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THE LAW-MAKING FUNCTION OF THE UN COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES

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INTRODUCTION

Karol Wolfke had a profound interest in questions of international law-making. His seminal work dealt with international customary law and its two constituent elements, i.e. practice and its acceptance as law.[1] Wolfke perceived that relevant practice was not limited to State practice *sensu stricto*, and he analysed, in particular, how the practice of International Organisations contributed to international law-making.[2] International courts, while in principle 'confined to ascertaining and applying law', may by their decisions either 'paralyse the development' of a customary rule or 'accelerate its ripening'.[3] Practice alone, however, does not suffice to create a rule of law. Wolfke firmly upheld that any practice must be accepted by States in order to create law. While customary law does not require explicit consent, a consensual element in the form of 'presumed acceptance' is needed.[4] This view has been recently confirmed by the International Law Commission in its draft conclusions on the identification of customary international law.[5]

In fact, customary law and treaty law both rely on explicit or implicit state consent. Whereas explicit state consent is needed for a treaty to enter into force, implicit state consent informs its future evolution. Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT) states as a general rule of interpretation that 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its

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[1] Karol Wolfke, *Custom in Present International Law* (2nd edn, Martinus Nijhoff Publishers 1993).

[2] Wolfke (n 1) 79-83; see also Karol Wolfke, 'Some Reflections on Kinds of Rules and International Law-Making by Practice' in Jerzy Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century. Essays in Honour of Krzysztof Skubiszewski* (Kluwer Law International 1996) 587, 588-589.

[3] Wolfke (n 1) 72-73.

[4] Wolfke (n 1) 162 ff.

[5] International Law Commission, *Report, Sixty-eighth session (2 May-10 June and 4 July-12 August 2016)*, UN Doc A/71/10, para. 62, draft conclusions 9-10.

interpretation' shall be taken into account. Thus, a practice accepted as law may either inform the interpretation of a treaty or create a new norm of customary law. The dividing line between treaty interpretation and creation of a new norm is difficult to draw. A striking example is Article 27(3) UN Charter. Whilst the text of the norm seems to indicate that Security Council resolutions may only be adopted with the affirmative vote of all five permanent members, constant Security Council practice merely recognises a veto right. According to this practice, which is now widely accepted as law, simple abstentions do not hinder a resolution from being adopted. This may be seen either as a far reaching interpretation of Article 27(3) UN Charter or, as Karol Wolfke did,[6] as a Charter modification through subsequent customary law. Anyhow, Wolfke is right in stating that treaties may, with time, 'become overgrown with practice of their implementation, more or less changing their original content.'[7]

Evolution through subsequent practice is particularly marked in international human rights law, where international human rights bodies produce abundant practice. Here, the question arises as to whether the practice of these bodies alone suffices to determine the content of international human rights obligations or whether organ practice must be backed up by state practice or forms of implicit state consent. This question shall be analysed with regard to the UN Convention on the Rights of Persons with Disabilities (CRPD) of 13 December 2006[8] and the Committee on the Rights of Persons with Disabilities (CeeRPD) established under 34 CRPD. Although the Convention is only ten years old, its Committee has already produced quite an important corpus of practice, and it has shown its willingness to construe the Convention in a rigorous way which makes important parts of current domestic state practice with regard to persons with disabilities illegal.

Section II introduces the CeeRPD and its practice before the law-making potential of CeeRPD documents is analysed in Sections III-V. Section III starts from the formal status of CeeRPD documents under the CRPD and Section IV explores their relevance as a subsidiary source before Section V considers them under the aspects of practice and State consent. Finally, some conclusions can be drawn in Section VI.

I. THE COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES

According to Art. 34(2) CRPD, the Committee is composed of 18 experts. Art. 34(3) CRPD informs the selection process: Committee members 'shall be of high moral standing and recognized competence and experience in the field covered by' the CRPD, i.e. not necessarily lawyers; States parties are called upon to nominate their candidates in close consultation with organisations representing persons with disabilities, and to actively involve persons with disabilities. This selection procedure guarantees the special expertise of Committee members and it results in the great majority of

[6] Wolfke (n 2) 590.
[7] Wolfke (n 2) 588.
[8] UN General Assembly resolution A/RES/61/106, Annex I.

Committee members living with disabilities themselves.[9] It may be taken for granted that persons acquainted with disabilities are particularly enabled to perceive not only the special needs of persons with disabilities but also structural discrimination which may be deeply rooted in society.

Like other UN treaty bodies, the CeeRPD has three main tasks: The examination of State reports under Article 36 CRPD, the examination of individual communications under the CRPD Optional Protocol of 13 December 2006[10] and the preparation of so called General Comments under Article 39 CRPD. Among the various documents produced by the Committee, three types are particularly important: So called General Observations on State reports, so called Views on individual communications and the General Comments under Article 39 CRPD. While this terminology fully complies with the practice of other UN treaty bodies, it cannot be found in the CRPD. Rather, the Convention provides for 'suggestions and general recommendations' to be made by the Committee under Articles 36 (1) and 39, whereas Article 5 Optional Protocol refers to 'suggestions and recommendations' to be given after the examination of an individual communication.

So far, the Committee has adopted two General Comments on the equal recognition before the law[11] and on accessibility[12]. Moreover, eleven individual communications procedures were concluded by the end of 2015. Three communications were declared inadmissible.[13] Two other communications were held to be unfounded.[14] In six cases, the Committee concluded that there had been violations of the Convention. In two cases, the Committee criticised that persons with visual impairments had insufficient access to public services.[15] Sweden was reprehended for having refused a building permit for a hydrotherapy pool without paying attention to the special needs of a physically disabled person[16] and Argentina for not providing reasonable accommodation for prisoners with disabilities.[17] Hungary was criticised for withholding the right to vote in case of certain

[9] In 2011, 16 out of 18 members were living with disabilities according to Theresia Degener, 'Behindertenrechtskonvention: 4. bis 6. Tagung 2010/2011' [2012] Vereinte Nationen 232, 233.

[10] See above (n 8), Annex II.

[11] CeeRPD, General Comment No 1 (2014), Article 12: Equal recognition before the law, UN Doc CRPD/C/GC/1.

[12] CeeRPD, General Comment No 2 (2014), Article 19: Accessibility, UN Doc CRPD/C/GC/2.

[13] CeeRPD, Decision of 28 September 2011, Kenneth McAlpine v UK, UN Doc CRPD/C/8/D/6/2011 (inadmissibility *ratione temporis*); Decision of 2 October 2014, SC v Brazil, UN Doc CRPD/C/12/D/10/2013 (non-exhaustion of local remedies); Decision of 27 March 2015, AM v Australia, UN Doc CRPD/C/13/D/12/2013 (lack of victim status).

[14] CeeRPD, Views of 2 October 2014, Marie-Louise Jungeling v Sweden, UN Doc CRPD/C/12/D/5/2011; Views of 27 March 2015, AF v Italy, UN Doc CRPD/C/13/D/9/2012; both concerning employment.

[15] CeeRPD, Views of 16 April 2013, Szilvia Nyusti and Péter Takács v Hungary, UN Doc CRPD/C/9/D/1/2010; Views of 21 August 2015, F v Austria, UN Doc CRPD/C/14/D/21/2014.

[16] CeeRPD, Views of 19 April 2012, HM v Sweden, UN Doc CRPD/C/7/D/3/2011.

[17] CeeRPD, Views of 11 April 2014, X v Argentina, UN Doc CRPD/C/11/D/8/2012.

mental or intellectual disabilities[18] and Germany for insufficient measures to facilitate inclusion in the labour market.[19]

Finally, the Committee has considered a series of State reports.[20] Poland has presented its first State report in 2014,[21] but the report has not yet been considered.

Among the Views on individual communications, the case of Bujdosó ea v Hungary[22] is particularly interesting for the purposes of the present contribution, because the Committee strictly excluded any exception to the right to vote related to any kind of disability. Thereby, the Committee implicitly rejected a common practice shared by many States to exclude the right to vote in case of mental or intellectual incapacity. According to Section 13(2) of the German Federal Elections Act (Bundeswahlgesetz), for instance, those who are placed under guardianship for all kind of affairs according to the German Civil Code do not have the right to vote. The same is true for incapacitated persons in Poland.[23] It is quite clear that the Committee holds all these restrictions on voting rights to be incompatible with Article 29 CRPD. This results both from the Concluding Observations on the first German State report[24] and from General Comment No 1 (2014) on equal recognition before the law.[25]

Such a strict approach, which contradicts widespread state practice, is not confined to questions of voting rights. Rather, it follows from General Comment No 1 (2014) that the Committee strictly rejects any incapacitation of persons related to a disability and any form of substitute decision making for persons with disabilities.[26] In doing so, the Committee is well aware that general state practice is different. In fact, the Committee summarises in General Comment No 1 that most States examined exclude legal capacity in case of a perceived mental incapacity, which the Committee holds to be discriminatory.[27]

A last example of a rigorous approach not covered by State practice relates to involuntary confinement. In many States, mentally disabled persons may be placed in care institutions even against their will at the request of their guardian or another institution if certain requirements are met.[28] Article 5(1)(d) of the European Convention on Human Rights (ECHR) expressly allows the deprivation of liberty in such cases, and so does the European

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[18] CeeRPD, Views of 9 September 2013, Zsolt Bujdosó ea v Hungary, UN Doc CRPD/C/10/D/4/2012

[19] CeeRPD, Views of 4 April 2014, Liliane Gröninger ea v Germany, UN Doc CRPD/C/D/2/2010.

[20] See eg CeeRPD, Concluding observations on the initial report of Germany of 13 May 2015, UN Doc CRPD/C/DEU/CO/1.

[21] Poland, Initial report received by the CeeRPD on 24 September 2014, UN Doc CRPD/C/POL/1.

[22] See above (n 18).

[23] See Poland (n 21) para 498.

[24] See above (n 20) para 53-54.

[25] See above (n 11) para 48.

[26] See above (n 11) paras 14, 17, 28.

[27] See above (n 11) para 15; see also para 3: ‘general misunderstanding’ and ‘general failure to understand’; Theresia Degner, ‘Behindertenrechtskonvention: 11. und 12. Tagung 2014’ (2015) 63 Vereinte Nationen, 229.

[28] See eg Poland (n 21), para 153-156; CeeRPD, Concluding observations on the initial report of Germany (n 20) paras 29-30.

Court of Human Rights (ECtHR).[29] According to the Committee, however, any such form of involuntary placement is contrary to Article 14 CRPD.[30] Once more, the Committee condemns a widespread and, until now, widely accepted practice.

II. THE FORMAL LEGAL STATUS OF COMMITTEE DOCUMENTS UNDER THE CRPD

1. Committee Powers

From a formal point of view, the Committee issues 'suggestions' and 'recommendations' according to Articles 36, 39 CRPD and Article 5 Optional Protocol CRPD. This wording highlights the non-binding nature of Committee documents, even when they terminate an individual communication procedure. All UN treaty body individual complaint procedures have been modelled upon the example of the Human Rights Committee (HRC), which was established under the 1966 International Covenant on Civil and Political Rights (CCPR). However, the respective Article 5(4) of the CCPR first Optional Protocol employs the term 'views' instead of 'suggestions and recommendations', thus giving more leeway for interpretation. Departing from this wording in 2006 indicates a clear intention to exclude binding effects.

It is true that all State parties are formally bound to respect the substantial obligations laid down in the CRPD and that they have accepted the procedures before the Committee. According to the Human Rights Committee, its Views therefore 'represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument.'[31] This has led some authors to assume at least some sort of binding effect.[32] However, this treaty based reasoning may not overrule the clear wording of the Convention. Even if one was willing to accept an evolutive interpretation of the CCPR with regard to HRC competences, this is not possible with regard to the CPRD, which is much younger. When the CPRD was adopted in 2006, the debate on the authority of UN treaty body views was well advanced. In this situation, the contracting States did not take up the wording of Article 5(4) of the CCPR first Optional Protocol. Rather, Article 5 of the CRPD Optional Protocol underlines the non-binding character

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[29] *Stanev v Bulgaria* App no 36760/06 (ECtHR GC, 17 January 2012), paras 145-157; *Mihailovs v Latvia* App no 35939/10 (ECtHR, 22 January 2013), paras 144f; *KC v Poland* App no 31199/12 (ECtHR, 25 November 2014) paras 65-67.

[30] CeeRPD, Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities, The right to liberty and security of persons with disabilities, adopted during the Committee's 14th session, held in September 2015, paras 6-8 <http://www.ohchr.org/Documents/HRBodies/CRPD/GC/GuidelinesArticle14.doc> accessed 15 March 2016.

[31] HRC, General Comment No 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, UN Doc CCPR/C/GC/33 para. 13.

[32] See Thomas Buergenthal, 'The Human Rights Committee' (2001) 5 Max Planck United Nations Yearbook, 341, 397; Hans-Georg Dederer, 'Die Durchsetzung der Menschenrechte' in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa* (vol. VI/2, CF Müller 2009) § 176, para. 81.

of these documents. The formal status of an expert body established by States parties in order to make suggestions and recommendations certainly confers a certain persuasive authority upon the Committee.[33] States must not simply ignore these views but take them into account. Unlike a Court, however, the Committee does not have the last word on what the Convention obligations are in a given case. It is true that the last word does not rest with an individual State party, either, but it rests with the community of States parties. Together, the States parties are the masters of the Covenant. They have the power to amend it or to give an authentic interpretation to its provision according to Article 31(3)(a) VCLT.

2. Composition and Procedure

Under a functional approach, a body's competences and powers should correspond to its composition and procedure. The UN treaty bodies have been assimilated to a certain degree to judicial organs,[34] and Courts are, indeed, in a position to formally establish what the law is. This is reflected in their composition. Judges of the International Court of Justice (ICJ) are expected to possess 'the qualifications required in their respective countries for appointment to the highest judicial offices' or to be 'jurisconsults of recognized competence in international law' according to Article 2 ICJ Statute. In a similar vein, judges of the International Criminal Tribunal for the former Yugoslavia must 'possess the qualifications required in their respective countries for appointment to the highest judicial offices' according to Article 13 ICTY Statute,[35] and Article 21(1) ECHR provides that ECtHR judges 'must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence'. Art. 34(2) CRPD, which requires a specialised qualification in the field of rights of persons with disabilities,[36] contrasts sharply with that standard formula for international judges.

The special expertise with regard to disabilities corresponds to the limited competences of the Committee *ratione materiae*. Unlike a human rights court and unlike the Human Rights Committee, the CeeRPD does not have to deal with a wide range of human rights applying to different groups of persons within society. Rather, the scope of the Committee is focused on the interests and needs of persons with disabilities. The Committee shares this feature with other Committees established under specialised human rights conventions such as the Committee on the Rights of the Child or the Committee on the Elimination of Racial Discrimination (CeeERD). This specialisation entails a certain risk of one-sidedness. This risk has been studied with regard to the Opinion of the CeeERD in the so called Sarrazin case.[37] According to Mehrdad Payandeh, it corresponds to the 'institutional

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[33] See also Geir Ulfstein, 'Individual Complaints' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies* (CUP 2012) 73, 97f.; Christian Tomuschat, *Human Rights. Between Idealism and Realism* (3rd ed, OUP 2014) 267.

[34] HRC, General Comment No 33 (n 31) para. 11.

[35] UN Doc S/25704, Annex.

[36] See above text to note 9.

[37] CeeERD, Opinion of 26 February 2013, TBB-Turkish Union in Berlin/Brandenburg v Germany, UN Doc CERD/C/82/D/48/2010, paras 12.8-12.9; see also C Tomuschat, 'Der "Fall Sarrazin" vor dem UN-Rassendiskriminierungsausschuss' (2013) 40 Europäische Grundrechte-Zeitschrift 262ff.

logic' that a specialised body like the CeeERD in the Sarrazin case claims 'a predominant role' for the concerns for which it was created.[38] This leads to a 'structural bias' which makes the CeeERD underestimate competing human rights such as freedom of speech.[39] Given its specific mission and composition, the CeeRPD is in a similar position.[40]

Therefore, the Committee is not in a position to act as a court, and it is only consequent that the Convention does not confer judicial powers on the Committee. The Committee is not intended to be a neutral arbiter, but to promote the interests and needs of persons with disabilities. This task, for which the Committee is perfectly qualified given its unique expertise, may be described as lobby function or 'advocatory role'.[41] This may explain why the Committee frequently opposes widespread State practice by a rigid understanding of Convention guarantees.

III. COMMITTEE DOCUMENTS AS SUBSIDIARY SOURCE

According to the Human Rights Committee, its Views 'exhibit some of the principal characteristics of a judicial decision.'[42] In fact, decisions of international courts have a strong influence on international law making. They are not only binding on the parties of a given case according to the principle of *res iudicata*. Rather, Article 38(1)(d) ICJ Statute gives them the authority of a subsidiary source. Although precedents are not formally binding under international law, the ICJ has invoked decisions by international courts, and ICJ judgments in particular, 'almost as being positive law', as Karol Wolfke rightly pointed out.[43]

Those who stress the quasi-judicial character of UN treaty bodies may be inclined to assimilate their law-making function to that of international courts and tribunals. According to Başak Çalı, the 'interpretative authority' of an organ does not depend on its power to issue binding decisions in a given case, so that the interpretative power of UN treaty bodies would be equal to that of international courts and tribunals.[44] However, this view underestimates the impact of adjudicative authorities as laid down, for instance, in Article 46(1) ECHR according to which all Convention States abide by the final judgments of the Court in cases to which they are parties. If state authorities

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[38] Mehrdad Payandeh, 'Fragmentation within international human rights law' in Mads Andenas, Eirik Bjorge (eds), *A Farwell to Fragmentation* (CUP 2015) 297, 318.

[39] Mehrdad Payandeh, 'Die Entscheidung des UN-Ausschusses gegen Rassendiskriminierung im Fall Sarrazin' (2013) 68 Juristenzeitung 980, 989; Christian Walter, 'Der Internationale Menschenrechtsschutz zwischen Konstitutionalisierung und Fragmentierung' (2015) 57 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 753, 757.

[40] See also Stephanie Schmahl, 'Menschen mit Behinderungen im Spiegel des internationalen Menschenrechtsschutzes' (2007) 45 Archiv des Völkerrechts 517, 538.

[41] Schmahl (n 40) 538: 'Rolle … eher advokatorischer denn richterlicher Natur '.

[42] HRC, General Comment No 33 (n 31) para. 11.

[43] Wolfke (n 10) l45.

[44] Başak Çalı, 'The legitimacy of international interpretive authorities for human rights treaties: an indirect-instrumentalist defence' in Andreas Føllesdal, Johan Karlsson Schaffer and Geir Ulfstein (eds), *The Legitimacy of International Human Rights Regimes* (CUP 2014) 141, 143, 160-61.

disregard an interpretation given by the ECtHR or by another international human rights court, they risk repeated condemnations unless they finally abide by the court's interpretation or eventually succeed in convincing the court to readjust its interpretation. This dilemma has become evident in the Hirst saga, where the UK persistently refuses to grant prisoners the right to vote. Meanwhile, the refusal to abide by Hirst[45] has led to a series of further formal condemnations.[46] If a treaty body is not endowed with judiciary powers, by contrast, States are in a better position not to accept an interpretation and to uphold their point of view.

It is true that the Committee was established by State parties in order to make suggestions and recommendations with regard to the implementation of the CRPD. Given this formal mandate, Committee documents may constitute subsidiary means of interpretation within the meaning of Article 32 VCLT.[47] However, their persuasive authority does not equal the authority of international courts and tribunals under Article 38(1)(d) ICJ Statute.

IV. CRPD EVOLUTION THROUGH SUBSEQUENT PRACTICE AND THE ROLE OF STATE CONSENT

Karol Wolfke's studies on practice and state consent[48] open another perspective. CeeRPD documents may contribute to international practice and thus to international law making, either through evolutive treaty interpretation within the meaning of Article 31(3)(b) VCLT or through the creation of customary law. However, CeeRPD practice does not stand alone. States also produce abundant practice through domestic legislation and jurisprudence.[49] So, even repeated CeeRPD practice is seriously challenged where domestic legislation and jurisprudence remain unchanged. It is important to see, therefore, up to what extent CeeRPD claims are taken up by domestic practice. If a considerable number of States were to abolish domestic incapacity legislation in general and domestic legislation on the incapacity to participate in elections in particular, this would be a strong argument in favour of the Committee's strict understanding of Articles 12 and 29 CRPD. However, this does not seem to occur, so far. Rather, the Committee has to recognise that most States are not willing to follow its Convention reading.[50]

Moreover, pure practice does not create law, as Karol Wolfke rightly confirmed.[51] Rather, the practice must be accepted as law. Treaty body practice might be considered to be so important that States are under an obligation to protest if they want to hinder a corresponding legal rule.[52] In fact, tolerating practice may justify 'the presumption of its acceptance as

[45] *Hirst v UK (no. 2)* App no 74025/01 (ECtHR GC, 30 March 2004).

[46] *Greens and MT v UK* App no 60041/08 and 60054/08 (ECtHR, 23 October 2010); *Firth ea v UK* App no 47784/09 ea (ECtHR, 12 August 2014); *McHugh ea v UK* App no 51987/08 ea (ECtHR, 10 February 2015).

[47] Oliver Dörr, 'Article 32' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A Commentary* (Springer 2012), para 25.

[48] See above text to n 1ff.

[49] See also Wolfke (n 1), 77ff with regard to domestic law.

[50] See above text to n 27.

[51] See above text to n 4.

[52] But see Ulfstein (n 33) 97.

law'.[53] It seems, however, that even in the absence of protest, treaty body practice can hardly be presumed to reflect existing law where it is contradicted by consistent state practice.

Furthermore, other international documents must be taken into account. In Alajos Kiss v Hungary, the ECtHR had to pronounce on voting rights in cases of disabilities. The Court held that the interest 'of ensuring that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs' was a legitimate aim for restricting the right to vote.[54] Although the Court considered it disproportionate that even persons under partial guardianship were categorically barred from voting under Hungarian law, it made clear that serious mental disease could justify a bar.[55] This differentiated approach was taken up by the OSCE Office for Democratic Institutions and Human Rights (ODIHR) in its Guidelines for Reviewing a Legal Framework of Elections. According to the Guidelines, restrictions may be reasonable and permitted where 'intellectual disability or psychiatric illness … amounts to a specific mental incapacity that justifies withdrawal of suffrage rights.'[56] The Guidelines do not present state practice *sensu stricto* but the ODIHR points out that its expertise has been accepted by the OSCE Ministerial Council.[57] Under these circumstances, there is no sufficient evidence that States are willing to accept a strict reading of Article 29 CRPD.

Samantha Besson has shown the difficulties of legitimizing international human rights in the absence of corresponding domestic human rights.[58] This makes the current practice of receiving and specifying international human rights norms at the domestic level important.[59] Treaty obligations derive their binding force from State consent. This is the fundamental concept of *pacta sunt servanda* as enshrined in Article 26 VCLT.[60] Progressive readings of the CRPD, however, may only be grounded on state consent if there is either a substantial state consent with regard to a specific reading of the CRPD or if the binding nature of CeeRPD views is consented by States. Since CeeRPD documents must be considered as mere 'suggestions' and 'recommendations', much depends on their persuasive force to generate a consensus among States parties.

CONCLUSION

Summing up, Committee views have persuasive authority. The degree of authority depends on a series of factors. The Committee's composition

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[53] Wolfke (n 1) 48.

[54] *Alajos Kiss v Hungary* App no 38832/06 (ECtHR, 20 May 2010), para 38.

[55] *Alajos Kiss v Hungary* (n 54) paras 42-44.

[56] OSCE Office for Democratic Institutions and Human Rights, *Guidelines for Reviewing a Legal Framework of Elections* (2nd ed, OSCE/ODIHR 2013) 22.

[57] OSCE (n 56) 2.

[58] Samantha Besson, 'The legitimate authority of international human rights' in Andreas Føllesdal, Johan Karlsson Schaffer and Geir Ulfstein (eds), *The Legitimacy of International Human Rights Regimes* (CUP 2014), 32ff.

[59] Besson (n 58) 76.

[60] See Kirsten Schmalenbach, 'Article 26', in: Dörr and Schmalenbach (n 47), paras 11ff.

gives weight to its views as it is composed of eminent experts. However, unlike a Court, the Committee is not composed in such a way that would guarantee a fair balancing of rights of persons with disabilities with other community interests. This institutional one-sidedness distinguishes the CeeRPD from certain other human rights bodies such as the Human Rights Committee which may, therefore, have a higher persuasive authority. In fact, an expert body composed like the CeeRPD is likely to highlight the interests of persons with disabilities without attaching as much relevance to other legitimate interests. Moreover, as a body created by the CRPD and formally endowed with 'recommendation' power, the CRPD enjoys some formal authority.

Authority also depends on pre-existing, actual or future state consent. An interpretation found by the Committee has high persuasive authority if it is grounded on large scale State practice which is a sign of State consent. Even a progressive interpretation which goes beyond actual State consent may acquire persuasive authority if it is accepted either by the State concerned or by third States. If, however, States constantly refuse to abide by Committee views and uphold a different Convention reading instead, the Committee's persuasive authority is undermined.

Finally, in the absence of binding force, the persuasive authority of Committee views relies on the quality of its reasoning. If the Committee succeeds in proposing realistic alternatives, which improve the situation of persons with disabilities without entailing excessive material or immaterial costs, States are likely to abide.

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