

# The International Right to Sport for People with Disabilities

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# THE INTERNATIONAL RIGHT TO SPORT FOR PEOPLE WITH DISABILITIES

MAUREEN A. WESTON\*

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#### I. THE VALUE OF SPORT AND POWER FOR INCLUSION

At any level, sport can provide tremendous value—for competitors, participants, as well as fans. Sport has the power to transform not only the life experience of the individual, but also to bring nations, cultures, and communities together from all over the world. Pope Francis, speaking at an international conference on sport, recognized that “[s]port is a human activity of great value, able to enrich people's lives.”<sup>1</sup> An important characteristic of sport, the Pope noted, is “the beauty and joy found in sports, whether playing or watching, is something that benefits and unites everyone, regardless of religion, ethnic group, nationality, or disability.”<sup>2</sup>

The physical, social, emotional, and cognitive benefits of sport and physical activity are undisputed. Yet the public depiction of sport competition generally focuses on elite athletes, at the pinnacle of their physical prowess, and celebrates the winners. Although sport rarely contemplates the inclusion of people with disabilities (PWDs), many PWDs, whether physical or invisible, have achieved success in sports competition.<sup>3</sup> For example, Jim Abbott, who was born with one arm, successfully pitched in U.S. Major League Baseball. Tom Dempsey, born with half a right foot and no right hand,

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1. *Pope Francis: Sport Has Great Value, Must be Honest*, VATICAN RADIO (May 10, 2016), [http://en.radiovaticana.va/news/2016/10/05/pope\\_francis\\_sport\\_has\\_great\\_value\\_must\\_be\\_honest/1263027](http://en.radiovaticana.va/news/2016/10/05/pope_francis_sport_has_great_value_must_be_honest/1263027).

2. CAN/EWTN News, *Pope Francis on Sports? The Pontiff Claims Sports Are 'At the Service of Humanity'*, CATHOLIC ONLINE (Oct. 16, 2016), <http://www.catholic.org/news/hf/faith/story.php?id=71269>.

3. Maureen A. Weston, *The Intersection of Sports and Disability: Analyzing Reasonable Accommodations for Athletes with Disabilities*, 50 ST. LOUIS U. L.J. 137 (2005). The term invisible or hidden to describe a disability can encompass a spectrum of chronic medical and neurological conditions. See *Invisible Disabilities List and Information*, DISABLED WORLD (Jan. 29, 2017), <https://www.disabled-world.com/disability/types/invisible/>.

set winning records in the National Football League (NFL) as a kicker for the New Orleans Saints. Bethany Hamilton survived a shark attack that severed her arm yet she returned to professional surfing championships.<sup>4</sup> South African swimmer Natalie duToit, whose leg was amputated after a scooter accident at age seventeen, returned to compete as the first female amputee in the “able-bodied” Olympics without the use of any technological or adaptive aid.<sup>5</sup> Deaf since the age of three, Derrick Coleman walked on to the Seattle Seahawks as a free agent to become the first deaf offensive player in the NFL.<sup>6</sup> These inspiring and celebrated athletes were able to compete “within the rules,” *despite* their disability.

PWDs comprise a significant segment of society—approximately “15 percent of the world’s population lives with a disability—more than the peoples of the European Union, Russia and the United States together.”<sup>7</sup> In other words, “[m]ore than 1 billion people in the world live with some form of disability and this number will increase in the years to come.”<sup>8</sup> PWDs are often isolated and discriminated against through physical barriers, exclusionary criteria, as well as societal and community standards. Their daily experience frequently involves “[s]ocial exclusion, low educational attainment, unemployment, low self-esteem and limited opportunities to participate in political and social life.”<sup>9</sup> Moreover, individuals with physical

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4. Ethical World Hackers, *Top 10 Physically Disabled Athletes in Sports*, SPORTSLOOK (Oct. 13, 2014), <http://www.sportslook.net/top-10-physically-disabled-athletes/>.

5. du Toit removes her prosthetic leg in “able-bodied” swim competition. See Jeré Longman, *South Africa’s du Toit Fulfills a Dream Derailed*, N.Y. TIMES, Aug. 17, 2008, <http://www.nytimes.com/2008/08/18/sports/olympics/18longman.html>.

6. Samantha Bresnahan, *Derrick Coleman: Deaf NFL Player Defying the Odds*, CNN (Aug. 6, 2015), <http://www.cnn.com/2015/08/06/health/derrick-coleman-seahawks-deaf/index.html>. Other players have acknowledged playing in the NFL with the hidden disability of mental illness, such as Chicago Bears’ Brandon Marshall (borderline personality disorder), Ricky Williams (social anxiety), Eric Hipple (depression) and Eric Aigne (bipolar disorder). See Marin Cogan, *Chicago Bears Brandon Marshall Spreads Awareness NFL’s Mental Health Crisis*, ESPN THE MAGAZINE, June 25, 2014, [http://www.espn.com/nfl/story/\\_/page/hotread140707/chicago-bears-brandon-marshall-spreads-awareness-nfl-mental-health-crisis-espn-magazine](http://www.espn.com/nfl/story/_/page/hotread140707/chicago-bears-brandon-marshall-spreads-awareness-nfl-mental-health-crisis-espn-magazine).

7. Magdy Martínez-Solimán, *2030 Agenda Demands Meaningful Participation From Persons with Disabilities*, U.N. DEV. PROGRAMME (Dec. 2, 2016), <http://www.undp.org/content/undp/en/home/blog/2016/12/2/Disabilities-and-dignity.html> (discussing advancing CRPD objectives as part of the United Nation’s Sustainable Development Goals). See *World Report on Disability*, WORLD HEALTH ORG., [http://www.who.int/disabilities/world\\_report/2011/report/en/](http://www.who.int/disabilities/world_report/2011/report/en/) (last visited Dec. 14, 2017).

8. Arkadi Toritsyn & A. H. Monjurul Kabir, *Promoting the Human Rights of Persons with Disabilities in Europe and the Commonwealth of Independent States: Guide*, U.N. DEV. PROGRAMME, 12 (2013), <http://www.eurasia.undp.org/content/dam/rbec/docs/BRC%20PWD%20Report.pdf>.

9. *Id.* at 7. See *Convention on the Rights of Persons with Disabilities*, OHCHR (Dec. 2017), <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx>

or intellectual disabilities are often presumed unable to participate in sport and are largely excluded from this important societal experience.

Participation in sport can provide PWDs with a positive outlet and opportunity to integrate into society. Programs through the International Paralympic Games and Special Olympics have long provided elite athletes with physical and intellectual disabilities the invaluable opportunity for sport competition exclusively for eligible PWDs.<sup>10</sup> Sport certainly involves more than elite competition. The benefits of sport extend to all aspects of the experience for the athletes and spectators. PWDs can experience and enrich these endeavors, and the force of international law is increasingly recognizing sport participation for PWDs as a fundamental right.

In 2006, the United Nations adopted the U.N. Convention on the Rights of Persons with Disabilities (CRPD), the first international human rights treaty and convention for protecting the rights and dignity of PWDs.<sup>11</sup> The purpose of the CRPD is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”<sup>12</sup> The Convention adopts a comprehensive and holistic approach to raise awareness and to ensure PWDs rights to accessibility, independent living, and participation in all aspects of society. In Article 30, the CRPD perceptively addresses these issues using sports and rights to participation in cultural life, recreation, leisure, and sport as an influential tool for inclusion. Establishing the right to sport, recreation, and play as international human rights law, CRPD Article 30(5) calls for the right of PWDs to participate “on an equal basis” in sports, recreation, and leisure activities.

The CRPD brings to the forefront the right of people with disabilities to engage in sports. This article examines Article 30’s mandate establishing PWDs’ rights to participate in sport, particularly how the measure has been interpreted and implemented in various countries throughout the world, and the treatment of this issue in the United States under the Americans with

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(stating that “[d]espite these various instruments and undertakings, persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world . . .”).

10. *Paralympic Sports - List of Para Sports and Events*, INT’L PARALYMPIC COMMITTEE, <https://www.paralympic.org/sports> (last visited Dec. 14, 2017).

11. *Declarations and Conventions Contained in General Assembly Resolutions*, U.N., [http://www.un.org/documents/instruments/docs\\_en.asp](http://www.un.org/documents/instruments/docs_en.asp) (last visited Dec. 14, 2017). The CRPD and its Optional Protocol were adopted on December 13, 2006 through United Nations, General Assembly Resolution 61/106, annex II. *Convention on the Rights of Persons with Disabilities (CRPD)*, U.N., <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html> (last visited Dec. 14 2017).

12. *Convention on the Rights of Persons with Disabilities*, *supra* note 9.

Disabilities Act (ADA).<sup>13</sup> Section II describes the CRPD, its general structure, coverage, and guiding principles. Section III focuses on Article 30(5) and its mandate for member States to ensure rights of PWDs to participate in sport. Section IV reports on the status of legislation and programs, which have been implemented by various member States in an effort to comply with Article 30, and analyzes comparable treatment of sport under disability laws in the United States. Reflecting upon the laws, programs, and possible measures to provide PWDs with the opportunity for meaningful participation in sport, the article concludes with thoughts for continued action, on legal and non-legal dimensions, to achieve the CRPD's goal for inclusion of PWDs through the commitment to create and provide sporting opportunities. Among these proposals is a call to consider unified sport competitions, such as combining the Paralympic and Olympic Games.

## II. U.N. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD)

### *A. Overview*

The CRPD is the first international instrument with legally binding obligations for member States in the context of disability rights.<sup>14</sup> The CRPD thus “fills a major gap in international human rights law.”<sup>15</sup> Before the CRPD, the rights of PWDs had been addressed, generally or incidentally, in other international instruments addressing specific groups or particular human rights abuses.<sup>16</sup> Despite their considerable potential, “the United Nations human

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13. As of 2017, 174 countries have ratified the CRPD, and 160 are signatories, binding those countries to abide by the CRPD's purposes and principles. Convention on the Rights of Persons with Disabilities ch. 4, Mar., 30, 2007, 2515 U.N.T.S. 3. The United States failed by six Senate votes to attain a two-thirds majority needed to ratify the CPRD in December 2012. See Rosalind S. Helderman, *Senate Rejects Treaty to Protect Disabled Around the World*, WASH. POST, Dec. 4, 2012, [https://www.washingtonpost.com/politics/senate-rejects-treaty-to-protect-disabled-around-the-world/2012/12/04/38e1de9a-3e2c-11e2-bca3-aadc9b7e29c5\\_story.html?utm\\_term=.acf3a611f67f](https://www.washingtonpost.com/politics/senate-rejects-treaty-to-protect-disabled-around-the-world/2012/12/04/38e1de9a-3e2c-11e2-bca3-aadc9b7e29c5_story.html?utm_term=.acf3a611f67f).

14. *Disability and Sports*, U.N. DIV. FOR SOC. POL'Y AND DEV. DISABILITY, <https://www.un.org/development/desa/disabilities/issues/disability-and-sports.html#resources> (last visited Dec. 14, 2017).

15. *Lauding Disability Convention As 'Dawn of a New Era,' UN Urges Speedy Ratification*, UN NEWS CENTRE (Dec. 13, 2006), <http://www.un.org/apps/news/story.asp?NewsID=20975&Cr=disab&Cr1#.WRotxdy1ut8> (“[t]he CRPD is also the “most rapidly negotiated human rights treaty in the history of international law.”). See *An International Convention on the Human Rights of People With Disabilities: What You Need to Know*, NATIONAL COUNCIL ON DISABILITY (July 2002), [http://www.ncd.gov/rawmedia\\_repository/a4ac0d62\\_b9db\\_43c5\\_8535\\_2f49c8c56425.pdf](http://www.ncd.gov/rawmedia_repository/a4ac0d62_b9db_43c5_8535_2f49c8c56425.pdf).

16. A number of international instruments address disability discrimination within various contexts, such the International Covenant on Civil and Political Rights; the International Covenant on

rights treaties had not been fully used in the context of disability and fell short of providing a protective legal framework to address the breadth of issues relating to disability.”<sup>17</sup>

*B. Access, Independence, and Participation as Human Rights*

The CRPD addresses the rights of PWDs to participate meaningfully in all aspects of society.<sup>18</sup> The principles guiding the CRPD call for (1) respect for inherent dignity and rights to individual autonomy; (2) non-discrimination; (3) full and effective participation and inclusion in society; (4) respect for difference and acceptance of PWDs as part of human diversity and humanity; (5) equality of opportunity; (6) accessibility; (7) equality between men and women; and (8) respect for the evolving capacities of children with disabilities and respect of the right of children with disabilities to preserve their identities.<sup>19</sup>

While the CRPD provides the standards for the social, economic, civil, and political rights of PWDs to inclusion, equality, and non-discrimination, the Convention’s Optional Protocol provides an enforcement mechanism in authorizing the 18-member panel of experts serving on the Committee on the Rights of Persons with Disabilities (“Committee”) to promote and oversee implementation of the CRPD as well as to receive individual complaints and investigate alleged violations of the CRPD. Member States are obliged to report on implementation efforts to the Committee.<sup>20</sup> The position of The

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Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment; the Convention on the Rights of the Child; and International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. *See Overview of International Legal Frameworks*, U.N. ENABLE (2007), <http://www.un.org/esa/socdev/enable/disovlf.htm>.

17. U.N. Secretary-General, *Report of the United Nations High Commissioner for Human Rights on Progress in the Implementation of the Recommendations Contained in the Study on the Human Rights of Persons with Disabilities*, U.N. Doc. A/HRC/7/61 (Jan. 16, 2008) [hereinafter *Human Rights Council 7th*].

18. “The adoption of the Convention and Optional Protocol has been the significant step forward which addresses the need to advance the equal enjoyment of human rights by persons with disabilities.” *Id.* Kofi Annan the then Secretary General of United Nations referred to the CRPD, the first human rights convention of the 21st century, as the “dawn of a new era.” *Lauding Disability Convention As ‘Dawn of a New Era,’ UN Urges Speedy Ratification*, *supra* note 15.

19. *Convention on the Rights of Persons with Disabilities*, *supra* note 9.

20. The Optional Protocol on the CRPD authorizes the Committee on the Rights of Persons with Disabilities, to receive individual complaints and investigate alleged violations of the CRPD. *See The International Human Rights Framework*, OHCHR, <http://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/Framework.aspx> (last visited Dec. 14, 2017).

Special Rapporteur on Persons with Disabilities, created in 2014 by the Human Rights Council, is charged “[t]o, among others, research and gather information on violations of the rights of persons with disabilities, recommend on how to better promote and protect their rights, and to provide technical assistance to that purpose.”<sup>21</sup>

The Convention and its Optional Protocol frame the inclusion of PWDs as matters of human rights and seek to guarantee “an inclusive and accessible development for all.”<sup>22</sup> The CRPD’s definition of disability creates a legal basis to change the traditional perception toward it, providing that “[d]isability is an evolving concept and that disability results from the interaction between persons with impairments and *attitudinal and environmental barriers* that hinder their full and effective participation in society on an equal basis with others.”<sup>23</sup> This definition underlines the intentional shift in approach, from a traditional “charitable” or “medical” model of disability “[w]hich attempts to ‘cure’ and ‘rehabilitate’ persons with disabilities, [and which] remains prevalent and influences the way in which they are perceived and treated by society,”<sup>24</sup> toward the CRPD’s modern, human rights based approach needed to eradicate discrimination and to achieve an inclusive society.

The CRPD, whose Preamble declares that “all human rights are universal, indivisible, interdependent and interrelated,” is structured into fifty articles. These articles cover a range of basic activities and impose upon member

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21. *Id.* Ms. Catalina Devanda Aguilar of Costa Rica, is the current and first-appointed Special Rapporteur for People with Disabilities. See also *Special Rapporteur on the Rights of Persons with Disabilities*, OHCHR, <http://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/SRDisabilitiesIndex.aspx> (last visited Dec. 14, 2017) (explaining the role and mandate of the Special Rapporteur).

22. Martínez-Solimán, *supra* note 7.

23. *Convention on the Rights of Persons with Disabilities*, *supra* note 9 (emphasis added). See *UN Disability Expert Welcomes Opportunity for Constructive Dialogue on Human Rights in North Korea*, OHCHR (May 15, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21615&LangID=E> [hereafter *Constructive Dialogue*] (noting hope for change in traditional perception of people with disabilities prevalent in North Korea, which signed the CRPD in December, 2016).

24. *Id.* (quoting Ms. Devandas-Aguilar). See also *White Paper on Understanding the Role of an International Convention on the Human Rights of People with Disabilities*, NAT’L COUNCIL ON DISABILITY, 27 (June 12, 2002), [https://ncd.gov/rawmedia\\_repository/fab40111\\_e273\\_4616\\_b451\\_d7c642b3b42b.pdf](https://ncd.gov/rawmedia_repository/fab40111_e273_4616_b451_d7c642b3b42b.pdf) (noting that the CRPD recognizes that

[h]uman rights are not the exclusive property of any one group to be guarded and shared with only a privileged few. Human dignity belongs to all and is to be shared by all equally. This entails a shift in thinking for people with disabilities from being passive recipients of charity to active claimants of their human rights.).



States obligations to ensure access for PWDs to, *inter alia*, physical, service, justice, health education, communication and information, and work (Art. 9); independent living (Art. 19); personal mobility (Art. 20); participation in political and public life (Art. 29); and cultural life, recreation, and sport (Art. 30).<sup>25</sup> The CRPD prohibits discrimination against PWDs and defines discrimination as “any distinction, exclusion, or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others.”<sup>26</sup> How this non-discrimination mandate operates within the context of sport, and competitive sport in particular, is examined in the following sections.

### III. CRPD ARTICLE 30(5) ON THE RIGHTS OF PERSONS WITH DISABILITIES TO SPORT

Article 30 of the CRPD sets forth the obligation of member States to ensure the rights of PWDs to participate in cultural life, recreation, leisure, and sport.

#### *A. Inclusion by Access to Cultural Life*

Paragraphs 1 and 2 of CRPD Article 30 focus on the importance of PWDs access to cultural and artistic experiences. Paragraph 1 provides that:

States Parties recognize the right of persons with disabilities to take part on an *equal basis* with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities:

- a. Enjoy access to cultural materials in accessible formats;
- b. Enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats;
- c. Enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance.<sup>27</sup>

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25. *Convention on the Rights of Persons with Disabilities*, *supra* note 9. Pursuant to the Optional Protocol, the Committee on the Rights of Persons with Disabilities is assigned with monitoring the CRPD in Article 34.

26. *Convention on the Rights of Persons with Disabilities*, *supra* note 9.

27. *Convention on the Rights of Persons with Disabilities*, *supra* note 9, at Art. 30(1)(2).

Under Paragraph 2, “States Parties shall take appropriate measures to enable persons with disabilities to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of society.”<sup>28</sup>

*B. Inclusion Through Sport, Recreation and Leisure/Play Activities*

CRPD Article 30(5) establishes the right to sport, recreation, and play as international human rights law and calls for the right of PWDs to participate “on an equal basis” in sports, recreation and leisure activities:

PARAGRAPH 5: With a view to enabling persons with disabilities to participate *on an equal basis* with others in recreational, leisure and sporting activities, States Parties shall take appropriate measures:

- a. To encourage and promote the participation, to the fullest extent possible, of persons with disabilities *in mainstream sporting activities at all levels*;
- b. To ensure that persons with disabilities have an opportunity to organize, develop and participate in *disability-specific* sporting and recreational activities and, to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources;
- c. To ensure that persons with disabilities have access to sporting, recreational and tourism venues.<sup>29</sup>

State obligations with respect to children with disabilities are specially noted in Art. 30(5)(d–e):

To ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system;

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28. *Convention on the Rights of Persons with Disabilities*, *supra* note 9, at Art. 30(1)(2).

29. *Convention on the Rights of Persons with Disabilities*, *supra* note 9, at Art. 30(5) (emphasis added).

To ensure that persons with disabilities have access to services from those involved in the organization of recreational, tourism, leisure and sporting activities.<sup>30</sup>

### *C. Rationale for CRPD's Right to Sport, Recreation, Cultural Access*

Article 30 provisions were adopted with widespread support during the preparatory works of the Convention.<sup>31</sup> Article 30(5)'s focus on promoting sporting opportunities operates in two dimensions by impacting PWDs as well as societal perceptions. Advocates for including Article 30(5) explain that sport can help to "reduce the stigma and discrimination associated with disability,"<sup>32</sup> while also promoting the dignity of the PWDs by focusing on ability rather than disability.<sup>33</sup>

#### 1. Sport's Connection to Improved Physical and Mental Health

Through sport, international law is employing a unique tool to help achieve objectives for securing inclusion and the human rights for PWDs. The potential for sport's connection to improved physical and mental health is recognized as perhaps even more significant for PWDs:

As physical inactivity is associated with deterioration in the physical and psychological health of persons living with disabilities, participation in sport and physical activity may yield more immediate benefits for them than for the rest of the population—such as improved functional independence and overall quality of life—beyond the amelioration of long-term health risks . . . For these reasons, investment in achieving equitable health outcomes for this population subgroup is

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30. *Convention on the Rights of Persons with Disabilities*, *supra* note 9, at Art. 30(5)(e).

31. Thomas Schindlmayr, *Disability in Sport: The International Legal Framework*, SPORT IN THE U.N. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, Int'l Disability in Sport Working Group (IDISWG), at 8 (2007), [http://pacific.ohchr.org/docs/UN\\_Sport\\_Disability\\_Booklet.pdf](http://pacific.ohchr.org/docs/UN_Sport_Disability_Booklet.pdf).

32. *Harnessing the Power of Sport for Development and Peace: Recommendations to Government*, SPORT FOR DEV. AND PEACE INT'L WORKING GROUP, 171 (2008) [hereafter *Harnessing the Power of Sport*].

33. Adlof Ogi, *Statement by the Special Adviser to the United Nations Secretary-General on Sport for Development and Peace Concerning the Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, SPORT IN THE U.N. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, Int'l Disability in Sport Working Group (IDISWG), 6 (2007), [http://pacific.ohchr.org/docs/UN\\_Sport\\_Disability\\_Booklet.pdf](http://pacific.ohchr.org/docs/UN_Sport_Disability_Booklet.pdf).

particularly important. However, persons with disabilities are consistently less likely to engage in physical activity than others, and children living with disabilities have been identified as a group requiring particular attention.<sup>34</sup>

## 2. Societal Awareness

Article 30(5) of the Convention is the conjuncture of several issues in the realm of international human rights law. The Article emphasizes the maximum inclusion of PWDs without *discrimination* on an *equal basis* with other parts of society all by means of *sport*, with a strong potential to reach out to society and in turn promote physical and mental health.

Raising awareness of the needs, contributions, and human rights of PWDs is a key component of the CRPD's implementation, and sporting events provide a platform to highlight PWDs through media and society.<sup>35</sup>

## 3. Non-Discrimination and Reasonable Accommodation

The CRPD's call for "the promotion of participation in sport" also emphasizes the "quality participation" of PWDs.<sup>36</sup> Notably, Article 30(5) is not simply a non-discrimination mandate. It calls for member States to take "appropriate measures" to ensure the full and equal promotion of PWDs access to these activities.

Commentators have regarded Article 30 as "[a] core component of realizing the substantive equality vision of the disability rights project."<sup>37</sup> But it is "[t]he explicit coupling of non-discrimination and the *reasonable accommodation* mandate, together with the requirement that they be applied across the CRPD, inclusive of social rights, [that] represents the clearest and strongest legal expression of the right to sport, recreation and play in

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34. U.N. Human Rights Council, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, 19 ¶ 80, U.N. Doc. A/HRC/32/33 (Apr. 4, 2016) [hereinafter *2016 Special Rapporteur Report*].

35. U.N. Human Rights Council, *Report of the Special Rapporteur on Disability of the Commission for Social Development on Monitoring of the Implementation of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, U.N. Doc. E/CN.5/2009/6 (Feb. 2009) (reporting on efforts to elevate awareness to the rights of PWDs in government, society, and globally).

36. Simon Walker, *The Convention on the Rights of Persons with Disabilities: Participation in Sport and the Right to Take Part in Cultural Life*, SPORT IN THE U.N. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, Int'l Disability in Sport Working Group (IDISWG), 16 (2007), [http://pacific.ohchr.org/docs/UN\\_Sport\\_Disability\\_Booklet.pdf](http://pacific.ohchr.org/docs/UN_Sport_Disability_Booklet.pdf).

37. Janet E. Lord & Michael Ashley Stein, *Social Rights and The Relational Value of the Rights to Participation in Sport, Recreation, and Play*, 27 BOSTON U. INT'L L. J. 249, 273 (2009).

international human rights law.”<sup>38</sup>

#### IV. CRPD IMPLEMENTATION EFFORTS: INCLUSION THROUGH SPORTS

The following examines various legislation, programs, and mechanisms which have been implemented in an effort to achieve the CRPD’s goal for inclusion for PWDs to participate in cultural activities, recreation, leisure and sport. The challenges and failures in achieving these efforts is also discussed.<sup>39</sup>

##### *A. Member State Ratification and Implementation*

Since the UN’s adoption of the CRPD, the Treaty has been signed by 187 countries and ratified by 173 of those 187 countries.<sup>40</sup> Ireland most recently

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38. *Id.* (emphasis added).

39. As a primer on international law and significance of the CRPD as an international treaty, note that the United Nations is an intergovernmental organization comprised of, presently 193, governments from around the world as member “States” to address important issues confronting humanity, including peace, security, and the articulation, protection, and advancement of universal human rights. An international treaty, synonymous with “convention,” is an agreement among member States, legally binding upon those which sign and ratify it. *See Main Organs*, U.N., <http://www.un.org/en/sections/about-un/main-organs/index.html> (last visited Dec. 14, 2017). *See also An International Convention on the Human Rights of People with Disabilities: What You Need to Know*, *supra* note 15.

40. *Status of Ratification Interactive Dashboard*, OHCHR, <http://indicators.ohchr.org/> (last visited Dec. 14, 2017) (hereinafter *Interactive Dashboard*). The countries that have signed, but not yet ratified, the CRPD are: Bhutan, Cameroon, Chad, Fiji, Ireland, Kyrgyzstan, Lebanon, Libya, Monaco, Saint Lucia, Solomon Islands, Tonga, United States of America, and Uzbekistan. *Ibid.* Countries which have ratified the CRPD include: Afghanistan, Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Brunei, Darussalam, Bulgaria, Burkina Faso, Burundi, Cabo Verde, Cambodia, Canada, Central African Republic, Chile, China, Colombia, Comoros, Congo, Cook Islands, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic People’s Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kiribati, Kuwait, Laos, Latvia, Lesotho, Liberia, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, North Korea, Oman, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Moldova, Romania, Russia, Rwanda, Saint Vincent and the Grenadines, Samoa, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Palestine, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syria, Thailand, Macedonia, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Tuvalu, Uganda, Ukraine, United Arab Emirates, United Kingdom, Tanzania, Uruguay, Vanuatu, Venezuela, Vietnam, Yemen, Zambia, and

ratified the CRPD in 2017.<sup>41</sup> The question moving forward is whether countries that have ratified the CRPD can successfully implement its policies, specifically those policies relating to Paragraphs 1, 2, and 5 of Article 30.

### *B. Representative National Implementing Legislation*

The CRPD obliges member States to review and revise their legislation where necessary to ensure that all PWDs, who might face unequal services or other discrimination, are able to “participate in and safely enjoy sports.”<sup>42</sup> These reports identify specific measures in which the rights of PWDs to participate in cultural life, recreation, and sport have been implemented or denied. This section describes how certain countries are implementing the CRPD as well as the fallout experienced when a country has inadequately enforced it.

#### 1. South Africa

South Africa ratified the CRPD on November 30, 2007.<sup>43</sup> Since then, the country has taken several steps to make sure that the CRPD is enforced to the benefit of its population of PWDs.<sup>44</sup> With regards to Paragraph 1, Section 31 of the South African Constitution stipulates that “all persons ‘belonging to a cultural, religious or linguistic community’ should not be ‘denied the right, with other members of that community, to enjoy their culture, practise their religion and use their language; and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.’”<sup>45</sup> This should help the government create mechanisms where PWDs, as a cultural group, will have equal access to cultural materials, cultural programs, and television channels. Also, in 2011, the South African government formed the Universal Accessibility in Tourism Action Plan and the Universal Accessibility in Tourism Declaration to help create equal access to the

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Zimbabwe.

41. Aoife Barry, *After Nine-Year Wait, Ireland to Strengthen Rights of People with a Disability*, THE JOURNAL, (Dec. 21, 2016) <http://www.thejournal.ie/ireland-un-ratify-convention-disability-3152689-Dec2016>. North Korea ratified the Convention in December 2016. *Constructive Dialogue*, *supra* note 23.

42. 2016 *Special Rapporteur Report*, *supra* note 34, at 23.

43. *Baseline Country Report to the United Nations on the Implementation of the Convention on the Rights of Persons with Disabilities in South Africa*, WOMEN, CHILDREN & PEOPLE WITH DISABILITIES, 69–71 (Apr. 17, 2013), <https://ubuntucentre.files.wordpress.com/2010/09/country-report-final-baseline-country-report-on-the-crpd-cabinet-approved-3.pdf>.

44. *Id.*

45. *Id.* at 69.

country's many cultural sites.<sup>46</sup> In addition, the South African National Parks have been implementing efforts to make their sites more accessible to people with "physical and visual disabilities."<sup>47</sup> The effort by the national parks was audited for compliance in 2013, and the results have not yet been made publicly available.<sup>48</sup>

For Paragraph 2, South Africa's Department of Education has a program to train arts educators in how to teach people with disabilities.<sup>49</sup> Also, the country's Department of Arts and Culture has been progressively budgeting to upgrade all of its facilities to be able to accommodate people with disabilities.<sup>50</sup> Lastly, South Africa's Performance Art Policy says that five percent of performers for national days of celebration must include people with disabilities.<sup>51</sup>

South Africa has also taken significant steps to accommodate Paragraph 5 of Article 30. Sport and Recreation South Africa (SRSA) has increased financial assistance to people with disabilities and has banned financial contributions to organizations that exclude people with disabilities.<sup>52</sup> Also, SRSA has given financial incentives to organizations that help accomplish government goals, such as increased participation by those with disabilities.<sup>53</sup> Other governmental steps undertaken include the Norms and Standards for Sport and Recreation Infrastructure Provision and Management, Volume 1 (NSSRIPM) and the National Sport and Recreation Plan (NSRP).<sup>54</sup> The NSSRIPM requires that "all sport and recreation centres must be designed to allow access to persons with disabilities," and the NSRP "provides for the inclusion of special schools for children with disabilities in the Talent Identification and Development Programme through participation in the National Top School Games as well as the SA Youth Olympic Games."<sup>55</sup> South Africa has lauded the makeup of both its Olympic and Paralympic teams, with specific references to Oscar Pistorius and Natalie du Toit, as proof of its success of implementing the Convention in this area.<sup>56</sup>

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46. *Id.* at 71.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 69.

53. *Id.*

54. *Id.* at 69–70.

55. *Id.* at 69, 70.

56. *Id.* at 71.

## 2. United Kingdom

Where South Africa seems to be prioritizing the implementation of the CRPD, the United Kingdom (UK) has been under investigation for alleged violations of it.<sup>57</sup> In 2016, the U.N. Equality Human Rights Commission published the results of a four-year inquiry into the UK's adherence to the Convention.<sup>58</sup> Although the report did not specifically focus on Article 30, the investigation did find "grave disability rights violations" and spending cuts of benefits for the disabled.<sup>59</sup> Citing problems the country is also having with implementation of Article 30, the report noted no significant upward trend in participation in sport by the disabled community in the UK.<sup>60</sup> The report also noted significant hurdles in the UK for PWDs participation in cultural activities.<sup>61</sup> The lack of accessible transportation, facilities, and transport was identified as a key reason for this inequality. A report published by Inclusion Scotland in 2017 cites the reduction in funding and resources for community clubs as negatively impacting participation for PWDs.<sup>62</sup> The report also finds fault with the British government and notes that it has not used its ability to influence policy in Scotland to the benefit of the disabled community there.<sup>63</sup>

## 3. Australia

Australian Civil Society's *Shadow Report on the Convention on the Rights of Persons with Disabilities (CRPD)* (Report) provides an extensive discussion examining Australia's compliance with its obligations under CRPD.<sup>64</sup> Regarding the status of CRPD Article 30 in Australia, the Report's executive summary notes that:

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57. UN: 'Grave' Disability Rights Violations Under UK Reforms, BBC, Nov. 7, 2016, <http://www.bbc.com/news/uk-37899305> [hereinafter *Disability Rights Violations*].

58. *Id.*

59. *Id.*

60. *Monitoring the Implementation of the UN Convention on the Rights of Persons with Disabilities*, EQUALITY AND HUMAN RIGHTS COMM'N, 33 (Dec. 2014), [https://www.equalityhumanrights.com/sites/default/files/monitoring\\_the\\_implementation\\_of\\_the\\_uncrpd2.pdf](https://www.equalityhumanrights.com/sites/default/files/monitoring_the_implementation_of_the_uncrpd2.pdf).

61. *Id.* at 34.

62. *Implementation of the United Nations Convention on the Rights of Persons with Disabilities*, INCLUSION SCOTLAND, 20 (Jan. 2017), <http://inclusionScotland.org/wp-content/uploads/2017/01/CRPD-shadow-report-Scotland-Jan-2017-PDF.docx.pdf>.

63. *Id.* (charts showing implementation).

64. *Australian Civil Society Shadow and Baseline Report to the UN Committee on the Rights of Persons with Disabilities*, DISABILITY ADVOCACY RESOURCE UNIT, 194-98 (June 2012), <http://www.daru.org.au/wp/wp-content/uploads/2012/05/CRPD-Shadow-Report-10-May-2012.doc>.



1. Programs that facilitate and support involvement in a broad range of community cultural and recreation opportunities receive little attention from government. While governments have invested in elite sporting programs, there has been little in the way of investment in accessible and inclusive grass roots participation in recreation, arts and cultural events and programs or sports clubs and activities. Attention to the needs of people with higher support needs to facilitate social connections and opportunities for friendship and a sense of belonging have declined over the last three decades [; and]

2. There is a need for government action to invest in programs that build social connections and friendships through participation in the arts, leisure and sport.<sup>65</sup>

The Report relays the sobering reality that laws are not readily or easily implemented and often fall short of achieving the CRPD goals in practice. In describing the status of Article 30 in Australia, the Report sets forth twenty-three findings on the considerable barriers for PWDs to participate in the cultural, recreational, and sporting activities, despite Australia's launch of the National Arts and Disability Strategy (Strategy) in 2009. The report cites inadequate resources allocated to the Strategy to achieve comprehensive implementation; lack of comprehensive measures to address these barriers, particularly the circumstances that create isolation and loneliness; and inaccessible cultural events, performances and materials, including restrictive access transport to various events. Other problems identified in the report include:

- Lack of opportunities to develop creative endeavours for PWDs in the arts industry
- Inaccessible tourism services and facilities
- Low participation rates in sport and recreation (due to insufficient funding, costs for disability support, specialized equipment such as modified wheelchairs, unfunded means to integrate, and a focus on organised sports, organizations, and physical activity over the “[b]roader range of leisure and recreation opportunities that include more social, passive and

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<sup>65</sup>. *Id.* at 9.

less structured activities and pastimes. . . .”

- Emphasis on physical aspect of sport over friendship and social connections through participation in a much wider range of recreation, sport and cultural activities.<sup>66</sup>

The Study’s Article 30 Recommendations are that Australia should:

- [p]rovide sufficient resources to comprehensively implement the National Arts and Disability Strategy.
- [f]ocus on developing measures to facilitate social connections and friendship for people with disability through provision of disability supports that encourage participation in a wide range of recreation opportunities in line with aspirations and preferences of individuals with disability.
- [a]dequately support the participation of people with disability in all aspects of the arts including professional development.
- [a]dequately support the participation of people with disability in sports and recreation activities at both grass roots community and elite levels.
- [p]romote good practice in accessible tourism.
- [d]evelop comprehensive measures to address barriers to the specific cultural needs and life of Aboriginal and Torres Strait Islander people with disability and people with disability from non-English speaking backgrounds.<sup>67</sup>

#### 4. European Union

As of 2011, the twenty-eight member States comprising the European Union have also signed on to the CRPD.<sup>68</sup> In June 2014, the EU published its report on its implementation of the CRPD. Regarding Article 30, the EU

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66. *Id.* at 194–98.

67. *Id.*

68. *Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union*, EUROPEAN COMMISSION, 38–39 (June 5, 2014), [http://ec.europa.eu/justice/discrimination/files/swd\\_2014\\_182\\_en.pdf](http://ec.europa.eu/justice/discrimination/files/swd_2014_182_en.pdf) [hereinafter *EU Report*].

reports that “[t]he EU has shared and supporting competences in the area of participation in cultural life, recreation, leisure, sport and tourism.”<sup>69</sup> As to the EU’s implementation regarding sport:

Sport is included in the Disability Strategy and the 2011 Communication on *Developing the European Dimension in Sport* identifies sport for people with disabilities as a priority area to tackle. The Commission encourages Member States and sport organisations to adapt sport infrastructure to take into account the needs of people with disabilities. Specific criteria should be adopted for ensuring equal access to sport for all pupils, and specifically for children with disabilities. The training of monitors, volunteers and host staff of clubs and organisations for the purpose of welcoming people with disabilities will be promoted through the Erasmus + Programme. In its consultations with sport stakeholders, the Commission takes special care to maintain a dialogue with representatives of sportspeople with disabilities.<sup>70</sup>

The report identifies the funding of projects, such as the European and World Special Olympics Games and Youth Paralympics and that disability was “mainstreamed in other activities such as the 2012 EU Guidelines on Dual Careers of Athletes.”<sup>71</sup>

##### 5. Other CRPD Signatory Legislation

The CRPD is still in its early stages of implementation in many countries and has yet to realize its full potential for cultural impact and societal transformation. A number of other countries have enacted legislation implementing the CRPD and have prepared reports describing their efforts to implement it in their respective countries. For example, Slovakia’s recommendations for Article 30 implementation focus on support for accessible communication, cultural facilities and services, artistic endeavors, and tourism for PWDs.<sup>72</sup>

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69. *Id.*

70. *Id.*

71. *Id.* at 40.

72. Alternative Report of Non-Governmental and Disability Persons Organizations, *Implementation of the United Nations Convention on the Rights of Persons with Disabilities in Slovakia*, 30–31 (July 2015), [http://www.mdac.org/sites/mdac.info/files/crpd\\_slovakia\\_alternative\\_report.pdf](http://www.mdac.org/sites/mdac.info/files/crpd_slovakia_alternative_report.pdf) (recommending im-

Norway signed the CRPD in 2007 and ratified it in 2013, but has not yet endorsed the Optional Protocol which would “[p]ermit[] individuals to lodge complaints with the UN committee monitoring implementation of the treaty.”<sup>73</sup> Norway’s report on Article 30(5) states that:

[p]roviding for athletes with disabilities is an important aim of Norwegian sports policy [and that] [t]he Norwegian Olympic and Paralympic Committee and Confederation of Sports (NIF) is the state's most important partner as regards sporting activities. Participation in sport for persons with disabilities is facilitated through grants to NIF. . . . [A]thletes with disabilities are provided for under the umbrella of sport generally. The decision is based on an ambition that everyone should be able to find an opportunity for sport in their local community.<sup>74</sup>

## 6. CRPD Article 30 Legislative Summary

South Africa is one example of a country that is attempting to embrace the people with disabilities within its borders whereas the UK has signed the UNCRPD, but has failed to achieve its promise. Australia represents a country in deep reflection on the measures needed to achieve compliance with the goals of the CRPD. The challenges in implementation are significant, but

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significantly expand capacity and financial support for transcription of documents into accessible formats, including student’s textbooks and other documents; build a fund of audiovisual works accompanied with an audio description, subtitles for the deaf, translation into the sign language or in the sign language; systematically expand and promote the process of accessibility of cultural facilities and services, expositions in museums, galleries and exhibitions; increase support for the development of creative and artistic potential of persons with disabilities in culture and in their cultural activities; [and] adopt a standard for uniform evaluation of the accessibility level of tourist facilities from the point of view of people with disabilities.).

73. *UN Convention on the Rights of Persons with Disabilities – Norway's Initial Report*, NORWAY’S INITIAL REPORT, 83–85, <https://www.regjeringen.no/contentassets/26633b70910a44049dc065af217cb201/crpd-initial-report-norway-english-01072015.pdf> (last visited Dec. 14, 2017) (noting that “[a]ccession to the Optional Protocol is currently under consideration.”).

74. NIF reports having about 11,000 members with disabilities. *Id.* at 83. The report also identifies implementation efforts for PWDs with respect to culture, music, theater, books, audio, summer camps, holidays and welfare programmes, escort cards, assistive aids, religious beliefs and practices. *Id.* at 83–85.

the benefits to not only the disabled community as well as all of society outweighs the obstacles that ratifying countries may encounter.

The countries that have ratified the Treaty must also implement programs and policies and demonstrate the will to ensure enforcement. Countries that have already ratified the document now must finish the process by ensuring an enforcement mechanism, as well as giving groups that are in a position to help the disabled adequate funding to accomplish their goals.

### *C. Inter-Governmental Organizations Role in Promoting CRPD Article 30*

The CRPD recognizes sport as an international human right for PWDs. The United Nations and its various agencies and offices play a central role in assisting member states and providing leadership guidance on policies, programs, reporting and evaluating systems that may be implemented to advance the rights of and opportunities for inclusion of PWDs in sport.

#### 1. The Sport for Development and Peace International Working Group

The Sport for Development and Peace International Working Group (SDP IWG) is “[a]n inter-governmental policy initiative with the aim to promote the integration of Sport for Development and Peace (SDP) policy recommendations into the national and international development strategies of national governments.”<sup>75</sup> SDP IWG provides a forum for member states to share best practices and to report on strategies used to develop and implement sport programs for PWDs.<sup>76</sup> SDP IWG coordinates the efforts to use sports within the United Nations framework “to promote the values of diversity, tolerance and fairness and as a means to combat all forms of discrimination.”<sup>77</sup> SPD IWG initiates reforms and development of “policy framework for subject-specific member state activities.”<sup>78</sup> The United Nation’s Office for Sports and Development serves as Secretariat to oversee SDP IWG.<sup>79</sup>

The 2008 SDP IWG report, *Harnessing the Power of Sport for*

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75. *Sports for Development and Peace Working Group*, UNOSDP, <https://www.un.org/sport/content/un-players/member-states/sport-development-and-peace-international-working-group> (last visited Dec. 14, 2017).

76. *Id.*

77. *Promoting Awareness, Understanding and the Application of the Universal Declaration of Human Rights Through Sport and the Olympic Ideal*, U.N. (Oct. 17, 2011), <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G11/167/55/PDF/G1116755.pdf>.

78. *2014 Annual Report*, UNOSDP, 10 (2015), [https://www.un.org/sport/sites/www.un.org.sport/files/ckfiles/files/UNOSDP%20Annual%20Report%202014%20web\(2\).pdf](https://www.un.org/sport/sites/www.un.org.sport/files/ckfiles/files/UNOSDP%20Annual%20Report%202014%20web(2).pdf).

79. *Id.*

*Development and Peace: Recommendations to Governments*,<sup>80</sup> was “instrumental in promoting and supporting the systematic integration and mainstreaming of [SDP] as an instrument in development plans and policies.”<sup>81</sup> This report led to the development of five thematic working groups, one of which focuses on Sport and PWDs.

“All UN member states are generally invited to express their interest in the participation in and contribution to any of the thematic areas addressed by or relevant to the work of SDP IWG.”<sup>82</sup> The working group had been actively addressing disability issues and sports in its agenda. The Special Advisor attended the 5th Special Olympics Golf Masters in an effort to promote participation of intellectually disabled persons in sport. A conference on “inclusion of mentally challenged in Asia’s modern society” was organized along with the games.<sup>83</sup>

In 2016, a partnership between the UN Special Advisor on Sport for Development and Peace and the International Wheelchair Basketball Federation, based on common values of both organizations to bring together people with and without disabilities, was established “to establish wheelchair sport as a therapeutic exercise with the focus on a feeling of togetherness, to foster inclusion, as and to create new structures which can be self-sustained.”<sup>84</sup>

## 2. Other NGO’s and Sport for PWDs

The World Health Organization (WHO) underlines the importance of sport for the inclusion of people with “psychosocial, intellectual and cognitive disabilities” and advocates the creation of sport teams to fight the stigma against PWDs and to use sport as a means to promote human rights in a “non-traditional, fun, and inclusive” manner.<sup>85</sup>

The International Committee of the Red Cross (ICRC) considers sport as a

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80. *Harnessing the Power of Sport*, *supra* note 32.

81. *Sport for Development and Peace: Building on the Foundations*, UNOSDP, 10 (Oct. 3, 2008), [https://www.un.org/sport/sites/www.un.org.sport/files/documents/pdfs/SG%27s%20Reports%20to%20GA/A-63-466/A-63-466\\_EN.pdf](https://www.un.org/sport/sites/www.un.org.sport/files/documents/pdfs/SG%27s%20Reports%20to%20GA/A-63-466/A-63-466_EN.pdf).

82. *2014 Annual Report*, *supra* note 78 at 11.

83. *Mr. Lemke Joins the Macau Special Olympics Golf Masters, Addressing Social Inclusion and Education Through Sport*, UNOSDP (April 27, 2016), <https://www.un.org/sport/news/mr-lemke-joins-macau-special-olympics-golf-masters-addressing-social-inclusion-and-education>.

84. *New Partnership Between USOSDP and International Wheelchair Basketball Federation*, UNOSDP (Dec. 22, 2016), <https://www.un.org/sport/news/new-partnership-between-unosdp-and-international-wheelchair-basketball-federation>.

85. *Setting Up and Operating a Civil Society Organization in Mental Health and Related Areas - WHO Quality Rights Training to Act, Unite and Empower for Mental Health*, WHO, 16 (2017), <http://apps.who.int/iris/bitstream/10665/254814/1/WHO-MSD-MHP-17.14-eng.pdf>.

“key ally” in their rehabilitation programs.<sup>86</sup> Focusing mainly on developing countries, the ICRC developed wheelchair basketball and cricket teams,<sup>87</sup> and they even helped PWDs become Paralympians.<sup>88</sup> In collaboration with the Ethiopian Basketball Federation, ICRC is using sport to create stronger inclusion for PWDs,<sup>89</sup> and they have organized the first wheelchair basketball tournament in the country.<sup>90</sup> In 2015, ICRC organized a public panel discussion for sport and disability on the International Day of PWDs.<sup>91</sup>

#### *D. The Olympic Movement as a Partner in Sport*

While international legislation establishes the policies to ensure the rights of PWDs to sport, culture, and recreation, non-governmental international sport organizations and major sport events play a vital role in providing the opportunities and leadership to promote and provide sport opportunities for PWDs.<sup>92</sup> The United Nations has viewed the International Olympic Committee (IOC) and international sport federations in the Olympic Movement as partners in sport who share the ideals for using sport to promote global peace and opportunity.<sup>93</sup> Mega sporting events, such as the International Paralympics Games, “can be used to promote human rights and strengthen universal respect for them, thus contributing to their full realization” of human rights standards.<sup>94</sup> For example, Zahra Nemati, a woman archer from Iran, paralyzed after a car accident at the age of 18,<sup>95</sup> went on to become the Golden

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86. *Sport Helping to Rehabilitate Victims of War and Armed Violence*, ICRC (Sep. 6, 2016), <https://www.icrc.org/en/document/sport-helping-rehabilitate-victims-war-and-armed-violence>.

87. *Working with People with Disabilities in Asia: Fostering Greater Inclusion For All*, ICRC (Dec. 3, 2015), <https://www.icrc.org/en/document/working-people-disabilities-asia-fostering-greater-inclusion-all>.

88. *Sport Helping to Rehabilitate Victims of War and Armed Violence*, *supra* note 86.

89. *Ethiopia Supporting Social Inclusion for Persons with Disabilities*, ICRC (Mar. 23, 2017), <https://www.icrc.org/en/document/ethiopia-supporting-social-inclusion-persons-disabilities>.

90. *Ethiopia: First Wheelchair Basketball Tournament Ends with a Win*, ICRC (Dec. 15, 2016), <https://www.icrc.org/en/document/ethiopia-first-wheelchair-basketball-tournament-ends-win>.

91. *Sport and Disability: Public Panel Discussion on the International Day of Persons with Disabilities*, ICRC (Dec. 3, 2015), <https://www.icrc.org/en/event/sport-disability-international-day-persons-disabilities-day-for-all>.

92. *2016 Special Rapporteur Report*, *supra* note 34, at ¶ 99.

93. Thomas Bach, *The Olympic Movement, the United Nations and the Pursuit of Common Ideals*, U.N. CHRONICLE, Aug. 2016, <https://unchronicle.un.org/article/olympic-movement-united-nations-and-pursuit-common-ideals>.

94. United Nations Human Rights Council, A/HRC/RES/26/18, *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health: Sport and Healthy Lifestyles as Contributing Factors*, U.N. Doc., A/HRC/RES/26/18, 2 (July 14, 2014).

95. Helen Pidd at Sambódromo, *Trail-Blazer Zahra Nemati Wins Hearts and Minds with Stirring Effort in Archery*, THE GUARDIAN (Aug. 9, 2016),

Paralympian in London 2012, a qualifier for the Rio 2016 Olympics and Paralympics, and an UN ambassador for promoting sport as a source of empowering women and PWDs.<sup>96</sup>

### 1. International Paralympic Committee

The spirit of the CRPD in using sport as a force for human rights is exemplified, in part, through the Olympic and Paralympic Movements.<sup>97</sup> Founded in 1989, the International Paralympic Committee (IPC) is the governing body for the Paralympic Movement. The IPC organizes the Summer and Winter Paralympic Games, supervises World Championships, and acts as the International Federation for ten sports.<sup>98</sup>

The Paralympic Movement brings together the world's elite athletes with physical impairments to compete in twenty-four sports in the Paralympic Games which take place in the same city and venue as the Olympic Games two weeks after Closing Ceremonies.<sup>99</sup> The Paralympics are recognized as “provid[ing] a platform to raise awareness and stimulate action on advancing the rights of and opportunities for persons living with disabilities, providing a unique opportunity to advocate for the Convention on the Rights of Persons with Disabilities and its Optional Protocol.”<sup>100</sup> The Paralympics Movement highlights “the achievements of athletes with disabilities to a global audience and in acting as a primary vehicle to promote positive perceptions and greater

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<https://www.theguardian.com/sport/2016/aug/09/zahra-nemati-olympics-heart-and-minds-archery>.

96. *Nemati to Bear Iran's Flag at Rio 2016 Opening Ceremony*, WORLD ARCHERY (Jan. 25, 2016), <https://worldarchery.org/news/136775/nemati-bear-irans-flag-rio-2016-opening-ceremony>.

97. *Olympic Charter*, IOC, Art. 1, §2 ¶ 8, [www.Olympic.org/Documents/olympic\\_charter\\_en.pdf](http://www.Olympic.org/Documents/olympic_charter_en.pdf). After the Second World War, the Olympic movement gathered unprecedented force, attracting Government support under the framework of sport as a social goal, which included the construction of public sport infrastructure and promotion of sport activities. *Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, U.N. Doc., A/HRC/13/20, ¶ 2 (Dec. 18, 2009). The growth in participation in sport was a result of these efforts that in turn plays a critical role in realizing the right to health through sport. *Id.* at ¶ 100.

98. *The IPC – Who We Are: About Us*, IPC, <http://www.paralympic.org/the-ipc/about-us> (last visited Dec. 14, 2017) [hereinafter *Paralympic Website*]. See Barrie Houlihan & Pippa Chapman, *Talent Identification and Development in Elite Youth Disability Sport*, 20 *SPORT IN SOC'Y* 107, 108 (2016).

99. *Paralympic Website*, *supra* note 80 (noting competitions in archery, para-athletics, badminton, boccia, cycling, canoe, goalball, equestrian, football 5-a-side, judo, para powerlifting, para dance sport, rowing, shooting, para sport, sitting volleyball, para swimming, table tennis, taekwondo, triathlon, wheelchair basketball, wheelchair rugby, and wheelchair tennis).

100. See *Games of the XXIX Olympiad & The XIII Paralympic Games in Beijing: The UN System in Action*, UNOSDP, 14 (2009), [https://www.un.org/sport/sites/www.un.org.sport/files/ckfiles/files/UNOSDP%20Beijing%20Olympic%20and%20Paralympic%20Games%202008%20Report\(1\).pdf](https://www.un.org/sport/sites/www.un.org.sport/files/ckfiles/files/UNOSDP%20Beijing%20Olympic%20and%20Paralympic%20Games%202008%20Report(1).pdf).



inclusion of persons with disabilities in sport and society”<sup>101</sup> and invites all stakeholders to use sport as a means to strengthen the quality of different aspects of life for specific groups including PWDs and to promote their social inclusion and improve their health conditions.<sup>102</sup> The UN General Assembly has recognized Paralympic athletes as leaders who contribute in “promo[ting] peace and human understanding through sport and the Olympic ideal.”<sup>103</sup> These athletes with disabilities are a major source of national pride.<sup>104</sup>

Global sporting events, such as the Paralympic Games, which is the third largest sporting event in the world, introduce the *abilities* of PWDs to the world.<sup>105</sup> Media coverage of sport events involving PWDs can play a major role in creating more positive and accurate perceptions.<sup>106</sup> Record breaking ticket sales for the Rio Paralympics provided the athletes with the opportunity to “display their amazing will and skills in fully booked venues.”<sup>107</sup> The London 2012 Paralympics was watched by 3.4 billion people around the world,<sup>108</sup> and the 2016 Rio Paralympics was estimated to have four billion viewers.<sup>109</sup> Images of disabled people using their special skills can be a strong inspiration for many people throughout the world by showing the resilient power of the human spirit. Understanding this, the IPC presents Paralympic Media Awards to members of the international media who thoughtfully feature Paralympic athletes and issues, through broadcast, written, and photo media.<sup>110</sup> Nevertheless, the media and television coverage given to Paralympic sport is unequal and extremely limited.<sup>111</sup> In implementing the CRPD, member states should recognize the importance of media and consider ways to promote and

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101. U.N. General Assembly, *Sport as a Means to Promote Education, Health, Development, and Peace*, U.N. Doc. A/71/L.38 (Dec. 16, 2016).

102. *Id.*

103. U.N. General Assembly, *Building a Peaceful and Better World Through Sport and the Olympic Ideal*, U.N. Doc. A/RES/70/4 (Nov. 13, 2015).

104. *See e.g.*, Longman, *supra* note 5.

105. Matt Slater, *Olympics and World Cup Are the Biggest, But What Comes Next?* BBC SPORT, Dec. 4, 2014, <http://www.bbc.com/sport/30326825>.

106. *Harnessing the Power of Sport*, *supra* note 32 at 177.

107. *Rio 2016 Ticket Sales Reach 1.5 Million Mark*, RIO2016 PARALYMPIC GAMES (May 9, 2016), <https://www.paralympic.org/news/rio-2016-ticket-sales-reach-15-million-mark>.

108. *London 2012 Paralympics Proves a Worldwide TV Ratings Winner*, OFFICIAL WEBSITE OF THE PARALYMPIC MOVEMENT (Nov. 27, 2012), <https://www.paralympic.org/press-release/london-2012-paralympics-proves-worldwide-tv-ratings-winner>.

109. *Record Number of Broadcasters for Rio 2016*, RIO2016 PARALYMPIC GAMES (May 9, 2016), available at <https://www.paralympic.org/news/record-number-broadcasters-rio-2016>.

110. *Paralympic Media Awards*, OFFICIAL WEBSITE OF THE PARALYMPIC MOVEMENT, <https://www.paralympic.org/the-ipc/awards/paralympic-media> (last visited Dec. 14, 2017).

111. Houlihan & Chapman, *supra* note 98, at 108.

incentivize international content providers to feature disabled sport more broadly.

## 2. The Special Olympics

The Special Olympics offers 32 Olympic-style summer and winter sports competitions in more than 170 countries for athletes with intellectual disabilities. The Special Olympics is the largest event for PWDs, with an estimated 7,000 athletes and 30,000 volunteers, while hosting other events, such as International Bowls for the Disabled World Championships with approximately 120 athletes.<sup>112</sup> The Special Olympics, founded by Eunice Kennedy Shriver, “is a global movement of people creating a new world of inclusion and community, where every single person is accepted and welcomed, regardless of ability or disability.”<sup>113</sup> The event works to reach the approximately 200 million people with intellectual disabilities through Olympic sport training opportunities as well as building communities, healthier athletes, youth involvement, leading research, and sports and play for youth, and sport leadership.<sup>114</sup>

### *E. The United States - The Americans with Disabilities Act*

The United States signed the CRPD in July 2009; however, the U.S. is not a signatory because the U.S. Senate failed to authorize ratification, falling six votes short of a needed two-thirds majority vote in 2009.<sup>115</sup> Although not a signatory to the CRPD, the U.S. does have comprehensive federal disability rights legislation.

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112. Tracey J. Dickson et al., *Enhancing Destination Competitiveness Through Disability Sport Event Legacies: Developing an Interdisciplinary Typology*, 29 INT’L J. OF CONTEMP. HOSPITALITY MANAGEMENT, 924, 936 (2017).

113. *Who We Are*, SPECIAL OLYMPICS, [http://www.specialolympics.org/Sections/Who\\_We\\_Are/Who\\_We\\_Are.aspx](http://www.specialolympics.org/Sections/Who_We_Are/Who_We_Are.aspx) (last visited Dec. 14, 2017).

114. *Id.* *The Power and Impact of Special Olympics*, SPECIAL OLYMPICS, [http://www.specialolympics.org/Stories/Best/Stories\\_of\\_Power\\_and\\_Impact.aspx](http://www.specialolympics.org/Stories/Best/Stories_of_Power_and_Impact.aspx) (last visited Dec. 14, 2017).

115. Kareem Dale, *Valerie Jarrett & Ambassador Rice at the U.S. Signing of the UN Convention on the Rights of Persons with Disabilities*, THE WHITE HOUSE (July 30, 2009), <https://obamawhitehouse.archives.gov/blog/2009/07/30/valerie-jarrett-ambassador-rice-us-signing-un-convention-rights-persons>. See John R. Vaughn, *Finding the Gaps: A Comparative Analysis of Disability Laws in the U.S. to the U.N. Convention on the Rights of Persons with Disabilities*, NAT’L COUNCIL ON DISABILITY (May 12, 2008), <http://www.ncd.gov/publications/2008/May122008#aa30>. See also Elisabeth Doyle, *The UN Convention on the Rights of Persons with Disabilities and U.S. Law: An Overview of Differences*, POWERS PYLES SUTTER & VERVILLE PC (Dec. 14, 2017), [http://www.c-c-d.org/fichiers/CRPD-and-US-Law\(Revised9-26-2008\).pdf](http://www.c-c-d.org/fichiers/CRPD-and-US-Law(Revised9-26-2008).pdf).

## 1. U.S. Disability Law Generally

Federal disability legislation in the United States is set forth in the Rehabilitation Act of 1973, which applies to federally funded programs, and the Americans with Disabilities Act of 1990 (ADA), whose broader coverage reaches most private employers and private entities constituting places of public accommodations. These laws prohibit discrimination on the basis of disability and further require these entities to provide reasonable accommodations, modifications, or auxiliary aids that will enable qualified individuals with disabilities to access and to participate in the program or activity.<sup>116</sup> In enacting the ADA, Congress found, *inter alia*, that individuals with disabilities continually encounter various forms of discrimination, including “outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities, programs and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs or other opportunities.”<sup>117</sup>

U.S. disability laws impose an affirmative obligation upon covered entities to comply with requests for reasonable accommodations, as well as for modification of non-essential eligibility criteria. For example, discrimination is defined in the ADA to include, *inter alia*,

the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability . . . [and] a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities.<sup>118</sup>

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116. The general prohibition of discrimination provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” 29 U.S.C. § 794 (2017); 42 U.S.C. § 12182 (2017). Similar non-discrimination mandates for employment and the provision of public services are set forth in §§ 12112 and 12132, respectively.

117. 42 U.S.C. § 12101(a)(5) (2017).

118. 42 U.S.C. § 12182(2)(A)(i–ii) (2017). *See* 42 U.S.C. § 12102(1) (2017) (defining “disability” to mean, with respect to an individual (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) regarded as having such an impairment.”).

The ADA further requires that these “[g]oods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.”<sup>119</sup> Exceptions are warranted only where the entity can demonstrate that such criteria are necessary or that “making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.”<sup>120</sup>

## 2. U.S. Disability Law Application to Sport

Although the U.S. disability laws do not specifically reference rights to participate in sport as done explicitly in Article 30(5) of the CRPD, the laws have similar application to entities providing cultural, recreational, or sporting opportunities and events. A goal of these laws, which apply to virtually all educational institutions, sport teams, and organizations, is to assure the equality of opportunity and full participation for individuals with disabilities.

For example, with respect to physical access, sport facilities, stadiums, and arenas must be physically accessible and usable by PWDs in the most integrated setting possible. Sport facilities thus must remove architectural barriers and provide wheelchair accessible parking, entrances, seating, restrooms, drinking fountains, signs, unobstructed sight lines, and assistive listening devices.<sup>121</sup>

U.S. disability laws have had and continue to have a significant impact in sport, at times raising complicated and controversial medico-legal questions surrounding the rights of PWDs to participate in athletics and the concomitant rights and obligations of the entities regulating athletic competition to set and enforce eligibility and safety rules. Athletes with disabilities have asserted various challenges to sport eligibility rules, such as medical clearance/participation rules,<sup>122</sup> age limits,<sup>123</sup> academic standards,<sup>124</sup> or

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119. 42 U.S.C. § 12182(b)(1)(B) (2017).

120. 42 U.S.C. § 12182(b)(2)(A)(ii) (2017).

121. 42 U.S.C. § 12181(a)(b)(1) (2017). See Mark A. Conrad, *Wheeling Through Rough Terrain - The Legal Roadblocks of Disabled Access in Sports Arenas*, 8 MARQ. SPORTS L. J. 263 (1998) (discussing stadium sightline access litigation).

122. See e.g., *Knapp v. Northwestern University*, 101 F.3d 473 (7th Cir. 1996), cert. denied 520 U.S. 1274 (1997) (upholding university’s refusal to allow Nick Knapp to play on the college’s basketball team based on the team physician’s determination that Knapp was medically ineligible because his increased risk of cardiac death, even while playing with an internal defibrillator).

123. See e.g., *Sandison v. Michigan High School Athletic Ass’n Inc.*, 64 F.3d 1026 (6th Cir. 1995); *Pottgen v. Missouri State High School Activities Ass’n*, 40 F.3d 926 (8th Cir. 1994) (holding the age limit rule was an essential eligibility requirement supported by health and safety concerns and that modification would be unreasonable). Cf. *Johnson v. Florida High School Activities Ass’n, Inc.*, 900 F. Supp. 579 (M.D. Fla. 1995) (conducting an individualized assessment and holding that waiver

physical accessibility for spectators. Therapeutic use exceptions for certain banned substances for recognized medical need or disabilities under the World Anti-Doping Code. But the most contentious questions regarding disability rights in sports involve questions about the law's impact on the competitive nature of sport and the ability of sporting organizations to enforce rules of participation.

Participation in sport was not a specific focus of the ADA, whose primary intent was to address employment and physical access issues. However, implementing regulations expressly require institutions to provide qualified individuals with disabilities an equal opportunity to participate in educational and nonacademic activities. Athletes who have been effectively excluded from sport participation because of a medical impairment, genetic predisposition, or disability have invoked the stringent anti-discrimination standards of U.S. disability laws in asserting rights to participate and to reasonable modifications of eligibility standards in sport programs at the interscholastic, intercollegiate and professional levels.<sup>125</sup>

As an example, Casey Martin, who suffers from a severe congenital disability affecting his right leg, sued the PGA Tour in order to permit Martin to ride a cart during professional golf competitions although all other players are required to walk. The debate focused, implicitly and expressly, on whether providing accommodations conferred an unfair competitive advantage.<sup>126</sup> In *PGA Tour, Inc. v. Martin*, the U.S. Supreme Court posited the central issue as whether allowing the plaintiff, given his individual circumstances, the requested modification of using a cart in tournament competition would fundamentally alter PGA . . . golf competitions.<sup>127</sup> In determining the walking rule "at best peripheral" to the nature of the PGA competition and that waiver of the rule for Martin reasonable, the Court held that entities such as the PGA must engage in an individualized inquiry to assess whether requests of disabled athletes to modification of rules pose a fundamental alteration to the nature of the competition.<sup>128</sup> The Court then determined that the walking rule

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of the age rule was a reasonable modification for the learning disabled student), *vacated* 102 F.3d 1172 (11th Cir. 1997), *appeal after remand*, 103 F.3d 720 (11th Cir. 1997).

124. *See e.g.*, *Bowers v. NCAA*, 9 F. Supp. 2d 460, 488 (D.N.J. 1998).

125. YASSER ET AL., *SPORTS LAW CASES & MATERIALS* 853 (Lexis Pub. 2015).

126. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 666–667 (2001).

127. *Id.* at 678. *See also id.* at 681 (concluding that "as a public accommodation during its tours and qualifying rounds, [PGA] may not discriminate against either spectators or competitors on the basis of disability"). *Id.* at 689 ("Congress made no such exception for athletic competitions, much less did it give sports organizations carte-blanche authority to exempt themselves from the fundamental alteration inquiry by deeming any rule, no matter how peripheral to the competition, to be essential.").

128. *Id.* at 683.

was “at best peripheral” to the nature of the PGA competition and that waiver of the rule for Martin was reasonable and necessary.<sup>129</sup>

The PGA argued that the law should distinguish between rules defining who is eligible to compete from rules governing how the game is played, with any modification to the latter “substantive” rules a *per se* fundamental alteration.<sup>130</sup> Justice Scalia, joined by Justice Thomas, argued in dissent that sport is different from other enterprises that are subject to the ADA in that it is up to sport to decide rules of the game. Justice Scalia challenged the assumption that the PGA must play traditional golf, asserting that no court, “not even the Supreme Court of the United States,” can pronounce one or another of the competitive rules of sport nonessential if the rule-maker deems them otherwise.<sup>131</sup>

Dissenting in *PGA v. Martin*, Justice Scalia, joined by Justice Thomas, argued that

The [ADA] seeks to assure that a disabled person’s disability will not deny him *equal access* to (among other things) competitive sporting events — not that his disability will not deny him an *equal chance to win* competitive sporting events. The latter is quite impossible, since the very *nature* of competitive sport is the measurement, by uniform rules, of unevenly distributed excellence. This unequal distribution is precisely what determines the winners and losers — and artificially to ‘even out’ that distribution, by giving one or another player exemption from a rule that emphasizes his particular weakness, is to destroy the game. . . .<sup>132</sup>

The Report of the Special Rapporteur on Persons with Disabilities commented on a short-coming of the *Martin v. PGA* decision, stating that:

To date, it seems that the appropriateness of participation in mainstream sport at the professional level has been determined on a case-by-case basis. For example,

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129. *Id.* at 682.

130. *Id.* at 671.

131. *Id.* at 699 (“why cannot the PGA Tour, if it wishes, promote a new game, with distinctive rules. . .”).

132. *Id.*

accommodations can be made for persons with disabilities to participate in sports such as golf, which do not alter the fundamental nature of the sport in question, and therefore should be undertaken to avoid discrimination. In situations where accommodations cannot be made without fundamentally changing the nature of the sport, the question of participation of persons with disabilities remains uncertain, and should be further examined by international organizations in consultation with persons with disabilities, to assist States in promulgating relevant policies.<sup>133</sup>

### 3. International Critique of US Individualized Inquiry Approach

The Special Rapporteur was critical of the individualized approach under the ADA to ascertaining obligations to provide accommodations to PWDs because of the uncertainty in applying the individualized approach. As the U.S. disability law does not confer a right to participation for PWDs when it juxtaposes a fundamental nature to the sport, how does the CRPD's "equal basis" standard address this situation?

#### *F. Equality and Equal Participation in Sport under CRPD 30(5)*

According to the 1982 World Programme of Action Concerning Disabled Persons, "Equalization of opportunities means the process through which the general system of society, such as the physical and cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sports and recreational facilities, are made accessible to all."<sup>134</sup> Creating an environment with equal opportunities increases the probability for PWDs to participate "in the civic and cultural life of their countries" and facilitates this process.<sup>135</sup>

Disabled athletes who are able to compete with non-disabled athletes are obvious examples of the positive results of implementing Article 30(5)(a) of the Convention stating the rights of PWDs to participate in the mainstream sport activities where they have the opportunity to compete with people

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133. 2016 *Special Rapporteur Report*, *supra* note 34 at 19.

134. *World Programme of Action Concerning Disabled Persons*, U.N. (Feb. 1982), <https://www.un.org/development/desa/disabilities/resources/world-programme-of-action-concerning-disabled-persons.html>.

135. *Secretary-General Hails Advances in Disability Rights, Telling Meeting on Tenth Anniversary of Landmark Convention 'We Must Go Further Still'*, U.N. (July 7, 2016), <http://www.un.org/press/en/2016/sgsm17909.doc.htm>.

without disability.<sup>136</sup> Equality does not mean a right to violate the rules, however. For example, athletes competing in the Paralympic Games are bound to comply with the anti-doping rules under the World Anti-Doping Code. Based upon a finding of a state-sponsored scheme of doping, the IPC suspended the entire Russian Paralympic delegation from the Rio 2016 Games.<sup>137</sup> But what is equality within CRPD Article 30(5) when athletes with disabilities require modification of competition eligibility or play rules?

#### 1. Accommodation or Advantage? *Pistorius v. IAAF*

The “equality” concept for participating in mainstream sport and rights of an athlete with a disability to compete in mainstream elite competition came squarely before the international sporting community in *Oscar Pistorius v. IAAF*.<sup>138</sup> South African sprinter Oscar Pistorius, a double amputee since he was eleven months old, sought to participate in mainstream competition with non-disabled people at the highest level in the world.<sup>139</sup> Pistorius had won a Gold Medal in the 2004 Athens Paralympic Games and later chose to compete in IAAF sanctioned competition alongside able-bodied athletes, including the 2008 Olympic Games in Beijing, China. To compete, Pistorius required the use of prosthetic legs, known as the Cheetah Foot Flex. The governing international sport federation, International Association of Athletics Federation (IAAF), banned Pistorius from competing in the 2008 Olympics on the grounds that the prosthetic legs constituted an illegal technical device and provided him with “a demonstrable mechanical and competitive advantage compared with someone not using the blade” in violation of IAAF competition rules.

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136. Eli A. Wolff et al., *Understanding the Right to Sport in the United Nations Convention on the Rights of Persons with Disabilities, Sport in the United Nations Convention on the Rights of Persons with Disabilities*, IDISWG, 2007, 32 (2007), [http://pacific.ohchr.org/docs/UN\\_Sport\\_Disability\\_Booklet.pdf](http://pacific.ohchr.org/docs/UN_Sport_Disability_Booklet.pdf). Natalie du Toit, an amputee South African swimmer became the first person to carry the national flag at the opening ceremonies of both the Olympics and Paralympics Games. See Longman *supra* note 5. See also Nemati and Pitsorius.

137. *The IPC Suspends the Russian Paralympic Committee with Immediate Effect*, IPC (Aug. 7, 2106), <https://www.paralympic.org/news/ipc-suspends-russian-paralympic-committee-immediate-effect>.

138. *Pistorius v/ IAAF*, Arbitration CAS 2008/A/1480, Certified Award ¶ 24 (May 16, 2008), <http://jurisprudence.tas-cas.org/Shared%20Documents/1480.pdf> [hereinafter *Pistorius CAS Award*].

139. Cole Moreton, *London 2012 Olympics: Oscar Pistorius Finally Runs in Games After Five Year Battle*, THE TELEGRAPH, Aug. 2, 2012, <http://www.telegraph.co.uk/sport/olympics/athletics/9452280/London-2012-Olympics-Oscar-Pistorius-finally-runs-in-Games-after-five-year-battle.html>. Oscar Pistorius successfully proceeded to the semifinal of the 400 meter race in the 2012 London Olympics to make history. *Oscar Pistorius Makes Olympic History in 400m at London 2012*, BBC SPORT, Aug. 4, 2012, <http://www.bbc.com/sport/olympics/18911479>.



Pistorius appealed the IAAF's decision to the Court of Arbitration for Sport (CAS), pursuant to the dispute resolution process required under Olympic Charter. Pistorius alleged that the IAAF failed to seek any appropriate accommodation, solution, or modification that would permit him to compete on an equal basis with able-bodied athletes and thus violated obligations of non-discrimination and denied his fundamental human rights, "including equal access to Olympic principles and values."<sup>140</sup>

The IAAF Rule banned "the use of any technical device that incorporates springs, wheels, or any other element that provides the user with an advantage over another athlete not using such a device." In analyzing Pistorius' request, the CAS Panel framed their analysis as that "disability laws only require that an athlete such as Mr. Pistorius be permitted to compete on the same footing as others."<sup>141</sup> Thus, the precise issue to be decided was "whether or not Mr. Pistorius is competing on an equal basis with other athletes not using [the] Cheetah Flex-Foot prostheses."<sup>142</sup> According to the Panel, the scientific evidence did not prove that the prostheses provided Pistorius with either metabolic or biomechanics advantage.<sup>143</sup> Thus, the Panel ruled that Pistorius could compete with non-disabled athletes on an equal basis provided the equipment does not provide him with advantage over other athletes.<sup>144</sup>

Analysis of the *Pistorius* arbitration decision can be a guideline to define the "equality" phrase.<sup>145</sup> Although the panel decided that the CRPD is not applied in this case because of the ratification issues by Monaco,<sup>146</sup> its analysis can clarify the limits of the *fullest extent* possible. The panel considered different factors to prove the eligibility of the appellant to participate in international IAAF-sanctioned events including the scientific evidence provided to the panel by both parties and legal principles.<sup>147</sup> The panel's analysis can be understood as an extensive interpretation that provides an explanation to the "fullest extent possible":

[T]he *Cheetah Flex-Foot* prosthesis has been in use for a decade, and yet no other runner using them—either a single amputee or a double amputee—has run times fast enough to

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140. Pistorius CAS Award, *supra* note 138, at 9.

141. *Id.*

142. *Id.*

143. *Id.* at 12.

144. *Id.* at 13.

145. *Id.* at 9.

146. *Id.*

147. *Id.* at 13.

compete effectively against able bodied runners until Mr. Pistorius has done so. In effect, these prior performances by other runners using the prosthesis act as a control for study of the benefits of the prosthesis and demonstrate that even if the prosthesis provided an advantage, and as noted none has been proven, it may be quite limited.<sup>148</sup>

The panel limited their decision to the specific case before them<sup>149</sup> and the specific version of prosthesis used.<sup>150</sup> It also addressed the ambiguity of the IAAF regulations to conclude that fullest extent possible had been considered in providing the athlete with the opportunity to compete in mainstream sport.<sup>151</sup> The case leaves open the question: when scientific advances in prosthetics enable an overall advantage, how can athletes such as Pistorius compete?

## 2. Are Separate Sporting Events “Unequal”?

Sporting events such as the Paralympic Games and the Special Olympics “help create role models of sportspeople who have reached the highest level of excellence in sport as inspiration within and across countries.”<sup>152</sup> The story of Paralympians is an inspiration for many disabled and non-disabled people. For example, Trischa Zorn-Hudson, blind from birth, is perhaps the most decorated Paralympian winning fifty-five medals in Paralympics swimming during a period of twenty-four years.<sup>153</sup> Esther Vergeer, paralyzed after a surgery on her spinal cord at the age of nine, dominated wheelchair tennis for ten years winning multiple tournaments including seven Paralympics titles.<sup>154</sup>

Being inclusionary raises an interesting question. If PWDs are to be treated equally, are separate sporting events for disabilities discriminatory?<sup>155</sup>

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148. *Id.*

149. *Id.* at 14.

150. *Id.*

151. *Id.* at 10.

152. Walker, *supra* note 36, at 16.

153. Paul D. Bowker, *With an Astounding 55 Medals, Trischa Zorn-Hudson is the Most Decorated Paralympian Ever*, TEAMUSA (March 23, 2016), <http://www.teamusa.org/US-Paralympics/Features/2016/March/23/The-Most-Decorated-Athlete-Youve-Never-Heard-Of-Meet-55-Time-Medalist-Trischa-Zorn-Hudson>.

154. Sarah Holt and Leila Hussain, *Esther Vergeer: What the Invincible Sportswoman Did Next*, CNN (Feb. 20, 2015), <http://edition.cnn.com/2015/02/17/tennis/the-career-of-invincible-esther-vergeer/index.html>.

155. Will Heilpern, *Why the Olympics and Paralympics Are Still Separate*, BUSINESS INSIDER (Aug. 17, 2016), <http://www.businessinsider.com/why-the-olympics-and-paralympics-are-separate-events-2016-8> (noting prospect of combining both Games to increase exposure to and funding for

Raising this question, one commentator noted that “[m]aking all athletes compete in a single Games would be the ultimate test of the ‘taking part’ ideal. Would disabled athletes be content if every event was won by able-bodied athletes? Or, as prosthetics and wheelchair technology are improved, would able-bodied athletes be happy if disabled athletes won every race?<sup>156</sup> Or, could we have separate events but during the same celebrated period of the Olympic Games?

### 3. Unify the Olympic Games and Unify Sport!?

The Paralympics and Special Olympics are undoubtedly extraordinary events in their own right. Unfortunately, media coverage and spectator viewing tends to wane after the immersion of the Olympic Games. As a thought experiment, imagine the eyes of the world were the Opening Ceremonies of the Olympic Games to include elite athletes from around the world who represent their respective countries in mainstream, Paralympic, and Special Olympic competition. The logistics of holding a single event with able-bodied and athletes with disabilities could well be challenging. But the goals of equality, inclusion, and promoting the spirit of the Olympic Movement are certainly further by bringing the world’s elite athletes—and fans—together on the same stage of the world’s most premier sporting event.

## V. CONCLUSION

Discrimination on the basis of disability occurs in many forms. Whether through physical, attitudinal, social, economic, or legal and policy barriers, PWDs have been denied meaningful access to full participation in cultural and social life, including the right to sport. Participation in cultural life, recreation, leisure, and sport is inextricably related to other basic human rights.

The CRPD recognizes the rights of PWDs to experience culture, recreation, leisure, and sport whether as an artist, athlete, participant, spectator, or fan. The value of these experiences extends from the individual to world community. Pope Francis has articulated the moral responsibility for sporting institutions, businesses, corporate sponsors, as well as educational, social, and religious societies to work to ensure that sport is inclusive, accessible, and free from corruption.<sup>157</sup> Sport is a unique phenomenon to promote the equality of PWDs and to demonstrate to society that human

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athletes with disabilities, asking “Is it time to end segregation of disabled athletes from their Olympic peers?”).

156. *Paralympics Ethics Guide*, BBC, <http://www.bbc.co.uk/ethics/sport/aspects/paralympics.shtml> (last visited Dec. 14, 2017).

157. *Pope Francis: Sport Has Great Value, Must be Honest*, *supra* note 1.

determination goes beyond the border of physical limitations.

The CRPD brings the force of international law to ensure the rights of persons with disabilities are at the forefront and engrained in global society. The United States should join the international community in solidarity to ratify the CRPD and to commit explicitly to universal guarantees against disability discrimination and to celebrate celebration and include all members in society. Member States, non-governmental sporting organizations such as the Olympic, Paralympic and Special Olympic movements, and the media play a critical role in this mission.

Ratification of the Convention demonstrates a positive step towards guaranteeing equal rights. Mere ratification, while welcome, will not alone help the people that the Convention seeks to help and is only one step on the road to equality. Systems for implementing, measuring, data collection, awareness, education and program implementation and oversight are essential.

Like the ADA, the CRPD holds significant promise to promote awareness of the rights of PWDs to integrate fully into all aspects of society. However, hope and policy also requires action –from the grassroots level of sport throughout and to the top. The individual child with a disability must be welcomed and encouraged to participate in sport at an early age, to foster acceptance as a norm. The concern about negative input on competitive sport should not distract from the need to be measured – provide sport opportunities to the vast majority of PWDs who simply want to play, exercise, and be part of one of life's greatest pleasures. Game On.