘impairment or insufficiency’ which means that they cannot protect their interests. .³⁸

³⁶ United States–Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R (decided Oct. 12, 1998) (adopted Nov. 6, 1998), reprinted in 38 I.L.M. 121 (1999). Report of the Panel, WT/DS58/R (decided May 15, 1998) (adopted as modified by the Appellate Body Nov. 6, 1998).

³⁷ GATT Article XX(g).

³⁸ Subject only to the question of whether the provision relates to a situation where the relevant impairment of the adult was sufficiently short-term in its effect as not to come within the definition of disability for purposes of Article 1 CRPD (referring as it does to ‘long-term’ impairments).

In relation to the first of these points, it is perhaps relevant to note that separate considerations arise as between the interaction between the CRPD and private international law treaties in relation to children. Amongst these, in particular, we note the 1996 Convention, the ‘mirror’ of the 2000 Convention for children. These considerations are not addressed in the present Study.

The second point reinforces the fact that the 2000 Convention straddles both those who are subjects of the CRPD and those who are the subjects of a potential (UN) Convention on the Rights of Older Persons.³⁹ An important goal in supporting the exercise of legal capacity by older persons throughout the life course is the implementation of measures such as private mandates and the enabling of their effective operation across borders (either in relation to their person or property) at a time when such is required. The CRPD does not provide directly for such measures, although the UN CRPD Committee has started to develop an understanding of such measures within the framework of Article 12 CRPD. Interestingly, therefore, the provisions of the 2000 Convention could (on one view) be seen as a useful ‘operationalisation’ of these concepts on the international plane, as well as a very concrete point of commonality between the CRPD and future Convention on the Rights of Older Persons.

In this regard, the authors consider that that the Special Rapporteur may wish to propose the development by the Hague Conference of a protocol to address unilateral statements by individuals to enable them (to use the language of General Comment 1 to the CRPD) to “state their will and preferences which should be followed at a time when they may not be in a position to communicate their wishes to others.”⁴⁰ Whilst protocols are unusual under the Hague Conference approach, and, as noted above, they are not formally provided within the 2000 Convention, they are not unprecedented,⁴¹ and it seems to the authors that it would be possible to conclude a protocol⁴² which provided the equivalent framework to those applied to private mandates to apply to unilateral statements.⁴³ We consider that this not only would fill a gap in the effective exercise across borders by persons with disabilities that is not provided for by the 2000 Convention,⁴⁴ but

³⁹ See the UN Open Ended Working Group on the topic: <https://social.un.org/ageing-working-group/>. This body have not yet moved to formal treaty drafting. See also World Health Organization, *Global report on ageism* (2021), <https://www.who.int/teams/social-determinants-of-health/demographic-change-and-healthy-ageing/combating-ageism/global-report-on-ageism>. See also Office of the High Commissioner for Human Rights, *Update to the 2012 Analytical Outcome Study on the normative standards in international human rights law in relation to older persons* (Working paper, March 2021), <https://social.un.org/ageing-working-group/documents/eleventh/OHCHR%20HROP%20working%20paper%2022%20Mar%202021.pdf>, and also, more broadly, Gerard Quinn, Ayelet Gur & Joanne Watson, *Chapter 3: Ageism, Moral Agency and Autonomy: Getting Beyond Guardianship in the 21st Century*, in *Ageing, Ageism and the Law – European Perspectives on the Rights of Older Persons* (Israel Doron & Nina Georgantzi, eds, Edward Elgar, 2018).

⁴⁰ UN CRPD Committee, General Comment 1 (2014) Article 12: Equal Recognition before the Law, available at [OHCHR | General Comments](#), paragraph 17.

⁴¹ See the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations. The Explanatory Report to this is enlightening as to the rationale for adopting a protocol rather than seeking to re-open/update the underlying Conventions: see paragraphs 14-17 of the Report by Andrea Bonomi, available at [Conférence de La Haye de droit international privé \(hcch.net\)](#). Some of the same considerations might be said to apply here.

⁴² This is a relatively unusual, but not unprecedented, step for the Hague Conference.

⁴³ We suggest adopting the ‘private mandate’ rather than the ‘protective measure’ approach because, functionally, the making of a unilateral statement is much closer to granting a private mandate.

⁴⁴ We note that the private mandate framework provides ‘let outs’ in relation to the situations where the implementation of such a statement would contravene the domestic law of the state (see Articles 15(3) and 20). It would therefore be possible for a State to adopt the Protocol but maintain a ‘let out’ where, for instance, its domestic law has specific provisions in relation (for instance) to the ability to refuse ‘basic care’ in the context of medical treatment.

it would also enable a further bridge between the 2000 Convention and any future Convention on the Rights of Older Persons. Unlike a protocol relating to guardianship, discussed above, we do not anticipate that such a protocol would run into the same technical or small ‘p’ political problems, as it identifies a discrete area for ‘upgrading’ the 2000 Convention in a way which clearly aligns with the aims of the CRPD without requiring States to address potentially difficult issues in respect of the relationship between the two conventions.

Conclusions

In light of the analysis above, we suggest that there are a number of ways in which the framework of the 2000 Convention is capable of evolving to reflect the ‘operationalisation’ by both current and future Contracting States of the CRPD within their domestic legal systems. We also consider that there are ways in which the 2000 Convention can be ‘future-proofed’ to take account of a future Convention on the Rights of Older Persons, and we have suggested a number of concrete steps which can be taken to support that approach throughout this Study and then gathered together in the Appendix.

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June 2021

Appendix: Action items for securing consistency between the 2000 Convention, the CRPD, and other potential future relevant human rights instruments

Individual States

States considering ratification of the 2000 Convention could make a declaration upon ratification as follows:

[Contracting State] confirms that, pursuant to Article 49, it shall interpret and apply the present Convention in accordance with obligations arising out of or relating to [Contracting State]'s participation in the Convention on the Rights of Persons with Disabilities and any other human rights obligations accruing under customary international law or as a result of participation in future human rights treaties bearing on matters governed by the present Convention. [Contracting State] further recognizes that other Contracting State may also adopt interpretations of the present Convention congruent with those Contracting States' obligations under international human rights law.

Hague Conference

The following steps could be taken by the Hague Conference in support of its stated position as to the complementarity of the 2000 Convention with the CRPD, and also to serve as a future bridge between the 2000 Convention and any future Convention on the Rights of Older Persons:

- a. Include express reference to the CRPD in the Practical Handbook being drafted at present, and, in particular, to identify how – where incorporated into domestic law in Contracting States – the obligations imposed by the CRPD can serve to ‘ratchet up’ human rights protections for persons with disabilities when those protections are being implemented across borders. This could be done through examples of situations where, prior to the coming into force of the CRPD, a ‘receiving’ State might have considered that a particular protective measure advanced for enforcement should be recognised and declared enforceable, but where that State – having ratified and incorporated the CRPD – would have to consider carefully whether that measure, in substance rather than form, complied with its obligations under the CRPD;
- b. Hold a specific session at the Special Commission in 2022 on the promotion of complementarity between the 2000 Convention and the CRPD, as well also in relation to the potential future Convention on the Rights of Older Persons and any other relevant human rights obligation, whether treaty-based or customary law;
- c. In questionnaires circulated to Contracting States for purposes of determining further steps to be taken to support the expansion and practical operation of the 2000 Convention, expressly to require Contracting States to identify the place of the CRPD within their domestic legal frameworks, and hence its relevance to consideration of the CRPD as a ‘mandatory’ provision of law within those Contracting States;
- d. Whether at the Special Commission in 2022 or separately, take steps towards proposing a protocol to the 2000 Convention specifically to address statements by individuals to enable them (to use the language of General Comment 1 to the CRPD) to “state their will and

preferences which should be followed at a time when they may not be in a position to communicate their wishes to others.” Whilst it would ultimately be for the Hague Conference to determine the precise scope and mechanism to apply to such statements, the most logical approach would be to start with the equivalent framework to those applied in the 2000 Convention to private mandates in Articles 15 and 16. An article within the protocol equivalent to Article 15 would set out which law would govern the existence, extent, modification and extinction of such a statement. An article within the protocol equivalent to Article 16 would then set out (in effect) ‘override’ provisions, potentially also including a provision that such statements would not have to be given effect where to do so would be to conflict with a mandatory provision of the law of the receiving State.

CRPD and UN system

Within the UN and CRPD legal and institutional framework, a number of steps may also be taken to support the consistent interpretation of the CRPD and the 2000 Convention. These could include:

- a. Continued work by the Special Rapporteur and Special Envoy to engage with States, civil society and other relevant stakeholder to promote an understanding of the Hague Convention congruent with the CRPD;
 - b. Parallel engagement with Special Rapporteurs and the Working Group on the Rights of Older People;
 - c. Comments or guidance from the Committee on the Rights of Persons with Disabilities and/or the Human Rights Council regarding the role that the 2000 Convention can play in supporting the implementation of the CRPD.
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