

Joint Submission

Re: The European Commission’s proposal for a Regulation and Council Decision governing the Hague Convention on the Protection of Adults.

To: European Commission.

From: The UN Special Rapporteur on the rights of persons with disabilities (Gerard Quinn) and the Independent Expert on the enjoyment of all human rights by older persons (Claudia Mahler).

Date: 2 August 2023.

Towards Greater Coherence of International Law

Reflections on the adequacy of the European Commission’s proposal for a Regulation and Council Decision governing the Hague Convention on the Protection of Adults.

“Affirming that the interests of the adult and respect for his or her dignity and autonomy are to be primary considerations”

Preamble to the Hague Convention

1. Introduction.

In 2021 we – the [UN Special Rapporteur on the rights of persons with disabilities](#) and the [UN Independent Expert on the enjoyment of all human rights by older persons](#) - produced a Joint Statement on the Hague Convention on the Protection of Adults (‘The Hague convention’).¹

¹ Text of the Joint Statement is to be found here:

https://www.ohchr.org/sites/default/files/Joint_Statement_on_Hague.docx

This is the seminal issue of our time as it cuts right through to the topics of autonomy and personhood – something that affects both persons with disabilities as well as older adults.

Our 2021 Statement was, in turn, based on a detailed Study that the UN Special Rapporteur on the Rights of Persons with Disabilities commissioned and which was authored by two eminent experts in the field of private international law - professors Sonia E. Rolland (Northeastern University, Boston MA) and Alex Ruck Keene (King's College London).² We have consulted them again on the adequacy of the Commission's proposal and remain deeply indebted to them for their willingness to share their knowledge and expertise.

We now have occasion to return to that subject matter with the publication by the European Commission in May 2023 of a proposed Regulation on 'jurisdiction, applicable law, recognition and enforceability of measures and cooperation in matters relating to the protection of adults'.³ The goal of the Commission's proposal is, *via* a Regulation, to domesticate key elements of the Hague Convention (with enhanced European cooperation) and to 'authorise' those Member States that have not done so already to ratify the Hague convention and thus ensure a uniform European engagement with third countries on the issues.

We are thankful for the opportunity to make this Joint submission. In this submission, we reprise the analysis and conclusions of the 2021 Study and 2021 Joint Statement, and assess whether the proposed Regulation and Council Decision chimes with that analysis and conclusions and, if not, whether it might be improved.

Our view in 2021 – which hasn't changed – is that there is much interpretive leeway on the Hague convention to allow it to be re-purposed to latch onto supported decision-making regimes. This would be in keeping with the preamble to the Hague convention that highlights human autonomy as a goal and it would be a service to the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD) which the EU and its Member States have ratified. However, that requires intentionality of purpose. The 2021 Study proposed a Declaration to steer the Hague Convention away from guardianship – a proposal we endorsed in our Joint Statement. The danger is that if applied as it is – without taking advantage of the flexibility of the instrument – then laws and practices that clearly violate the UN CRPD will be further cemented into place. To allow this to happen would be a missed opportunity to harness private international law to advance the goals of the UN CRPD.

2. Our Overall Goal – the Coherence of International Law.

Our principal concern in 2021 – and now – is the fragmentation of international law and the need to seek as much coherence as possible.

² Text of the 2021 Study is to be found here:

https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/Hague-CRPD_Study.docx.

³ COM(2023) 280 final, 31, May, 2023.

The 2021 Rolland/Ruck Keene Study emphasised that, while private international law and substantive international human rights law orbit two different spheres, they nevertheless need to be brought into a meaningful relationship – one that ratchets forward more contemporary understandings of rights and individual autonomy. The reduction of needless fragmentation in international law is one of the key goals of the International Law Commission.⁴

A key bridge between both instruments (the Hague convention and the UN CRPD) is the notion of human autonomy. Respecting autonomy is one of the stated primary goals of the Hague Convention. And the CRPD plays a vital role in re-centring people in their own lives and accentuating autonomy and personhood (Article 12). An underlying assumption in the 2021 Study and Joint Statement was that a meaningful alignment of both instruments could be done given the open-ended nature of the rules in the Hague convention and its insistence/concession that higher substantive human rights standards ought to prevail (Article 49).

Such normative re-alignment is needed. The Hague convention was drafted at a time when there was more widespread acceptable that the ‘protection’ of those who were not in a position to protect their own interests could only (or best) be achieved by some sort of substitute decision-making regime – i.e., guardianship. That is to say, the personhood of the individual was displaced to a third party acting (hopefully) in the individual’s best interests.

Obviously, this predicate was stood on its head by the UN CRPD with its insistence on a universal theory of personhood regardless of any differences of physical or mental capacity. Henceforth, the focus was on creating new ‘techniques of discovery’ to uncover the will and preferences of the person which had remained conveniently hidden by guardianship regimes. Therefore, the legal conflicts of the future would be qualitatively different as contrasted to the legal conflicts of the past. They would involve disjunctures between different national regimes on supported decision making instead of disjunctures between different kinds of restrictive ‘protection’ regimes including guardianship.

The focus of both instruments – the Hague convention of 2000 and the CRPD of 2006 - is quite different. The Hague convention is less focused on substance and more on how to handle conflicts of laws as between national law when it comes to various ‘protection’ regimes. Put another way, it is not wedded to the view that the best form of protection in the context of decision-making frailty is to take voice away through guardianship. By way of contrast, the UN CRPD is more concerned with substance. It has often rightly been said that personhood and autonomy lie at the very heart of the UN CRPD. Protection hasn’t gone away. But the focus of ‘protection’ measures becomes less a fixation on who or what makes decisions in default of the person and more in terms of ‘protecting’ his/her/their autonomous space and presumed capacity to forge his/her/their own life plans.

⁴ International Law Commission Study Group (2007) *Fragmentation of International Law: difficulties arising from the diversification and expansion of international law*.

The question inevitably arises: can (or how can) the 2000 Hague convention be re-purposed in light of the CRPD to subserve the higher and newer goal of protecting human autonomy? The 2021 Study presumed that it could – and we presumed that it could in our 2021 Joint Statement. But to do that successfully – we advised – would entail making intentional use of Article 49 of the Hague convention to nudge forward the application of the Hague convention to a new reality of supported decision-making regimes. Otherwise, ratification of the Hague convention might well be used as an occasion to freeze an outdated conception of the law into place and thus stymie the goals of the UN CRPD. Hardly a recipe for the harmonious development of international law.

3. Highlights of the 2021 Rolland/Ruck Keene Study and Our 2021 Joint Statement – Re-purposing the Hague Convention to Underpin and not Undermine the CRPD.

A reprise of some of the analysis and findings of the 2021 Study and our earlier Joint Statement are in order.

In our 2021 Joint Statement we asserted:

...although the Hague convention mentions guardianship as a ‘protective measure, it does not lock that into place. Indeed, the definition of ‘protection’ is open-ended in the Hague Convention (Article 3). *That means that the conflicts provisions in the Hague convention can be (and ought to be) progressively re-purposed accordingly, as States transition away from guardianship regimes and migrate toward assisted decision-making regimes (as they are obliged to do under the CRPD).*

[Italics added]

This reflected a key finding of the 2021 Rolland/Ruck Keene Study which asserted that the Hague convention does “not try to establish uniform substantive law in relation to its subject matter.” In other words, it has the inherent flexibility to move toward newer forms of ‘protection’ which include supported decision-making regimes.

The Rolland/Ruck Keene Study asserted that the Hague text deliberately shied away from using terminology like ‘mental incapacity’ or even ‘best interests’ (citing to the Lagarde Report or Explanatory memorandum). We stand by that analysis. We continued in our 2021 Joint Statement:

The world needs ways of mitigating conflicts of laws that will inevitably arise between different supported decision-making regimes. *By such conscious re-purposing, the Hague convention can serve a useful purpose in underpinning and not undermining the paradigm shift of the CRPD.*

[Italics added].

We also affirm that analysis. We also opined that the Hague convention contained enough normative hooks to justify such a re-purposing. We asserted:

Article 49.1 of the Hague convention is to the effect that ratification of the same does not affect any other international instrument to which the contracting States are parties. *We view this as implying that the*

CRPD takes effective precedence on substance. That is to say, the CRPD requires the migration away from guardianship. *The fact that States still have traditional guardianship laws in place is not something that is driven by, much less required by, the Hague convention.* When States migrate toward supported decision-making regimes (as they ought to in order to meet their requirements under the CRPD) then the conflicts rules of the Hague convention will latch on to the new support systems.

Italics added.

Similarly, Article 4.4 of the UN CRPD mirrors this normative ordering by emphasising that where two or more instruments covering the same issues overlap then the one that is ‘most conducive to the realization of the rights of persons with disabilities’ should be prioritised (Rolland/Ruck Keene Study at p. 9).

The interplay of Article 49 of the Hague convention and Article 4.4 of the UN CRPD means that the higher substantive norms of the UN CRPD ought to be controlling in any debate about how the Hague convention should be operationalised.

That is why we greatly welcomed the proposed Interpretive Declaration in the 2021 Rolland/Ruck Keene Study (to be made by States upon ratification of the Hague convention) which would build on Article 49 of the Hague convention (as well as Article 4.4. of the UN CRPD) to ensure ‘a forward momentum’ in their laws and policies. The proposed Declaration was as follows:

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

[p. 15].

Such an Interpretive Declaration is clearly allowable when ratifying the Hague Convention under the terms of Vienna Convention on the Law of Treaties – provided it does not amount to a disguised reservation.⁵ In this instance it would do more than to affirm that, in the view of ratifying parties, the substance of the Hague convention should be interpreted in line with obligations arising under the UN CRPD.

We further stated in our earlier Joint Statement:

States that join [i.e., ratify] the Hague convention should be clear that their primary obligation is to phase out guardianship (under the CRPD) and should not fall back on the Hague convention as an excuse of pretext to preserve it.

⁵ For a treatment of Declarations see Anthony Aust, **Modern Treaty Law and Practice**, (Cambridge U Press, 3rd Ed. 2013 at 115-117).

[Italics added.]

The next question, therefore, is whether the Commission's proposal for a Regulation and a Decision adequately performs the related tasks of:

- (1) appropriately aligning the procedural focus of the Hague convention with the more substantive focus of the CRPD to underpin the latter and steer the former,
- (2) denying the application of the Hague convention to outdated laws and practices that ought to be reformed and so to prevent the Hague convention from been used even unintentionally as a pretext for the preservation of old laws that are incongruent with the UN CRPD, and
- (3) to optimise the use of the conflicts of laws norms to deal with the new reality of a divergence of supported decision-making regimes.

4. The Commission's Proposal for a Regulation and a Council Decision.

The European Commission's proposal is twofold.

First, it proposes a Regulation building on the Hague Convention and binding as between EU Member States. The essence of the idea is to use the norms of the Hague convention to build up mutual trust and enhanced judicial cooperation between the Member States in this field.⁶

Secondly, it proposes a Council Decision authorising those Member States that have not already done so to ratify the Hague convention.⁷ This approach was previously relied on the 1990s to authorise ratification by EU Member States of a Hague convention dealing with the cross-border protection of children.⁸ Interestingly, the explanatory memorandum to the proposal for the Decision specifically cites Europe's ageing population and "the associated incidence of age related illnesses..." (reasons and objectives of the proposal) as a reason for this initiative. It could therefore cement into place one view of decision-making frailty in old age which compounds weak voices by taking them away entirely (through guardianship. That is not the future of autonomy for older persons.

In any event, the intent appears to be to use the Regulation to guide inter-Member State relations (and enhance co-operation) and to use the Hague convention to guide the external relations of EU Member States *vis-à-vis* third States but in a common manner. In a way, that

⁶ The Commission's proposal for a Regulation can be found here:
https://commission.europa.eu/document/6ff766ad-aca6-4b27-a3cd-b7a9afe8857d_en.

⁷ The Commission's proposal for a Decision can be found here:
https://commission.europa.eu/document/9f84a9a4-324a-48db-9b71-871c5c04d3c7_en.

⁸ 2008/431/EC: Council Decision of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law - Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children.

might encourage non-EU Member States to ratify the Hague convention. Currently, all Contracting Parties to the Hague convention are European States.

A Legal Study was commissioned by the European Commission in 2021: **Study on the Cross Border Legal Protection of Vulnerable Adults in the EU.**⁹ The aim of the Study was:

To evaluate the main legal difficulties and practical challenges in the cooperation within the ERU in the field of the protection of vulnerable adults, and to assess the need for and possible added value of a common legal framework for the protection of vulnerable adults in cross border cases, either through mandatory ratification of the Hague convention...or via the adoption of an EU instrument to reinforce and streamline the judicial cooperation in the area.

[p.10].

This otherwise meticulous report pays scattered attention to the issue of the alignment of the Hague convention with the UN CRPD. It cites Article 49 of the Hague convention and asserts:

[Article 49]...suggest that the Hague convention is subordinate to the application of the UNCRPD. Since all Contracting States of the Hague convention are also parties to the UN CRPD, they can ensure that the application of the Hague convention is consistent with the human rights obligations provided by the UNCRPD.

[p. 31].

Of course, one way EU Member States can do this is to make the Declaration suggested in the Rolland/Ruck Keene 2021 Study.

The Commission's Study cites positive changes in the laws of some EU Member States (bringing in various forms of supported decision-making) but stops short of describing this as the ideal way of aligning private international rules to the UN CRPD to regulate differences between different types of supported decision-making (as we suggested in our 2021 Joint Statement).

One reason for delay in ratifying the Hague Convention given in the Commission's 2021 Study was the need in many countries to bring their laws into alignment with the CRPD (p. 35). If that is the case – if the centre of gravity is shifting away from guardianship and toward supported decision-making – then indeed a case can be made for Declarations and other mechanisms to ensure that the Hague convention applies primarily to supported decision-making regimes in the future.

One indicator that the times are indeed changing is the very fact that the US Senate (Special Committee on Ageing) convened a hearing on Guardianship in March 2023 and took the

⁹ Lorenz Adriaenssens, Camille Borrett, Sarah Fialon, Pietro Franzina, Nathy Rass-Masson and Ian Sumner, Study on the Cross Border Legal Protection of Vulnerable Adults in the EU.

opportunity to introduced a Bill on alternatives to guardianship.¹⁰ The hearing included testimony from people who had their guardianship terminated in favour of supported decision-making.¹¹ In our view, the Hague convention cannot possibly hope to attract ratifications from important jurisdictions like the United States unless it is configured to take stock of this new reality. Plainly, the European Union cannot possibly hope to attract reciprocating partners in the Hague process beyond the European Union unless the edifice is made to face the future and not ratify the past.

Another indicator that the centre of gravity has moved internationally since the Hague convention is to be found in regional law. For example, Article 5 of the Protocol to the African Charter on Human and People's Rights on the Rights of Older Persons is explicitly entitled the 'Right to Make Decisions.' It assures to older persons the right 'to appoint a party of their choice to carry out their wishes and instructions; (5.1). To all intents and purposes, this is 'supported decision-making.' Article 5 does contemplate incapacity but, at the same time, also provides for a right to 'legal and social assistance in order to make decisions that are in their [own] best interests and wellbeing' (5.2). This is a far cry from traditional guardianship systems. Adopted in 2016, This Protocol is more indicative of international trends than a narrow view of the Hague convention. Similarly, the Organisation of American States adopted a similar protocol in 2016. Article 7 protects a right to 'independence and autonomy.' It requires States Parties to 'respect for the autonomy of older persons in making their decisions.'(7.a.). No mention is made of incapacity. Both these regional Protocols vividly show that the tide has gone out on an old model of protection that compounds a weak voice by taking that voice away through narrow protection mechanisms.

Recommendation CM(2014)2 of the Committee of Ministers of the Council of Europe ('on the promotion of human rights of older persons') acknowledges a right on the part of older persons to 'enjoy legal capacity on an equal basis with others' (echoing Article 12 of the UN CRPD) and recognises a 'right to appropriate support when taking their decisions when they feel the need for it, including by appointing a trusted third party of their own choice to help with their decisions (para 12). This appointed third party should support the older persons on his or her request and in conformity with his or her wishes and preferences' (para 13). Ten examples are given in the Recommendation of 'good practices' from ten different European countries – many showing the trend away from narrow 'protective' tools like guardianship and toward supported decision-making. Even in Europe – which where all the current Contracting Parties to the Hague convention are located – the trend is away from narrow conceptions of 'protection.'

The European Commission's 2021 Legal Study stated:

¹⁰ See Press Release of the US Senate Committee here: <https://www.aging.senate.gov/press-releases/casey-holds-hearing-on-guardianships-introduces-bill-to-promote-alternative-options-for-seniors-people-with-disabilities-and-their-families>

¹¹ Video of the US Senate Committee hearing and witness testimony is available here: <https://www.c-span.org/video/?527068-1/hearing-legal-guardianships-elderly>

A Study authored by Sonia Rolland and Alex Ruck Keene...concluded that there are a number of ways in which the framework of the 2000 Hague convention is capable of evolving to reflect the ‘operationalisation’ by both current and future Contracting States of the UN CRPD.

[p.132].

While this is true, it omits the caveats such as the need for a Declaration to ensure that the Hague convention is not used as a pretext to cement into place outdated notions of ‘protection’ and especially in the form of guardianship. The Commission’s Study continues:

For the same reasons, the institution of an EU common framework of private international law rules would not be likely to undermine the UN CRPD.

To the contrary, unless great care is taken, simple ratification of the Hague convention without signalling that its future application resides primarily in conflicts as between supported decision-making regimes could easily undermine the UN CRPD.

On a positive note, two Recitals to the draft Regulation acknowledge the pre-eminence of the UN CRPD. Recital 10 asserts:

...the interpretation of the rules laid down in this Regulation should be guided by its objectives that are to enhance the protection of fundamental rights and freedoms and other rights of adults in cross-border situations, *including their right to autonomy...*

[Italics added].

Recital 10 continues:

The rights safeguarded by the UN CRPD are to be protected in both national and cross-border cases, and where measures are taken in relation to persons with disabilities, these measures are to be taken in line with the UN CRPD. As Contracting Parties to UN CRPD, Member States are to ensure that their national substantive and procedural law laws on the treatment of adults are consistent with the human rights obligations of the UN CRPD. In particular, Member States are to respect the equality of adults before the law and their right to enjoy legal capacity on an equal basis with others in all aspects of life, *with the support that they may require, as well as the autonomy and integrity of the adults in accordance with Article 12 of the UN CRPD.*

[Italics added.]

There is nothing inherently wrong with this. Indeed we support it provided it is accurately reflected throughout the substance of the proposal. We think it is not.

Recital 15 of the draft proposal continues:

...the Regulation should be interpreted in accordance with [the EU Charter] and the UN CRPD. To protect the right to autonomy, safeguards should be provided in this Regulation and make it possible to refuse recognition of measures which are taken without providing the adult with the opportunity to be

heard except in justified exceptional circumstances related to the urgency of the situation, or which are manifestly contrary to public policy.

To be fully consistent with Article 12 of the UN CRPD, this should have asserted an ironclad rule ensuring vulnerable adults' right to be heard and to have all measures and interventions based on the wishes and preferences of the individual. Put another way, the public policy ground for refusing recognition should be interpreted to mean that any form of 'protection' not sanctioned by the UN CRPD (including particularly guardianship) should be refused recognition. There should be agreement among Contracting Parties at the outset that 'protection' incongruent with the UN CRPD is not cognisable.

Recital 15 continues:

Where assessing whether a measure taken by the authorities of another Member State is not manifestly contrary to public policy, the authorities of a Member State where the recognition is sought should assess whether the measure ensures the fundamental rights of the adult in light of Articles 3, 9, 12 and 19 of the UN CRPD.

This is very useful and should be built on. It is to be noted that it explicitly includes Article 12 (legal capacity) and 19 (right to live independently). To be consistent with the former, substitute decision-making should not be allowed, recognised or facilitated. And to be consistent with the latter, institutionalisation as a 'protective' or other measures should not be allowed.

Recitals 10 and 15 ought to form the bedrock of the proposal. Instead, they are inconsistently applied throughout.

The notion of 'representation' seems conflated in the draft proposal with the notion of supported decision-making in the UN CRPD. For example, the proposal asserts that it is:

...a significant step forward for the respect of the right to autonomy enshrined in the UN CRPD because it will considerably facilitate the circulation of powers of representation granted in advance by an adult for a time when the adult will not be in a position to protect their interests.

[p. 3].

Article 3.3 of the proposed Regulation cements this into place by defining 'power of representation' as a ...

Power... granted by an adult, either under an agreement or by a unilateral act, to be exercised when that adult is not in a position to protect his or her interests...¹²

¹² We acknowledge that, in using this language, Article 3.3 is mirroring the language of the Hague convention. However, given that the proposed Regulation is expressly seeking – as per Recitals 10 and 15 – to align the UN CRPD and the Hague convention, the mismatch between the explanation given and the language of the Article is particularly jarring.

This it is submitted, significantly miscomprehends the difference between a ‘power of representation’ and supported decision-making. The former arises upon the occurrence of a contingency such as incapacity at a future date. The latter is not predicated on incapacity at all, does not transfer rights of personhood, and recognises a third party only as a support for decision-making purposes. The distinction is crucial. If, by ‘powers of representation’ the proposal means handing over decision-making autonomy to a third party then this clearly violates the UN CRPD. We emphasise, however, that, if ‘powers of representation’ were re-framed only to mean ‘supported decision-making regimes’ (voluntarily entered into by the individual) then a case could be made for the same under the Hague convention. At a minimum, we suggest, the proposed Regulation should make this clear.

Further, Article 21 of the proposed Regulation allows for a protection measure of ‘placement’ in an institution. This is a clear violation of both Articles 5 (equality) and 19 (right to live independently) in the UN CRPD and should have no place in the Regulation. It amounts to unequal treatment on the ground of disability (the essence of the famous and influential US Supreme Court judgment in *Olmstead*, 1999). It even violates the clear wording of Recital 15 that pivots on Article 19 of the UN URPD (widely understood as proscribing institutionalisation). Draft Article 21 flies directly in the face of the European Commission’s stated intention to adopt clear guidance on de-institutionalisation by 2024 (EU Disability Strategy 2023-2030). Further, in very recent years, the WHO has moved decidedly against compulsory measures in the context of mental health. It would look odd in the extreme if the EU were to row against that tide.

Given that the UN CRPD is a ‘mixed convention’ such a practice or policy of endorsing and recognising institutionalisation as a ‘protective measure’ would engage the legal liability of both the EU and its Member States jointly and severally. Further, whilst the language of draft Article 21 mirrors language in the Hague convention, any Member State adopting a UN CRPD-compliant interpretation of the convention (as per the proposed Declaration we set out in 2021) would be bound to refuse recognition and enforcement of such a measure. Given that all EU Member States assert compliance with the UN CRPD, including institutional placement within draft Article 21 would therefore be without purpose as no Member State would or should be putting forward such a measure under the Regulation for recognition and enforcement in any other Member State; nor would that receiving Member State be prepared to recognise and enforce it.

Both draft Articles 3.3 and 21 of the Regulation therefore require revisiting, we suggest. Further, as between EU Member States and external parties, we would go further than we did in 2021 and suggest that the Decision authorising Member States to ratify the convention should make clear that they should not only make the general Interpretative Declaration we proposed in 2021, but also should make a Reservation to the Convention excluding (to the effect that it does allow for it¹³) institutionalisation from the scope of protective measures.

¹³ Reiterating the point that we made earlier that the convention does not seek to prescribe substantive measures, as opposed to providing procedural solutions to intra-State conflicts of private law.

5. Our Conclusions – Recitals 10 and 15 Should become Central and Controlling.

We reiterate the point that the issues at stake are crucial for both persons with disabilities and older persons.

We noted the paradigm shift in the UN CRPD with respect to the preservation of the autonomy of persons with disabilities. Since the UN CRPD is largely declaratory of international law, much the same principles will apply to the autonomy of older persons. It is expected that, if and when a new UN treaty on the rights of older persons is adopted, it will contain provisions equivalent to Article 12 of the UN CRPD.¹⁴ It is therefore crucial that the foundations are laid wisely and in a manner that facilitates profound shifts in public policy.

We appreciate recitals 10 and 15. They can be built upon. However, we do not see any consistent follow-through from these Recitals in the substantive provisions of the proposed Regulation. Indeed, we see many contradictions.

The proposed Interpretive Declaration put forward in the 2021 Study would chime easily with draft Recitals 10 and 15 and is perfectly allowable under the Vienna Convention on the law of treaties. We suggest that States give active consideration to it when ratifying the Hague Convention. This would make clear (not only within the EU but also vis-à-vis third States) that the CRPD is given lexical priority. The proposed Reservation we suggest above in relation to institutionalisation would play a significant role in ensuring that this is no longer seen as an appropriate response to the needs of persons with disabilities or older persons.

In the Regulation, and hence as between EU Member States, ‘Representation agreements’ should be re-framed to only mean ‘supported decision making agreements.’ To be avoided at all costs are arrangements that only kick into place upon the occurrence of a contingency like ‘incapacity.’ Instead, the Hague rules on conflicts could be usefully re-purposed to deal with disjunctures between different types of supported decision-making regimes. This would generate real added value and would be better in keeping with Recitals 10 and 15.

Similar, in the Regulation, institutionalisation as a form of ‘protection’ should be explicitly prohibited as between EU Member States. Such an approach is manifestly at odds with key provisions of the UN CRPD (Articles 5 and 19) which are explicitly referenced in the draft Recitals.

Regional law developed *after* the Hague Convention – in the African Union, the Organisation of American States and the Council of Europe – already reflects and advances a new model policy response based on autonomy and supported decision-making. This applies both to older

¹⁴ For analysis on the appropriateness of guardianship for older persons see, e.g., Quinn, G., Gur., A., & Watson, J., *Ageism, Moral Agency and Autonomy: getting beyond guardianship in the 21st Century*, chapter 3 in Issie Doron & Nena Goeorganzi (Eds.), *Ageing, Ageism and the Law: European Perspectives on the Rights of Older Persons* (Elgar, 2018).



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persons and persons with disabilities. It would be incongruent with these trends to ratify Hague without ensuring that it did not (even unintentionally) cement into place an outdated policy response. Not only would that be inconsistent with the UN CRPD and but it would likely undermine the concept of autonomy that is like to figure prominently in any future UN convention on the rights of older persons.

Private international law has a profoundly important role to play in giving effect to the object and purpose, substance and interpretation of the UN CRPD. The flexible nature of the rules allows it to adjust to new realities. However, ratification and implementation must self-consciously steer it toward higher substantive norms and trends. However, there is a real risk that, if enacted as proposed, the Regulation and Decision will only be used to freeze into place an outdated policy response to disability and the needs of older persons. And there is a real risk that, if enacted as proposed, the Regulation and Decision will only attract needless legal liability in the international legal order for the EU and its Member States.

That is why it is important to think through how the Hague Convention might be self-consciously moulded to underpin and not undermine the UN CRPD and also create breathing space for the drafting and eventual adoption of a universal (UN) treaty on the rights of older persons.